

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

UNITED STATES OF AMERICA,	:	No. 96-5163
	:	
Appellee,	:	Consolidated for Briefing and
	:	Disposition With
v.	:	Nos. 95-5554, 95-5601, 96-5160, 96-5161
	:	and 95-5162
JACINTO RODRIGUEZ-MORENO,	:	
	:	
Appellant.	:	

**ON APPEAL FROM A JUDGMENT OF CONVICTION OF THE
UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY**

**BRIEF AND SUPPLEMENTAL APPENDIX OF APPELLANT
JACINTO RODRIGUEZ-MORENO**

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On the Brief

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CERTIFICATION OF ADMISSION

The undersigned hereby certifies that he is admitted to practice before the United States Court of Appeals for the Third Circuit having been admitted on October 13, 1981.

STATEMENT OF RELATED CASES

There are currently five (5) appeals related to the instant appeal pending before the United States Court of Appeals for the Third Circuit. These cases, United States v. Omar Torres-Montalvo, Appeal No. 96-5160, United States v. Jorge Luis-Pacheco, Appeal No. 95-5601, United States v. Milton Palma-Ruedas, Appeal No. 95-5554, United States v. Jairo Pedroza-Ortiz, Appeal No. 96-5161 and United States v. Randy Alvarez-Quinones, Appeal No. 96-5162 have already been consolidated for purposes of appeal.

STATEMENT OF SUBJECT MATTER & APPELLANT JURISDICTION

This appeal is taken by right from a final judgment from the United States District Court for the District of New Jersey. The District Court obtained subject matter jurisdiction pursuant to 18 U.S.C. § 1201(a)(1) and (c). This Court has jurisdiction of the appeal under 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

STATEMENT OF ISSUES AND STANDARDS OF REVIEW

1. Was venue proper in the District of New Jersey?

Standard of Review: Plenary review on application of a legal precept. Honeywell v. American Standards Testing Bureau, 851 F.2d 652, 655 (3d Cir. 1988), cert. denied, 488 U.S. 1010 (1989).

2. Did the District Court err in denying appellant's Motion for Severance?

Standard of Review: Abuse of Discretion resulting in prejudice to the defendant. United States v. Sandini, 888 F.2d 300 (3d Cir. 1989).

3. Was there a variance between indictment and proof offered at time of trial and if so, did the variance prejudice some substantial right of appellant?

Standard of Review: Abuse of Discretion. Government of Virgin Islands v. Lima, 774 F.2d 1245 (3d Cir. 1985).

STATEMENT OF THE CASE

On January 3, 1995, six (6) men were arrested in Maryland. They were Ormar Torres-Montalvo, Jorge Luis-Pacheco, Milton Palma-Ruedas, Randy Alvarez-Quinones, Jairo Pedroza-Ortiz and Jacinto Rodriguez-Moreno. All six (6) were tried in the United States District Court for the District of New Jersey and convicted of numerous offenses. All six (6) cases are now on appeal before this Court.

There were three (3) indictments returned, an original indictment and two (2) superseding indictments. It was the second superseding indictment, returned on or about June 12, 1995, which was submitted to the jury for deliberation.

The charges contained in the indictment were serious. They included Conspiracy to Distribute 30 Kilos of Cocaine, Conspiracy to Kidnap Efrain Avendano and Marbel Avendano, two substantive counts of Kidnaping and Unlawful Possession of a Weapon During a Felony in violation of 18 U.S.C. § 924(c).¹

¹ As set forth more particularly below, it was only appellant Moreno who was charged in that count.

The defendants can fairly be divided into two (2) groups. The first group consists of Omar Torres-Montalvo, Jorge Luis-Pacheco and Randy Alvarez-Quinones. The United States Attorney argued and attempted to prove that all three (3) of these men were involved in the conspiracy to distribute narcotics where Efrain Avendano was a “middleman.” When the drug deal went bad, Avendano was kidnaped in order to secure payment for the cocaine. The second group consists Milton Palma-Ruedas, Jairo Pedroza-Ortiz and Jacinto Rodriguez-Moreno. These three (3) appellants were not alleged to have participated in the drug conspiracy. They were, however, alleged to have participated in the kidnaping of the Avedanos in order to secure payment for the cocaine. Factually and legally, the cases of these three (3) appellants are nearly identical.

Moreno was convicted of the charges contained in Counts One, Two, Three and Five on August 1, 1995. On February 16, 1996, the defendant was sentenced to 87 months on Counts One, Two and Three, to run concurrently, and a term of 60 months on Count Five to be served consecutively to the terms imposed on Counts One, Two and Three to the extent necessary to produce a total term of 147 months. SA2.²

On February 26, 1996, defendant Moreno filed his timely Notice of Appeal. SA8.

SUMMARY OF ARGUMENT

POINT I

Appellant Moreno should have been tried in the District of Maryland on Count Five. That

² SA refers to the supplemental appendix which is attached to this Brief. A joint appendix has been prepared and filed on behalf of all of the appellants in their related cases pursuant to an Order of this Court.

particular count of the indictment (SA9) charged Moreno alone with a violation of 18 U.S.C. § 924 (c)(1) and (2). The specific weapon he was charged with carrying during the commission of a crime of violence was a Dan Wesson, Model CTG .357 Magnum, Serial No. 357S003434. This weapon was possessed only in the State of Maryland and was never possessed in the District of New Jersey.

POINTS II and III

As previously stated, appellants Moreno, Ortiz and Ruedas and similarly situated both factually and legally. Rather than duplicate the arguments of cocounsel, we specifically rely on the Brief filed by the law firm of Durkin & Durkin on behalf of appellant Jairo Pedroza-Ortiz Appellate No. 95-5161. Specifically, their arguments on those points concern the denial of the appellants' Motions for Severance and the variance from the conspiracy alleged in the indictment to the proofs offered at trial.

STATEMENT OF FACTS

Appellant Moreno will rely upon the Statement of Facts set forth on pages 10 through 14 of the Brief of co-appellant Ortiz in support of this appellant's legal argument on Points II and III.

The facts pertaining to the gun charge are not in dispute. At the Rule 29 conference before Judge Barry, the government conceded that the defendant's rendition of facts was correct for the purposes of that Motion. What followed was a legal argument on whether those facts gave rise to venue in the District of New Jersey.

Efrain Avendano and his wife Marbel Avendano had a long-standing association with Fanol Ochoa. In December, 1995, Mr. Ochoa allegedly put together a 30 kilogram drug deal with

defendant Omar Torres-Montalvo. Montalvo, according to the government, was assisted at all times by Jorge Luis-Pacheco (his brother-in-law). Randy Alvarez-Quinones (Quinones) had apparently assisted in making some introductions.

When Ochoa went to meet with Montalvo, he brought Efrain Avendano. Avendano testified that Ochoa took off with the 30 kilos without paying for them. Avendano testified that he was unaware that Ochoa was doing this and he stayed behind with Montalvo and Pacheco to wait for Ochoa. When Ochoa did not return and the defendants were unable to contact him, they held Efrain Avendano hostage in the State of Texas. Specifically, the evidence was that Montalvo, Pacheco and others (not any of the co-defendants) held Avendano captive from December 12, 1994 through December 26, 1994 in a house in Texas. The proofs at trial established that Avendano was taken from Texas on December 26, 1994 by car to his home in New Jersey, arriving on December 28, 1994. It was alleged that three of the appellants (Moreno, Ortiz and Ruedas) assisted Montalvo and Pacheco in transporting Avendano. Throughout this trip, and later on in New Jersey and Maryland, the defendants jointly possessed two (2) firearms. One was a .38 caliber Charter Arms revolver and the other was a .38 caliber Smith & Wesson Special revolver. Mr. Avendano testified that he was taken to New Jersey by these five (5) appellants who entered his home in Middlesex County, New Jersey. It was alleged that the all of the appellants and the Avendanos stayed there for three days while Avendano and Montalvo attempted to contact Ochoa to settle up the cocaine debt.

On December 31, 1994, the five (5) appellants left Marbel Avendano and her children in Middlesex and proceeded with Efrain Avendano to New York State to the home of appellant Randy Alvarez-Quinones. On or about January 1, 1995, all six (6) appellants and Efrain

Avendano proceeded to Maryland where they stayed in the home of a friend before returning to Texas, having never met up with Ochoa. The testimony established that the two (2) .38 revolvers were used interchangeably by the defendant in Texas, New Jersey, New York and Maryland.

Efrain Avendano testified that once they got to Maryland on January 1, 1995, Jacinto Rodriguez-Moreno threatened him with a .357 Dan Wesson revolver. This gun belonged to the gentlemen who owned the home on Maryland and had not been used at any time prior to the appellants and Efrain Avendano arriving in Maryland on or about January 1, 1995.

Avendano, according to his testimony, fled the Maryland home with a suitcase containing the two (2) .38 caliber revolvers. Avendano contacted the police and all of the appellants were arrested on January 2, 1995.

Applicants, Ortiz, Ruedas and Moreno were originally charged with the drug conspiracy. They moved to dismiss that charge pursuant to Rule 29 of the Federal Rules of Criminal Procedure. Judge Barry granted that Motion at the end of the government's case. In addition, Moreno moved to dismiss Count Five because the weapon that he was alleged to have used in the commission of a violent felony was never possessed or used in the State of New Jersey.

The government conceded that the gun charged in Count Five, a .357 Magnum, first surfaced at the house in Maryland and had never been used or possessed in the State of New Jersey. JA Vol. II 24-27.³

After reviewing some case law in the matter, the trial judge denied the defendant's timely motion for a judgment of acquittal pursuant to Rule 29 of the Federal Rules of Criminal

³ JA denotes the joint appendix filed on behalf of all of the defendants by counsel for co-appellant Omar Torres-Montalvo.

Procedure. SA 10-11.

The appellant was convicted on Count Five and filed a timely Notice of Appeal. SA 8.

LEGAL ARGUMENT

POINT I

THE DISTRICT COURT OF NEW JERSEY LACKED VENUE TO TRY APPELLANT MORENO ON COUNT FIVE OF THE INDICTMENT.

Article III, § 2, Clause 3 of the United States Constitution provides that “The Trial of all Crimes, except in Cases of Impeachment shall be . . . held in the State where the said Crimes shall have been committed” It is clear that this is a right of the accused in a criminal case provided by the Sixth Amendment of the Constitution which states “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed” Additionally, Rule 18 of the Federal Rules of Criminal Procedure provides that “[e]xcept as otherwise permitted by statute or by these rules, the prosecution shall be had in the district in which the offense was committed.”

In part, Count Five of the Indictment against appellant Moreno charges that on or about December 12, 1994 through on or about January 2, 1995, at Middlesex County in the District of New Jersey, and elsewhere, the defendant Jacinto Rodriguez-Moreno did knowingly and wilfully use and carry a firearm, namely a Dan Wesson, Model CTG .357 Magnum, Serial No. 357S003434, during and in relation to the crimes of violence [Counts Two and Three] and drug trafficking crime [Count Four] in violation of 18 U.S.C. § 924(c) 1 & 2.

At appellant’s Rule 29 motion at the end of the government’s case in chief, the United States Attorney conceded that this weapon was never used or carried by Moreno in the District of New Jersey. In fact, the testimony was that Moreno had possession of this weapon for a period of less than 24 hours exclusively in the State of Maryland.

Denying appellant's Motion to Dismiss, the Court relied primarily on a Fifth Circuit case United States v. Pomranz, 43 F.3d 156 (5th Cir. 1995). Appellant Moreno asked the Court to consider the Ninth Circuit case of United States v. Corona, 34 F.3d 876 (9th Cir. 1994). The Courts of Appeals in these two (2) cases reached opposite conclusions on nearly identical facts. The issue in those two (2) cases was identical to the issue in this case. It can be framed this way:

Assuming that the District was the proper venue for the underlying offenses, must the District have separate venue for the substantive 18 U.S.C. § 924 charge without reference to venue for the underlying charges.

In United States v. Corona, the defendant was tried on four (4) counts of an indictment involving drug trafficking in Nevada and California. Count One charged him with Conspiracy to Distribute Narcotics. Counts Two and Three charged substantive Distribution of Cocaine and Count Four charged the defendant with Unlawful Use of a Firearm During a Drug Trafficking Crime in violation of 18 U.S.C. § 924(c). 34 F.3d at 878-879. The Court found that either Nevada or California were proper venues for the drug conspiracy charge as there were overt acts committed in both states. After a thorough analysis of the law of venue, the Ninth Circuit concluded that the underlying substantive crimes could be tried only in California because that is where those crimes were committed. The substantive crimes were not committed in Nevada and Nevada had no jurisdiction to try those counts.

In part, the Ninth Circuit relied on an earlier case from the Fourth Circuit, United States v. Walden, 464 F.2d 1015 (4th Cir.), cert. denied, 409 U.S. 867 (1972). In that case, the Fourth Circuit ruled that while South Carolina was the proper venue for the conspiracy to commit bank robberies count, the underlying substantive counts had to be tried in the district where the banks

were robbed. 34 F.3d at 880.

In United States v. Pomranz, the Fifth Circuit considered an identical issue and ruled that no separate venue analysis had to be made for a count alleging a violation of 18 U.S.C. § 924 where the district already had jurisdiction over the offenses related to that weapons charge. In that case, appellant Pomranz was tried for a drug conspiracy count in the Northern District of Texas. One of the substantive offenses was that during that conspiracy, he possessed a weapon in the State of Oklahoma. He was tried and convicted for violation of 18 U.S.C. § 924(c). The appellant argued that an independent venue analysis should have been conducted regarding that weapons offense. 43 F.3d at 159. Instead of relying on prior case law and Constitutional principals, the Fifth Circuit relied primarily on the Congressional intent to use 18 U.S.C. § 924(c) as a comprehensive response to the increasing use of firearms in violent crimes. The Fifth Circuit then took this “public policy” argument and made it a rule of law based on perceived notions of judicial economy. 43 F.3d at 161-162. Their holding was that because of “the difficulties inherent involved in prosecuting it, the government must be allowed to try the defendant in the district where the act was committed, or in a district where venue would properly lie for the underlying drug crime.” 43 F.3d at 161.

There are not a lot of decisions dealing with this particular issue. It appears that the Sixth Circuit would also require that a weapons count (18 U.S.C. § 924(c)) be tried in the district where the firearm was carried. United States v. Scaife, 749 F.2d 338, 346 (6th Cir. 1984).

We would urge this Court to adopt the rationale of the Ninth Circuit Court of Appeals and reject the holding in Pomranz. Pomranz seems to suggest that public policy and Congressional intent are more meaningful than Constitutional provisions. Furthermore, Pomranz relies on the

need for judicial economy when that is not a real issue in the case. For virtually every violent crime, the United States Sentencing Guidelines (U.S.S.G.) provides for enhanced punishment if a weapon is carried, used or brandished. Those enhancements vary, but in this case, it would have the practical effect of adding another 48 months to the sentence received by the appellant. In fact, should this Court reverse the appellant Moreno's conviction on Count Five for lack of venue, it is anticipated that he would not be retried. Instead, he would be resentenced with a two (2) level enhancement pursuant to U.S.S.G. § 2A4.1(a)(3). Instead of receiving a term of 87 months on Counts One, Two and Three, the Judge would have the discretion to sentence to 135 months based on the two (2) level increase. This would be twelve (12) months less than the appellant received by a consecutive sentence of 60 months pursuant to 18 U.S.C. § 924(c).

For all of these reasons, we respectfully ask this Court to follow the holding in United States v. Corona and vacate the appellant's conviction on Count Five of the Indictment.

POINT II

THE DISTRICT COURT ABUSED ITS DISCRETION IN FAILING TO SEVER DEFENDANT MORENO'S TRIAL FROM HIS CODEFENDANTS, WHICH FAILURE RESULTED IN CLEAR AND SUBSTANTIAL PREJUDICE TO DEFENDANT MORENO AND A MANIFESTLY UNFAIR TRIAL.

Appellant Moreno relies upon the legal argument of coappellant Jairo Pedroza Ortiz which is located in Appellant Ortiz' Brief at pages 14 through 25.

POINT III

**THE VARIANCE BETWEEN INDICTMENT AND
PROOF PRESENTED AT TIME OF TRIAL SUBSTANTIALLY
PREJUDICED THE DEFENDANT AND THE CONVICTION
SHOULD BE VACATED.**

Appellant Moreno relies upon the legal argument of coappellant Jairo Pedroza Ortiz which is located in Appellant Ortiz' Brief at pages 26 through 30.

POINT IV

JOINDER IN ARGUMENTS OF COAPPELLANTS.

Appellant Jacinto Rodriguez Moreno joins in and adopts the arguments set forth in the Briefs of coappellants pursuant to Rule 28 (i) of the Federal Rules of Appellate Procedure.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this matter be reversed and remanded to the United States District Court for the District of New Jersey and that Appellant's conviction on Count 5 of the indictment be reversed.

Respectfully submitted,

McDONALD, ROGERS & RIZZOLO

By:

John P. McDonald

Dated: June 17, 1997

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3. Also, on June 17, 1996, I hand delivered to the United States Court of Appeals for the Third Circuit an original and nine (9) copies of the appellant's brief.

I am aware that if any of the foregoing is knowingly false, I am subject to punishment.

McDONALD, ROGERS & RIZZOLO
Attorneys for defendant,
Jacinto Rodriguez-Moreno

DATED: June 17, 1996

By:

John P. McDonald

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-5163

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UNITED STATES OF AMERICA

vs.

JACINTO RODRIGUEZ-MORENO, a/k/a Joel
Moreno, Joel Moreno-Llanos, Arturo
Torres Celorio

Jacinto Rodriguez-Moreno

Appellant

SUR PETITION FOR REHEARING

PRESENT: SLOVITER, Chief Judge, BECKER, STAPLETON,
MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD,
ALITO, ROTH, LEWIS, and McKEE, Circuit Judges.

The petitions for rehearing filed by appellant, Jacinto Rodriguez-Moreno and by appellee, United States of America, in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by the court en banc, the petition for

rehearing is denied. Judges Becker, Stapleton, Greenberg, Scirica, Cowen and Alito would have granted rehearing.

BY THE COURT,


Circuit Judge

Date: **SEP 26 1997**

cmh/cc: JPM
GSL
KM