

A P P E N D I X

APPENDIX

Decision of the Court of Appeals for the Eleventh Circuit, <i>United States v. John Bradham</i> , 18-12346 (June 6, 2019)	A-1
Judgment imposing sentence.....	A-2

A-1

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-12346
Non-Argument Calendar

D.C. Docket No. 0:18-cr-60009-WPD-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOHN EDWARD BRADHAM,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(June 6, 2019)

Before ED CARNES, Chief Judge, WILLIAM PRYOR, and GRANT, Circuit
Judges.

PER CURIAM:

John Edward Bradham appeals his convictions for distributing cocaine base and possessing a gun and ammunition as a felon. He contends that the district court should have excluded from evidence a video recording depicting a confidential informant who was never called to testify at trial because the admission of the recording violated the Confrontation Clause of the Sixth Amendment and because the recording was not properly authenticated.

I.

A federal grand jury indicted Bradham for one count of distributing cocaine base, in violation of 21 U.S.C. § 841(a)(1), (b)(e), and one count of being a convicted felon in possession of a firearm and ammunition, in violation of 18 U.S.C. § 922(g)(1), 924(e). The case proceeded to a jury trial.

At trial officer Carlton Smith testified that he and another police officer, Steven Smith, met with a confidential informant.¹ Carlton testified that the informant had recorded cell phone conversations with Bradham in which they discussed setting up a sale for crack cocaine and a gun. The government played an audio recording of a phone conversation in which the informant asked Bradham if he had any “hard” and whether he could “hook [him] up . . . with a fat one.” It also played an audio recording in which Bradham says he would be near Sixth Street Park and that, “I got seven bullets in it, dog. But I’ll let you go for four hundred.”

¹ We will refer to the officers by their first names to avoid confusion.

Carlton testified that he, Steven, and the informant arranged to meet Bradham for the sale. The officers gave the informant a covert recording device and a backpack containing \$400 to buy the gun and \$60 to buy the cocaine. The informant then set up the sale in a recorded call with Bradham. Carlton testified that he could tell it was Bradham's voice on the recorded phone call because he had spoken with Bradham and knew what his voice sounded like.

Carlton testified that the officers then dropped off the informant, who got on a bus. The informant got off the bus and walked to a different bus stop across the street. Bradham met the informant at the bus stop. After their transaction the officers picked up the informant. At that point the backpack contained a rock of crack cocaine and a firearm with ammunition. Carlton testified that he did not have a clear view of the meeting and could see only outlines of two people sitting on the bus stop bench.

Carlton testified that the audio and video recording from the informant's covert device was downloaded onto a DVD following the meeting. He testified that there was nothing on the recording device before he gave it to the informant and that he and Steven had searched the informant prior to the meeting with Bradham to make sure nothing was on his person other than the backpack and recording device. The government then moved to introduce the recording, and

Bradham objected on hearsay and Confrontation Clause grounds. The district court sustained the objection.

Carlton further testified that a SWAT team arrested Bradham at the bus stop. Carlton met him there and discovered a backpack on him that contained the \$400 that the informant had been given to buy the gun. Carlton said that during the transaction he was listening through an open line. He said the voices were muffled by noise from cars, but that he heard a gun being racked several times and “bits and pieces” of conversation including Bradham explaining how to oil the gun.

The government then attempted to introduce the recording again, but the district court sustained Bradham’s objection. Carlton testified that what he heard when reviewing the recording was consistent with some of the things he heard while listening over the open line during the transaction.

The government then called detective John Loges. Loges identified Bradham in court. He testified that during the transaction he was positioned “right across the street” and saw Bradham approach the informant, but could not hear what was being said. He testified that he could clearly see what was happening and that Bradham had a backpack in his hand when he crossed the street to meet the informant. He saw Bradham reach into the backpack and show something to the informant. Loges had “more of a side view” of Bradham “manipulating something in his hands” and “maneuvering with something.” Loges could see the

covert recording device in the informant's hand. Loges watched the informant get up and walk away from the bus stop.

Loges testified that he had reviewed the recording. The video was consistent with what he saw, but he "was looking at an angle where the camera view is basically straight on." Loges explained that the video was recorded by the informant, whereas he saw the interaction from the side. The government moved to admit the recording. Bradham objected that Loges was too far away to hear what was being said, that there was a lack of foundation, that the recording was hearsay, and that there had not been an opportunity to cross-examine the informant. The district court overruled the objections and admitted the recording into evidence.

The recording is about two minutes long and shows the latter portion of the meeting with Bradham from the informant's point of view. Bradham can be seen racking a handgun and heard telling the informant that he can keep the gun clean by wiping it down with baby oil. The informant can be heard making the following statements: "My problem's over"; "No sit right here, oh OK"; "Ooh nice"; "Oh my god"; "Ain't no bullets in there, right, take it out, take it out"; "That's good, that's good. I don't want to accidentally fire so leave the clip out"; "I don't want to shoot myself"; "So we done dealing, right"; "All right. I'm heading home to some friends. All right. I'll let you know who my first victim is"; "Yeah, yeah,

appreciate it”; “Baby oil, just rag it”; “Appreciate it. I got you. OK. All right, all right. OK. OK I hear you. OK cool”; “Done deal. I’m walking south on 27th.”

The informant never testified. The jury returned a guilty verdict on both counts. The district court rejected Bradham’s motion for a new trial, stating that “the authenticated evidence was sufficient to support a finding that proper foundation had been shown” and that “[t]he circumstantial evidence was overwhelming.” The court sentenced Bradham to 262 months imprisonment. This is his appeal.

II.

Bradham contends that his Sixth Amendment right to confront the informant was violated by admitting the recording into evidence without giving him the opportunity to cross-examine him.

“A defendant’s claim that his Sixth Amendment rights were violated is reviewed de novo.” United States v. Ignasiak, 667 F.3d 1217, 1227 (11th Cir. 2012). “[A]n otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt.” Delaware v. Van Arsdall, 475 U.S. 673, 681, 106 S. Ct. 1431, 1436 (1986). “[T]he denial of the opportunity to cross-examine an adverse witness does not fit within the limited category of constitutional errors that are deemed prejudicial in every case.” Id. at 682, 106 S.

Ct. at 1437. Whether such a denial is harmless depends on a “host of factors” including “the importance of the witness’ testimony in the prosecution’s case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution’s case.” Id. at 684, 106 S. Ct. at 1438.

Even if we assume that admitting the recording into evidence violated the Confrontation Clause, any error was harmless beyond a reasonable doubt because the contents of the recording were cumulative of the other “overwhelming” circumstantial evidence that the government presented at trial. This evidence included audio recordings of cell phone conversations — the admissibility of which has not been challenged on appeal — where the informant arranged to buy crack cocaine from Bradham; Carlton’s testimony that the informant’s cash was found in Bradham’s backpack and a gun and cocaine were found in the informant’s backpack after the transaction; and Loges’ testimony that he saw Bradham and the informant clearly from across the street. Much of the evidence included in the recording was also cumulative. Carlton testified that he heard Bradham racking the gun and describing how to oil it contemporaneously over the open line. So looking at the “whole record” we can confidently say that any constitutional error was harmless beyond a reasonable doubt. Id. at 681, 106 S. Ct. at 1436.

III.

Bradham also contends that the district court erred in admitting the video because the government did not properly authenticate it.

“[A] nonconstitutional error will be harmless unless the court concludes from the record as a whole that the error may have had a ‘substantial influence’ on the outcome of the proceeding.” United States v. Montalvo-Murillo, 495 U.S. 711, 722, 110 S. Ct. 2072, 2080 (1990). Because of the overwhelming circumstantial evidence the government produced, admitting the recording did not have a “substantial influence” on the outcome of Bradham’s trial.

AFFIRMED.

A-2

UNITED STATES DISTRICT COURT
Southern District of Florida
Fort Lauderdale Division

UNITED STATES OF AMERICA
v.
JOHN EDWARD BRADHAM

JUDGMENT IN A CRIMINAL CASE

Case Number: 18-60009-CR-DIMITROULEAS
USM Number: 17035-104

Counsel For Defendant: Michael Spivack, AFPD
Counsel For The United States: William Shockley, Esq.
Court Reporter: Francine Salopek

The defendant pleaded guilty to count(s) One and Two.

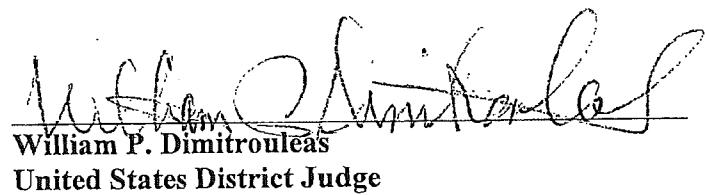
The defendant is adjudicated guilty of these offenses:

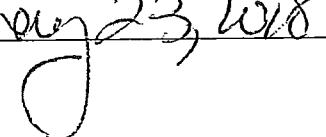
<u>TITLE & SECTION</u>	<u>NATURE OF OFFENSE</u>	<u>OFFENSE ENDED</u>	<u>COUNT</u>
21 USC 841(a)(1)	Distribution of cocaine base	10/17/2017	One
18 USC 922 (g)(1)	Possession of a firearm and ammunition by a felon	10/17/2017	Two

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

Date of Imposition of Sentence: 5/23/2018


William P. Dimitrouleas
United States District Judge

Date: May 23, 2018


DEFENDANT: JOHN EDWARD BRADHAM
CASE NUMBER: 18-60009-CR-DIMITROULEAS
IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **262 months consisting of 240 months on Count One and 262 months on Count Two to run concurrent to Count One.**

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

DEPUTY UNITED STATES MARSHAL

**DEFENDANT: JOHN EDWARD BRADHAM
CASE NUMBER: 18-60009-CR-DIMITROULEAS**

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **5 years consisting of 3 years on Count One and 5 years on Count Two. Both Counts are to run concurrent.**

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first fifteen days of each month;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. The defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11. The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: JOHN EDWARD BRADHAM
CASE NUMBER: 18-60009-CR-DIMITROULEAS

SPECIAL CONDITIONS OF SUPERVISION

Anger Control / Domestic Violence - The defendant shall participate in an approved treatment program for anger control/domestic violence. Participation may include inpatient/outpatient treatment. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

Mental Health Treatment - The defendant shall participate in an approved inpatient/outpatient mental health treatment program. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

Permissible Search - The defendant shall submit to a search of his/her person or property conducted in a reasonable manner and at a reasonable time by the U.S. Probation Officer.

Substance Abuse Treatment - The defendant shall participate in an approved treatment program for drug and/or alcohol abuse and abide by all supplemental conditions of treatment. Participation may include inpatient/outpatient treatment. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

Unpaid Restitution, Fines, or Special Assessments - If the defendant has any unpaid amount of restitution, fines, or special assessments, the defendant shall notify the probation officer of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay.

DEFENDANT: **JOHN EDWARD BRADHAM**
CASE NUMBER: **18-60009-CR-DIMITROULEAS**

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$200.00	\$0.00	\$0.00

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>NAME OF PAYEE</u>	<u>TOTAL LOSS*</u>	<u>RESTITUTION ORDERED</u>	<u>PRIORITY OR PERCENTAGE</u>

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

**Assessment due immediately unless otherwise ordered by the Court.

DEFENDANT: JOHN EDWARD BRADHAM
CASE NUMBER: 18-60009-CR-DIMITROULEAS

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A. Lump sum payment of \$200.00 due immediately.

F. Special instructions regarding the payment of criminal monetary penalties:
Any monetary penalties remaining are to be paid during the term of supervised release.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

This assessment/fine/restitution is payable to the CLERK, UNITED STATES COURTS and is to be addressed to:

U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
400 NORTH MIAMI AVENUE, ROOM 08N09
MIAMI, FLORIDA 33128-7716

The assessment/fine/restitution is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

CASE NUMBER	TOTAL AMOUNT	JOINT AND SEVERAL AMOUNT
DEFENDANT AND CO-DEFENDANT NAMES (INCLUDING DEFENDANT NUMBER)		

The defendant shall forfeit the defendant's interest in the following property to the United States:
One Ruger .380 auto caliber semiautomatic handgun bearing serial number 371304828; five rounds of 9mm /Browning Corto caliber ammunition; One Smith & Wesson .357 S&W magnum caliber revolver handgun be

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.