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# TO THE POINT

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*"The only thing that the U.S. accepts is that you sell out. The U.S. accept nothing less than that you surrender. It is all or nothing. Think about it."*

*– Fidel Castro*

## Mobster Accused in Cop Killing Not Guilty

*By Selim Algar, New York Post*
*November 26, 2013*

A Brooklyn jury found a former mob boss who federal prosecutors said ordered the 1997 hit on an NYPD officer who married his ex-wife not guilty.

It took only 4 ½ hours of deliberations for the jurors to find former Colombo consigliere Joel "Joe Waverly" Cacace not guilty of ordering the grisly hit on Police Officer Ralph Dols in Brooklyn. Now 72, the stone-faced Mafioso looked mildly pleased by the verdict and turned to give hearty hugs and kisses to his defense team while sullen government prosecutors looked on silently.

Jurors rejected testimony from two of Dols' killers. They said Colombo captain Thomas "Tommy Shots" Gioeli told them Cacace wanted the cop dead. "When you don't have any evidence, a jury can tell," said Cacace's jubilant attorney.

The defense attorney painted the witnesses as soulless killers whose testimony had no value. She repeatedly referred to them as "maniacs," "animals," and "subhuman," arguing that the killers were simply trying to soften their own looming sentences by taking down a mob whale for the government.

Asked if her famously old-school client said anything after the verdict, – the attorney paused. "He's not a talker," she said.

**Commentary**: No surprise here. But before you think the defendant won because the witnesses were so unsavory and uncorroborated (although that should make a difference), lawyer Susan Kellman, who defended Cacace believes it was the snitches' story themselves that did not hold up. Professor Dan Richman of Columbia University, a former prosecutor himself in the Southern District of New York, put it this way:

> "I think the working assumption of good prosecutors is that it's very risky to use a really bad guy -- even if credible -- against someone who's not so bad or even of equal badness. So you would try to do without him unless his narrative was critical, which probably means not fully corroborated. But the risk can be mitigated by getting the jury to realize that the cooperator has been captured and dealt with and the defendant has yet to be. This is why the SDNY is so keen on cooperators pleading to everything and having massive sentencing exposure. And I don't think the defense argument of "he's as bad as me or worse" has ever gone far when the cooperator has been charged. The argument works only if the other guy has been treated in a way that minimizes culpability."

The lesson here is that just knowing that your witnesses are bad guys is not enough to decide to go to trial, although in the case of paramilitary leaders there was a different consideration altogether. There was political component. The U.S. government would have never released debriefing statements from its witnesses, as it is required to, had the paramilitaries pressed to go to trial. Uncle Sam would have wanted to keep this highly sensitive information to itself and sensitive it was since these guys dealt with the power structure in Colombia. Knowledge is power so releasing it would not only undermine the power. It could de-stabilize the government. It is why I never understood why the paramilitaries went so quietly. And it is why the government offered the only paramilitary leader who insisted on going to trial a ten-year-old money laundering charge and what turned out to be a "time served" sentence. It was definitely the right move. The agents were not happy, but the agents did not have the same concerns as their bosses. The government did what was in the interest of the government to do.

But I digress. What you should understand is that the message is as important or more important than the messenger. Just because the snitch is the wrong guy he still could be delivering the right message. Don't discount the message even if you discount the messenger.

But while you are never better than your evidence, you are never worse either. So don't sell yourself too cheap.

*– David Zapp*

## Legal Issues We All Wondered About but Never Got Around to Asking

In United States vs. CARLOS ARTURO PATINO RESTREPO, AKA "Patemuro," the court affirmed the conviction of an otherwise unremarkable case. However there was a discussion of certain issues that crop up in many cases and are nicely addressed here. Case citations have been omitted to a large extent and some editing has been done but ever so slightly in the interest of clarity for non-lawyers.

### 1. Hearsay Evidence Before A Grand Jury

"The defendant alleges that the Assistant United States Attorney engaged in misconduct before the grand jury using hearsay testimony instead of eyewitness testimony.

Said the Court: "First, we reject the government's contention that because the defendant failed to challenge the superseding indictment prior to re-trial he waived his prosecutorial misconduct objection on appeal. (That's good!)

The Court went on: "The government is permitted to use hearsay evidence during its

presentation to the grand jury; such use does not constitute prosecutorial misconduct where the jury is properly informed regarding the nature of the testimony.

". . .where the government fully informed grand jurors about the hearsay nature of the evidence they were considering, their opportunity to see the original evidence, and their proper independent function in determining whether to return the indictment, grand jurors were not misled and the indictment was valid. In *United States v. Estepa*, 471 F.2d 10 1132, 1135-36 (2d Cir. 1972) [the Court] **dismiss[ed] an indictment** where the agent who testified had limited knowledge of the transaction at issue but likely misled grand jurors into thinking he was providing eyewitness testimony.

In the Patino case "the Assistant United States Attorney making the presentation to the grand jury provided a detailed introductory statement explaining that the testifying witness would be presenting the condensed testimony of other witnesses who had already testified. He explained that the witness would be relaying hearsay evidence and testifying to events and transactions that he did not personally witness. The Assistant United States Attorney also informed the grand jurors that they had a right to supplement the hearsay evidence by requesting that witnesses with first-hand knowledge testify before them. The complete transcripts of each witness's testimony were also made available for the grand jury's review, and the Assistant United States Attorney reminded the grand jurors of the transcripts' accessibility.

"It was also clear throughout the witness's testimony that he was not testifying based on firsthand knowledge. It was also likely that the defendant would have been indicted if solely non-hearsay evidence had been used in the grand jury because the trial jury convicted him based upon the testimony of witnesses who likely would have been called to testify before the grand jury had grand jurors requested firsthand evidence.

### 2. Multiple Conspiracies Instruction to the Jury

Said the Court: "A multiple conspiracies charge is required where several different conspiracies could be inferred from the evidence offered at trial. The charge is designed to assist the jury in determining whether a defendant's conduct was part of the single, comprehensive conspiracy charged.

"The need for such an instruction stems from the potential ''spill over effect' of permitting testimony regarding one conspiracy to prejudice the mind of the jury against the defendant who is not part of that conspiracy but another.'

"A proper multiple conspiracies instruction must stress that in order to return a conviction, jurors are required to find that the single conspiracy charged existed and that the individual defendant knowingly participated in that conspiracy. The multiple conspiracies instruction emphasizes that there must be a finding of the single specific conspiracy charged and knowing participation in the identified scheme by each defendant."

The problem with multiple conspiracies is that the single conspiracy can always exists of separate groups who band together to engage in narcotics trafficking. Thus if one group makes the kilos of cocaine and another group sell the the cocaine, then while both are clearly separate groups, the also combined make one group to distribute the drug in the open market. Very hard defense to win and the jury is not going to split hairs when it comes to drug trafficking.

### 3. The Rule of Specialty in Extradition cases: Evidence of prior bad acts.

"[The defendant] challenges his conviction on the ground that the jury's consideration of pre-1997 evidence contravenes the Diplomatic Note by which he was extradited from Colombia and thus violates the 'rule of specialty.' We hold that there was no violation of the rule of specialty in this case because the jury expressly convicted [the defendant] based only on conduct that occurred after December 17, 1997."

"The "rule of specialty" is a principle of international law that prohibits extraditing countries from prosecuting a defendant on charges other than those for which he was specifically extradited. This doctrine also requires an extraditing country to adhere to express limitations placed on the prosecution by the surrendering country. Defendants who contest alleged violations of this rule pursuant to a treaty between the United States and the surrendering country generally have standing to contest perceived violations of the treaty.

"Defendants from Colombia, however, are extradited pursuant to Resolutions by the Foreign Ministry called Diplomatic Notes. We have not yet decided whether a defendant has standing to allege violations of a Diplomatic Note. *See the case of Cuevas*, 496 F.3d at 262.

"The Colombian Diplomatic Note permitting the United States to extradite defendant states that he must not be "judged or condemned" for pre-December 17, 1997 conduct. Therefore, under the 'rule of specialty,' defendant could be tried only for crimes committed after December 17, 1997. Defendant argues that submission of pre-December 17, 1997 prior bad acts evidence to the jury for consideration led the jury to "judging" him on the basis of pre-December 17, 1997 evidence in reaching their ultimate guilty verdict.

"The district court, however, in this case provided the jury with special interrogatories which specifically asked whether the jury found that the government proved the charges beyond a reasonable doubt with evidence of defendant's conduct *after* December 17, 1997. The jury answered yes. The jury therefore did not "judge or condemn" defendant for conduct prior to December 17, 1997."

Prior bad acts are a killer for defendants. Anytime a defendant goes to trial in a Federal court, the prosecutor puts out the word to all United States attorneys' offices throughout the country via e-mail that he is interested in knowing whether anyone has any information regarding prior bad acts by his defendant that may not be part of the charges in the indictment. That's why you will get some inmate coming out of the woodwork to testify as to other criminal activity not recited in the indictment.

*– David Zapp*


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