

ORIGINAL

NO. 19 - 5310

IN THE SUPREME COURT OF THE UNITED STATES

RODOLFO CANTU, JR., also known as Lil Rudy
Petitioner,

v.

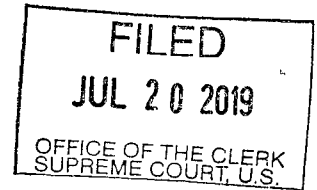
UNITED STATES OF AMERICA,
Respondent.

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

Was the enhancement for a *credible threat* improper considering the district court's partial reliance on hearsay facts outside the record, which violated Mr. Cantu's Fifth Amendment right to due process as well as his confrontation right under the Sixth Amendment?

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 Rodolfo Cantu, 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 April 23, 2019.

OPINION BELOW

On April 23, 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 April 23, 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. The Confrontation Clause, providing that an accused has the right to confront and cross-examine witnesses against him, applies not only to in-court testimony, but also to out-of-court statements introduced at trial, regardless of the admissibility of statements under the law of evidence. Crawford v. Washington, 124 S.Ct. 1354 (2004).

The Sixth Amendment to the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial ***; to be confronted with the witnesses against him

U.S. Const. amend. VI.

STATEMENT OF THE CASE

A. Course of proceedings.

On October 11, 2017, a federal grand jury in the Corpus Christi Division of the Southern District of Texas returned a one-count indictment charging Defendant-Appellant Rodolfo Cantu, Jr. aka Lil Rudy with one count of knowingly possessing with intent to distribute more than five grams of methamphetamine, that is, approximately twenty-two and two-hundredths (22.02) grams of methamphetamine, a Schedule II controlled substance, in violation of 21 U.S.C. § 841(a)(1) and 841(b)(1)(B). ROA.11.

On March 19, 2018, Mr. Cantu appeared before United States District Judge John D. Rainey and pleaded guilty without a plea agreement to Count One of the indictment. ROA.155, 182.

After receiving a copy of the Pre Sentence Report, Mr. Cantu filed an Objection to the PSR on May 17, 2018, challenging his enhancement for a Credible Threat and his enhancement for maintaining a premises for the purpose of manufacturing and or distributing a controlled substance, and for excluding him from a safety valve downward departure. ROA. 172-179.

On June 18, 2018, the district court sustained Mr. Cantu's objection to the two point enhancement for *maintaining a premises for the purpose of manufacturing and or distributing a controlled substance*, but denied Mr. Cantu's objection to the *credible threat of violence* two point enhancement (thus finding Mr. Cantu was not eligible for a safety valve reduction) and sentenced Mr. Cantu to the minimum mandatory

sentence of 60 months in the custody of the Bureau of Prisons, to be followed by a 4-year term of supervised release. ROA.161-170. The district court waived imposition of a fine, but did impose the mandatory \$100 special assessment. ROA.170.

Mr. Cantu filed a timely notice of appeal to the United States Court of Appeals for the Fifth Circuit on June 20, 2018. And on April 23, 2019, the Fifth Circuit affirmed the judgment of conviction and sentence. See United States v. RODOLFO CANTU, JR., also known as Lil Rudy, 765 Fed.Appx. 111 (Mem) (5th Cir. April 23, 2019) (unpublished) (Appendix A).

B. Statement of the relevant facts.

1. District Court.

On March 19, 2018, Mr. Cantu appeared before United States District Judge John D. Rainey and pleaded guilty without a plea agreement to Count One of the indictment. ROA.155, 182.

To provide a factual basis for Mr. Cantu's plea, the prosecutor proffered the following facts at the rearraignment:

"If we were called to do so at trial, the government would prove the following facts beyond a reasonable doubt:

Drug enforcement administration agents, along with Texas Department of Public Safety investigators, Robstown Police Department, and the United States Marshals Service, had been looking into the drug distribution activities of this defendant, Rodolfo Cantu, Jr., in 2016.

Mr. Cantu was identified as a member of the Texas Mexican Mafia prison gang.

The United States Marshal Service obtained a state arrest for a bond violation. The deputies confirmed that 1330 Dakota was the address where the defendant resided. They went to that address in order to affect that arrest

warrant on January 12, 2017. The deputies knocked and announced for several minutes without any response. They then breached the door with a ram and made entry.

At that time, the defendant came out of the back bedroom. A protective sweep was performed, and deputies located the defendant's wife in the back bedroom with a small child. Deputies observed what appeared to be narcotics in an open cabinet in the kitchen.

The defendant gave officers written consent to search, and law, and law enforcement found a total of 22.024 grams of actual methamphetamine and 9.449 grams of cocaine base. Both those amounts were tested and confirmed by DEA laboratories.

The defendant was Mirandized and admitted that the narcotics, in fact, belonged to him.

In the same cabinet as the drugs were located, the agents also found two sacks of United States currency, \$180 and \$187, respectively, with identifying notes attached to each of them indicating that those moneys/sic/ were supposed to go to two different people, most likely owed for the drugs having been fronted to the defendant for the purposes of sale."

ROA.153-154. Mr. Cantu agreed that those facts were true but remained silent regarding the Mexican mafia gang allegation. ROA.155. In response to the district court's questions, Mr. Cantu stated he understood the elements of his offense as described in the indictment, specifically that he possessed a controlled substance, methamphetamine of more than five grams, with the intent to distribute it or to transfer it to someone else, as described in the indictment. ROA.152. The Judge accepted Mr. Cantu's guilty plea, and adjudged him guilty of the offense charged in the one count indictment. ROA.156-157.

C. Presentence report and Sentence

After Mr. Cantu's plea, the court ordered that a presentence report ("PSR") be prepared to assist the court in sentencing him. ROA. 157. Using the 2016 edition of the United States Sentencing Guidelines ("USSG"), ROA. 184, the PSR as adopted by the district court calculated Mr. Cantu's total offense level as shown in the table below:

Calculation	Levels	USSG §	Description	Where in record?
Base offense level	26	2D1.1(c)(7)	18 U.S.C. § 841(a)(1) and U.S.S.G. § 2D1.1	ROA.185 (PSR ¶ 15)
Enhancement(s)	+2	U.S.S.G. § 2D1.1(b)(2)	Credible Threat	ROA.185 (PSR ¶ 16)
	+2	U.S.S.G. § 2D1.1(b)(12)	Drug Residence	ROA.185 (PSR ¶ 17)
Adjustment to offense level	-3	3E1.1(a) & (b)	Acceptance of responsibility	ROA.185 (PSR ¶ 23 & 24)
Total offense level	27			ROA.185 (PSR ¶ 25)

The PSR held Mr. Cantu accountable for 22.024 grams of actual methamphetamine, and 9.449 grams of cocaine base (crack cocaine), resulting in marihuana equivalencies of 440.48 kilograms and 33.74 kilograms, respectively, for a total of 474.22 kilograms of marijuana, per U.S.S.G. § 2D1.1, Application Note (8)(B), with a resulting base offense level of 26, pursuant to U.S.S.G. § 2D1.1(c)(7) ROA.184-185 (PSR ¶ 15).

The PSR placed Mr. Cantu in a criminal history category of I with a total criminal history score of zero. ROA.186 (PSR ¶ 28). Based on a total offense level of 27 and a criminal history category of I, the PSR calculated an advisory Guidelines imprisonment range of 70 to 87 months. ROA.191 (PSR ¶ 55). The PSR noted that 21 U.S.C. § 841(b)(1)(B) carries a mandatory minimum

sentence of five years and a maximum term of 40 years. ROA.191 (PSR ¶ 54).

At sentencing on June 18, 2018, Mr. Cantu objected to the *Credible threat of violence* two point enhancement and argued he did qualify for a safety valve reduction, which was overruled by the Court. In addition, Mr. Cantu objected to the two point enhancement for *maintaining a premises for the purpose of manufacturing and or distributing a controlled substance*, which was sustained by the Court. ROA.161-170. After evidence presented and argument, the court sentenced Mr. Cantu to the minimum mandatory sentence of 60 months in the custody of the Bureau of Prisons, to be followed by a 4-year term of supervised release. ROA.170. The district court waived imposition of a fine, but the court imposed the mandatory \$100 special assessment. ROA.170.

On June 20, 2018, Mr. Cantu timely filed notice of appeal. See ROA.50-51 (judgment entered on the docket on June 20, 2018). ROA.7.

2. Appeal.

After sentencing, Mr. Cantu filed notice of appeal. In his brief to the Fifth Circuit Court of Appeals, Mr. Cantu challenged the two-level enhancement under U.S.S.G. § 2D1.1(b)(2) for making a credible threat to use violence, which disqualified him from being eligible for the safety valve reduction, arguing the district court erred in the enhancement because the facts in the presentence report (PSR) were vague and did not support a finding of a credible threat.

The Fifth Circuit affirmed, rejecting Mr. Cantu's argument the enhancement was improper, holding the district court's finding that Cantu made a credible threat to use violence was "plausible in light of the record as a whole," because as stated in the PSR, Cantu as a member of the Texas Mexican Mafia (TMM) told two arresting officers that he and the other members of the TMM knew personal information about

them, telling one officer he should conceal his face while executing warrants and questioned why the officer continued to work in law enforcement given what the TMM knew about him; and Mr. Cantu did not qualify for safety valve.

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

This Court should grant certiorari to address the district court's partial reliance on hearsay facts outside the record to determine a "credible threat," which violated Mr. Cantu's Fifth Amendment right to due process as well as his confrontation right under the Sixth Amendment, because procedural protections afforded to defendants at trial under Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) should be extended to sentencing proceedings.

A. Finding of a Credible Threat was not proper.

U.S.S.G § 2D1.1(b)(2), which is applicable to drug trafficking offenses, provides that a defendant's offense level is increased by two levels if he "used violence, made a credible threat to use violence, or directed the use of violence." The Guidelines do not define the terms "use of violence" or the "threat of violence." The Seventh Circuit addressed the definition of "violence" and concluded in U.S. v. Harden, 866 F.3d 768 (7th Cir. 2017) that the defendant's conduct of leading officers on a high-speed chase involved the "use or credible threat of violence":

"Thus, at a minimum, our cases have consistently recognized that conduct constitutes the use or threat of violence if it involves the use or threat of force capable of injuring another, and includes conduct jeopardizing the life of another by *the use of a dangerous weapon*. "

Examples of a two-level "credible threat" sentencing enhancement include cases in which the defendant threatened a buyer *at knifepoint* after the buyer failed to pay for his methamphetamine, U.S. v. Townley, 472 F.3d 1267 (10th Cir. 2007) ; where a defendant *showed a firearm* to a government informant during the course of a drug sale and threatened to shoot the informant if the defendant did not know who

the informant was when the informant arrived to buy drugs (as the presence of a firearm during drug transaction clearly increased risk of violence), U.S. v. Early, 77 F.3d 242 (8th Cir.1996); where the Defendant *shot a victim* over a drug-related argument and threatened he would go into an apartment and “*stab everybody up*” after the witness notified police of drug activity, U.S. v. Fernandez 636 Fed.Appx. 71 (2nd Cir. 2016); where the Defendant attempted to intimidate informant through other inmates, stated that he would *drive car over* co-conspirator and predicted two co-conspirators’ *impending deaths*, U.S. v. Kirk Tang Yuk, 885 F.3d 57 (2nd Cir. 2018); and where the Defendant *brandished a gun* during a drug transaction while accusing the declarant of trying to rob him, U.S. v. Overstreet, 693 Fed.Appx.374 (5th Cir. 2017). In U.S. v. Cardona, 709 Fed.Appx. 275 (5th Cir. 2017), the Fifth Circuit found a *credible threat enhancement* was proper where the defendant got angry with an associate, demanded that he return with “either... the drugs or the money” before handing him *a pistol*, and the evidence developed during trial showed the defendant’s propensity for violence including his motto “we’re not going to fight anybody.... we’re just going to *kill them* in case something is set to go down.” Likewise, the 5th Circuit found an enhancement proper where, in the case of a jointly undertaken criminal activity involving the TS, a drug debtor was *held at gunpoint* and threatened in the defendant’s backyard, U.S. v. Torres, 694 Fed.Appx. 937 (5th Cir. 2017); and in U.S. v. Bonilla, 670 Fed.Appx. 875 (5th Cir. 2016), where the Defendant always *carried a handgun* during drug transactions, sold a firearm to a co-conspirator and the

Defendant *pointed a shotgun* and threatened to harm an individual if she did not pay a drug debt.

The PSR assessed Mr. Cantu an enhancement for a credible threat of violence under USSG § 2D1.1(b)(2) alleging Mr. Cantu made threats to the Robstown Police Department officers at the time of his arrest when asking the officers why they did not attempt to conceal their identities and indicating that the Mexican Mafia knew where the officer and the officers' families lived, which was upheld by the Court. PSR ¶ 13. ROA. 182-183. The PSR included a background of the Mexican Mafia without legal authority. PSR ¶ 4-6. ROA. 182.

During the sentencing, the Court, without taking judicial notice, drew upon its own experience trying cases involving other defendants and the Mexican Mafia and found that Mr. Cantu had made a credible threat. ROA. 166-167.

“You know, we try to be practical about how we view what was said. Law enforcement is very aware of the Mexican Mafia and its reputation, what it does, why it does it. Violence is part of what the Mexican Mafia engages in, intimidation, extortion, drug selling, retaliation, whatever. It's well-known. I mean, I have tried numerous cases. I have had numerous defendants and actually had trials involving the Mexican Mafia, looked at the constitution. I have heard testimony from former members, law enforcement people.

When you mention the Mexican Mafia and you put it in proper context, you think in terms of definitely potential for violence.”

ROA.166-167.

The district court's partial reliance on the hearsay assertions mentioned in the PSR as well as the Court's own observations involving witnesses in unknown and unrelated court proceedings to determine a “*credible threat*” violated Mr. Cantu's Fifth Amendment right to due process as well as his confrontation right under the

Sixth Amendment. The procedural protections afforded to defendants at trial under Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) should be extended to sentencing proceedings.

Relying on the Court's own observations, the Court's comparison between Mr. Cantu and other unknown Defendants, who may or may not have been similarly situated, in unrelated cases, deprived Mr. Cantu of his ability to cross examine or to look into those other cases because the Court considered evidence not adduced at the sentencing hearing of Mr. Cantu, was an excessive comparison and did not show it was probative or relevant to Mr. Cantu's case. It in effect made the Court itself an expert witness and/or referenced other possible expert witnesses of whom the defense could not cross examine or challenge. Because the Court's determination of a *credible threat* involved fact-bound determinations capable of increasing Mr. Cantu's sentence, the court's reliance on hearsay testimony/evidence violated his right of confrontation under Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). *Crawford* concerned testimonial hearsay that was introduced at trial, but did not address whether the Sixth Amendment right to confront witnesses applies similarly at sentencing. The First, Second, Fifth, Sixth, Seventh and Eleventh Circuits have rejected this argument, finding there is no *Crawford* violation when hearsay testimony is used at sentencing. See United States v. Luciano, 414 F.3d 174, 179 (1st Cir.2005); United States v. Martinez, 413 F.3d 239, 243–44 (2d Cir.2005); United States v. Navarro, 169 F.3d 228 (5th Cir.1999), United States v.

Katzopoulos, 437 F.3d 569, 576 (6th Cir.2006); United States v. Roche, 415 F.3d 614, 618 (7th Cir.2005); United States v. Chau, 426 F.3d 1318, 1323 (11th Cir.2005).

Here, there was no evidence presented that officers were engaged in a Mexican Mafia related investigation at the time of Mr. Cantu's arrest, no mention of the Mexican Mafia in the indictment, no details of what if any alleged role Mr. Cantu held in the Mexican Mafia or that he had engaged in any past gang related violent activity or threats. The Court made references to a Mexican Mafia constitution as a factor in its determination Mr. Cantu had made a *credible threat*.

Interestingly, in Whren v. United States, 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996), this Court questioned the application of Standard Operating Procedure manuals to traffic-stop cases as a method by which a court could determine if an officer made a pretextual stop, stating:

“Indeed, it seems to us somewhat easier to figure out the intent of an individual officer than to plumb the collective consciousness of law enforcement in order to determine whether a “reasonable officer” would have moved to act upon a traffic violation. While police manuals and standard procedures may sometimes provide objective assistance, ordinarily one would be reduced to speculating about the hypothetical reaction of a hypothetical constable—an exercise that might be called virtual subjectivity.”

Similarly, gang related practices, even if they could be practicably assessed by a judge, vary from place to place and time to time, and the determination of whether or not a *credible threat* was used should not be decided upon such potential deviations. It is unclear as to what procedures, witnesses, information or “*Mexican Mafia-generated*” *Constitution* (and purported passages) the Court was relying upon regarding any alleged credible threats made by Mr. Cantu; yet, Mr. Cantu was being

held to a potential standard set out by unknown witnesses and a purported constitution not presented in court. Any reliance upon an unknown constitution or witnesses would be a violation of *Crawford* and not proper.

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). In the present case, the facts as stated in the PSR were vague and do not support the sentencing enhancement for a credible threat of violence. There was no weapon of any kind used, threatened or even found, there was no articulable threat of violent conduct, if any. The context of the statements were during an arrest in which Mr. Cantu was cooperative, signed a consent to search and gave a voluntary statement. The conduct stated in the PSR was too vague to constitute a credible threat and did not provide Mr. Cantu with enough specificity with which to defend against the enhancement. The statements reported in the PSR appeared to be, if anything, mere puffery and philosophical statements versus an articulable threat, and were inherently implausible because the conversation Mr. Cantu had with officers was cooperative- after all, he fully cooperated, signed a consent to search, interviewed with officers- and shared with them all necessary information. There was no indication he was angry or that his demeanor was vindictive or hostile. Therefore, it was not a credible threat.

During Mr. Cantu’s sentencing, the Court and the prosecution acknowledged there were not cases directly on point:

“THE COURT: This is obviously a very close call just for the reasons you both stated. There are no cases directly on point.”

ROA. 166.

C. A Safety Valve reduction should have been granted:

Similarly, the District Court clearly erred by denying Mr. Cantu § 5C1.2’s safety-valve relief over his alleged threat because any such threat, if any, was not credible.

Mr. Cantu should have qualified for a safety-valve reduction in sentence pursuant to U.S.S.G. § 5C1.2. If a defendant meets the five criteria of the safety-valve provision, a sentencing court must reference its sentence to the Sentencing Guidelines without regard to any statutory minimum sentence. See U.S.S.G. § 5C1.2(a)(1)-(5). Mr. Cantu did not have more than one criminal history point- he had a criminal history score of zero PSR ¶ 25, the offense did not result in death or serious bodily injury, there was no evidence presented he was a leader, and he had debriefed with agents and been told at the time of debriefing that he met the criteria for safety valve.

The second of the safety valve criteria, and the only one at issue in this case, required that “the defendant did not use violence *or* credible threats of violence ... in connection with the offense.” U.S.S.G. § 5C1.2(a)(2). The relevant conduct regarding credible threat of violence, as stated in the PSR, did not meet the criteria for credible threats of violence.

The Fifth Circuit found that neither Section 5C1.2 nor the accompanying commentary defines “violence” or “credible threats of violence,” U.S. v. Zamudio, 267 Fed.Appx. 369 (5th Cir. 2008), although the 5th Circuit found that definitions were not required when the defendant *ran his vehicle* into the agent’s vehicle as the agent was attempting to exit his vehicle. This can, again, be contrasted with the circumstances stated in Mr. Cantu’s PSR in which there was no weapon or even articulable threat. In U.S. v. Wilson, 105 F.3d 219 (5th Cir. 1997), the Fifth circuit found that the District Court erred in concluding the Defendant was not eligible for safety valve because Section 5C1.2 allows for consideration of only the defendant’s conduct, not the conduct of his co-conspirators, regarding a firearm, and it was the co-conspirator rather than the Defendant who possessed the firearm. Again, there was no evidence presented that any type of weapon was used, displayed or even found regarding Mr. Cantu and no articulable threat was made.

CONCLUSION

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

Date: July 19, 2019

Respectfully submitted,

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