UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, **Plaintiff,** **v.** **MICHAEL NOBARI, EDDY A. GEORGE, EDISON SHINO, RITO S. ZAZUETA,** **Defendants.**	**1:03-CR- 05453 OWW** **STATEMENT OF DECISION AND ORDER DENYING DEFENDANTS' MOTIONS FOR NEW TRIAL**

I. INTRODUCTION

Defendants Michael Nobari ("Nobari"), Eddy A. George ("George"), and Rito S. Zazueta ("Zazueta") each filed motions for a new trial. Defendants Edison Shino ("Shino"), Nobari, and Zazueta each joined co-Defendants' motions for new trial. The Government opposes all Defendants' motions.

II. PROCEDURAL BACKGROUND

Defendants were indicted by a grand jury for several violations under 21 U.S.C. §841 and under 18 U.S.C. 924(c). (Doc. 142, Indictment, Filed February 3, 2005.) A verdict was returned against Defendants following a criminal jury trial on May 4, 2005. (Doc. 235, Verdict as to Edison Shino, Filed May 4, 2005; Doc. 236, Verdict as to Eddy A. George, Filed May 4, 2005; Doc. 237, Verdict as to Rito S. Zazueta, Filed May 4, 2005; Doc. 238, Verdict as to Michael C. Nobari, Filed May 4, 2005).

Defendants' time to file a motion for new trial was extended to February 2, 2006. (Doc. 290, Order, Filed December 13, 2005). Defendant Michael C. Nobari filed a motion for a new trial on January 3, 2006. (Doc. 292 SEALED, Motion for a New Trial, Filed January 3, 2006.) Defendant Eddy George filed a motion for new trial on February 2, 2006. (Doc. 294 SEALED, Motion for New Trial, Filed February 2, 2006). Defendant Rito Zazueta also filed a motion for a new trial on February 2, 2006. (Doc. 295 SEALED, Motion for New Trial, Filed February 2, 2006). Defendants Michael C. Nobari, Edison Shino, and Rito Zazueta each joined their co-Defendants' motions for new trial. (Doc. 296, Motion for Joinder by Michael C. Nobari, Filed February 1, 2006; Doc. 298, Motion for Joinder by Edison Shino, Filed February 1, 2006; Doc. 297, Motion for Joinder by Rito S. Zazueta, Filed February 2, 2006.) The Government filed its opposition to Defendant George's motion for a new trial on March 27, 2006. (Doc. 305 SEALED, Government's Opposition to Defendant George's Motion for a New Trial, Filed March 27, 2006.) The Government also filed an opposition to Defendant Nobari's motion for a new trial. (Doc. 306 SEALED, Government's Opposition to Defendant Nobari's Motion for a New Trial, Filed March 27, 2006).

III. FACTUAL BACKGROUND

A superceding indictment was filed on February 3, 2005 against all Defendants. (Doc. 142, Indictment, Filed February 3, 2005.) Count one of the indictment charged Defendants with conspiring to aid and abet the manufacture of methamphetamine and to possess pseudoephedrine. Count two of the indictment charged Defendants with attempted possession of pseudoephedrine, a

chemical known or believed to be used to manufacture methamphetamine. (*Id.*) Count three of the indictment charged Defendants with possession of a firearm in furtherance of a drug trafficking crime. (*Id.*) Defendant Zazueta was also charged with a fourth count of being a deported alien found in the United States. (*Id.*)

The charges against Defendants arise out of negotiations between Defendant George and Fresno police undercover detective John Galvan to purchase pseudoephedrine for the manufacture of methamphetamine that began in November 2003. (Doc. 306 SEALED, Government's Opposition to Defendant Nobari's Motion for a New Trial, Filed March 27, 2006.) The evidence at trial showed that Defendant George engaged in negotiations with Agent Galvan to purchase up to 200 cases of pseudoephedrine pills for $400,000. (*Id.*) The evidence at trial also showed that Defendant George and Defendant Nobari met with Agent Galvan on November 20, 2003 and that Agent Galvan showed them 22 buckets of pseudoephedrine pills he had inside a rental truck driven to the meeting location by another undercover agent. (*Id.*) Agent Galvan told George and Nobari that the price for each bucket was $10,000. (*Id.*) According to the evidence, George and Nobari then told Agent Galvan that they would return with the money. (*Id.*)

George and Nobari then made several trips to Defendant Shino's residence during the course of the transaction with Agent Galvan on November 20, 2003. (*Id.*) At one point, George and Nobari met with Agent Galvan to obtain a sample of the pills and then returned to Shino's residence where they met with Shino and Defendant Zazueta. (*Id.*)

The transaction between Defendants and Agent Galvan took place in a McDonald's parking lot in the city of Turlock. (*Id.*) According to the evidence at trial, George and Nobari told Agent Galvan that "George's Cousin" (Defendant Shino) would purchase seven buckets and "the other guy" (Zazueta) coming with Shino would purchase six. When Zazueta and Shino arrived at the McDonald's parking lot to meet with George and Nobari, the evidence showed that Zazueta was armed with a loaded gun equipped with a laser sight and that Shino handed George a bag full of money. (*Id.*) When Agent Galvan and George were conducting the transaction in George's Honda Civic, there was a loaded handgun registered to Defendant Nobari under the floor mat of the right passenger seat where George was seated.

At trial, the jury was presented with a tape recording of the transaction where Defendants refer to themselves as Middle-Easterners in terms of race. For example the jury heard a tape recording of the transaction with Agent Galvan, in which George refers to Zazueta as "the Mexican guy." (Gov. Ex. 1-c-2 at 20). After a ten day jury trial that concluded in May 2005, the jury found the Defendant Shino and Defendant George guilty on counts one and two of conspiracy to aid and abet the manufacture of methamphetamine, and attempted possession of pseudoephedrine. Defendants Nobari and Zazueta were found guilty on all counts, including using or carrying a firearm in relation to a drug trafficking offense.

IV. STANDARD OF REVIEW

Rule 33 of the Federal Rules of Criminal Procedure states that the trial court may grant a Defendants' motion for a new

trial "if the interest of justice so requires." Fed. R. Crim. P. 33(a). Rule 33 gives the court "broad discretion. . . to set aside a jury verdict and order a new trial to avert a perceived miscarriage of justice." *Id.* The court is not obliged to view the evidence in the light most favorable to the verdict, and it is free to weigh the evidence and evaluate for itself the credibility of the witnesses. *United States v. Kellington,* 217 F.3d 1084, 1097 (9th Cir. 2000) (citations omitted). If the court concludes that, despite the abstract sufficiency of the evidence to sustain the verdict, the evidence preponderates sufficiently heavily against the verdict such that a serious miscarriage of justice may have occurred, it may set aside the verdict, grant a new trial, and submit the issues for determination by another jury. *Id.* (citations omitted).

V. DISCUSSION

A. Prosecutorial Misconduct For Statements Made During Trial

A claim of prosecutorial misconduct must be evaluated in the entire context of the trial. *United States v. Cabrera,* 201 F.3d 1243, 1246 (9th Cir. 2000) (citations omitted). Reversal on this basis is justified only if it appears more probable than not that the prosecutorial misconduct materially affects the fairness of the trial. *Id.* In making this assessment, a court looks to several factors, not only the impact of the prosecutor's remarks, but also Defense counsel's opening salvo. *United States v. Weatherspoon*, 410 F.3d 1142, 1150 (9th Cir. 2005); *see also United States v. Young,* 470 U.S. 1, 12-13 (1985). If the prosecutor's remarks were "invited," and did no more than respond substantially in order to "right the scale," such comments would

not warrant reversing a conviction. *Young*, 470 U.S. at 12-13.

The substance of any curative instruction and the closeness of the case may also be a factor in considering a claim of prosecutorial misconduct. *United States v. Brown*, 327 F.3d 867, 871 (9th Cir. 2003). In evaluating such allegations, it is not enough that the prosecutor's remarks were undesirable or even universally condemned. *Tak Sun Tan v. Runnels*, 413 F.3d 1101, 1112 (9th Cir. 2005). Another factor is the strength of the case against a defendant. *Weatherspoon*, 410 F.3d at 1151. When the case is particularly strong, the likelihood that prosecutorial misconduct will affect the defendant's substantial rights is lessened because the jury's deliberations are less apt to be influenced. *Id.* But as the case becomes progressively weaker, the possibility of prejudicial effect grows correspondingly. *Id.*

B. Harmless Error Standard

Where Defense counsel objected to acts of alleged prosecutorial misconduct at trial, we review for harmless error. *Cabrera*, 201 F.3d at 1246. Under harmless error review, Federal Rule of Criminal Procedure 52(a) states that any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded. Fed. R. Crim. P. 52(a). Where an error is non constitutional it may be reversed if it is "more probable than not" that the error did not materially affect the verdict. *United States v. Perlaza*, 439 F.3d 1149, 1171 (9th Cir. 2004). Where an error is of constitutional dimensions, the error must be harmless beyond a reasonable doubt. *Id.* A specific analysis of the trial record determines whether the error was prejudicial. *Olano v. United States*, 507 U.S. 725, 734 (1993). The Government

bears the burden of persuasion in showing that there was no prejudicial effect by the alleged prosecutorial misconduct. *See id.* Defendants each raise several instances of alleged prosecutorial misconduct previously objected to during trial.

i. Prosecutor's Closing Argument

The prosecution is allowed "a degree of latitude in the presentation of their closing summations," including "the freedom to strike hard blows based on the evidence and all fair inferences therefrom." *United States v. Velarde-Gomez,* 224 F.3d 1062, 1072 (9th Cir. 2000). There is no reversible error unless misconduct in the summation was so gross as probably to prejudice the defendant, and the prejudice has not been neutralized by the trial judge. *Id.* The issue is whether the Prosecutor delivered such a strongly worded closing that the argument amounted to foul blows. *Id.*

a. Escobar's Reference to Race During Her Closing Argument

Defense counsel for George argues that the prosecution engaged in racial and ethnic stereotyping by making the following comments during closing argument:

> MS. ESCOBAR: Red herring number two. Racial and ethnic profiling. There was no racial or ethnic profiling in this case, ladies and gentlemen. The defense is playing the race card for the sole purpose of trying to inflame you. The DEA's mission is not to target Assyrian drug dealers who want to buy a house for their mom. Their mission, the DEA's mission is to target drug dealers, period. As you know, and as George admits, George made the initial contact with law enforcement during the Chicago pseudoephedrine pill transaction. There was no targeting whatsoever. He initiated the contact. However, within the context of

> methamphetamine manufacturing, the fact that George, Shino and Nobari happened to be Assyrian, happened to be Middle Eastern is significant because, as you heard, [according to DEA agent testimony] Middle Easterners typically occupy the role of pill broker and are not involved in the actual manufacture of methamphetamine. Within the context of methamphetamine manufacturing, the role of obtaining pills for the manufacture of methamphetamine is typically assumed by Mexicans. In fact, as you heard in many of the recordings, George himself talks about unloading the pills to the Mexicans, who in his experience would take 50 cases at a time. During the drug deal at the McDonald's, it was George who referred to Zazueta as "the Mexican who wanted the rest of the pills." This talk about race is a classic red herring. Don't buy it. The fact is Zazueta is a Hispanic drug dealer. I am a Hispanic prosecutor. My grandmother happens to be Columbian. We both made our own choices, ladies and gentlemen. Race has nothing to do with the prosecution of this case.
>
> MR. REYES: Objection. We object to the prosecutor's reference to heritage.

The court responded and provided the following curative instruction to the jury:

> THE COURT: The objection is overruled. Remember, ladies and gentlemen, to rely on what is in evidence and in this case, the reference as to the prosecutor's heritage is not in evidence and therefore you should not treat that as having been proved. Beyond that there is no reference to nor implied support of any party or witness in this case by that reference and the jury should therefore disregard it. You may continue.

RTP, May, 3, 2005, 1460:12 - 1462:1.

Defendants cite to several cases to support their argument. The first case is *Bains v. Cambra*, 204 F.3d 964 (9th Cir. 2000). In *Bains*, the Defendant, who was Sikh, appealed a district court's denial of his habeas corpus petition. *Bains*, 204 F.3d at

967. The Ninth Circuit reversed, stating that Defendant was prejudiced by testimony and closing arguments made during trial. *Id.* at 974. Specifically, a significant portion of the Prosecutor's argument highlighted the relevant testimony in a way that went beyond merely providing evidence of motive and intent. *Id.* The Prosecutor relied on arguments showing all Sikh persons are irresistibly predisposed to violence when a family member has been dishonored and also are completely unable to assimilate to and abide by the laws of the United States. *Id.* at 975. The fact that much evidence already had been permissibly introduced to show Bain's motive and intent did not alleviate the concerns. *Id.* Also, the danger of prejudice was further exacerbated by the state trial court's reluctance to issue limiting instructions to the jury. *Id.*

Defendants also cite to *United State v. Vue*, 13 F.3d 1206 (8th Cir. 1994), which held that a customs agent's testimony about the tendency of Hmong people to smuggle opium into the Twin cities was reversible error. *Vue*, 13 F.3d at 1212-13. In *Vue*, a Government's witness provided testimony during his direct exam that, based on his experience, 95 percent of opium smuggling cases in the Twin Cities area of Minnesota were related to Hmong individuals. *Id.* at 1212. The court reasoned that it could not find the interjection of race in the trial testimony as harmless beyond a reasonable doubt because such testimony clearly invited the jury to put the Vues' racial and cultural background into the balance in determining Defendant's guilt. *Id.* at 1213.

Lastly, Defendants cite to *United States v. Doe*, 903 F.2d 16, 20 (D.C. Cir. 1990), which held that references to the

defendant as "the Dominican" and DEA agent's testimony about a New York City neighborhood where drug transactions took place as having a very high Hispanic population were reversible error.

The present case, however, is more analogous to *United States v. Santiago*, 46 F. 3d 885 (9th Cir. 1995). Defendant Santiago appealed his conviction alleging that the Government violated his equal protection rights under the Fifth Amendment by injecting the issue of ethnicity into the trial. *Santiago*, 46 F. 3d at 890. Specifically, Defendant charged that the term "Mexican Mafia" along with testimony during trial about the Hispanic population. *Id.* The Ninth Circuit rejected the argument that there was an Equal Protection violation during trial. *Id.* It noted that the core concern is whether the argument shifts its emphasis from evidence to emotion. *Id.* at 891. It further stated that if the prosecution's case, overall, was a dispassionate and intelligent presentation of evidence, the relevant use of a racial term is less likely to prejudice the outcome. *Id.*

Contrary to *Bains*, the Prosecutor's argument in this case did not go beyond the evidence or draw inferences between the facts presented and the Government's case in chief. In the present case, race and the term "Mexican" is first raised by Attorney Reyes, counsel for Zazueta. RTP, April 19, 2005, 158:4-5. Further, Defendants in their conversations specifically referred to each other as Middle-Eastern and claimed comradeship based on such ethnicity. For example, throughout the trial, the jury heard audio tapes of negotiations for the purchase of up to 200 cases of pseudoephedrine in which co-Defendants refer to each

other by ethnic terms rather than by names. The use of ethnic terms was necessary to identify for the jury which Defendant was referred to as "The Mexican" in the audio tapes received in evidence. The evidence at trial revealed that George referred to Zazueta as "The Mexican."

Also, unlike *Vue*, the Prosecutor does not generalize Mexican people as being responsible for the problem of methamphetamine trafficking. The Prosecutor rather cautioned throughout her opening statement that reference to "Mexican" is only a statement of fact not intended to be inflammatory or to affect the deliberations. RTP, April 20, 2005, 225:7-20. The Prosecutor presented such evidence which was introduced by the Defendants as a part of how they referred to each other, in a dispassionate manner without appealing to emotion. The Prosecution's evidence of such references was the Defendants' own words during the transactions and her closing argument did not amount to "foul blows."

Any conceivable negative innuendo did not approach the level of potential prejudice. The Defense made objections to the Prosecution's comment which were ruled on and accompanied by a curative instruction. This curative instruction, coupled with the strong case presented against Defendants, was sufficient to neutralize any potential prejudice that might have arisen. Any alleged error is harmless beyond a reasonable doubt.

b. Impermissible Vouching

The Government is prohibited from vouching for the credibility of its witnesses, its case, or the Prosecutor herself: (1) by "placing the prestige of the government behind

the witness" through personal assurances; or (2) suggesting that information not presented to the jury supports the witness' testimony. *United States v. Weatherspoon*, 410 F.3d 1142, 1146 (9th Cir. 2005). The second type of vouching involves prosecutorial remarks that bolster a witness' credibility by reference to matters outside the record. *United States v. Frederick*, 78 F.3d 1370, 1378 (9th Cir. 1996). Such prosecutorial remarks may be fatal if the remarks, fairly construed, were based on the District Attorney's personal knowledge apart from the evidence in the case and that the jury might have so understood them. *Id.*

Defendants argue that the Prosecutor engaged in impermissible vouching when commenting on not being able to present evidence. This statement was in response to Defense Attorney Nutall's[1] closing statement:

> But if that hadn't been flushed out, and fortunately it has been, or it came to naught. I mean, it ended up against the wall. It had no validity. You would have been left with the thought that Eddy George had phone records that showed that he communicated with and associated with known drug traffickers, thereby giving the impression that he was a high level trafficker. And it wasn't there. Now, this is what I mean about bearing false witness.
>
> MS. ESCOBAR: Your Honor, I'd like to note an objection to this entire argument.
>
> THE COURT: And the ground?
>
> MS. ESCOBAR: Had the government been able to present the evidence --
>
> MR. REYES: We object, Your Honor.

[1] Mr. Nuttal is also Eddy George's Attorney.

> THE COURT: All right. The objection is overruled. The jury will remember what the evidence was at the time that concerned Jorge Padilla.

RTP, April 29, 2005, 1362:8-24.

The Prosecutor's comment does raise an inference that the Government was privy to additional information regarding Defendant George. Her statement was objected to mid sentence, before any reference to any inadmissible evidence was made. The Prosecutor's objection to Mr. Reyes' argument was overruled. The jury was given a curative instruction reminding them to consider only the evidence presented at trial concerning Jorge Padilla. Analysis of the harm caused by vouching depends on the closeness of the case. *Fredricks*, 78 F.3d at 1378. Insufficient information was referred to in argument to make the Prosecutor's incomplete statement prejudicial. Balancing the curative instruction about the Prosecutor's comment coupled with the strength of the overall evidence presented during trial against the potential for prejudice, the Prosecutor's comment was not prejudicial to Defendants' case.

c. Impermissible Disparaging of Defense Attorneys

The Defense also argues that the Prosecutor engaged in misconduct by making improper comments about Defense counsel. Defendants allege that the following comment amounted to a personal attack:

> MS. ESCOBAR: The defense attorneys have not only mischaracterized the law, they have also mischaracterized the evidence. The defense tactics may be characterized in two words, ladies and gentlemen.
>
> MR. NUTTALL: Can we see what those two words

are?

MS. ESCOBAR: Red herring. Red herring. Ladies and gentlemen, in oral argument, a red herring is a tactic to divert your attention away from the truth. The basic idea is to win an argument by leading attention away from the argument to another topic. The term has interesting historical origins. As I understand it, a herring turns red when it's dried and smoked. I've never had a red herring, but it's supposed to have a very strong odor as well. British fugitives in the 1800s would rub a red herring across their trail in order to divert the bloodhounds that were in hot pursuit. Well, the defense has put forth some pretty smelly fish to distract you. To divert attention away from --

MR. NUTTALL: This is inappropriate. This is inappropriate commentary.

MR. REYES: Object to the big fish, Your Honor.

THE COURT: The objection is overruled. The ladies and gentlemen of the jury will remember that the attorneys are not witnesses and that you are the triers of the fact and will determine the facts from the evidence that has been presented. You may proceed.

Reporter's Transcript of Proceedings ("RTP"), May 5, 2005, 1456:25 - 1457:25.

The Government argues that the Prosecutor's comment was invited by the following comment from the Defense Attorney Reyes:

Now, there's something else that bothered me in this case, too, and that's the use of Zayed. Call him Sam. Call him Zayed. Mr. Othman. Mr. Kisswani. He had several other names, but when asked he acknowledged that he was that person. It bothers me when our government creates a relationship -- and I say kind of strange bed fellows, a relationship with someone who come forward here and testify who is quite a character. An individual who is a known established admitted criminal. And here, because he said I was promised nothing, so he said. The truth of the matter is although not directly

> promised, he obtained his liberty and his freedom based on what we know is his involvement with the government. It's like bringing in a big shark to deal with these little goldfish. It's like having the government bring in the greatest sinner to have a potential menial sin. This is the case, ladies and gentlemen, I say which bothers me. Because it's the lack of evidence, it is that quantum leap, it is that push the government would like you to take that added step to fill in the blanks. Now, Chief Justice Earl Warren, in his memoirs, wrote about his days when he was a young prosecutor. And he writes about his experiences with rats, informants, people who have dealt with the scum of the world and basically become professional witnesses. And he talks about the injustices that he observed firsthand. And why he, as a prosecutor, never again chose to prosecute a case with an informant.

RTP, May 5, 2005, 1432:14 - 1433:14.

In support of their contention, Defendants cite *Bruno v. Rushen*, 721 F.2d 1193 (9th Cir. 1983), where the Ninth Circuit found the Prosecutor's comments about Defense counsel during a criminal trial to be prejudicial to Defendant. The Prosecutor in *Bruno* inferred that a reversal in the testimony of a pro prosecution witness was the result of her consultation with the accused's attorney. *Bruno*, 721 F.2d at 1194. In *Bruno*, the Prosecutor repeated this theme in his closing argument by labeling Defense counsel's actions unethical and illegal, without producing a shred of evidence to support these accusations. *Id.* He also hinted to the jury that the accused's hiring of Defense counsel was probative of his guilt. *Id.* This argument suggested that all Defense counsel in criminal cases are retained solely to lie and distort the facts and camouflage the truth in an attempt to confuse the jury as to the accused's involvement with alleged

crimes. *Id.* Again the Prosecutor offered no evidence to support these suspicions. *Id.*

The Prosecutor's closing arguments in *Bruno* are distinguishable from the Prosecutor's closing arguments in this case. Here, Ms. Escobar directly responded to arguments by the Defendants, which invited comment on subjects Defendants raised based on evidence in the record. For example, Ms. Escobar argued that Defendants' joint presence at the McDonald's on November 20, 2003 was not a mere coincidence and that Defendants were present with money ($20,000), firearms (Zazueta and Nobari), and George and Nobari participated in negotiations with Agent Galvan on that date. RTP, May 3, 2005, 1458:5-15. This evidence is consistent with the theme of the Government's case.

The term "red herring" is a recognized rhetorical analogy by the Ninth Circuit. *See Ishikawa v. Delta Airlines, Inc.*, 343 F.3d 1129, 1132 (9th Cir. 2003) ("The argument that the federal scheme does not create a private right of action is a red herring."); *see also United States v. Skurdal*, 341 F.3d 921, 926 (9th Cir. 2003) (the Government's argument that trial counsel did not improperly withdraw as Defendant's counsel is a red herring). The analogy refers to an attempt to divert attention from issues on which the Prosecutor seeks to focus. The Prosecutor's arguments constituted an attack on the strength of the merits of the defense, not on the integrity or personalities of Defense counsel. The Prosecutor was entitled to some latitude based on Defense counsels' comments describing the Government's informant as a "rat" and "a big shark gulping up gold fish for breakfast." In the entire context of the trial, the Prosecutor's red herring

comment did not materially prejudice the Defendants.

d. Inflaming the Passions of the Jury

Defendants argue that the Prosecutor attempted to inflame the passions of the jury with the following comment:

> MS. ESCOBAR: Ladies and gentlemen, Zazueta came prepared for this deal. Guns and drugs go hand in hand. Had these agents not been out there, this would have been another drug rip and who knows what would have happened to the little boy that was coming out of that McDonald's.
>
> MR. NUTTALL: Objection, Your Honor, that's not proper.
>
> MR. REYES: Join
>
> THE COURT: The objection is sustained. The jury will determine what bearing any testimony or evidence has on the issues to be decided. You may continue.

RTP, April 29, 2005, 1347:2-12.

The Defense cites *United States v. Weatherspoon*, 410 F.3d 1142 (9th Cir. 2005), and states that the Prosecutor's comment was "clearly designed to encourage the jury to enter a verdict on the basis of emotion rather than fact." In *Weatherspoon*, the prosecutorial statement at issue pertained to the Prosecutor's repetitive statements that in convicting the defendant the jury would be "protecting other individuals in the community" and somehow helping to ameliorate society's woes. *Weatherspoon*, 410 F.3d at 1149. The court reasoned that the prosecutorial statements were improper because they spoke not to the proof presented at trial but rather to the potential social ramifications of the jury's reaching a guilty verdict. *Id.*

The Prosecution's isolated statements did not allude to a potential for harm not presented by any evidence during trial.

The four Defendants were at the Turlock McDonald's, two in two cars. A firearm was in each of the cars Defendants occupied at the transaction site. Although calling for speculation, Circuit law recognizes the relationship between guns and drugs. *See, e.g., United States v. Pitts*, 6 F.3d 1366, 1371 (9th Cir. 1993). Defendants had only $20,000, not the $400,000 cash that had been discussed as the purchase price for 20 cases of pseudoephedrine. There is no dispute the pseudoephedrine was being purchased to manufacture illegal drugs: methamphetamine. The evidence supports the inference the Prosecutor argued that Defendants intended to "rip off" the sellers for 18 cases. The Prosecution's statement does not unwarrantedly ask jurors to be the conscience of the community. Unlike *Weatherspoon*, this simple statement was not repeated. The Defense objected to the argument and the objection was sustained. The jury was given a curative instruction. Any potentially harmful effect against Defendants was ameliorated during closing arguments.

e. Misstating the Evidence

Defendants argue that Prosecutor misstated evidence when she made the following comment:

> MS. ESCOBAR: As for the firearm charge contained in Count Three, the 924(c) charge as we call it, the use of the firearm in connection with drug trafficking crimes. Well, you've heard throughout this trial guns are common tools of the drug trade. Guns are used by drug dealers to protect themselves and to protect their contraband. Sometimes they're used as a means of intimidation to obtain contraband. The fact that Nobari and Shino possessed fully loaded firearms during this drug deal not only supports their involvement in the narcotics conspiracy but indicates too that they possessed the firearms in furtherance of the drug

> trafficking conspiracy.
>
> MR. HUNT: Well, Your Honor, I'll object again. That's a misstatement of the evidence, that Shino possessed a firearm.
>
> THE COURT: Objection is sustained. The jury will determine from the evidence and the law what the ultimate facts are.
>
> MS. ESCOBAR: That's right. I misspoke. Nobari and Zazueta actually possessed firearms. So there's no question with respect to their possession, to their use of a firearm in connection with a drug trafficking offense. However, even though both Nobari and Zazueta actually possessed the weapons, George -- Defendants George and Shino are equally culpable. Because under the law, as the judge is instructed, a person has possession of something if they either actually possess it or constructively possess it. Constructive possession is having the ability to exercise dominion or control over a weapon. And we know that George had access to a firearm when he was handing the money over to Galvan. George constructively possessed Nobari's firearm, even though he did not actually have it on his person.

RTP, April 29, 2005, 1352:24 - 1354:4.

Defendants argue that the Prosecution's statement regarding Shino actually possessing a gun was misleading to the jury. However, immediately after the statement was made, an objection was sustained, a curative instruction was given and the Prosecutor admitted to the jury that she had misspoken. She was entitled to argue joint and constructive possession under the conspiracy and aiding and abetting theories. Any potential for prejudice against Shino was cured during trial. Further, the statement that Nobari and Zazueta actually possessed a firearm was a legal argument properly made by the Prosecution and supported by the evidence. The evidence showed Zazueta's actual possession of a firearm, as well as a firearm present at the deal

site which was registered to Nobari, found in a car Nobari and George were to travel to the meet, and located in the passenger side of the vehicle where Nobari was sitting. This firearm evidence was consistent with the Prosecution's theme of her case. Some examples include:

1. Agent Galvan testified that Zazueta was present and armed during the transaction. RTP, April 21, 2005, 471:19-23.

2. Agent Galvan gave expert testimony that narcotic traffickers commonly use firearms. RTP, April 21, 2005, 473:13-14.

3. The jury was shown photos of a Baretta firearm found in the rear pocket of Zazueta, which fell to the ground at the time of his arrest. RTP, April 21, 2005, 415:12-17.]

f. Continued Reference To Past Objectionable and Previously Inadmissible Evidence

Defendants argue that the Prosecution continued to refer to the following evidence ruled inadmissible:

> i. MS. ESCOBAR: The toll records show, and you'll review those records, you'll review all the evidence that's been in our carts the last two weeks. The toll records show that after George negotiated with Agent Galvan, on November 20th, George called Defendant Shino. Shino then called George more than once. Shino then called Nobari more than once and Nobari called Shino. Then -- that was on the 19th. That was on the 19th. The next day, the 20th, which was a work day and a school day we saw from the videotape. We saw the kids with their backpacks. None of these men were working. They had a huge chunk of time in the afternoon of the 20th to confer about prices and get the money together for the 200 cases of pseudoephedrine. At any rate, Agent Galvan contacted George by phone around noon. This was the testimony. George tried to contact Shino then ten times, you'll see from the records, the toll records, between 12:30 and one o'clock. And after Galvan contacted George, Zazueta contacted Daniel Jiminez.

MR. REYES: Objection. There's no evidence of that, Your Honor.

THE COURT: All right. The objection is sustained.
You may refer to the phone numbers.

MS. ESCOBAR: Zazueta contacted the tolls, the number associated with Danny Jiminez and, as the judge has instructed, you may consider circumstantial evidence. And you may consider -- the judge has told you, circumstantial evidence and direct evidence are the same, carry equal weight.

RTP, April 29, 2005, 1337:23 - 1338: 25.

ii. MS. ESCOBAR: Agent Galvan not only showed them the truck, but you saw on the videotape. Defendant George walked into the truck, he inspected the pills. Defendant Nobari stood outside the back of the truck and looked in while Defendant George was inspecting the buckets of pills. While Defendant George was negotiating with Agent Galvan. During this time of the negotiation, the first time they were negotiating at the McDonald's for the truck load full of pills, George was seen on the videotape contacting who he called an individual called "Sheen." And you know, ladies and gentlemen, the toll records will bear out that the person he contacted on the 20th was Shino.

MR. HUNT: Your Honor, objection. It's misstating
the evidence. The toll records show there was a call, but
not --

THE COURT: The objection is sustained.

MS. ESCOBAR: Again, you may rely on circumstantial evidence. That is evidence that, through a chain or series of events that establishes the fact that this person had a phone, showed up at a meet, used that phone. Toll records show calls by George to him calling him "Sheen." You may have heard that is

circumstantial evidence, ladies and gentlemen. That is the leaking hose on the wet sidewalk.

RTP, April 29, 2005, 1339:20 - 1340:10.

iii. MS. ESCOBAR: The toll evidence also graphically illustrates the association of the defendants in the conspiracy. And as I said, you may use the circumstantial evidence in this case to deduce that it was, in fact, George and it was, in fact, Zazueta. It was, in fact, Shino and it was, in fact, Nobari that made those calls. And that chart shows the relationship amongst the co-conspirators during the time frame of the conspiracy based on the toll record evidence that we have. And during the negotiations, in fact, the agents saw all the defendants talk on cell phones.

MR. REYES: Objection. Misstates the evidence.

THE COURT: The jury will make their own determination as to what the evidence shows regarding who was using cell phones.

RTP, April 29, 2005, 1351:12-21.

iv. MS. ESCOBAR: Well, you've heard throughout this trial guns are common tools of the drug trade. Guns are used by drug dealers to protect themselves and to protect their contraband. Sometimes they're used as a means of intimidation to obtain contraband. The fact that Nobari and Shino possessed fully loaded firearms during this drug deal not only supports their involvement in the narcotics conspiracy but indicates too that they possessed the firearms in furtherance of the drug trafficking conspiracy.

MR. HUNT: Well, Your Honor, I'll object again. That's a misstatement of the evidence, that Shino possessed a firearm.

THE COURT: Objection is sustained. The jury will determine from the evidence

> and the law what the ultimate facts are.
>
> MS. ESCOBAR: That's right. I misspoke. Nobari and Zazueta actually possessed firearms. So there's no question with respect to their possession, to their use of a firearm in connection with a drug trafficking offense.

RTP, April 29, 2005, 1353: 10-19.

v. MS. ESCOBAR: When I asked George about -- Defendant George, when he was testifying, during cross-examination, about Jorge Padilla, whose number appeared in George's cell phone, George claims to have met him at the gym and did not know he was wanted for methamphetamine trafficking.

> MR. NUTTALL: I'm going to object, Your Honor, we made a motion to strike that evidence and the motion to strike was granted and our objection was sustained.
>
> MR. REYES: Join.
>
> MR. HUNT: Join.
>
> THE COURT: All right. The objection is sustained. The jury will follow the instruction the Court gave.
>
> MS. ESCOBAR: If you look at Jiminez' Day planner, which was marked 7-B, Government Exhibit 7-B, there is a purple business organizer contained in that Day planner marked 7-E. You will see the name Jorge Padilla. The same name and number that --
>
> MR. NUTTALL: I'm going to object, Your Honor, thesame objection.
>
> THE COURT: That objection is overruled.

RTP, May, 3, 2005, 1454:18 - 1455:12. The Defendants have not identified other instances in the record where the Prosecution continued to refer to these planner references after they were objected to. The Defense also fails to show how these comments make it more probable than not that the verdict was affected.

ii. Prosecutor's Direct Examination

a. Inflamed the Passions of the Jury By Questioning About Operation Mountain Express

Defendants also argue that including testimony about Operation Mountain Express was done to inflame the passions of the jury:

> BY MS. ESCOBAR:
> Q. And what was Mountain -- there were actually two phases of Operation Mountain Express; is that -- is that correct?
> A. At least two, maybe even three, I'm not positive on that.
> But yes.
>
> Q. And would you explain to the ladies and gentlemen of the
> jury what was Mountain -- Operation Mountain Express?
>
> A. Operation Mountain Express, what we do when --
>
> MR. NUTTALL: Objection, Your Honor, this is outside the scope of this phase of --
>
> THE COURT: To the extent that there was an explanation offered, I'm not going to state what it was, but there was a direct suggestion of what the prior case number was and what it related to, that's what this pertains to.
>
> MR. NUTTALL: It related to the --
>
> THE COURT: The same subject.
>
> MR. NUTTALL: -- the participation of this informant.
>
> THE COURT: It related to him, but the government, since that door was opened, and she didn't open it, is entitled to explain the whole picture. Overruled. You may answer.

RTP, April 26, 2005, 863:20-864:10.

Taking the context as a whole, this line of questioning is not improper or so gross as to prejudice Defendants. It was not

improper for the Government to question its witness on Operation Mountain Express, a matter that was previously inquired into by the Defense who opened the door and relevant to the organizational scheme of pseudoephedrine and methamphetamine trafficking. After the court granted Defendants' motion in limine about additional methamphetamine trafficking and manufacture that was under investigation, Defendants chose to cross-examine the agent on his notes that referred to the Mountain Express investigations and thereby opened the door to this reference, which was not repeated.

b. Eliciting Testimony From Government Witness Regarding The Informant's Veracity

Defendants argue that the Prosecution improperly engaged in the following line of questioning:

> MS. ESCOBAR: And so from that time, August 2002 to the present, has your experience -- have you -- has the defendant -- has the informant been reliable?
>
> A. Yes.
>
> Q. Has the informant been truthful?
>
> A. Yes.
>
> MR. NUTTALL: Objection. Lack of foundation.
>
> THE COURT: Well, lay the foundation.
>
> MR. NUTTALL: That calls for speculation.
>
> THE COURT: Let's see if there's a foundation. That objection is overruled. There's no basis for me to rule on it.
>
> BY MS. ESCOBAR:
> Q. In your dealings with the informant, has he been where
> he -- has he followed your instructions?
>
> A. Yes.

Q. Has he complied with the DEA conditions of being an informant?

MR. NUTTALL: Objection. Lack of foundation.

THE COURT: Let's find out how many instances in which there's been interaction between this witness and the informant.

BY MS. ESCOBAR:
Q. Would you describe your -- the number of interactions that
you've had with him.

A. I've probably spoken to him daily since August 2002.

Q. Has he always been available to you?

A. Yes.

Q. Has his information that he's provided to you been, based on your experience with him, reliable?

A. Yes.

MR. NUTTALL: Again, objection, Your Honor.

THE COURT: That objection is overruled.

BY MS. ESCOBAR:

Q. Has your -- in daily contacts with him, has he always been truthful? Based on your --

MR. NUTTALL: Same objection. Lack of foundation. No way that this witness can know.

THE COURT: Let me have counsel approach.

RTP, April 28, 2005, 1199:3 - 1200:16.

During sidebar the judge explained to the attorneys that the line of questioning would be kept "within careful confines." RTP, April 28, 2005, 1201:15. The witness could only describe his personal knowledge of the informant's past performance, as Defendants sought to impeach the informant's credibility, called

him a liar and suggested the informant was unreliable. Consequently the objection was overruled. The Prosecutor's line of questioning was narrowly tailored to prevent any undue prejudice to Defendants. The Defense concedes that Defense counsel also raised the issue of plea agreements, other benefits, and the informant's background and criminal history, which they explored on cross for the better part of a day, thus opening the door for questioning about such plea agreements. (Doc. 295, SEALED Defendant Rito S. Zazueta's Motion for New Trial, File February 1, 2006.)

C. Plain Error

If trial counsel does not object, claims that a prosecutor committed misconduct are reviewed for plain error. *United States v. Rodriguez-Preciado*, 399 F.3d 1118, 1132 (2005); *Cabrera*, 201 F.3d at 1246; *see also United States v. Tam*, 240 F.3d 797, 804 (9th Cir. 2001). Federal Rule of Criminal Procedure 52(b) provides that "plain errors that affect substantial rights may be considered even though [they were] not brought to the court's attention." The authority Rule 52(b) provides is circumscribed. *Olano v. United States,* 507 U.S. 725, 732 (1993). First, a defendant has the burden of showing there is an actual error. *Id.* at 734. Deviation from a legal rule is "error" unless the rule has been waived. *Id.* at 732. A defendant must also show that the error is plain, clear, or obvious. *Id.* at 734; *Anderson,* 201 F.3d at 1149-50. Lastly, the plain error must have been prejudicial. *Anderson,* 201 F.3d at 1150. If these conditions are met the error is reversible only if it seriously affects the fairness, integrity, or public reputation of judicial

proceedings. *Id.*

i. Prosecutor's Closing Arguments

a. Impermissible Vouching During Closing Argument

The Government is prohibited from vouching for the credibility of its witnesses, its case, or the Prosecutor herself: (1) by "placing the prestige of the government behind the witness" through personal assurances; or (2)suggesting that information not presented to the jury supports the witness' testimony. *United States v. Weatherspoon*, 410 F.3d 1142, 1146 (9th Cir. 2005). Defendants argue that the Prosecutor placed the prestige of the government in her case when stating:

> MS. ESCOBAR: Thank you, Your Honor. Ladies and gentlemen, 19 years ago when I became a federal prosecutor, I did take an oath to uphold and defend the constitution and the laws of the United States, to protect the constitution from all enemies, both foreign and domestic. That is what I have done in this case. That is what the law enforcement agents have done. We have done our job, ladies and gentlemen. We have gone from here to here. We went from here to here in two days, ladies and gentlemen. The defendants are no longer presumed innocent. We have proven the defendants guilty beyond a reasonable doubt. The defense attorneys have also done their job to the extent that they have insured that their clients receive a fair trial. But it is not their job to redefine the law. The law which you must follow is the law that has been defined to you by the Court.

RTP, May 3, 2005, 1452:7-1452:24.

The Prosecution rejoins that her comment was invited and was necessary to "right the scales" after Attorney Reyes made the following argument:

> Usually before I close in a closing argument, I try to think of how I could best put this case with one central theme before you. I

> like the temple of justice. And I like the thought of the part that I said in the beginning about let's get real. And I said let's get real because a lot of the evidence in this case, ladies and gentlemen, involves the government's ability to utilize what I referred to as the power of the oath to be able to stretch, to expand, to infer, to take that quantum leap that they want you to take. And ladies and gentlemen, I'm going to ask you not to take it. And I'll give you several reasons why.

RTP, May, 3, 2005, 1425:22-1426:7.

The Prosecution's comments in this instance do no more than respond to the inference Mr. Reyes raised about the prosecution taking "leaps of faith" and using the power of the oath to "expand" the evidence. The Prosecutor's remarks about her personal history were not based on the record, but only suggested inartfully that the substantial evidenced adduced by the government has rebutted the presumption of innocence to prove their guilt beyond a reasonable doubt. No deviation from the rule against improper vouching was so "plain, clear, or obvious," as to be prejudicial and seriously affect the fairness, integrity, or reputations of the proceedings.

b. Improper Disparaging of Defense Counsel

Defendants also argue against the following comment by the Prosecutor in her closing:

> MS. ESCOBAR: As for Shino, his lawyer talked about puffing like some used car salesman would. Well, maybe Mr. Hunt did a lot of puffing when he was running for elected office, but the drug deal in this case was not about puffing, ladies and gentlemen. Shino is not a follower. George Nobari and Zazueta all conferred with Shino. They went to Shino's house to confer with each other during the process of getting the money for the pseudoephedrine pills. George constantly touched base with Sheen throughout the

> transaction. It was Shino who came with Zazueta to the McDonald's in Jiminez' truck with cash, deadly weapon and extra ammunition.

RTP, May 3, 2005, 1459:6-16.

The Prosecution argues that their argument was invited by the following comment during Attorney Hunt's[2] closing:

> Now, when others were talking about the discussions between different defendants and Mr. Zayed, they were talking about $400,000 worth of pills. $200,000. Things of that nature. And it reminded me of a concept that we studied in law school. And that is if you go on a car lot and you say to the car salesman, "How many miles to the gallon does this car get?" And he says, "Oh, it will get about 75 miles to the gallon." And you rely on that and you buy the car. And then you try to sue him for misrepresentation because there's no way it's going to get 75 miles to the gallon. In the law, that is called puffing. It is so ridiculous that nobody would believe it. And that's why it's called puffing.

RTP, April 29, 2005, 1414:6-17.

During voir dire Mr. Hunt made reference to his role as a former prosecutor for Fresno County. The Prosecution's comment was an attempt to use an analogy about "puffing" that responded to Mr. Hunt's puffing argument and his allusion to his status as a former prosecutor in an awkward attempt to "right the scale." Given the strength of the evidence presented against Defendants during trial, it cannot be said that this argument was so prejudicial that it seriously affected the fairness, integrity, or public reputation of the proceedings. Any error was harmless.

//

[2] Mr. Hunt is Defendant Eddy George's attorney.

c. Inflaming the Passions of the Jury

The Defense argues that the Prosecution impermissibly inflamed the passions of the Jury by making the following statement:

> MS. ESCOBAR:
> In the end, ladies and gentlemen, it all comes down to this. Common sense tells you the defendants are drug dealers who came to McDonald's in Turlock not to buy a Big Mac, they came with guns and cash to buy them pseudoephedrine to cook 183 pounds of pure methamphetamine. That's it. One more thing.
>
> (A tape was played.)
>
> Ladies and gentlemen, that is not the product of government entrapment. You heard the concern in the voice of Agent Galvan. A 23-year Fresno Police Department veteran, concern for another human being as Mr. Nuttall would say, genuine concern. Because he knew this was a volatile situation. This was the real deal. These drug traffickers pose a real and viable threat. Had it not been for the intervention of these law enforcement officers, it was a volatile situation. There was a real danger. The City of Turlock should be thankful to law enforcement for their efforts in diffusing a volatile situation, for finding these drug traffickers and you, ladies and gentlemen, should not let the City of Turlock down. We've proven they are drug traffickers. It is your duty now to find them guilty. Thank you.

RTP, May 3, 2005, 1471:9-1472:5.

The Defense again cites *United States v. Weatherspoon*, 410 F.3d 1142 (9th Cir. 2005), and states that Prosecutor's comment was "clearly designed to encourage the jury to enter a verdict on the basis of emotion rather than fact." In *Weatherspoon*, the improper prosecutorial statement was the Prosecutor's repetitive statements that in convicting defendant the jury would be "protecting other individuals in the community" and somehow

helping to ameliorate society's woes. *Weatherspoon*, 410 F.3d at 1149. The court reasoned that the prosecutorial statements were improper because they spoke not to the proof presented at trial but rather to the potential social ramifications of the jury's reaching a guilty verdict. *Id.*

Because no objection was made during trial, the statement is reviewed under plain error analysis. Whether the prosecution's statement urged the jury to render their decision based on emotion is a close call. The statement describes Defendants as drug dealers and a threat to the City of Turlock and its citizens. She goes on to argue the evidence has proven beyond a reasonable doubt that Defendants were acting as drug dealers and should be convicted. Balanced against the overwhelming evidence at trial, the Defense fails to show how such statements were so grossly prejudicial that it affected the integrity of Defendants' trial or resulted in such prejudice that but for the argument the outcome would have been different. Defendants have not met their burden under the plain error standard.

d. Misstating The Evidence

The Defense argues that the Prosecutor misstated the evidence against Defendant Nobari when making the following argument:

> MS. ESCOBAR:
> As George admitted to you, he's known Shino and Nobari for a long time. They were trusted associates. As the video and the audio recordings show, those two trusted associates, Shino and Nobari, who showed up at the deal with them, they showed up with money and firearms. Although you don't hear Shino's words on any of the recordings, you do hear George talking to "Sheen" on the phone during his meetings with Galvan and

> attempting to gather up the money for the buckets of pills. And George also told Galvan that Shino wanted the seven buckets of pills.

RTP, April 29, 2005, 1350:19-1351:3

The Defense argues that the Prosecutor misled the jury by arguing that Nobari "actually possessed" the gun. The Defense, however, ignores that the firearm was registered to Nobari, and was in the car at the drug deal, on the passenger side near where Nobari was sitting. The argument was not "error," so plain, clear or obvious, and prejudicial that it affected the integrity of the trial. Specifically, the evidence was that, during the drug transaction, a loaded Glock firearm registered to Nobari was found on the passenger side of George's Honda Civic where Nobari was seated at the time the drug deal was to be executed. The jury was also presented with a videotape that showed Nobari appearing to place a firearm in his waistband when meeting with co-Defendant Shino at his residence. Given this substantial evidence, the Prosecutor's comment about Defendants (Nobari included) showing up with firearms was a reasonable inference drawn from the actual evidence that was presented to the jury.

e. Continued to Refer to Past Objections and Facts Not In Evidence Which Were Sustained.

The Defense also argues that the Prosecution engaged in improper conduct by referring to previous objections and inadmissible evidence when she stated:

> MS. ESCOBAR: This is the government's theory and it's a theory that the circumstantial evidence supports. The phone that Shino had in his possession contacted George several times then. The phone that Shino possessed then contacted the phone associated with Daniel Jiminez several times. Zazueta also then contacted Jiminez. Around 2:30, then --

> those calls were all made before 2:30. Around 2:30, George and Nobari then left to go get what would have been $220,000 for the 22 buckets of pseudoephedrine that was in the truck. First they went to Shino's residence on Fosberg, which we've seen before. Also in Turlock. Right about here. And we saw a videotape that was taken by Agent Bret Campbell at the Fosberg residence. And we see, during that time, that George Nobari and Shino met. That was on the videotape. But the toll records, when reviewed in conjunction with the videotape, are also instructive. When they went to Shino's residence, around the time they arrived there, the toll records for Shino's phone show that he called Jiminez, the phone associated with Jiminez, two times. While Shino, George and Nobari were meeting, George, the phone that he had, called Agent Galvan and at that time said his people -- and this was recorded -- were used to dealing in bottles. You've heard the testimony of Agent Galvan. It's at that time when they're at Fosberg meeting together, Shino, George and Nobari, that George said his people were leery of the buckets because they were used to dealing in bottles.

RTP, April 29, 2005, 1341:14-1342:16.

Defendants do not specifically demonstrate how this statement is a deviation from the evidence that constitutes "error" which is plain or obvious, and so prejudicial that it seriously affects the integrity of the proceedings. Defendants have not met their burden under the plain error standard.

ii. Trial Testimony

a. Racial Testimony by Informant Zayed and Agent Jones During Trial

Defendants also argue that the Prosecution engaged in racial and ethnic stereotyping by undertaking the following line of questioning of Informant Zayed:

> BY MS. ESCOBAR:
> Q. Were you given special permission to

travel outside the Northern District of Illinois, the Chicago area, to testify here?

A. It took a while, but the subpoena -- we had -- she had to see the subpoena that the defense subpoenaed me for me to come up here.

Q. So you had to receive -- you had to get their blessing in order for you to leave the district?

A. Yes.

Q. Otherwise you would have not been in compliance with your conditions of probation?

A. Yes

Q. Or supervised release, I guess. And it was your testimony, I believe, that the co-defendants in the Arizona case, the co-defendants that you are aware of did not receive a sentence in excess of five years?

A. Yes.

Q. That there were different sentences up to five years --

A. Yeah.

Q. Or not more than five years.

A. Not more -- I know who got like -- most of the Middle Easterns, I know what they got.

Q. And speaking of Middle Easterns, based on your experience in the pill business, what -- are there Middle -- I mean, do you -- did you conduct business with Middle Easterns?

A. Mexicans.

Q. In what capacity did you know Mexicans?

A. Cooks.

Q. Have you ever known, in the -- your pill trafficking, Middle Easterners to actually cook?

A. There isn't a Middle Eastern that cooks, no.

Q. What primarily do the Middle Easterns --

A. We bring it from Canada to Chicago to California.

Q. Do the Middle Easterners serve primarily as pill brokers?

A. Brokers, yes.

Q. And in your experience, the Mexicans, as they were referred to even in these conversations with Eddy George, based on your experience, they would be the people involved in actually extracting the ephedrine from the pills to make the methamphetamine?

A. They're the cookers, that's their secret. You know, they never let us know their secret of cooking. That's who cooks the pseudo and did all the pseudo. They called it cooking.

RTP, April 28, 2005, 1109:1-1110:18.

Another instance to which Defendants object as racial and ethnic stereotyping was during Agent Galvan's testimony:

BY MS. ESCOBAR:
Q. Is there a hierarchy within a drug trafficking organization?

A. Yes.

Q. Would you explain that.

A. You have couriers, you have transporters, you have your money guy, particularly in methamphetamine drug dealing, you have cooks, you have people that go around and buy precursors.

Q. And in terms of cooks, based on your experience in Chicago and investigating pseudoephedrine pill cases --

MR. REYES: This is improper rebuttal.

THE COURT: Overruled. You can answer.

BY MS. ESCOBAR:
Q. Do certain ethnic groups, Mexicans, perform certain roles within the methamphetamine, methamphetamine

organization?

A. Based on -- based on my experience with the wiretaps and other investigations, the individuals handling the pseudoephedrine are of Middle Eastern descent and they talk about trying to get the pseudoephedrine to California --

MR. NUTTALL: Objection, nonresponsive, Your Honor.

THE COURT: Sustained.

BY MS. ESCOBAR:
Q. The Mexican -- the role of Mexicans and the reference to "Mexicans" by Eddy George in the transcript, what did that signify to you?

A. That the final destination of the pseudoephedrine was going to be a Mexican.

Q. And what, based on your training and experience in the investigation of methamphetamine labs, is there -- what was the role of the Mexicans?

A. The pseudoephedrine would be given to a Mexican cook and it would be converted with other chemicals into methamphetamine.

Q. Based on your training and experience in investigating pseudoephedrine pill cases, having seen Middle Easterners participate in pseudoephedrine pill trafficking?

A. Yes.

Q. A large number?

A. Yes.

Q. And based on your training and experience, what is the role that Middle Easterners play?

A. The cases that I have been involved in, the Middle Easterns were secreting the pseudoephedrine from Canada into the United States with the final destination being California.

Q. And typically, what is the role that they -- are they involved directly in the manufacturing process, the Middle Easterners?

> A. Based on my experience, the Middle Easterners are simply controlling the pseudoephedrine trade and, as a middle man, and getting the pills to a cook.
>
> Q. Who you have seen based on your training and experience to be what ethnic background?
>
> A. For which?
>
> Q. The cooks.
>
> A. Of Mexican descent.

RTP, April 28, 2005, 1240:4-1242:8.

The following day Mr. Hunt requested that the testimony be stricken. In response to this request the court gave the following limiting instruction about racial and ethnic references:

> THE COURT:
> Yesterday there was some testimony by Agent Jones and I wanted to give you a limiting instruction on this testimony. The agent testified that in the context of this particular case, that the evidence and his observations caused him to associate, as he used the words, Middle Easterners and then as he used the word "Mexicans" with either pill brokering or cooking. Now, I want you to understand that his testimony is to be considered by you only in the context of this case and the evidence that is in this case and his particular perspective in the Chicago area.
> You are not to consider that to suggest that any particular ethnic group or persons of a particular racial origin have these characteristics or tendencies or that where a person is born or what a person's ethnicity is has anything to do with whether he or she is likely or not likely to engage in criminal activity.

RTP, April 29, 2005, 1263:24-1264:14.

In support of their argument, the Defense cites to *United States v. Cabrera*, 222 F.3d 590 (9th Cir. 2000). Defendants in

Cabrera appealed their conviction for conspiracy to distribute, possession with intent to distribute, and distribution of crack cocaine. *Cabrera*, 222 F.3d at 591. Defendants argued that the government's lead witness was improperly questioned and testified to stereotypes about Defendant's Cuban origin. *Id.* On direct examination the witness provided testimony that round, flat, wafers of cocaine were typical of members of the Cuban community. *Id.* at 592. He also testified that Cubans had a tendency to be flight risks given their history of migrating to America. *Id.* at 593. The court reasoned that appeals to racial, ethnic, or religious prejudice during the course of a trial violate a defendant's Fifth Amendment right to a fair trial, due process rights, and equal protection rights. *Id.* at 594. It further held that most of the witness' references to Cubans did not qualify as relevant evidence in the trial. *Id.* at 596. The witness' testimony only made it seem like the Las Vegas drug market was falling under the control of Cuban drug dealers. *Id.* While the testimony about how Cubans package their drugs may have been relevant to other aspects of the case, it was prejudicial because it added to the perception that Cuban drug dealing was a city wide problem in Las Vegas. *Id.*

Evidence is relevant if it has "the tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." Fed. R. Evid. 401. Evidence that is not relevant is not admissible. *Id.* 402. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. *Id.* 403.

This case is wholly unlike *Cabrera*. Contrary to *Cabrera*, the error is reviewed as plain error in this case because there was no timely objection made to the testimony during trial. A curative admonition was given to a belated defense request made a day later. Also, the testimony by both informant Zayed and agent Galvan is highly relevant to the roles and structure of the pseudoephedrine trafficking organizations which, as the evidence showed, they played in the transactions as dealings that led to this case and how Mr. George got involved with Zayed through family contacts in Chicago. That roles in the transaction had some relation to race and ethnicity was relevant to explain the nature and structure of the transaction and how George, Shino, and Nobari came to be involved and what their roles were to be. In this case, race and the term "Mexican" were first raised by Mr. Reyes, counsel for Defendant Zazueta. RTP, April 19, 2005, 158:4-5. The Defendants themselves referred to each other along racial lines. Throughout the trial, the jury was presented with audio tape evidence of the drug transaction where co-Defendants refer to each other in racial terms rather than by given names. The testimony of informant Zayed and agent Galvan was necessary to identify for the jury, why, and which Defendant was referred to as "The Mexican" in the tapes submitted into evidence. The evidence at trial revealed that George referred to Zazueta as "The Mexican."

There is no actual error in the testimonies of informant Zayed and agent Galvan in referring to actual participants and events that occurred in this case. Any alleged error was not so clear or prejudicial that it seriously affected the fairness of

any Defendants' trial. Any conceivable negative innuendo did not rise to the level of actual prejudice. At the request of the Defense, the court gave a limiting instruction reminding the jury that the testimony was only to be considered as to specific individuals in the context of the facts of this case, and not as racial stereotyping or suggesting that any racial or ethnic group had particular criminal proclivities. The curative instruction, coupled with the strong case presented against Defendants, was sufficient to neutralize any potential prejudice that might have arisen.

b. Eliciting Testimony from Government Witness Regarding His Veracity Because of Truthfulness of Plea Agreements

Defendant Zazueta argues in his brief that the Prosecutor engaged in impermissible vouching by bringing up the following line of questioning:

> BY MS. ESCOBAR:
> Q. Now, what was the nature of your -- or what was your understanding of the nature of the cooperation agreement in Phoenix?
>
> A. To testify against my co-defendants.
>
> Q. And in connection with your cooperation, did the agreement indicate and did you agree to provide information and testimony that was truthful, honest, candid and complete with no knowing material false statements or omissions?
>
> A. Yes.
>
> Q. And in recommending a reduction, did the Assistant US Attorney -- the reduction was based on your fulfillment of this agreement.
>
> A. Yes.
>
> Q. To provide truthful testimony.
>
> A. Yes.

Q. And did the agreement, and your understanding of the agreement, indicate that you would neither attempt to protect any person or entity through false information or omissions nor falsely implicate any person or entity?

A. Yes.

Q. Based upon your fulfillment of the agreement, you received a reduction?

A. Yes.

Q. And did the agreement further provide that the determination of your assistance to the government would be decided solely by the United States Attorney for the District of Arizona and by him alone?

A. Yes.

Q. And as part of that process, the agreement indicated that it was the sole discretion of the United States. And that you would agree to submit to polygraph examinations to verify information. Was that correct?

A. Yes.

Q. So the reduction, again, at another point in the plea agreement, the US Attorney in its sole discretion, would move at the time of sentencing for a departure from the sentencing guidelines and impose a sentence below a level established by law as the minimum sentence to reflect your substantial assistance. Again, was it your understanding that the determination of your compliance with the cooperation agreement would be based solely on the Assistant US Attorney's evaluation of your compliance?

A. Yes.

RTP, April 28, 2005, 1106:25-1108:18.

This statement was not objected to and is reviewed under plain error. Defendant argues that such testimony implies that the Government can guarantee a cooperating witness' truthfulness. Defendant argues that it was impermissible to further distinguish

between the informant and Defendant George in inferring that the informant witness had "come clean" and Defendant George had not. This is untrue. The Prosecutor correctly pointed out that the informant's plea agreement required his testimony be truthful; that the agreement was voidable if his testimony was false; and that it was in the sole discretion of the Government to determine if the informant's cooperation was substantial, i.e., valuable. However, Defendant Zazueta fails to allege that such testimony is a deviation from any legal rule so as to constitute "error" that is plain, clear or obvious resulting in such prejudice to the Defense that it seriously affected the integrity of the trial. The explanations of the informant's cooperation (plea) agreement were necessary to enable the jury to understand limits on the informant.

D. Count Three Jury Instructions

A party who objects to any portion of the jury instruction or to a failure to give a requested instruction must inform the court of the specific objection and the grounds for the objection before the jury retires to deliberate. Fed. R. Crim. P. 30(d). The district court has substantial latitude in tailoring jury instructions. *Brewer v. City of Napa*, 210 F.3d 1093, 1097 (9th Cir. 2000). Jury instructions must be formulated so that they fairly and adequately cover the issues presented, correctly state the law, and are not misleading. *Id.* If a defendant complies with Rule 30 by properly objecting to an instruction, the instruction is reviewed for abuse of discretion. *See United States v. Garcia*, 353 F.3d 788, 791-92 (9th Cir. 2003). Where a party fails to object, an allegedly erroneous jury instruction

will be reviewed for plain error. *See United States v. Jimenez Recio*, 371 F.3d 1093, 1099 (9th Cir. 2004). Reversal under plain error is appropriate only if the error is so highly prejudicial that it affects a defendant's substantial right to a fair trial. *See* Fed. R. Crim. P. 52(b).

The Defense makes several arguments regarding the jury instruction pertaining to count three of the indictment charging Defendants with possession of a firearm during and in relation to a drug trafficking crime. First, Defendants argue that the Pinkerton instruction misstated the elements of count three. Defendants also argue that, the elements of 18 U.S.C. § 924(c)[3] were cross matched. Lastly, Defendants argue that these mistakes constituted an impermissible amendment of the indictment. The only objections to the jury instructions raised during trial were to the giving of a Pinkerton instruction, not its form or language. RTP, April 29, 2005, 1304:18-1305:23.

i. The Pinkerton Instruction

Because the Defense objected to the jury instruction on Pinkerton liability, the instruction is reviewed for abuse of discretion. During trial the jury was given the following instruction:

> Before you may consider the statements or acts of a co-conspirator, you must first determine whether the acts or statements were

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[3] Section 924(c) provides:

> "Any person who, during and in relation to any drug trafficking crime uses or carries a firearm, or who in furtherance of any such crime possesses a firearm shall be subject to a term of not less than five years."

> made during the existence of and in furtherance of an unlawful scheme and whether any offense was one which could reasonably have been foreseen to be a necessary or a natural consequence of the unlawful agreement. Therefore, you may find a defendant guilty of possessing a firearm during and in relation to a drug trafficking crime, as Count Three of the indictment charges, if the government has proved each of the following elements beyond a reasonable doubt:
>
> First, a person named in Count Three of the indictment committed the crime of possessing a firearm during and in relation to a drug trafficking crime. And that person was a member of the conspiracy charged in Count One of the indictment; and that person committed the crime of possessing a firearm during and in relation to a drug trafficking crime as alleged in Counts One and Two of the indictment in furtherance of the conspiracy. The defendant must also be found to have been a member of the same conspiracy at the time the offense charged in Count Three was committed and the offense must be within the scope of the unlawful agreement and it must have been reasonably foreseeable to be a necessary or natural consequence of the unlawful agreement. You must decide whether the conspiracy charged in the 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 the defendant may have been a member of some other conspiracy.

RTP, April 29, 2005, 1323:3-1324:12.

Defense counsel argues that in this Pinkerton instruction the district court erroneously substituted the phrase "during and in relation to" for the required "in furtherance" element of the possession offense charged for the indictment. Defense argues that, as a result, the Government was held to a lower threshold of "during and in relation to" rather than having to meet the

higher burden of the "in furtherance" element.

For Pinkerton liability, jury instruction No. 20 was patterned on the express language of the Ninth Circuit Model Criminal Instructions § 8.20[4]. These instructions are formulated to fairly and adequately cover the issues presented and correctly

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[4] Section 8.20 of The Ninth Circuit Model Criminal Instruction provides:

> Each member of the conspiracy is responsible for the actions of the other conspirators performed during the course and in furtherance of the conspiracy. If one member of a conspiracy commits a crime in furtherance of a conspiracy, the other members have also, under the law, committed that crime.
>
> Therefore, you may find the defendant guilty of [e.g., distributing cocaine] as charged in Count _____of the indictment if the government has proved each of the following elements beyond a reasonable doubt:
>
> 1. a person named in Count _____ of the indictment committed the crime of [e.g., distribution of cocaine] as alleged in that count;
> 2. the person was a member of the conspiracy charged in Count _____ of the indictment;
> 3. the person committed the crime of [e.g., distribution of cocaine] in furtherance of the conspiracy;
> 4. the defendant was a member of the same conspiracy at the time the offense charged in Count _____ was committed; and
> 5. the offense fell within the scope of the unlawful agreement and could reasonably have been foreseen to be a necessary or natural consequence of the unlawful agreement.

state the law. The Defense fails to show that it was an abuse of discretion to instruct the jury using the Ninth Circuit instructions.

ii. Instruction for 18 U.S.C. §924(c) Was Given Pursuant to the Ninth Circuit Pattern of Criminal Jury Instruction No. §8.65

The Defense for Mr. Nobari next argues that the substantive instruction on count three also cross matched the elements of 924(c) such that the Prosecution was relieved of proving every element of the crime beyond a reasonable doubt.

During trial the following instruction was given to the jury:

> The defendants are charged in Count Three of the indictment with possessing a firearm during and in relation to a drug trafficking crime in violation of United States law.
>
> In order for a defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:
>
> First, the defendants committed the crime of conspiring to aid and abet the manufacture of 50 grams or more of methamphetamine and/or to possess pseudoephedrine knowing or having reasonable cause to believe it would be used to manufacture methamphetamine as charged in Count One of the indictment. Or that the defendant committed the crime of attempting to possess pseudoephedrine, knowing or having reasonable cause to believe it would be used to manufacture methamphetamine as charged in Count Two.
>
> In other words, as I have said before and I'll say it again for clarity sake, you have to find either that Count One or Two has been proved to get to Count Three because Count Three is charged that the weapons were used or carried in the furtherance of a drug offense.
>
> The second element of the possession of a firearm in furtherance of a drug offense is that the defendant knowingly possessed a firearm. And I've just defined "knowingly"

> for you.
>
> And third, the defendant possessed the firearm during and in relation to the crime charged in Count One or Count Two or both, if you find that both crimes were committed. A defendant takes action in relation to the charged drug crimes if the firearm facilitates or plays a role in one or more of the drug trafficking crimes charged.

RTP, April 29, 2005, 1325:20-1326:24.

Defense counsel for Mr. Nobari makes several arguments regarding the language used in the instruction.[5] First, the Defense argues that the jury was not clearly instructed that it must find the critical element of "in furtherance of" in the present case. Instead, the Defense claims that the court instructed the jury that it should convict on count three if the defendant possessed a gun "during and in relation to" which, they argue, sets up a lower burden for the Government. The Defense also argues that the instruction was given without defining the term "use" or "carry." Lastly, the Defense argues that the instruction for the 924(c) offense was an impermissible amendment

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[5] In support of their argument, the Defense for Nobari cites *United States v. Mann*, 389 F.3d 869 (9th Cir. 2004). In *Mann*, the court rejected the government's argument that because pen guns (a small-caliber single shot weapon that resembles a fountain pen) are inherently dangerous and generally lacking in usefulness except for violent criminal purposes, possession of such a weapon satisfies the "in furtherance of" element. *Mann*, 389 F.3d at 880. A case such as *Mann*, where the government failed to show sufficient evidence that the gun was used to aid or facilitate the commission of the drug trafficking, is distinguishable from this case where there was ample evidence against Defendants, that the firearms were carried to the drug deal meet location and were in the actual possession of Zazueta and at least the constructive possession of Nobari in the vehicle George drove and at the ---- residence where he appeared to be placing the pistol in his waistband.

of the indictment.

Because the Defense did not object to the 924(c) instruction during trial, it is reviewed for plain error. Reversal is appropriate only if the error is so highly prejudicial that it affects a defendant's substantial right. *See* Fed. R. Crim. P. 52(b). The jury was instructed on the §924(c) offense in accordance with Ninth Circuit Model Criminal Jury Instruction §8.65[6]. Upon instructing the jury on the §924(c) offense, a

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[6] Ninth Circuit Model Criminal Jury Instruction §8.65 provides:

> The defendant is charged in [Count Three of] the indictment with [using] [carrying] [possessing] [brandishing] [discharging] a firearm during and in relation to a [drug trafficking crime] in violation of Section 924(c) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:
>
> First, the defendant committed the crime of [*e.g.*, murder] [as charged in Count ____ of the indictment];
>
> Second, the defendant knowingly [used] [carried] [possessed] [brandished] [discharged] a [*firearm*]; and
>
> Third, the defendant [used] [carried] [possessed] [brandished] [discharged] the [*firearm*] during and in relation to the crime.
>
> [A defendant has "used" a firearm if he or she has actively employed the firearm in relation to [*crime charged*].] [Use includes any of the following:
>
> (1) [[brandishing] [displaying] [bartering] [striking with] [firing or attempting to

portion of the charge contained in count three had different language. RTP, April 29, 2005, 1325:20-1326:24. However, the language was corrected by the court with the following clarification to the jury:

> In other words, as I have said before and I'll say it again for clarity sake, you have to find either that Count One or Two has been proved to get to Count Three because Count Three is charged that the weapons were used or carried in the furtherance of a drug offense.

RTP, April 29, 2005,1326:10-14. The brief difference in terminology cannot be material or prejudicial where the jury was expressly told the use or carrying of the firearm was in the furtherance of a drug trafficking offense. The clarification was sufficient. The Ninth Circuit Model Criminal Jury Instructions are clear and unambiguous. Pinkerton has been an approved jury

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> fire] a firearm;]
>
> (2) [referring to a firearm in the offender's possession [in order to bring about a change in the circumstances of the predicate offense];]
>
> (3) [the silent but obvious and forceful presence of a firearm in plain view].]
>
> A defendant carries a firearm if the defendant knowingly possesses or carries the firearm. Carrying is not limited to carrying weapons directly on the person, but can include circumstances such as carrying in a vehicle or a locked compartment of a vehicle.
>
> A defendant takes such action "in relation to the crime" if the firearm facilitated or played a role in the crime.

instruction since 1946. *Pinkerton v. United States*, 328 U.S. 640, 647 (1946). Under a Pinkerton theory of liability a co conspirator may be charged with the use or carrying of a firearm during a drug crime. *See, United States v. Alvarez-Valenzuela*, 231 F.3d 1198, 1203 (9th Cir. 2000). There was no instructional error so highly prejudicial in the §924(c) instruction that warrants reversal in this case.

E. Court's Failure to Give a Specific Unanimity Instruction

The Defense argues that it was an abuse of discretion and a violation of Nobari's constitutional rights to give the jury a general, rather than a specific, unanimity instruction for the §924(c) offense. An instruction that was reasonably likely to have been misunderstood by the jury is subject to harmless error analysis. *Murtishaw v. Woodford,* 255 F.3d 926, 973 (9th Cir. 2001)(*citing Calderon v. Coleman,* 525 U.S. 141, 145 (1998), which held that jury instructions that were constitutionally erroneous are reviewed under harmless error analysis.) A constitutional error in jury instructions is reversible if it is harmless beyond a reasonable doubt that a rational jury would have found the defendant not guilty absent the error. *United States v. Munoz,* 412 F.3d 1043, 1047 (9th Cir. 2005).

Defense counsel argues that the court was required to give a unanimity instruction in this case because there was a genuine possibility of jury confusion. The Defendants reliance on *United States v. Southwell*, 432 F.3d 1050 (9th Cir. 2005), in support of their argument is misplaced. In *Southwell,* the district court failed to instruct the jury on whether they were required to reach a unanimous decision on defendant's insanity before

considering guilt or innocence. During deliberations, the jury sent a note to the court indicating that it was unclear on what to do if the jurors could not agree unanimously on the issue of insanity. *Southwell*, 432 F.3d at 1052. Rather than address the jurors' confusion, over Defense counsel's objections the court advised the jury to use their "best recollection" of the evidence and the instruction. *Id.* The Ninth Circuit found this response to be inadequate by reasoning that the court abused its discretion when failing to answer a jury's question on a matter that is not fairly resolved by the jury instruction. *Id.* at 1053. However, the court failed to decide whether the original instructions were deficient and rendered their ruling entirely on the inadequacy of the jury's response. *Id.* at n.1.

In the ordinary case, a general instruction that the jury's verdict must be unanimous will be sufficient. *Jazzabi v. Allstate Ins. Co.*, 278 F.3d 979, 986 (9th Cir. 2002). There is no indication of jury confusion in this case. None of the jurors expressed any doubt or misunderstanding regarding the instructions they were given. There is also no evidence that Defense counsel requested a specific unanimity instruction during trial. The jury in this case was instructed according to the Ninth Circuit's jury instruction guidelines, in the following manner:

> "Your verdict, whether guilty or not guilty on each of the three counts, must be unanimous."

RTP, May 3, 2005, 1472:12-13; *see also* Ninth Circuit Model Criminal Instructions. 7.1 - Duty to Deliberate (2006 ed.). The jury was also advised that they were required to reach a

"unanimous agreement on the issues that have been submitted to you to decide." RTP, May 3, 2005, 1475:6-7. The instructions were unambiguous. The verdict forms also contained the finding that a unanimous verdict had to be reached in every finding as the separate verdict forms as to each Defendant. The jury was individually polled at the time the verdicts were returned in open court to assure unanimity. Absent any evidence of jury confusion abuse of discretion cannot be found where the jury was instructed pursuant to the Ninth Circuit Model Criminal Instructions.

VI. CONCLUSION

All the reasons stated within court on June 9, 2006, at the hearing of Defendants' motions for new trial are incorporated by this reference and made a part of the decision. Defendants' motions for new trial are **DENIED.**

SO ORDERED.

Dated: August 30, 2006

/s/ OLIVER W. WANGER

OLIVER W. WANGER
United States District Judge