IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

JUAN CARLOS RODRIGUEZ,

PETITIONER,

VS.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

ISSUE 1: Whether the trial and appellate court erred when it adjudged that Petitioner had no standing to request suppression of evidence obtained from a warrantless search of Co-Defendant Weeks private residence where he was physically present within the residence at the time of the search.

Issue 2: Whether the trial and appellate court erred when they adjudged that Co-Defendant Weeks consent to search was sufficient to permit a warrantless search of his residence where Petitioner was also physically present within the residence and law enforcement had knowledge that Petitioner had carried personal property, a Saks Fifth Avenue style shopping bag, into the private residence and was not given an opportunity to object to the warrantless search and seizure of evidence including the shopping bag and cocaine.

Issue 3: Whether the trial and appellate court committed plain error when they adjudged that Co-Defendant Weeks consent to search was sufficient to permit a warrantless search of his residence where his wife and co-inhabitant of his residence was physically present within the residence and was not given an opportunity to object to the warrantless search.

Issue 4: Whether the trial and appellate court erred when they permitted the introduction of prior bad act evidence under Rule 404(b) where (1) the evidence was not established to be relevant to an issue other than a defendant's character, (2) there was insufficient proof to allow a jury to find that the defendant committed the act by a preponderance of the evidence, and (3) the evidence's probative value, if any, was substantially outweighed by the risk of unfair prejudice under Rule 403.

Issue 5: Whether the trial and appellate court erred when they permitted the introduction of prior bad act evidence under Rule 404(b) and did not (a) give a cautionary instruction at the time the prior bad act evidence was introduced during trial and (b) did not instruct the jury at the close of the case with the Rule 404(b) requested instruction.

Issue 6: Whether the trial and appellate court erred when they declined to impose a variance sentence below the computed advisory guideline range after considering the totality of the circumstances concerning Petitioner's sentence.

- Prefix-

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The Petitioner, JUAN CARLOS RODRIGUEZ, respectfully prays that a writ of certiorari issue to review the judgment-order of the United States Court of Appeals for the Eleventh Circuit entered on February 21, 2019, Case No. 17-13926-EE; Southern District of Florida Case Numbers 16-cr20057-JAL-2.

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OPINION BELOW

On February 21, 2019, the Eleventh Circuit Court of Appeals entered its opinion-order affirming Petitioner's convictions and sentence, Case No. 17-13926-EE. A copy of the opinion-order is attached hereto as Appendix A.

JURISDICTION

Jurisdiction of this Court is invoked under Title 28, United States Code Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner has been deprived of his liberty without due process of law as guaranteed by the Sixth and Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

Petitioner was the Defendant in the District Court and will be referred to by name or as the Petitioner. The respondent, the Untied States of America will be referred to as the Government. The record will be noted by reference to the volume number, docket entry number of the Record on Appeal as prescribed by the rules of this Court. References to the transcripts will be referred to by the docket entry number and the page of the transcript.

The Petitioner is incarcerated and is serving his sentence in the Bureau of Prisons at the time of this writing.

Course of the Proceedings and Disposition in the Court Below

On January 15, 2016, Petitioner was arrested and appeared before the District Court to answer to a Criminal Complaint. DE 1, 3.

On January 21, 2016, the District Court set reasonable bail and on January 26, 2016 Petitioner posted bail and was released from custody pending Indictment and trial. DE 14

On January 28, 2016, the Indictment was returned as to Petitioner and his Co-Defendant Francisco Weeks. DE 1 Summarized the Indictment charged Petitioner and Weeks with conspiracy to possess with intent to distribute 500 grams or more of cocaine (Count 1); and substantive possession with intent to distribute 500 grams or more of cocaine (Count 2). DE 17 Both counts of the Indictment relate to an investigation on the dates January 13, 2016 and January 14, 2016 which took place in Miami-Dade County, Florida.

On January 29, 2016 Petitioner was arraigned and enter pleas of not guilty to all counts and discovery was

ordered. DE 18 The case was set for jury trial in due course on March 7, 2016.

On February 12, 2016 the Government filed a response to the Standing Discovery Order. DE 28

On February 19, 2018 the Court ordered substitution of counsel for Petitioner, letting out Attorney Jose Rafael Esteban Batista and allowing in Attorney Raphael Lopez as counsel for Petitioner. DE 32

On March 1, 2016, the District Court granted Petitioner's Motion to Continue Jury Trial (DE 37); and re-scheduled Petitioner's jury trial for May 2, 2017. DE 39

On March 14, 2016, Petitioner filed his Motion to Suppress Evidence. DE 46 On March 15, 2016, the aforesaid motion was referred to United States Magistrate Judge Jonathan Goodman for disposition. DE 4 A hearing on the Motion to Suppress was scheduled for March 17, 2016. DE 50

On March 17, 2016 the evidentiary hearing was held on Petitioner's Motion to Suppress. DE 53 The hearing was concluded on April 7, 2016. DE 68 On April 11, 2016, Petitioner filed his Memorandum of Law in Support of Motion to Suppress. DE 71 The Government responded to the Memorandum of Law on April 12, 2017. DE72

On April 12, 2016 and April 13, 2016, Magistrate Judge Goodman filed his Reports and Recommendations regarding the

Motions to Suppress. DE 73 and 74 On April 20, 2016, Petitioner filed Objections to Report and Recommendations. DE 76 On April 25, 2016 the Government filed a Response to Petitioner's Objections. DE 79

On May 3, 2016, the District Court continued the jury trial until June 13, 2016. DE 89

Also on May 3, 2016, the District Court entered an Order Adopting Magistrate Judge Goodman's Reports and Recommendations. DE 90 and 91

On May 23, 2016 the Government filed a Motion in Limine. DE 93

On May 31, 2016 Petitioner filed a Motion for Bill of Particulars. DE 99

On June 8, 2016 Petitioner filed a Motion for Specific Brady-Kyles materials. DE 108

Also on June 8, 2016 Petitioner filed a Motion for Trial Severance Based on Bruton Violation. DE 111

On June 8, 2016 the District Court granted the Government's Motion in Limine. DE 112

On June 9, 2016 the District Court denied Petitioner's Motion for Bill of Particulars. DE 113

On June 15, 2016, the District Court denied Petitioner's Brady and Severance Motions as moot noting

that Co-Defendant Weeks had pleaded guilty on June 15, 2016. DE 132.

On June 16, 2016, jury trial commenced, however said trial was again ordered continued. DE 136

On June 16, 2016, Petitioner filed a Pretrial Memorandum in Support of Admissibility of Impeachment Evidence. DE 138

On June 21, 2016 Petitioner filed a Motion to Compel Production of Confidential Informant Materials. DE 141

On June 28, 2016 Petitioner filed a Renewed Motion to Suppress Evidence. DE 144

On July 6, 2016 the District Court denied Petitioner's Renewed Motion to Suppress. DE 153

On July 6, 2016 the District Court referred Petitioner's Motion to Compel Brady Material to Magistrate Judge Goodman. DE 158

On July 13, 2016 the Government filed a Motion in Limine for Supplemental Ruling. DE 164

On August 17, 2016 the District Court denied the Government's Motion in Limine. DE 181

On August 18, 2016, the District Court granted the Government's Rule 404(b) Motion and denied Petitioner's Motion in Limine concluding that a prior drug transaction between Petitioner, his Co-Defendant Weeks and the

confidential informant was inextricably intertwined to the charged offense and further that Weeks would be permitted to offer testimony concerning the prior drug transaction. DE 183

On August 23, 2016, the District Court began jury trial. DE 196. On August 30, 2016 the jury returned verdicts of guilty as to Counts 1 and 2 of the Indictment against Petitioner.

On November 8, 2016 Petitioner was adjudged guilty and sentenced to a term of 84 months as to Counts 1 and 2 concurrently with each other. DE 237

On March 21, 2017 Petitioner filed a Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. 2255 alleging that Petitioner had requested his counsel to file a direct appeal and no direct appeal was ever filed. DE 238 On August 15, 2017 the District Court adopted the Report of Magistrate Judge and granted Petitioner's Motion to Vacate. DE 248 On August 25, 2017 the District Court entered an Amended Judgment imposing the same 84 month sentence upon Petitioner. DE 250

On August 28, 2018 Petitioner filed his Notice of Appeal. DE 252.

On February 21, 2019 the Eleventh Circuit Court of Appeals affirmed the Judgment and Sentence of the District Court.

Statement of the Facts

The facts on appeal arise from the record of the pre-trial hearings, jury trial and sentencing proceedings. The evidence of Petitioner's alleged case offenses was as follows:

The case facts can be summarized from the filed Criminal Complaint and Affidavit. DE 1 The Drug Enforcement Agency (hereinafter "DEA") was advised by a Confidential Informant (hereinafter "CI") on January 13, 2016 that the CI had been contacted by Co-Defendant Weeks to determine if the CI wished to purchase kilograms of cocaine. The next day January 14, 2016, the DEA installed a recording device on the CI's person to record his conversations and traveled with the CI to Weeks home to complete the deal. DE 1-4 Upon arrival at Weeks home, the CI and Weeks entered a vehicle and spoke about the CI's prospective purchase of cocaine with the DEA listening. Weeks explained that his supplier would pick up the cocaine at a warehouse and arrive at Weeks home in 5 minutes. DE

1-5 Soon after, the DEA observed a silver Nissan SUV vehicle arrive at Weeks home with Petitioner exiting the vehicle with a black shopping bag. The DEA then observed the CI, Weeks and Petitioner enter weeks residence. DE 1-5 The DEA overheard the CI state he needed a sharp object to cut the wrappings. DE 1-5 Thereafter, Weeks exited the residence, entered the SUV and began to depart before being stopped in the vehicle and detained by the DEA. DE 1-5 Petitioner, the CI and a woman then walked out of the residence through a side door and were likewise detained. DE 1-5 Weeks waived his Miranda rights, admitted brokering the cocaine transaction, executed a consent to search form and invited the DEA into his home where 4,353 grams of cocaine were seized. DE 1-6

Petitioner's Motion to Suppress Evidence alleged that on January 14, 2016 that Petitioner was a guest on the premises and was present on a social visit at the home of Weeks, physical address 3811 S.W. 133rd Court, Miami, Florida. DE 46-2 While inside Weeks took Petitioner's vehicle keys, exited the home, and attempted to move Petitioner's vehicle at which time the DEA arrested Petitioner at gunpoint while still inside Week's residence. DE 46-2 Petitioner's cellular telephones were seized. DE 46-3

At hearing on Petitioner's Motion to Suppress Evidence, Petitioner testified that he had visited Week's home on five, six, seven or eight occasions. DE 61-8 Petitioner explained that on January 14, 2016 he was present at Weeks home for a social visit, to have a pair of pants hemmed and have lunch. DE 61-10 Petitioner was invited there for the social visit and lunch by Francisco Weeks his Co-Defendant and the occupant of the property. DE 61-11 When Petitioner arrived at Week's residence, a food delivery man was present with Weeks. DE 61-13 Petitioner entered through the side door to the home and was greeted by Beatrice Weeks whom he intended to hem his pants which Petitioner carried in a bag (he could not recall the color). DE 61-15 Petitioner was placed on the ground by the police and handcuffed while inside the residence. DE 61-16 The police seized Petitioner's cellular phone from his person without his permission subsequent to his arrest within the residence. DE 61-17 On cross-examination Petitioner testified that he had originally met Weeks years before at Weeks' cousin Luis (last name unknown) birthday party. DE 61-18 Upon entering the terrace Petitioner handed his bag and pants to Beatrice Weeks. DE 61-20

Thereafter, DEA Agent Daniel Summers (hereinafter Summers) relevant testimony was as follows: On January 16, 2016, Summers was parked a short distance from Weeks home listening to the CI conversation transmissions and did not have a direct view of the residence. DE 61-48 Summers was advised that upon arrival at Weeks residence that Petitioner was carrying a black shopping bag and met Weeks outside and then entered the residence. DE 61-50 Summers overheard a Spanish to English translation of the intercepted conversation within the house wherein the CI described 4 objects which he intended to cut into, 3 hard 1 soft which Summers believed to be kilograms of cocaine. DE 61-51 Summers was advised by the surveillance unit that Weeks has exited the residence and entered a vehicle and Summers fearing that Weeks would depart with the suspected cocaine determined to block the driveway with his police vehicle and prevented Weeks from driving out of the driveway and at that moment Weeks was arrested. DE 61 51-52 At the same time Summers exited his vehicle and with the assistance of other agents pulled Petitioner and Beatrice Weeks from the entryway of the open door to a covered terrace which they had used as the entryway to the house and detained both Petitioner and Beatrice Weeks, Petitioner was handcuffed and placed on the grass outside.

DE 61-52 Thereafter, Summers made the decision to perform a protective sweep of the Weeks residence in the interest of officer safety and in the interest of protecting the evidence (the kilograms of cocaine). DE 61-55 During the protective sweep, Summers entered the master bedroom and in plain sight observed a black shopping bag and on the bed in the master bedroom and 4 kilograms of cocaine sitting on the bureau; each sliced with white powder coming out of them. DE 61-56-57 Summers then ordered his agents to read Miranda warnings to Weeks and Petitioner and soon thereafter was advised that Weeks had waived his rights and wished to cooperate. DE 61-58 Agents advised Summers that Weeks had volunteered that he (Weeks) had brokered a 4 kilogram cocaine deal between the CI and Petitioner and that the 4 kilograms of cocaine were in the house and Weeks executed a consent to search form for the residence. DE 61-58-59 Summers then organized his agents and searched the residence during which he recovered the 4 kilograms of cocaine from the master bedroom bureau and the black shopping bag from the bed and placed all items into evidence bags. DE 61-59 Petitioner invoked his Miranda Rights when read to him. DE 61-62 Summers never attempted to obtain a search warrant for the residence or otherwise. DE 61-68 Summers had no reason to suspect that either

Weeks or Petitioner might be violent subjects or that there might be firearms in the residence. DE 61-71 The Weeks residence had 2 doors a front door and a patio door with a sliding door. DE 61-74 Summers recalled that Petitioners person was searched and 2 cell phones were retrieved from Petitioners person without Petitioners consent and further as of the hearing date the phones had not been reviewed. DE 61-99-100 Summers began the process of obtaining a search warrant however due to Weeks cooperation no warrant was obtained. DE 61-104 Summers did not find a pair of pants in the black bag on the bed and did not recall viewing any pants during the search. DE 61-106 DEA Special Agent Jeremy Nawyn testified that: during the buy bust operation that he was 1 block away from the location in a police vehicle with 3 other agents, Summers, Evans and McPhee. DE 61-111 Upon overhearing the CI state that he was cutting into the suspected kilograms of cocaine Summers decided to move in to effect arrest. DE 61-116 Nawyn approached Weeks vehicle with a rifle and in full tactical gear where Weeks was in the vehicle drivers seat. DE 61-116 Nawyn commanded weeks to stop the vehicle and place it in park which Weeks did. DE 61-117 Thereafter, Evans ordered Weeks to exit the vehicle and lay down on the ground to which Weeks complied and was handcuffed by Evans.

DE 61-117 Numerous other detectives and agents were present at the time of Weeks arrest. DE 61-118 In addition to Weeks, Petitioner, Weeks wife and the CI were also detained. DE 61-119 Nawyn and other agents searched the residence finding no one else in the residence. DE 61-121 Nawyn approached Weeks who was standing in the street handcuffed along with Evans to speak with Weeks. As neither Nawyn and Evans spoke Spanish, another unknown detective acted as an interpreter with all 3agents and Weeks entering a vehicle to speak. DE 61-125 Nawyn explained the Miranda rights procedure, essentially that the Spanish speaking detective read Weeks his Miranda rights using a Spanish language form with the executed form being accepted into evidence having observed Weeks initial and sign the form. DE 61-126-127 Weeks thereafter told Nawyn through the interpreter that he had brokered the cocaine deal and that Petitioner had supplied the cocaine and that the cocaine was inside the residence and that you guys can go in there and see for yourselves. DE 61-129 Nawyn consulted with Summers and the prosecutor via telephone and it was determined to have Weeks execute a consent to search form. DE 61-133 Thereafter the executed by Weeks, Spanish language consent to search form was received into evidence. DE 61-134 Next, Agent Joshua

Evans testified as follows: Evans was present during the investigation at Weeks residence and did not recall anything until he stopped Weeks vehicle and called out Weeks from the vehicle, Weeks being compliant. DE 61-183 Evans, armed with a pistol type firearm, yelled at Weeks in an authoritarian voice and handcuffed Weeks behind his back as he lay on the ground on his chest. DE 61-183 Evans did not recall any conversation on the subject of obtaining a search warrant for Weeks residence however he did sign the Miranda waiver form. DE 61-192-193 The suppression hearing thereupon was continued until April 7,2016; the Magistrate Court granted Weeks motion to raise a probable cause to arrest issue in addition to the voluntariness of the consent to search issue DE 75-9 wherein witness Walter Enamorado testified as follows: Enamorodo, a 15 year Miami-Dade Police Department officer with narcotics bureau, was assigned the area perimeter during the subject investigation at Weeks residence and was summoned to the residence once the takedown signal was given. DE 75-15-16 Upon arrival Enamorodo observed that all subjects were already in custody detained and separated in handcuffs and stood by to assist if needed. DE 75-16 Enamorodo, hearing that a Spanish speaking detective was needed, offered assistance, being a native of Honduras and fluent

in the language. DE 75-18 Enamorodo identified the Miranda waiver exhibit and explained that the advised Weeks to read and initial and sign the document and he observed Weeks initial and sign the waiver form. DE 75-21 Thereafter Enamorodo recalled participating during the interrogation of Weeks and that he Weeks claimed to be the broker for the 4 kilos of cocaine and that Weeks at that point gave permission for the agents to check the residence. DE 75-22 Enamorodo recalled that it was law enforcement who asked for consent to search the residence. DE 75-23 Enamorodo advised Weeks to read the Spanish language consent form, Weeks read and signed the form as did Enamorodo and the DEA agent. DE 75-24 Thereafter, Summers was recalled and testified that: there was no specific audio cue for the CI to speak in order to trigger a takedown and that he was told via the Spanish interpretation play by play that the CI was looking at four objects and that he needed a knife to cut into them and to examine them from which he concluded that cocaine was inside the residence. DE 75-50 Following argument, the Magistrate Court denied the Motion to Suppress ruling that: the protective sweep search was lawful; the Miranda form was lawfully obtained; the consent to search was lawfully obtained; and Weeks arrest was supported by probable cause.

DE 75-91 Finally, Weeks counsel proffered into the record that the CI recording captures the detectives asking if there were any other persons inside the house to which the answer no was heard and that the additional voice of a woman (Beatrice Weeks) had been heard on the recording 3 minutes prior to the take down.

Jury trial was commenced on August 23, 2016 DE 196 Summers identified the CI as Rafael Iglesias a contract CI with the DEA since 2012 who was motivated by a desire to help a friend in jail. DE 239-158 159 Iglesias phoned Summers on January 13, 2016 advising him that Weeks had 20 kilograms of cocaine to sell and would display to the CI at his home. DE 239-160 On January 14, 2016 Summers organized the buy bust operation with surveillance on Weeks home, met with other agents telling them he expected to find cocaine at Weeks home and met in person with the CI. DE 239-161 The CI was equipped with an audio transmitter and recorder. DE 239-164 A recorded call was made from the CI to Weeks. DE 239-166 At 11:50 a.m. Weeks arrives at his residence. DE 239-167 The CI entered Weeks residence at 12:10 p.m. DE 239-168 At 1:47 p.m. Petitioner arrived in a silver SUV type vehicle and entered Weeks residence. De 239-169 Summers gave the arrest signal and drove to the front of Weeks residence blocking

Weeks vehicles path. DE 239-172 Summers arrived observing Petitioner and Beatrice Weeks on the fenced in porch area by the door and also the CI within the residence all of whom were detained and handcuffed. DE 239-173 Summers yelled into the house 8-10 times if there was anyone in the residence and receiving no answer order a security sweep of the residence for officer safety. DE 239-174 During the security sweep Summers observed 4 bricks shaped packages of suspected cocaine which were cut open on the master bedroom dresser which were not tested or removed at that time. DE 239-175 After exiting the residence Summers directed that Petitioner and Weeks be given their Miranda warnings. DE 230-175 Weeks consent to search was admitted into evidence. DE 239-175 Summers reenters the residence and seized the suspected cocaine and a black shopping bag located 5-6 feet away. DE 239-178 The cocaine was received into evidence. DE 239-179 The black shopping bag was admitted into evidence. DE 239-180 Phone toll records were received into evidence and Summers described the call records and numbers and times for January 14, 2016. DE 239-193 Summers acknowledged that there was a second car that arrived at Weeks residence during the surveillance delivering a package. DE 239-207-210 Homeland Security Special Agent Thomas Coleman (hearinafter Coleman)

testified that on January 24, 2016 during the buy bust operation he was standing by 4 blocks from Weeks residence. DE 240-85 At Summers request Coleman moved his vehicle to a location where he could personally observe Weeks residence. DE 240-86 Coleman parked 300 to 400 feet down the street from Weeks residence and utilized binoculars and a radio during surveillance. DE 240-88 Coleman recalled a large truck pass by and a food delivery. DE 240-90 Coleman opined that the delivery bag would not support 4 kilograms of cocaine, the white vehicle was parked in the street for a minute and Coleman advised to disregard the vehicle. DE 240-91-92 A silver SUV arrived in the driveway and Coleman observed Petitioner and Weeks speaking briefly in the driveway, where after Weeks returned to the residence and Petitioner reached into either the front or rear drivers side doors and retrieved the shopping bag and followed Weeks to the front of the residence. DE 240-95 Coleman participated in the initial security sweep and subsequent consent search of Weeks residence. DE 240-102 Coleman identified the black shopping bag on the bed as the bag he had referred to earlier and the 4 packages of suspected cocaine. DE 240-103 DEA Task Force Officer, West Miami Police Department Officer Pedro Arcia testified that he monitored the electronic recording device being

worn by the CI. DE 240-125 Arcia translated for the CI at the operational meeting where Summers explained what was needed of him, the CI, during the buy bust investigation. DE 240-126 Arcia translated the call between the CI and Weeks for Summers and equipped the CI with the recording device. DE 240-128 Arcia observed Petitioner arrive at Weeks residence where he was greeted by Weeks. DE 240-133 Recordings of the telephone calls and transcripts of the conversation between the CI and Weeks and the recording device worn by the CI were admitted into evidence. DE 240-136 During the recording Arcia hears Beatrice Weeks ask if anyone was hungry. DE 240-152 The Co-Defendant Francisco Weeks (hereinafter Weeks) testified that he had pled guilty in this case and was cooperating with the Government, his plea agreement was admitted into evidence, he met with the Government 2-4 times and had no guarantees made regarding his sentence. DE 240-207-212 Weeks described a previous cocaine transaction the prior year in October and November 2015 between himself, Petitioner and the CI where 1 kilogram of cocaine was brokered by Weeks for $14,000. DE 240-221-225 Regarding the January 14, 2016 cocaine deal at his residence Weeks was telephoned by the CI on January 10 or 12 that the CI was looking for 4-8 kilograms of cocaine, which he discussed with Petitioner. DE 240-227 Weeks

identified the telephone calls with the CI which were published to the jury. DE 241-7 On January 14 at around 12:30 p.m. the CI arrived at Weeks residence. DE 241-9 Weeks spoke to Petitioner who advised he was running late. DE 241-11 Weeks received the black bag from Petitioner when he arrived and identified the bag in court. DE 241-187 Weeks separated the CI and Rodriguez inside the residence and Weeks took the CI back to his bedroom with the bag and the cocaine where the CI put the bag on the bed and the cocaine on the dresser to check it with a knife and a flashlight. DE 241-15-17 The police entered Weeks residence and arrested everyone within the Weeks residence. DE 241-187 Weeks wife Beatriz Weeks (hereinafter Weeks wife) testified that she and Weeks have been married for 28 years. DE 241-103 The Weeks have lived at 3811 S.W. 133rd Court (the Weeks residence) for 18 years. DE 241-103 Weeks was a truck driver and she observed him use cocaine. DE 241 103 Previously Weeks had grown marijuana at their home which she discovered when the police arrived to arrest Weeks. DE 241-104 Weeks wife was home on January 14, 2016 when the police arrived and that Petitioner was on the house patio at that time. DE 241-107 She stated that the CI arrived prior to Petitioner and that he had visited her home once before and that she had no knowledge of any drug

deal. DE 241-108 Weeks wife ordered lunch only for herself which was delivered in a plastic bag. DE 241-113 Weeks observed Petitioner carrying the black shopping bag when he arrived at the residence. DE 241-115 Weeks and Petitioner moved to another part of the house that Weeks wife could not view. DE 241-117 Weeks wife denied receiving any pants to hem or that she sewed. DE 241-118 Petitioner had visited the Weeks residence and been observed there by Weeks wife on two prior occasions. DE 241-119 Weeks asked her for a knife and then left the residence and thereafter the police arrived. DE 241-119 The kilograms of suspected cocaine were not in the bedroom prior to Petitioner's arrival. DE 241-123 Carmelo Gomez, DEA forensic chemist was qualified as an expert DE 241-153 and testified that the substance seized was chemically tested and confirmed to be cocaine with a total weight of 3,979 grams. DE 241-154-155. Ana Zadow, DEA fingerprint analyst testified that Petitioners fingerprints were not found on any of the kilograms of cocaine in evidence. DE 242-10 Zadow was not directed to investigate the bags in evidence for latent fingerprints. DE 242-18

REASONS FOR GRANTING THE WRIT

ISSUE 1: Whether the trial and appellate court erred when it adjudged that Petitioner had no standing to request suppression of evidence obtained from a warrantless search of Co-Defendant Weeks private residence where he was physically present within the residence at the time of the search.

The District and Appellate Courts erred in ruling that Petitioner lacked requisite standing to mount a challenge to the warrantless search of Weeks residence in reliance upon the decision of this court in United States v. Garcia, 741 F.2d 363, 366 (11th Cir. 1984). In Garcia this Court held that "mere presence in an apartment is not sufficient to confer standing and that an occupant who is neither the owner nor the lessee must demonstrate a significant and current interest in the searched premises to establish an expectation of privacy." Petitioner was much more than being merely present or a casual bystander. Petitioner was an invited guest of both Co-Defendant Weeks and his wife Beatrice Weeks. Petitioner was invited into the home for lunch. Petitioner had previously visited the Weeks residence on 6-8 occasions as a social invitee. Petitioner was acquainted with the Weeks and by all accounts was not a trespasser or unwanted intruder. In addition, Petitioner

carried with him into the Weeks residence personal property, a black shopping bag and the contents thereof. These facts clearly distinguish the case at bar from Garcia. Additionally the District Court cited United States v. Jones, 184 F. App'x 943, 945 (11th Cir. 2006) as authority where this Court held that a defendant, who inconsistently claimed he lived at residence "from 'time to time' " and stored personal effects there, had no subjective expectation of privacy in residence because he also denied living there and told officers he did not have authority to consent to its search. As in Garcia this holding is distinguished as law enforcement never consulted with or questioned Petitioner at all regarding the consent to search issue. Further the District Court cites United States v. Sweeting, 933 F.2d 962, 964 (11th Cir. 1991) where standing failed when the defendants claimed that residence was rented by their mother as a residence for their grandmother and they had temporary access along with other members of the family and had some personal effects there. As none of these decisions are on point with the facts of this case, reversal is required. Consent to search was never discussed at any level by law enforcement with Petitioner.

In order to perfect standing to request the suppression of evidence, a defendant must establish both a subjective expectation of privacy in the place searched as well as the objective reasonableness of that expectation. United States v. Robinson, 62 F.3d 1325 at 1328 (11th Cir. 1995). Mere presence where the search occurred is not enough to confer standing. Rakas v. Illinois, 439 U.S. 128, 143 (1978). The overnight guest has a reasonable expectation of privacy in a residence sufficient to establish standing. Minnesota v. Olson, 495 U.S. 91, 98-100 (1990). However, a guest present only for a brief commercial transaction does not. See Minnesota v. Carter, 525 U.S. 83 (1998). The undisputed circumstances of Petitioners presence at Weeks residence establish standing to request suppression of evidence.

Law enforcement observed Petitioner travel to the residence, park his vehicle in front of the residence, be greeting in the front of the residence by Weeks, enter the residence with Weeks, remained in the residence with Weeks and his Wife, and prepared to have lunch with Weeks and Weeks wife. It cannot be disputed that Petitioner was an inside the residence at the time of the takedown arrest. Further the testimony from the officers was that Petitioner carried a black Saks Fifth Avenue style shopping or gift

bag into the residence and that the bag was located in the residence and seized by law enforcement. These certain facts distinguish this case from those relied upon by the District Court. Where law enforcement seeks to seize the personal property of Petitioner located inside a private residence where law enforcement observed Petitioner enter with the personal property seized from within without a warrant, Petitioner has standing to move to suppress the evidence seized where there is a warrant violation and his personal property is seized requiring the granting of a writ of certiorari.

Issue 2: Whether the trial and appellate court erred when they adjudged that Co-Defendant Weeks consent to search was sufficient to permit a warrantless search of his residence where Petitioner was also physically present within the residence and law enforcement had knowledge that Petitioner had carried personal property, a Saks Fifth Avenue style shopping bag, into the private residence and was not given an opportunity to object to the warrantless search and seizure of evidence including the shopping bag and cocaine.

Petitioner reincorporates his argument stated in Issue 1 above here as is related to the facts supporting the standing issue and the argument seeking to distinguish this case from those cited by the District Court. It cannot be

disputed that law enforcement observed Petitioner enter Weeks residence carrying personal property a black shopping bag. Law enforcement surveillance observed Petitioner arrive at Weeks residence, be greeting by Weeks in front of Weeks residence, specifically return to his vehicle to retrieve the black shopping bag and carry the black shopping bag into Weeks residence. Thereafter, all occupants of Weeks residence, including Petitioner, were detained by law enforcement. Thereafter a protective sweep was conducted of the residence during which law enforcement observed the personal property of Petitioner, the black shopping bag in the master bedroom of Weeks residence. Subsequent to the consent to search by Weeks, law enforcement seized the black shopping bag and same was ultimately offered and received into evidence to aid in the Governments proof against Petitioner which ultimately led to his guilty verdicts. Again, these facts distinguish this case from those cited by the District Court which required law enforcement to solicit consent to search from Petitioner prior to warrantless seizure of his personal property located within the private residence after law enforcement specifically observed Petitioner enter the residence with the shopping bag requiring the granting of a writ of certiorari.

Issue 3: Whether the trial and appellate court committed plain error when they adjudged that Co-Defendant Weeks consent to search was sufficient to permit a warrantless search of his residence where his wife and co-inhabitant of his residence was physically present within the residence and was not given an opportunity to object to the warrantless search.

The Fourth Amendment guarantees people the right to be "secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. Without a warrant, "a search is reasonable only if it falls within a specific exception to the warrant requirement." Riley v. California, 573 U.S. ___, ___ (2014). One exception is that a warrantless search is lawful when a person with actual or apparent authority voluntarily consents to law enforcement officers conducting a search. United States v. Watkins, 760 F.3d 1271, 1279 (11th Cir. 2014); Bates v. Harvey, 518 F.3d 1233, 1243 (11th Cir. 2008). When two people share common authority over "premises or effects," the consent of one person "is valid as against the absent non-consenting person with whom the authority is shared." United States v. Matlock, 415 U.S. 164, 170 (1974). This Court has explained that it is reasonable to recognize that any co-inhabitant can consent

to a search of a jointly-controlled area because the co-inhabitants assume "the risk that one of their number might permit the common area to be searched." Id. In order to determine whether a person has the authority to consent to a search of shared property, courts ask whether there is "mutual use of the property by persons generally having joint access or control for most purposes." Id. Another formulation of this standard is whether the defendant has placed the items in question "in an area over which others do not share access and control." Georgia v. Randolph, 547 U.S. 103, 135 (2006) In Georgia v. Randolph, this Court added an exception to this third party consent rule, providing that when a physically present co-inhabitant expressly refuses to consent to a police search, such refusal is dispositive, regardless of the consent of a fellow co-inhabitant. Id. at 114-17. In that case, Defendant Randolph's wife called law enforcement to their shared home after a domestic dispute and informed the officers that there were "items of drug evidence" in the house. Id. at 107. Both the defendant and his wife were present when the police asked to search the home. Id. The wife consented, but the defendant unequivocally refused. Id. The law enforcement officers searched the house and discovered cocaine. Id. This Court suppressed the drug

evidence, holding that the warrantless search was invalid as to Defendant Randolph. Id. at 114-17. It provided that "a physically present co-occupant's stated refusal to permit entry prevails, rendering the warrantless search unreasonable and invalid as to him." Id. at 106. This Court in Randolph also addressed the situation presented in this appeal: what to do when a co-tenant is asleep when the police knock on the door and another co-tenant gives consent to enter and search the residence. Id. at 121. This Court responded to this scenario by stating that it was "drawing a fine line" with the Randolph rule, and that "if a potential defendant with a self-interest in objecting is in fact at the door and objects, the cotenant's permission does not suffice for a reasonable search, whereas the potential objector, nearby but not invited to take part in the threshold colloquy, loses out." Id. Thus, the Court expressly declined to require police to wake a sleeping co-tenant. See Id. Nonetheless, if the district court addresses the merits of a defendant's Fourth Amendment claim without receiving evidence relating to his standing to bring such a claim, a reviewing court may be required to remand the case for fact-finding on the standing issue. Combs v. United States, 408 U.S. 224, 226-28 & n.3 (1972) where the Court remanded for further fact-finding, where

the court of appeals upheld the denial of the defendant's motion to suppress on the ground that he lacked standing to pursue a Fourth Amendment claim; and where the government did not challenge his standing and the district court, which rejected his claim on the merits after holding an evidentiary hearing, made no factual findings on the standing issue. Herein, the undisputed facts establish that Weeks wife was present, within the residence at the time of both the surveillance and the takedown and arrest procedures. Weeks was separated from his wife, Petitioner and the CI in a separate vehicle occupied by Weeks, law enforcement officers and the Spanish language interpreter. In this vehicle setting Weeks executed a consent to search document relied upon by law enforcement to search the residence and seize the black shopping bag and cocaine. Weeks' wife was never consulted regarding the search. Weeks' wife was never advised that a search of the residence was being contemplated by law enforcement, requested and received from Weeks and in fact conducted by law enforcement. Weeks' wife was present and available to consult with, using the available Spanish language interpreter if necessary, regarding the search. The record reflects that Weeks' wife had no knowledge of the requested residence search and consent. Weeks' wife was never given

any opportunity to either asset to or object to the consent to search provided by Weeks. The act of keeping Weeks' wife, the co-inhabitant of the residence in the dark regarding the warrantless search and disallowing her an opportunity to object to any search will not facilitate law enforcement to get around the established case law requires the granting of a writ of certiorari.

Issue 4: Whether the trial and appellate court erred when they permitted the introduction of prior bad act evidence under Rule 404(b) where (1) the evidence was not established to be relevant to an issue other than a defendant's character, (2) there was insufficient proof to allow a jury to find that the defendant committed the act by a preponderance of the evidence, and (3) the evidence's probative value, if any, was substantially outweighed by the risk of unfair prejudice under Rule 403.

This Court established a three-part test for determining whether evidence of a prior bad act is admissible under Rule 404(b) in United States v. Miller, 959 F.2d 1535, 1538 (11th Cir. 1992) (en banc). The Miller test provides that such evidence is admissible if: (1) the evidence is relevant to an issue other than a defendant's character, (2) there is sufficient proof to allow a jury to find that the defendant committed the act by a

preponderance of the evidence, and (3) the evidence's probative value is not substantially outweighed by the risk of unfair prejudice under Rule 403. In order to have Rule 404(b) prior act evidence admitted, the proponent need only provide enough evidence for the trial court to be able to conclude that the jury could find, by a preponderance of the evidence, that the prior act had been proved. The prosecutor can, of course, prove the prior act by calling witnesses to testify. Or, as is often the case when the act has become the subject of a conviction, the prosecutor can prove the act by introducing a certified judgment of conviction. "It is elementary that a conviction is sufficient proof that the defendant committed the prior act." United States v. Calderon, 127 F.3d 1314, 1332 (11th Cir. 1997) The fact that the defendant was convicted of prior offense is sufficient proof that the defendant committed the prior act. Obviously, a conviction based on a verdict of guilty after a trial will suffice. A jury can convict only if it has found the defendant guilty beyond a reasonable doubt, which standard clearly exceeds the preponderance standard. Likewise, a conviction based on a guilty plea to the prior crime also suffices to meet Rule 404(b)'s proof requirement. Calderon, 127 F.3d at 1332 Under Federal Rule of Evidence 404(b), prior act evidence

may be admissible for such purposes as "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Fed.R.Evid. 404(b). The three-part test is employed to determine whether evidence is admissible under Rule 404(b), asking (1) if the evidence is "relevant to an issue other than the defendant's character," (2) if there is "sufficient proof so that a jury could find that the defendant committed the extrinsic act," and (3) if the evidence meets the other requirements of Fed.R.Evid. 403. United States v. Jernigan, 341 F.3d 1273, 1280 (11th Cir. 2003) (quotation omitted). The District Court permitted Weeks to offer uncorroborated testimony about an uncharged prior cocaine deal between himself, Petitioner and the CI. The date of the charged counts in the indictment were January 13 through January 14, 2016. DE 17 Weeks testified, over defense objection, that in October of the previous year 2015, the CI purchased 1 kilogram of cocaine from Petitioner for $34,000 during a meeting at his home. DE 240-223-226 There was no arrest or prosecution and no corroborating evidence. The CI did not testify. Weeks' wife testified that she had seen Petitioner and the CI at her home previously but not on the same date at the same time. The Government offered no corroboration of Weeks' story, i.e. phone records etc.

Applying the three-part Jernigan test to determine whether this similar act evidence is admissible under Fed.R.Evid. 404(b), clearly it was not. As to point (1) Weeks' testimony of similar act evidence was not relevant to any possible issue other than the defendant's character as the Government argued if he did it once he will do it again. No defense of mistake or mis-identification or entrapment was presented. Secondly, there was no sufficient proof that a jury could find that the defendant committed the extrinsic act based upon Weeks' uncorroborated testimony. Finally, the evidence failed to meets the other requirements of Fed.R.Evid. 403 requiring the granting of a writ of certiorari.

Issue 5: Whether the trial and appellate court erred when they permitted the introduction of prior bad act evidence under Rule 404(b) and did not (a) give a cautionary instruction at the time the prior bad act evidence was introduced during trial and (b) did not instruct the jury at the close of the case with the Rule 404(b) requested instruction.

The Government's prior bad act evidence was introduced through Weeks' testimony alone as described above. DE 240-223-226. No contemporaneous cautionary instruction was read to the jury at the time the evidence was received.

Petitioner did request a that the pattern 404(b) Similar Acts Evidence instruction be read to the jury at the close of the case which was granted by the District Court. DE 241-171 However, the final instructions did not include this Similar Acts Evidence instruction. DE 203 The final Jury Instructions as read to the jury likewise, did not include the requested 404(b) instruction. Petitioner submits above that the District Court erred in admitting the Similar Acts Evidence through Weeks' testimony, the error was compounded by not giving the jury the cautionary instruction at the time of introduction of Weeks' testimony as well as in the final instructions to the jury. Weeks' testimony, essentially that Petitioner participated in the October 2015 cocaine transaction, was evidence of another prior, uncharged crime, not the crime alleged in the indictment, and as such, clearly was subject to Rule 404(b), Federal Rules of Evidence. United States v. Cancelliere, 69 F.3d 1116 (11th Cir. 1995); United States v. Mills, 138 F.3d 928 (11th Cir. 1998) Thus, the failure to give a cautionary instruction when 404(b) evidence is admitted can standing alone justify reversal. In United States v. Gonzalez, 975 F.2d 1514 (11th Cir. 1992) the Eleventh Circuit held that the absence of the limiting instruction opened the door for the jury to consider this

evidence in an improper light. This prejudiced Gonzalez to the effect that it relieved the Government of its burden of persuasion beyond a reasonable doubt of every essential element of the crime. Francis v. Franklin, 471 U.S. 307 (1985). Since the jury was able to consider this evidence without a limiting instruction from the trial court, Gonzalez was seriously impaired from presenting an effective defense. The district court abused its discretion by failing to give defendant's proposed jury instruction requiring the granting of a writ of certiorari.

Issue 6: Whether the trial and appellate court erred when they declined to impose a variance sentence below the computed advisory guideline range after considering the totality of the circumstances concerning Petitioner's sentence.

This Court has determined that the standard of review for the determination of whether a downward variance should be granted and whether or not the sentence is reasonable requires a two-part inquiry in evaluating a sentence's reasonableness, A) the Court must ensure that the district court did not commit a significant procedural error, such as improperly calculating the guideline range, treating the guidelines as mandatory, failing to consider Section 3553(a) factors, selecting a sentence based on clearly

erroneous factors, or failing to explain adequately the chosen sentence; and B) to review the sentences substantive reasonableness by examining the totality of the circumstances, including an inquiry into whether the statutory factors in Section 3553(a) supports the sentence in question. United States v. Gonzalez, 550 F.3d 1319, 1323 (11th Cir. 2008) Petitioner submits that his sentence is not reasonable under the same rationale cited above regarding downward variance and that a variance sentence below the guidelines is appropriate in this case. It was clear at sentencing that Petitioner had no prior criminal record, no history of drug convictions, no weapons, no history of weapons, no violence, no history of violence, was not the mastermind of the case which was orchestrated by the CI and Weeks. DE 244-21-22 Petitioner submits that a downward variance sentence was warranted from his advisory guideline sentence of 84 months with a total offense Level 28, criminal history category I range of 78-97 months for less than 3,979 grams of cocaine with a level 28 range of 2.5 to 5 kilograms of cocaine requiring the granting of a writ of certiorari.

CONCLUSION

For the foregoing reasons, petitioner respectfully submits that the petition for writ of certiorari should be granted.

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Respectfully submitted,

/s/ A. Wallace

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