NO._____

IN THE SUPREME COURT OF THE UNITED STATES

JAVIER BOCANEGRA, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Is there insufficient evidence for a conspiracy to transport cocaine conviction based upon the testimony of cooperating witnesses who are not credible and without proof beyond a reasonable doubt of the conspiracy undertaken and nature of what was transported.

II. Is it a Violation of the Full Faith and Credit Act to enhance under an old law, 21 U.S.C. § 841, for what was then a prior felony drug offense based upon a Texas deferred adjudication (of guilt) Possession of Marihuana when the Texas Court of Criminal Appeals has found a deferred adjudication is not a conviction, and Mr. Bocanegra was still on deferred adjudication probation at the time of the enhancement with a possibility he could later be adjudicated of a state jail felony or misdemeanor, which would preclude the 841 enhancement.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings are named in the caption of the case before this Court.

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PRAYER

Petitioner Javier Bocanegra, Jr. respectfully prays that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Fifth Circuit issued on January 16, 2019.

OPINION BELOW

On January 19, 2019, the United States Court of Appeals for the Fifth Circuit entered its judgment and opinion affirming the judgment of conviction and sentence. The Westlaw version of the Fifth Circuit's opinion is reproduced in the appendix to this petition.

JURISDICTION

On January 16, 2019, the United States Court of Appeals for the Fifth Circuit entered its judgment and opinion affirming the judgment of conviction and sentence. This petition is filed within 90 days after that date and thus is timely. See Sup. Ct. R. 13.1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

I. The Due Process Clauses of the Fifth and Fourteenth Amendments "[protect] the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 90 S.Ct. 1068 (1970).

The Fifth Amendment to the United States Constitution provides:

> No person shall be *** deprived of life, liberty, or property, without due process of law;***

U.S. Const. amend. V.

II. Enhancement based upon a prior serious drug felony

(A) The Full Faith and Credit Clause of the United States Constitution provides:

> Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

U.S. Const. Art. IV § 1

The Full Faith and Credit Act provides:

> The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.
>
> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.
>
> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in

every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

28 U.S.C. § 1738

(B) Section 841 of U.S.C.A. provided (PRIOR TO DECEMBER 21, 2018):

(a) Unlawful acts
Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—
(1) To manufacture, distribute , or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; ***
(b) ***any person who violates subsection(a) of this section shall be sentenced as follows:
(1)(A) In the case of a violation of subsection (a) of this section involving— ***
(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of—
(II) cocaine***
Such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life***. If any person commits such a violation after a prior conviction for a *felony drug offense**** has become final, such person shall be sentenced to a term of imprisonment of not less than 20 years and not more than life imprisonment***

21 U.S.C. § 841

On December 21, 2018, under the First Step Act, the sentencing penalties were reduced from twenty to fifteen years for those found to have committed a prior *serious drug felony*, and the term "*felony drug offense*" was changed to "*serious drug felony*," which is not retroactive. FIRST STEP ACT OF 2018: PL 115-391, December 21, 2018, 132 Stat 5194.

STATEMENT OF THE CASE

A. Course of proceedings.

On August 24, 2016, a federal grand jury in the Corpus Christi Division of the Southern District of Texas returned a one-count indictment charging Defendant-Appellant Javier Bocanegra, Jr. with one count of conspiring to possess with intent to distribute more than five kilograms of cocaine, that is, approximately twenty-four and fifty-two hundredths (24.52) kilograms of cocaine, in violation of 21 U.S.C. § 846, 841(a)(1) and 848(b)(1)(A). ROA.21-22. On the same date, the Government filed a Notice of a related case involving Ms. Lynette Rocha ("*Ms. Rocha*") and Ms. Aisha Delgadillo ("*Ms. Delgadillo*"), who were arrested at the Falfurrias checkpoint on November 5, 2015 and later convicted of transporting a controlled substance. ROA.524. 1352-1366. 1374-1392. There was no prior Complaint filed, although there was a Complaint in the related case. ROA.523-524, 1349-1350.

On September 13, 2016, Mr. Bocanegra entered a plea of Not Guilty to the indictment. ROA.30-31, 524. On November 19, 2016, the Court granted Mr. Bocanegra's Motion for Production of Favorable Evidence. ROA.525.

On November 23, 2016, the Government filed Notice of Enhancement of Punishment, pursuant to 21 U.S.C. § 851, increasing the sentencing range from "ten years to life" to "twenty years to life," alleging Mr. Bocanegra, Jr. was convicted of a felony Possession of Marijuana in Texas District Court, for which he received ten (10) years deferred adjudication. ROA.101-102, 525, 1323, 1487-1490.

On March 4, 2017, Mr. Bocanegra filed Notice of Intent to Object to the

Enhancement under Title 21 Section 841.

On March 6, 2017, a three day jury trial commenced, but ended in a Mistrial requested by the defense after the Government's witness, the DEA case agent, violated a Motion in Limine and said in front of the jury she had viewed Mr. Bocanegra's mugshot from a prior case in a newspaper article. ROA.528. 1079-1085. 1483.

On September 1, 2017, Mr. Bocanegra filed Notice of his Request for a Bench Trial, and the parties agreed to the prior jury trial testimony and exhibits being considered. ROA.533-534. 1466.

On September 11, 2017, the Bench Trial commenced, the Court took judicial notice of all previous filings in the case, the earlier jury trial transcript and exhibits were submitted into evidence, no live witnesses testified and the parties made closing arguments. ROA.534. On September 12, 2017, the Court found the Defendant guilty as charged in Count 1 of the Indictment. ROA.534.

On September 20, 2017, Mr. Bocanegra filed a Motion for New Trial, and an Amended Motion for New Trial on September 23, 2017, which was denied by the Court in a Memorandum Opinion and Order on October 16, 2017. ROA.534, 1469-1481.

After receiving a copy of the Pre Sentence Report, Mr. Bocanegra filed an objection to the enhancement. ROA.1280-1284.

On January 3, 2018, the district court denied Mr. Bocanegra's objection to the enhancement and sentenced Mr. Bocanegra to 240 months in the custody of the

Bureau of Prisons, to be followed by a 10-year term of supervised release. The district court did not impose the $5,000 special assessment and waived imposition of a fine, based on Mr. Bocanegra being indigent, but the court imposed the mandatory $100 special assessment.

Bocanegra filed a timely notice of appeal to the United States Court of Appeals for the Fifth Circuit on January 9, 2018. And on January 16, 2019, the Fifth Circuit affirmed the judgment of conviction and sentence. See United States v. Javier Bocanegra, Jr., 747 Fed.Appx. 998 (Mem) (5th Cir. Jan. 16, 2019) (unpublished) (Appendix A).

B. Statement of the relevant facts.

1. District Court.

According to the PSR, the Government's case hinged upon the following alleged facts: On November 5, 2015, Ms. Lynette Rocha and Ms. Aisha Delgadillo were arrested at the Falfurrias Checkpoint transporting over 24 kilos of cocaine hidden in their vehicle. ROA. 1294-1295. After their arrest, the two women became cooperating witnesses and accused Mr. Bocanegra of participating in the conspiracy, and he was later indicted. ROA. 1294-1295. The Government conducted an investigation and determined that on April 2, 2015, Mr. Bocanegra rented a vehicle at Enterprise Rental Car and provided a phone number ending in 5407; on October 8, 2015, the two cooperating witnesses, Aisha Delgadillo and Lynette Rocha, were seen entering Mexico with Mr. Bocanegra (in his Mini Cooper vehicle), and both witnesses, per the PSR, said at trial the purpose of the trip was allegedly to meet Bocanegra's drug

organization and discuss the transportation of drugs into the United States, and the two women are later seen reentering the United States without Mr. Bocanegra. ROA. 1294. The PSR further alleges: a phone analysis revealed a high number of calls allegedly between Mr. Bocanegra and Lynette Rocha from November 3 through November 5, and on November 4 (2015), Ms. Rocha received a phone call from Mr. Bocanegra who allegedly advised it was time to transport drugs. ROA. 1294. At approximately 1 pm, the PSR alleges that Mr. Bocanegra, Ms. Rocha and Ms. Delgadillo met to transport the drugs through the checkpoint and because the load vehicle was not yet ready, the three went to a movie, Church's Chicken and Jack-in-the-Box, and stayed in Mr. Bocanegra's vehicle for one hour before the load vehicle, a Chevy Traverse, arrived. ROA. 1294. The two women entered the Chevy Traverse and allegedly Mr. Bocanegra followed. ROA. 1294. During this time, several phone calls were exchanged between Ms. Rocha and allegedly Mr. Bocanegra, and the load vehicle stopped at an HEB in Mission, Texas for gas and a car wash, and there is a video of Ms. Delgadillo paying for the gas. ROA. 1294. Afterwards, the PSR states: security footage at the Love's Travel Stop captured Ms. Rocha, Ms. Delgadillo and allegedly Mr. Bocanegra purchasing items at the Love's Travel Stop, and forty-five minutes later, Ms. Rocha and Ms. Delgadillo entered the Falfurrias Checkpoint and five seconds later, per a photograph, Mr. Bocanegra allegedly entered the same checkpoint driving a Mini Cooper. ROA. 1294 When the load vehicle entered the checkpoint, Ms. Delgadillo was driving, Ms. Rocha was a passenger, Ms. Delgadillo stated they were traveling to San Antonio, a canine alerted to the vehicle and 24.52

kilograms of alleged cocaine was concealed within the vehicle. ROA. 1294-1295. Ms. Rocha told Agents they knew something was illegal inside the vehicle but did not know what it was. ROA. 1295. The PSR states Ms. Delgadillo claimed the vehicle belonged to Ms. Rocha's cousin, and both identified Mr. Bocanegra in open court as being involved in the transportation of drugs. ROA. 1295.

On January 11, 2017, following a hearing in Court regarding the disclosure of the PSR for the Government's cooperating witnesses, Mr. Bocanegra filed a motion requesting the PSR and PSI materials of both cooperating witnesses and attached a letter from Aisha Marie Delgadillo received by Judge Janis Graham Jack on September 6, 2016 in cause number 2:15CR1046-2, in which Ms. Delgadillo said she was not truthful with the Court regarding her substance abuse problem, to which the Court ruled on March 2, 2017 it would view the PSR and PSI reports of the cooperating witnesses in camera, and the Court stated several times it would be difficult, not knowing the case, what would in fact be impeachment evidence. ROA. 176-191. 526-527. 555-557. 578. 580-584. 1405-1407. In the Pretrial Services Report of Lynette Rocha, Ms. Rocha reported she had been in a relationship with Aisha Delgadillo, the government's other cooperating witness for over two years, she had traveled to Reynosa, Mexico five times in the last six months to visit a friend, Crystal Recio, whom the defendant reported moved there as a fugitive from justice, she had last traveled to Mexico one month ago, she had a history of attempted suicide (her last attempt was approximately six months before by cutting her wrists), she was a daily user of weed and had last used the day before and had been a daily user of

cocaine, weekly user of Ecstasy and alcohol, occasional user of LSD and Xanax, she had a juvenile history of making a false report to a police officer, Theft and an Assault, and the PSI further reported Ms. Delgadillo's mother did not wish for Ms. Rocha to live in her home and that the substance was methamphetamine, per the Criminal Complaint. ROA.1347-1350. In the PSR of Lynette Rocha, it was reported she had falsely accused someone of sexually assaulting her and was charged with Making a False Report to Law Enforcement, and that in 2015 she worked at a gentleman's club and performed private dances. ROA. 1374-1392. On March 3, 2017, at a Final Pretrial Conference, the Court reviewed the sealed documents in Cause No. 2-15cr1046 and made them a part of the record, under seal, in this case. ROA.527.

On March 4, 2017, Mr. Bocanegra filed Notice of Intent to Object to the Enhancement under Title 21 Section 841. ROA.528.

On March 6, 2017, a three day jury trial commenced, but ended in a Mistrial requested by the defense after the Government's witness, case agent Kristen Gorman, violated a Motion in Limine and said in front of the jury she had viewed Mr. Bocanegra's mugshot from a prior case in a newspaper article. ROA.528. 1079-1085. 1483.

During the Jury trial, a US Border Patrol Agent testified it was common for people to go into Mexico to visit with loved ones. ROA. 646. A Jack in the Box parking lot video was shown containing one hour and three minute footage of a Mini Cooper in the parking lot, Ms. Delgadillo and Ms. Rocha entering the restroom and then exiting, and another vehicle pulling up alongside the Mini Cooper. ROA. 687-688.

692-694. A video of an HEB gas station was shown in which Ms. Delgadillo (only) purchased gas. ROA. 656-659. A Love Truck Stop employee testified that only one of the sixteen cameras' footage was requested by the government, which was blurry. ROA 678. 684-685. A T-Mobile employee testified that phone records were only requested beginning on November 1, 2015 and the actual subscriber (near the time of the arrests of Ms. Degladillo and Ms. Rocha) for Mr. Bocanegra's alleged phone was Jose Perez, and there are no checks and balances on the accuracy of phone records. ROA 667. 670. 672-673. On the day of Ms. Rocha's and Ms. Delgadillo's arrest on November 5, 2015, the Falfurrias checkpoint was busy, Agents observed Indiana paper plates on the load vehicle, which Ms. Delgadillo claimed belonged to her cousin, and Ms. Rocha gave a statement to Agents, immediately after her arrest, that a boss of "Guero" (whom the Government determined was the Defendant) kept calling her on her cell phone and followed her to the checkpoint, that she knew there was something illegal in the vehicle but not what, and she physically forced Ms. Delgadillo to do it. ROA. 717-720. The Border Patrol Agent denied interviewing Ms. Delgadillo and could not account for his I-44 entry that she had given a statement corroborating Ms. Rocha, acknowledged the initial I-44 report stated the substance was methamphetamine (instead of cocaine), it was dark at the checkpoint when Ms. Rocha and Ms. Delgadillo were apprehended and aliens could have been hiding in the backseat, that the women did not initially come across as being honest and that they were allowed to sit on benches and possibly talk while the vehicle was being searched, and that when he interviewed Ms. Rocha, he did not believe parts of her story, neither

woman knew it was narcotics they were transporting and he was told the bundles were all black. ROA. 721-724. 729-730. 732-740. The canine handler Agent testified that his dog was trained to detect marijuana, methamphetamine and heroin. ROA. 753. The Supervising Border Patrol Agent testified the substance field tested positive for methamphetamine, it was "gooey," he could not identify which bundle he tested or where it came from in the vehicle and a paper plate was a factor of suspicion. ROA 804. 813. 817-818. The DEA forensic chemist testified he only tested nine of the bundles, could not identify which of the nine he tested, did not observe the substance to be "gooey," sent the bundles for fingerprint testing without accounting for chain of custody, and opined that if there were any labels on the bundles, crooks may have labeled them. ROA 837. 843. 846. 850. Ms. Aisha Delgadillo, one of the two cooperating witnesses, testified that she and Ms. Rocha traveled to Mexico with Javier although she stayed in the car and did not hear what was said, she did not know what the "job" entailed, someone told Ms. Rocha in September it would be a different kind of "job," the man Ms. Rocha met in Mexico wasn't "the same people from this job," in Mexico Ms. Rocha met with men to do jobs crossing money, drugs, "I don't know," that Javier and Ms. Rocha talked about "random stuff" (not related to the case) when they were at the Jack in the Box, the load vehicle smelled of marihuana, and she had attempted to purchase some firearms for individuals. ROA. 862, 864-866. 874-875. 877-879. 886. 897. 909. Ms. Delgadillo's testimony became more incredible when she testified she was certain "Javier" paid for the gas at the HEB, and was impeached when the video was shown in which she herself actually

paid for the gas. ROA. 898-899. Ms. Delgadillo, on cross, denied telling agents she had purchased AK-47s, and claimed instead she had only said rifles and denied telling Agents that she had purchased Ak-47's for other individuals, and then stated she said "AK" to Agents but not "AK-47, and that for fun she would purchase an AK." ROA. 886-888. 897. 901. She then denied telling an Agent that Leslie would do "jobs" with her, that it's possible Guero (whom the Government identified as the Defendant) asked her and Ms. Rocha if they wanted to party, that Ms. Rocha led a party life-style when they would break up, she at first denied Ms. Rocha had ever hit her but then said Ms. Rocha had slapped her the day before their arrest because of an unrelated argument over money, and that she did not know what was going on until after her apprehension when she met with the DEA agents. ROA. 897-898. 902. 907-908. When questioned about her PSI, Ms. Delgadillo acknowledged she told the probation officer and then the judge at sentencing she didn't have a problem with drugs and maintained this was a true statement, but was impeached with a letter she wrote to her sentencing Judge, in which she stated she struggled with marihuana, pills and alcohol. ROA.114-117.

Ms. Rocha testified at the Jury trial and said she and Guero, whom she identified as the Defendant, discussed her driving cars into Mexico- the prosecutor asked her "or out of Mexico," and Ms. Rocha maintained "into" Mexico and she did not know why because she did not ask any questions. ROA 911-912. 914. Ms. Rocha said the evening before she was arrested, she and Ms. Delgadillo had gotten into an argument and she had contact with the Defendant, that she suffered from depression,

was abusing alcohol, weed, cocaine and ecstacy, was estranged from her family, lived with Ms. Delgadillo and at other times from friend to friend, had made an attempt on her life and had not been receiving medical treatment at the time of her arrest in 2015, had made a false report to a police officer four years before her arrest (when she was 15) and she was 19 at the time of her arrest. ROA. 921. 941. 944. During her testimony, she mistakenly misidentified an unknown man in a video at the Love's truck stop as being the defendant and explained that she had been adamant the day before it was the man in the red cap but then realized today it was not him because she remembered what they wore that day, she wore a lot of make up and a see through shirt the day of her arrest, packed a suitcase because she planned on leaving Ms. Delgadillo and planned on partying in Houston the night of her arrest in 2015. ROA. 947. 949. Ms. Rocha described the defendant as someone she knew from high school in McAllen and identified him as having the nickname "Guero," yet when asked why Ms. Rocha told Agents "Guero" was from Mexico, Ms. Rocha said "because that's the only time that I met him when we went over there. I never met him here, went to his house or hung out with him:"

> A: "…the reason I said he was from Mexico was because I never went to his house, I didn't know he was from here."
> Q: And this is someone that you said that you knew for at least a year and went to high school with?
> A: Yes, ma'am.
> Q: Okay. Does that seem a little bit incredible to you that you're saying this now?
> A: No, ma'am.

ROA. 954-956.

Ms. Rocha testified she had no idea that cocaine or meth or anything else was

in the vehicle, that she was concerned because she believed Ms. Delgadillo was working with "Leslie" to move AK-47s and saw a text mentioning "AK-47" and on October 20, 2015, just days before the arrest, Delgadillo had so much money she could not close her wallet. ROA. 962-963. Ms. Rocha further testified she had not been truthful with Agents during a debrief on March 16, 2016, testified that Guero had spoken with her about transporting aliens, and that she had reached out to Guero on October 31, 2015, had an on and off again relationship with Ms. Delgadillo, had worked as an exotic dancer and the day of the arrest she had not been drinking nor had she been partying the day before. ROA.965-966. 970-974.

A DEA agent testified and confirmed Ms. Delgadillo used the word "AK-47," she had stated she thought it was aliens they were smuggling, she was heading to Houston to meet with a friend on the day of the arrest and she and Ms. Rocha were in her cousin (Jessica Cantu's) car when arrested at the checkpoint, although the DEA did not seek to locate Jessica Cantu in Indiana because "there are a lot of Jessica Cantus in the United States" and they located the dealership but got no farther, Ms. Rocha said she thought it was weed (they were transporting) and in fact "I believe the story is they were not sure specifically what they were carrying up until they were told by Border Patrol the specifics. They knew that they were doing something wrong, which was where the comment of it could have been illegal aliens," that Ms. Rocha had said to Agents that "Guero" spoke with her the day of the arrest about transporting aliens and even had discussed bringing in children, and there was no other evidence out there besides "he did it and we were at this place." ROA.1023.

1028-103,.

During a recess in the trial, the Court ruled that an instruction regarding prior inconsistencies would be submitted and stated, "Okay. We'll submit it. I mean, I thought there was enough." and the Court ruled that an instruction regarding multiple conspiracies would be allowed. ROA. 928. 1064-1065.

On March 20, 2017, the Magistrate Court denied the Government's Motion to withdraw the exhibits from the jury trial, although the District Court later granted the Government's request on April 6, 2017. ROA.529. On March 22, 2017, Mr. Bocanegra filed a Motion to Dismiss based upon the mistrial caused by the Government's witness, which was denied by the Court on April 6, 2017. ROA.530-531. On March 23, 2017, Mr. Bocanegra filed a Motion in Limine regarding the testimony of the cooperating witnesses, which was denied by the Court on April 7, 2017 and a Motion to Strike the Government's witness list on March 28, 2017. ROA.530. Mr. Bocanegra filed an Amended Motion to Strike the Government's witness list on April 18, 2017.ROA.533.

On April 12 and 13, 2017, the Government filed an Ex Parte Notice to the Court under SEAL that one of the cooperating witnesses, Ms. Lynette Rocha, had engaged in a relationship with a prison guard, which included attached exhibits in which Ms. Rocha stated she had pretended to be ill, and the guard had facilitated notes between her and Ms. Delgadillo, and the Court ruled it must be disclosed to the defense. ROA.1441-1463. A second Notice was filed on April 13, 2017 and the Court ordered it be disclosed to the defense. ROA. 1451-1463.

On April 27, 2017, the Government filed a Notice to the Court and to the defense that Aisha Delgadillo, the other cooperating witness, admitted to the Government she had not been truthful when she last testified at Mr. Bocanegra's trial, specifically regarding her purchase of an AK47 firearm for her cousin. ROA. 1464-1465.

On September 1, 2017, Mr. Bocanegra filed Notice of his Request for a Bench Trial, and at a Pretrial Conference on September 6, 2017, the parties agreed to the prior jury trial testimony and exhibits being considered. ROA.533-534. 1466. On September 11, 2017, the Bench Trial commenced, the Court took judicial notice of all previous filings in the case, the earlier jury trial transcript and exhibits were submitted into evidence, no live witnesses testified and the parties made closing arguments. ROA.534. On September 12, 2017, the Court found the Defendant guilty as charged in Count 1 of the Indictment.ROA.534. On September 20, 2017, Mr. Bocanegra filed a Motion for New Trial, and an Amended Motion for New Trial on September 23, 2017, which was denied by the Court in a Memorandum Opinion and Order on October 16, 2017. ROA.534, 1469-1481.

C. Presentence report and Sentence

After finding Mr. Bocanegra guilty, the court ordered that a presentence report ("PSR") be prepared to assist the court in sentencing him. Using the 2016 edition of the United States Sentencing Guidelines ("USSG"), ROA.1291, the PSR as adopted by the district court calculated Mr. Bocanegra's total offense level as shown in the table below:

Calculation	**Levels**	**USSG §**	**Description**	**Where in record?**
Base offense level	32	2D1.1	18 U.S.C. § 846 and 841(a)(1)	ROA.1296 (PSR ¶ 21)
Specific offense characteristic	0			ROA.1296 (PSR ¶ 22)
Adjustment to offense level	0			ROA.1296 (PSR ¶ 28)
Total offense level	**32**			ROA.1296 (PSR ¶ 29)

The PSR placed Mr. Bocanegra in a criminal history category of III. ROA.1300 (PSR ¶ 37). Based on a total offense level of 32 and a criminal history category of III, the district court calculated an advisory Guidelines imprisonment range of 151 to 188 months. ROA.1304 (PSR ¶ 58). However, the PSR noted that 21 U.S.C. § 846 and 841(b)(1)(A) carries a mandatory minimum sentence of 240 months. ROA.1304 (PSR ¶ 57).

On January 3, 2018, the district court sentenced Mr. Bocanegra to 240 months in the custody of the Bureau of Prisons, to be followed by a 10-year term of supervised release. ROA.138. The district court did not impose the $5,000 special assessment and waived imposition of a fine, based on Mr. Bocanegra being indigent, but the court imposed the mandatory $100 special assessment. ROA.18.

On January 9, 2018, Mr. Bocanegra timely filed notice of appeal. See ROA.18; ROA.546 (judgment entered on the docket on January 9, 2018).

2. Appeal.

After sentencing, Mr. Bocanegra filed notice of appeal. In his brief to the Fifth Circuit Court of Appeals, Bocanegra argued the evidence was insufficient due to the

lack of credibility of the cooperating witnesses and the Government failed to prove the alleged conspiracy even involved a controlled substance (versus aliens or guns) or the type of controlled substance and the weight; and his enhancement was improper because it was based on a Texas Possession of Marihuana deferred adjudication, which is not considered a conviction by the Texas Court of Criminal Appeals and, in so doing, violated the Full Faith and Credit Act under 28 U.S.C. § 1738

The Fifth Circuit affirmed, rejecting Mr. Bocanegra's argument the cooperating witnesses were incredible, finding the evidence did not rest exclusively on the testimony of those two witnesses as their accounts were corroborated by surveillance videos, phone records and receipts; drug quantity and type are not formal elements of a conspiracy offense and any failure by the Government to prove such affects only the statutorily prescribed sentence the Court may impose; and Fifth Circuit precedent forecloses the argument a deferred adjudication is not a conviction under §841(b) nor that it "violates the Full Faith and Credit Clause of the Constitution."

BASIS OF FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

The district court has jurisdiction pursuant to 18 U.S.C. § 3231.

REASONS FOR GRANTING THE WRIT

I. As to the first question presented, this Court should grant certiorari to address incredible testimony by cooperating witnesses as well as the proof required for a controlled substance conspiracy given the wide spread use of cooperating witnesses and convictions sought for these types of cases.

A. Introduction

The Government's case hinged entirely upon the testimony of two cooperating witnesses, neither of whom were credible. In addition, the Government failed to prove what in fact the conspiracy was about (guns, undocumented aliens, marihuana or cocaine), whether the substance was in fact cocaine because it initially field tested as methamphetamine, there was a discrepancy if the substance was powdery or "gooey," and there was a break in the chain of custody. Because there was insufficient evidence linking Mr. Bocanegra to the conspiracy and regarding the actual substance, this Court should vacate the judgment and reverse the Court's finding of guilt.

B. Two cooperating witnesses were not credible.

To convict a defendant of conspiracy under 21 U.S.C. § 846, the government must prove beyond a reasonable doubt: (1) the existence of an agreement to violate the drug laws and that each co-conspirator (2) knew of, (3) intended to join, and (4) voluntarily participated in the conspiracy. United States v. Abadie, 879 F.2d 1260 (5th Cir.), cert. denied. An express, explicit agreement is not required for a conspiracy; rather, a tacit agreement is enough. United States v. Greenwood, 974 F.2d 1449 (5th Cir.1992). A person who plays a minor role may still be guilty as a co-conspirator, United States v. Prieto-Tejas, 779 F.2d 1098 (5th Cir.1986), and he need not know all

the details of the unlawful enterprise or know the exact number or identity of all the co-conspirators, so long as he knowingly participates in some fashion in the larger objectives of the conspiracy. United States v. Fernandez-Roque, 703 F.2d 808 (5thCir.1983). The elements of the offense of conspiracy may be established solely by circumstantial evidence because secrecy is the norm. United States v. Espinoza-Seanez, 862 F.2d 526 (5th Cir.1988). Mere presence at the scene of the crime or close association with a co-conspirator will not support an inference of participation in a conspiracy, although a common purpose and plan may be inferred from a "development and a collocation of circumstances." United States v. Malatesta, 590 F.2d 1379 (5th Cir.) (en banc). As long as it is not factually insubstantial or incredible, the uncorroborated testimony of a co-conspirator, even one who has chosen to cooperate with the government in exchange for non-prosecution or leniency, may be constitutionally sufficient evidence to convict." U.S. v. Westbrook, 119 F.3d 1176 (5thCir. 1997). Just like Bench trials, the U.S. Supreme Court stated in Estelle v. Williams, 425 U.S. 501, Courts should not hesitate when necessary in overturning a jury verdict to "guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt," and the Fifth Circuit has found that convictions should not be had on mere suspicion and innuendo, United States v. Littrell, 574 F.2d 828.

The Government has no case absent the testimony of the two cooperating witnesses, Ms. Rocha and Ms. Delgadillo, and neither is credible and in fact they are both incredible witnesses. Specifically, both witnesses were drug addicts, one had a

prior juvenile criminal record of giving a false report to a police officer, clearly were not being truthful, testified inconsistently, and cooperated with the government to avoid the mandatory minimum sentence. Without more, the other evidence the Government cites against Mr. Bocanegra, standing alone, would show no direct links of Mr. Bocanegra to the alleged cocaine. The Government's case identifying Mr. Bocanegra as "Guero" and linking Mr. Bocanegra to the alleged controlled substance relied solely upon the testimony of the two cooperating witnesses, who did not testify credibly at the first trial, and after the first trial, more evidence came to light showing their continued pattern of not being credible. The two women were housed together in a Detention facility, after their sentencing, despite the fact they were both witnesses in Mr. Bocanegra's case and despite the fact that they were in a sexual relationship. In addition, when the two women were brought back in September of 2016 to testify in Mr. Bocanegra's case, they were again housed at the same facility, the Coastal Bend Detention Center, and exchanged notes with the assistance of a guard. ROA.1441-1463. During this time, the Government agents debriefed with both women. ROA.1441-1463. Sometime after, Ms. Rocha requested that she be separated from Ms. Delgadillo because Ms. Delgadillo had broken off their relationship. ROA.1441-1463. In addition, in a letter sent to the Chief Officer at the Coastal Bend Detention Center Ms. Rocha said she had lied to prison officials in order to meet with a Guard, with whom she became romantically involved, and lied to medical personnel. ROA.1441-1463. From an email from the Chief Officer at the Coastal Bend Detention Center, Ms. Rocha secretly communicated with the Guard by using a third person on

the outside to assist her in making calls to the Guard. ROA.1441-1463. Only a few years before, Ms. Rocha was found by a Court to have made a False Statement to Law Enforcement. ROA. 1374-1392.

Even without the evidence developed after the first trial, it was apparent from the notes and reports of the Agents and from the testimony of Ms. Rocha and Ms. Delgadillo at trial on March 7, 2017, that Ms. Delgadillo's and Ms. Rocha's testimony was not credible, not believable and should not be allowed. A conviction obtained by the use of false evidence cannot be permitted to stand. Mooney v. Holohan, 55 S.Ct. 340 (1935). See also Giglio v. United States, 92 S.Ct. 763 (1972); Miller v. Pate, 87 S.Ct. 785 (1967); Napue v. Illinois, 360 U.S. 264 (1957); White v. Ragen, 65 S.Ct. 978, (1945); Pyle v. Kansas, 63 S.Ct. 177 (1947); Hysler v. Florida, 62 S.Ct. 688 (1942). The same result may obtain even though the false nature of the evidence concerns only the credibility of an important witness, rather than the ultimate issue of guilt or innocence. Brady v. Maryland, 373 U.S. 83 (1963). The rule of Mooney v. Holohan, supra, has been extended to situations in which the suppressed evidence goes to the credibility of a prosecution witness only when the "estimate of the truthfulness and reliability of (the) given witness may well be determinative of guilt or innocence." Napue v. Illinois, supra, 360 U.S. at 269, 79 S.Ct. at 1177, quoted in Giglio v. United States, supra, 92 S.Ct. 763 (1976).

Ms. Delgadillo testified during the first trial that she did not have a drug problem, when in fact she had written a letter to the District Court stating she had misled the Court in her PSR and in fact she had a substance abuse problem, and was

requesting treatment in prison. In addition, she at first testified she never said the word "AK47" and then said she only used the word "AK," which was not believable. ROA. 886-888. 897. 901. Following the first trial, the Government provided a Notice to the Court Ms. Delgadillo was not credible. ROA. 1464-1465.

Ms. Rocha testified, among other discrepancies, that she had first met "Guero," whom she alleged to be the Defendant, in Mexico versus in the United States, which directly contradicted what she had told agents. ROA. 954-956.

Reasonable doubt exists regarding whether Mr. Bocanegra was in a conspiracy because no drugs were found on him, he gave no statements implicating himself, there is no wire-tap or undercover surveillance, no fingerprints, no search warrant and seizure of drugs or drug paraphernalia from his home, family business or even vehicle, no furtive gestures, or any other evidence linking Mr. Bocanegra beyond a reasonable doubt to the drugs and load vehicle.

The Fifth Circuit stated in U.S. v. Blessing, 727 F.2d 353 (5th Cir. 1989), cert denied:

> "the government must show beyond a reasonable doubt that the defendant had the deliberate, knowing , and specific intent to join the conspiracy… this court will not "lightly infer a defendant's knowledge and acquiescence in a conspiracy." It is not enough that the defendant merely associated with those participating in a conspiracy, nor is it enough that the evidence placed the defendant in a 'climate of activity that reeks of something foul.'"

To sustain a conviction for possession with intent to distribute, the government

must show that the defendant knowingly possessed the contraband with intent to distribute it. U.S. v. Molinar-Apodaca, 889 F.2d 1417 (5th Cir,1989). The Government may prove actual or constructive possession by either direct or circumstantial evidence. U.S. v. Ruiz, 860 F.2d 615 (5th Cir.1988). To show constructive possession, the government must show that the defendant controlled, or had the power to control, the vehicle or the contraband; mere proximity to the contraband is not enough. U.S. v. Moreno–Hinojosa, 804 F.2d 845, 847 (5th Cir.1986). In U.S. v. Rosas-Fuentes, 970 F.2d 1379 (5th Cir.1992), the Fifth Circuit held there was insufficient evidence the defendant knew of marijuana in the gas tank of the vehicle in which he was a passenger to support his conviction by a bench trial for conspiracy to possess with intent to distribute marijuana hidden in the vehicle's spare tank, despite his nervous demeanor at the checkpoint, Agents' testimony on prior occasions he did not act nervous when he went through the checkpoint, his implausible explanation for riding with the driver to the destination given, and his statement to the Agent, "well, yes," when asked if they had found anything in the tank. Likewise, in U.S. v. Jackson, 700 F.2d 181 (5th Cir.1983), the 5th Circuit found that the evidence was insufficient to support one of the defendants' convictions for conspiracy to possess cocaine because of the absence of any evidence he had specific knowledge of the conspiracy, despite the fact the 5th Circuit easily found a conspiracy existed and the Defendant was present while parts of the conspiracy were taking place, including his presence with other conspirators at the restaurant where the conspiracy was being carried out and a large amount of money was present: "His conviction may not rest on mere conjecture

and suspicion." In U.S. v. Fitzharris, 633 F.2d 416 (5th Cir.1980), the Fifth Circuit found insufficient evidence for conspiracy to distribute marijuana, despite the defendant knowing several of the conspirators, his [untrue] claims he was entering the ranch (where a large amount of marihuana was found) to feed his cows when Agents did not see any livestock, numerous documents found in the trash barrel tying the Defendant to the ranch, and calls between the defendant and the other conspirators: "Any association with the conspiracy would be forbidden speculation," citing Vick v. United States, 216 F.2d.228 (5th Cir.1954): "The 'appellant' may be guilty, but his conviction cannot rest upon mere conjecture and suspicion." In U.S. v. Longoria, 569 F.2d 422 (5th Cir. 1978), the Fifth Circuit reversed the Defendant's conviction for aiding and abetting in a drug distribution case where the Defendant was told there was marihuana in the car and paid $300 shortly before the checkpoint apprehension, remained silent at the checkpoint (indicating her desire the unknown quantity of marihuana escape detection and she and the co-defendant arrive safely in Austin) because there was insufficient evidence proving the defendant's guilt beyond a reasonable doubt, finding that mere negative acquiescence will not suffice, citing Glasser v. United States, 315 U.S. 60 (Sup.Ct.1942): "Unless the conviction is supported by 'substantial evidence,' it must be overturned." In United States v. Jackson, 526 F.2d 1236 (5th Cir.1976), the Fifth Circuit was convinced of the Defendant's involvement in the distribution of the cocaine, but held there was no evidence of the Defendant's involvement in the possession of the cocaine because he was not present at the actual sale, despite helping to set up the transaction, being

aware of all the circumstances and his intent that the illegal venture succeed.

In this case, arguably, even if the Court is inclined to believe the cooperating witnesses, despite their credibility issues, Mr. Bocanegra's conviction for conspiracy to possess with intent to distribute cannot be sustained because Mr. Bocaengra did not possess, constructively or otherwise, the cocaine; he was not in the load vehicle, there is no evidence Ms. Delgadillo or Ms. Rocha knew what the controlled substance was or even if it was a controlled substance and in fact discussions had allegedly been had concerning transporting illegal aliens and the load vehicle smelled of marihuana, no evidence discussions were ever had between Mr. Bocanegra and the two cooperators regarding what was being illegally transported. In short, the government failed to prove the two cooperating witnesses or Mr. Bocanegra knew in fact it involved a controlled substance instead of undocumented aliens or guns, for example.

In U.S. v. Gardea Carrasco, 830 F.2d 41, 45 (5th Cir.1987), the defendant's conviction was reversed for insufficient evidence where the facts alleged were that the Defendant loaded suitcases containing marijuana onto an airplane but was not privy to conversations concerning the conspiracy or the contents of the suitcases. In the present case, the Government failed to prove beyond a reasonable doubt that the conspiracy contemplated even involved a controlled substance because Ms. Rocha and Ms. Delgadillo told agents they had no idea what they were transporting illegally and did not know if it was aliens, money, AK-47s or a controlled substance, and there was evidence Ms. Delgadillo very recently had been engaging in illegal activity regarding distributing AK47s. Although the present case was a Bench trial, an analysis of a

Jury trial multiple conspiracies instruction is helpful. A multiple conspiracies instruction "is generally required where the indictment charges several defendants with one ... overall conspiracy, but the proof at trial indicates that some of the defendants were only involved in separate conspiracies unrelated to the overall conspiracy charged in the indictment." United States v. Greer, 939 F.2d 1076 (5th Cir.1991). Multiple conspiracy jury instructions inform the jury that it must acquit the defendant if it concludes that he was not a member of a conspiracy charged against him, even if it finds that the defendant was a member of an uncharged conspiracy and whether evidence establishes the existence of an additional conspiracy separate and distinct from that charged in the indictment is a jury issue, United States v. Erwin, 793 F.2d 656 (5th Cir.1986). Arguably, the Government failed to prove Mr. Bocanegra was not in a separate conspiracy unrelated to the substance located in the load vehicle of the other conspirators (it is believed beyond a reasonable doubt Mr. Boceangera was involved in a drug conspiracy), and the Court in fact granted the defense's request for a multiple conspiracy instruction during the jury trial. ROA. 928. 1064-1065.

C. Insufficient evidence the substance was a controlled substance

Further, the Government failed to establish beyond a reasonable doubt that in fact the substance was a controlled substance, that it was cocaine, or that the substance weighed at least five kilograms. The Government failed to prove beyond a reasonable doubt that the substance tested by the DEA lab technician was in fact the substance collected at the scene because he could not properly identify it, he

stated none of the substance was gooey in direct contradiction to the Border Patrol supervisor at the scene who field tested the substance as being methamphetamine and found it was "gooey", stated the criminals may have tagged the bundles and sent the bundles next door for fingerprinting without properly accounting for the chain of custody. ROA 804. 813. 817-818. 837. 843. 846. 850.

A break in the chain of custody goes to the weight of the evidence" United States v. Dixon, 132 F.3d 192 (5th Cir. 1997), and in Mr. Bocaengra's case, the Government failed to show in fact the substance tested was the same alleged substance collected and weighed at the scene. The identification of a controlled substance may be established by circumstantial evidence, such as lay experience based upon familiarity through prior use, "so long as the drug's identity is established beyond a reasonable doubt." United States v. Harrell, 737 F.2d 971 (11th Cir.1984), cert denied, United States v. Crisp, 563 F.2d 1242 (5th Cir.1977). In the instant case, an highly experienced US Border Patrol supervisor found that the substance found at the load vehicle was methamphetamine after opening one of the bundles at the time of the apprehension and inspecting it and field testing it and even directed an I44 form and Complaint be filed stating the substance was methamphetamine. ROA 804. 813. 817-818. This same supervisor placed the substance he had identified as methamphetamine in a storage unit, without accounting for whether the substance was commingled with other evidence or substances in unrelated cases. ROA 804. 813. 817-818. The Government failed to establish that the items picked up, weighed and tested by the DEA and sent to the DEA lab for analysis hundreds of miles away was

in fact the same substance collected at the scene and field tested as methamphetamine at the time of the apprehension. Later, a DEA chemist, who was not present at the scene, could not account for the break in chain of custody or even what bundles he tested or where they came from, said it was cocaine. 837. 843. 846. 850. The discrepancy between the findings of a highly trained Border Patrol supervisor at the scene and the DEA chemist hundreds of miles away months after the apprehension creates a reasonable doubt as to the type of substance found or if in fact it was a controlled substance. Also, the Government failed to establish the alleged cocaine weighed at the DEA lab months later was in fact the same bundles collected at the scene, which again is a break in the chain of custody and an insufficiency in the evidence.

II. As to the second question presented, this Court should grant certiorari to decide whether the enhancement under Section 841 for a Texas Possession of Marihuana deferred adjudication case was improper and is a violation of the Full Faith and Credit Act especially in light of the clear legislative intent in the First Step Act to dial back the rigorous sentencing enhancement laws and definition of a prior drug offense.

A. To enhance based upon a Texas deferred adjudication is improper.

Mr. Bocanegra's enhancement is based upon an alleged prior deferred adjudication, which is arguably not a conviction, much less a final felony conviction. ROA. 1487-1490. The Texas Court of Criminal Appeals in McNew v. State, 608 S.W.2d 166 (Tex.Crim.App.1978), clearly stated an adjudication of guilt must precede a final conviction. In that case, the Texas Court of Criminal Appeals considered the

meaning of "conviction" in relation to the deferred-adjudication statute and the court recognized that "a 'conviction,' regardless of the context in which it is used, always involves an adjudication of guilt." Id at 171 and 172. (emphasis added). Because the procedures for granting deferred adjudication do not involve an adjudication of guilt until after community supervision is revoked, if it is ever revoked, the Court of Criminal Appeals concluded that "it is clear that a trial judge's action in deferring the proceedings without entering an adjudication of guilt is not a 'conviction.' " Id. Whether examined in the context of the term's plain meaning or of its common usage, there can be no "final conviction" without an adjudication of guilt. See id.

Because 21 U.S.C. § 841(b) requires a final felony conviction, Mr. Bocanegra's alleged Possession of Marihuana deferred adjudication should not be used to enhance his sentence. Although the 5th Circuit has found in several cases, including United States v. Cisneros, 112 F.3d 1272 (5th Cir.1997), that a Texas deferred adjudication is a final conviction, arguably Mr. Bocanegra's case can be distinguished because he was still on deferred probation at the time he was convicted of this offense and; therefore, there is the distinct possibility he could be convicted of a lesser-included offense. Because it is unclear as to what felony degree the Texas state Court might adjudicate Mr. Bocanegra, or if it would adjudicate him of a lesser-included offense, which could include only a 180 day term in a state jail facility or of a Texas Penal Code Section 12.44(a) or (b) misdemeanor conviction resulting in up to one year in a Texas jail, Mr. Bocanegra's alleged prior deferred adjudication does not meet the

definition of a "felony drug offense," which requires more than one year of imprisonment.

Under Section 12.44 of the Texas Penal Code, a court may punish a defendant who is convicted of a state jail felony by imposing the confinement permissible as punishment for a Class A misdemeanor (up to one year in a County Jail) or, alternatively, the court may authorize the prosecuting attorney to prosecute a state jail felony as a Class A misdemeanor. Arguably, under Texas law, a Court could adjudicate a Defendant guilty of a lesser-included offense, which could include a misdemeanor or state jail possession of marihuana, resulting in a sentence less than one year of imprisonment. The Government has failed to meet its burden of proving Mr. Bocanegra would in fact be subject to a sentence over one year.

Further, to use Mr. Bocanegra's alleged Deferred Adjudication for enhancement of his sentence violates the Full Faith and Credit Act, 28 U.S.C. § 1738, which provides that the judicial proceedings of other states "shall have the same full faith and credit within every court within the United States ... as they have by law or usage in the courts of such State, Territory or Possession from which they are taken." Although the 5th Circuit has found this argument to be meritless in U.S. v. Castellan, 228 Fed.Appx.494 (2007), arguably, because the Texas Court of Criminal Appeals has specifically found that a deferred adjudication is not a conviction, the principles of federalism and recognition by courts of one jurisdiction of the laws and judicial decision of another (Judicial Comity) embodied in the full faith and credit statute are endangered when the State's determination of whether a conviction is final or not is

not considered in a federal sentencing analysis. Because Texas does not find that a deferred adjudication constitutes a conviction, much less a final conviction, Mr. Bocanegra's alleged deferred adjudication for Possession of Marihuana should not be taken into consideration.

In addition, the Legislature recently dialed back the rigorous mandatory sentencing laws and definition of a prior drug offense, so that at this time, Mr. Bocanegra's Possession of Marihuana deferred adjudication would arguably not fall under 21 U.S.C. § 841(b). On December 21, 2018, under the First Step Act, the sentencing penalties were reduced from twenty to fifteen years for those found to have committed a prior *serious drug felony*, as opposed to the prior term "*felony drug offense*." FIRST STEP ACT OF 2018: PL 115-391, December 21, 2018, 132 Stat 5194. The new law does not appear to contain an express retroactive statement, and as such under the general savings statute, 1 U.S.C. §109, requires application of the penalties in place at the time the crime was committed. But the failure to apply the First Step retroactively or specifically in Mr. Bocanegra's case, is contrary to the Congressional intent. A necessary and fair implication of the First Step law would require application in Mr. Bocanegra's case, and a denial would be cruel and unusual punishment.

CONCLUSION

For the foregoing reasons, petitioner Javier Bocanegra, Jr. prays that this Court grant certiorari to review the judgment of the Fifth Circuit in his case.

Date: April 8, 2019

Respectfully submitted,

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This case was not selected for
publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial decisions
issued on or after Jan. 1, 2007. See also
U.S.Ct. of App. 5th Cir. Rules 28.7 and 47.5.
United States Court of Appeals, Fifth Circuit.

UNITED STATES of America, Plaintiff - Appellee
v.
Javier BOCANEGRA, Jr., Defendant - Appellant

No. 17-40980
|
Summary Calendar
|
Filed January 16, 2019

Appeals from the United States District Court for the Southern District of Texas, USDC No. 2:16-CR-711-1

Attorneys and Law Firms

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Before DENNIS, CLEMENT, and OWEN, Circuit Judges:

Opinion

PER CURIAM: *

Javier Bocanegra Jr. appeals his conviction and 20-year sentence for conspiracy to possess with intent to distribute 24.52 kilograms of cocaine in violation of 21 U.S.C. §§ 846 and 841(a)(1) and (b)(1)(A). He argues that the evidence was insufficient to support his conviction because it relies upon the incredible testimony of two cooperating witnesses; because, even if the two cooperating witnesses' testimony is considered credible, it did not show that he had ***999** knowledge of what was being transported by the charged conspiracy; and because it is insufficient to show the controlled substance found in the load vehicle used by the conspiracy was cocaine. He also challenges the imposition of the 20-year mandatory minimum sentence under § 841(b)(1).

"To establish a conspiracy [under § 846], the government must prove that: (1) an agreement existed between two or more persons to violate federal narcotics law, (2) the defendant knew of the existence of the agreement, and (3) the defendant voluntarily participated in the conspiracy." *United States v. Ochoa*, 667 F.3d 643, 648 (5th Cir. 2012). The two cooperating witnesses testified that they conspired with Bocanegra to transport drugs across the United States-Mexico border. This court will not revisit the district court's credibility determination of the two cooperating witnesses who corroborated each other, particularly where Bocanegra has not shown their testimony was incredible as a matter of law. *See United States v. Chapman*, 851 F.3d 363, 376-77, 378 (5th Cir. 2017). Moreover, the conviction did not rest exclusively on the testimony of those witnesses as their accounts of the events were corroborated by surveillance videos, phone records, and receipts.

Additionally, Bocanegra argues that the evidence was insufficient to support his conviction because the Government did not prove beyond a reasonable doubt that the controlled substance in the car was in fact cocaine. However, as drug quantity and type are not formal elements of a conspiracy offense, any failure by the Government to prove quantity and type affects only the statutorily prescribed sentence that the court may impose. *See United States v. Daniels*, 723 F.3d 562, 572-74 (5th Cir. 2013). Thus, if the evidence does not support a finding that a particular drug type or quantity was involved, a defendant's conviction is not undermined. *See id.* at 572-74. Accordingly, when viewed in the light most favorable to the Government, the evidence was sufficient to establish that Bocanegra conspired to distribute a controlled substance in violation of § 846. *See United States v. Smith*, 895 F.3d 410, 415-16 (5th Cir. 2018).

Finally, Bocanegra concedes that our precedent forecloses his arguments that his prior Texas deferred adjudication for a felony drug offense does not constitute a conviction for purposes of sentencing under § 841(b) and that application of the sentencing enhancement under § 841(b) violates the Full Faith and Credit Clause of the Constitution. *See United States v. Fazande*, 487 F.3d 307, 309 (5th Cir. 2007); *United States v. Cisneros*, 112 F.3d

1272, 1282 (5th Cir. 1997) (finding that a "guilty plea that resulted in a deferred adjudication was a 'prior conviction' for purposes of sentence enhancement under § 841(b)(1)(A)"). Moreover, even if he is ultimately sentenced to less than a year for the state offense, it is considered a felony drug offense because it is a final conviction that "is *punishable by* imprisonment for more than one year." *See* 21 U.S.C. § 802(44) (emphasis added); *Dickerson v. New Banner Institute*, 460 U.S. 103, 106-08, 113-14, 122, 103 S.Ct. 986, 74 L.Ed.2d 845 (1983).

AFFIRMED.

All Citations

747 Fed.Appx. 998 (Mem)

Footnotes

* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.