No. 20-

IN THE SUPREME COURT OF THE UNITED STATES

FERNANDO DURAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

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Petition for a Writ of Certiorari

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Question Presented

This case raises a fundamental question about the government's burden to prove a defendant's guilt beyond all reasonable doubt. The jury here convicted Fernando Duran of distributing and possessing with intent to distribute cocaine based on nothing more than a series of recorded phone calls in which he and his alleged co-conspirator employed so-called drug slang. But no actual drugs were observed, recovered, or tested; no search warrants were issued or executed; and no controlled buys were conducted. No one—not a single person—ever saw Mr. Duran in the presence of drugs. And at most, the recorded phone calls show nothing more than Mr. Duran referencing the possession of drugs by someone else or a plan to get drugs at some later date. Mr. Duran never acknowledged possessing cocaine himself. If due process is to mean anything, it must mean that the government's case against Mr. Duran fell well short of proof beyond a reasonable doubt.

The question this case presents is: Does the due process clause's requirement of proof beyond a reasonable doubt obligate the government in a drug possession case to present evidence of an observable substance a jury could reasonably infer is a narcotic or an acknowledgment by the defendant of such possession.

Table of Contents

Table of Authorities

Cases

Statutes

Other Authorities

Petition for Writ of Certiorari

Petitioner Fernando Duran petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

Opinions Below

The district court orally denied Mr. Duran's motion for judgment of acquittal. Pet. App. 017a. On October 9, 2019, in a published decision, the Court of Appeals affirmed Mr. Duran's conviction. *Id.* at 115a. *United States v. Duran*, 941 F.3d 435 (10th Cir. 2019).

Jurisdiction

The Court of Appeals affirmed Mr. Duran's convictions on October 9, 2019 in a published decision. Pet. App. 115a. Mr. Duran is filing this petition within ninety days of the Court of Appeals' decision. This petition is timely. SUP. CT. R. 13.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

The due process clause of the Fifth Amendment provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. This command requires the government in a criminal case to prove every element of a charged offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970).

Title 21, Section 841(a)(1) makes it illegal to distribute and possess cocaine with the intent to distribute. It says:

> **(a) Unlawful acts**
>
> Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—
>
> > (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.

21 U.S.C. §§ 841(a)(1).

Statement of the Case

1. **The Procedural Posture.** On August 31, 2017, a jury convicted Mr. Duran of four counts involving controlled substances. Pet. App. 042a. The district court sentenced Mr. Duran on January 18, 2018. *Id.* The Tenth Circuit Court of Appeals affirmed Mr. Duran's convictions in a published opinion issued on October 9, 2019. *Id.* at 115a.

2. **The charges.** In a superseding indictment, the government charged Mr. Duran with five counts:

- Distribution and possession with intent to distribute cocaine on March 8, 2017 (Count 22);
- Distribution and possession with intent to distribute 28 grams or more of crack cocaine on March 11, 2017 (Count 24);

- Conspiracy to distribute and to possess with intent to distribute cocaine and crack cocaine, from February 1, 2017 to March 31, 2017 (Count 34);
- Using a telephone to facilitate the manufacture, distribution, and possession with intent to distribute crack cocaine on March 8, 2017 (Count 35); and
- Using a telephone to facilitate the manufacture, distribution, and possession with intent to distribute crack cocaine on March 11, 2017 (Count 36).

Pet. App. 043a–044a.

The jury acquitted Mr. Duran of Count 24 but convicted him of the remaining counts. *Id.* at 044a. As to the conspiracy count, the jury concluded that Mr. Duran conspired to distribute and possess with intent to distribute cocaine; the jury rejected the claim that he conspired to distribute and possess with intent to distribute crack cocaine. *Id.* The district court imposed concurrent forty-six-month sentences on each count. *Id.* at 044a–045a.

3. Jerrell Birch. In Count 34, the government charged that Mr. Duran conspired with Jerrell Birch to distribute and possess with intent to distribute cocaine and 28 grams or more of crack cocaine. *Id.* at 045a. The indictment charged that the conspiracy occurred between February 1, 2017 and March 31, 2017. *Id.*

This case arises out of an investigation by the Metro Gang Task Force. *Id.* at 045a. At trial, Task Force Case Agent Frank Fania testified for the government that the "eyes of the [task force's] investigation" were on Mr. Birch from March 2016 to March 2017, the year preceding Mr. Duran's alleged involvement in the conspiracy. *Id.* Over objection, Agent Fania testified that during this one-year period, the task force conducted three controlled buys involving Mr. Birch and a confidential human source (CHS). *Id.* The first controlled buy took place on March 11, 2016, the second occurred on March 25, 2016, and the third occurred in January 2017. *Id.* None of the transactions between the CHS and Mr. Birch involved or implicated Mr. Duran—his involvement in the conspiracy did not allegedly begin until February 2017—and none involved Agent Fania in an undercover role. *Id.* at 045a–046a.

Indeed, as Agent Fania was forced to admit, the government never conducted a controlled buy involving Mr. Duran. *Id.* at 046a. Nor was the government ever able to tie Mr. Duran to specific drugs; no drugs were observed, recovered, or tested; and no drugs were admitted into evidence at trial. *Id.*

4. **The wiretaps.** As part of its investigation, the task force obtained wire taps on two of Mr. Birch's phones. *Id.* The task force tapped one phone from February 1, 2017 to March 31, 2017, and the other phone from March 2, 2017 to

March 31, 2017. *Id.* In listening to Mr. Birch's phones, the task force recorded various calls between Mr. Birch and Mr. Duran, which led to—and were the exclusive basis of—the charges against Mr. Duran in this case. *Id.*

The first call between Mr. Duran and Mr. Birch occurred on February 7, 2017. *Id.* In the call, Mr. Duran explained that "Unc" had been "blowing [him] up every fucking day." *Id.* Mr. Duran told Mr. Birch that, "I owe this dude that fucking, all that bread, that two racks and more. But I need to get that bread from you to get this fucking dude out the way." *Id.*

At this point, the task force had not identified Mr. Duran. *Id.* at 047a. That identification occurred on February 18, after surveillance officers saw Mr. Duran at Rod's Cars, where Mr. Birch worked. *Id.* As Mr. Duran drove away, officers conducted a pretextual traffic stop based on an alleged red-light violation to contact Mr. Duran in his car and identify him from his driver's license. *Id.*

5. March 8, 2017. The task force conducted extensive surveillance on Mr. Birch on March 8, 2017. *Id.* At approximately 2:00 p.m. that afternoon, officers followed Mr. Birch in a grey BMW SUV to the RINO neighborhood of Denver. Mr. Birch parked his car and went inside a restaurant/bar called Cold Crush, where he worked in addition to Rod's Cars. *Id.* At some point, Mr. Birch came back outside and got "something" out of his car. *Id.* He put the object in his hoodie and

walked away. *Id.* For his part, Mr. Duran was nowhere around. *Id.* Officers then lost sight of Mr. Birch until he was observed back at his apartment at 16th & Paris. *Id.* His BMW remained parked outside Cold Crush. *Id.*

Later, Mr. Birch left his apartment in a black Cadillac, drove around for a while, filled the car with gas, and returned to his apartment. *Id.* After Mr. Birch returned to his apartment in the Cadillac, Mr. Duran arrived at Paris Street driving the grey BMW. *Id.* at 048a. Mr. Duran got out of the BMW and joined Mr. Birch in the Cadillac, and they drove away. *Id.*

They returned to the apartment a short time later and went inside. They were inside for approximately 1 ½ hours, after which Mr. Duran drove the BMW to a house on Leona Street in Aurora, Colorado. *Id.* At that point, officers terminated surveillance. *Id.* Later investigation revealed that the BMW was registered to Christina Fierro, who resided at the Leona Street address. *Id.*

Throughout the afternoon of March 8, Mr. Birch and Mr. Duran exchanged five phone calls. *Id.* On the first, at 12:14 p.m., Mr. Birch called Mr. Duran and asked, "what's up." *Id.* Mr. Duran responded that "Unc's" here and that he was "happy as a motherfucker" because he had "raindrops, drop tops." *Id.* Mr. Duran said he would meet Mr. Birch at "four when I get off." *Id.*

On the second call, at 3:56 p.m., Mr. Duran called Mr. Birch. *Id.* Mr. Birch said they would have to meet at his place in Aurora. *Id.* Mr. Duran said he would leave in 15 minutes and call when he was on his way. *Id.*

On the third call, at 4:46 p.m., Mr. Duran called Mr. Birch to tell him that he was "ready to shoot that way." *Id.* at 049a. Mr. Birch told him to come to his crib on Peoria. *Id.*

On the fourth call, at 5:28 p.m., Mr. Duran called Mr. Birch and told him he was "at [his] crib." *Id.* Mr. Birch responded that he was ten minutes away. *Id.*

On the final call, at 5:42 p.m., Mr. Duran called Mr. Birch and told him he thought he was on the wrong street. *Id.* Most of the call was Mr. Birch giving Mr. Duran directions to his apartment and making fun of him for going to the wrong location. *Id.* At one point in the call, Mr. Birch said, "Yeah I'm about to see that gooey, gooey." *Id.* Mr. Duran responded, "Yeah right motherfucker." *Id.* Eventually, Mr. Duran found his way to Mr. Birch's apartment and he parked his car. *Id.*

At no point on March 8 did officers observe any drug transactions. *Id.* Nor did they observe Mr. Duran and Mr. Birch exchange anything or deliver anything. *Id.* They observed both individuals drive cars around town, eventually meeting at

Mr. Birch's apartment, and they saw Mr. Birch get "something" or "some object" out of his car earlier in the day. *Id.* That's it. Nothing more.

6. March 11, 2017. The government had even less evidence of what happened on March 11, 2017. According to the government, Mr. Duran and Mr. Birch planned to meet at a 7-Eleven to exchange one and one-half ounces of crack cocaine, but Mr. Birch changed the meeting location to a Hamburger Stand. *Id.* at 050a. No officer or witness observed Mr. Duran and Mr. Birch meet that day, however. *Id.* Instead, the government's evidence regarding March 11 was limited to five phone calls recorded that day. *Id.*

On the first call at 6:52 p.m., Mr. Birch told Mr. Duran that he was at Colorado Mills Mall, while Mr. Duran told Mr. Birch that he was at the Cherry Creek Mall buying a prom dress for his daughter. *Id.* Mr. Duran told Mr. Birch that he still had that "one and a heezy" of hard. *Id.*

On the second call at 7:44 p.m., Mr. Duran suggested he and Mr. Birch meet at a 7-Eleven after Mr. Duran dropped off his daughter. *Id.* Mr. Birch told Mr. Duran that he didn't want to drive all that way and to meet him somewhere else. *Id.* Mr. Duran said he would call him back. *Id.*

On the third call, at 8:20 p.m., Mr. Birch complained that he was still at Colorado Mills Mall and would be stuck there for another thirty minutes. *Id.* Mr.

Duran told Mr. Birch to call him when he left and that they could meet at the same spot on Tenth. *Id.* at 051a.

On the fourth call, at 9:01 p.m., Mr. Birch said he was on his way. *Id.* Mr. Duran said he would meet Mr. Birch there. *Id.*

On the final call, at 9:27 p.m., Mr. Birch told Mr. Duran to meet him at the Hamburger Stand because the 7-Eleven had five cameras. *Id.*

7. The government's case agent and its "expert" witness. Because no one ever saw Mr. Duran possess or distribute drugs, and because no drugs were ever recovered or tested, the government's case depended entirely on the phone calls between Mr. Duran and Mr. Birch. In turn, the government relied upon the testimony of Co-Case Agent Kevin Rossi and Agent Donny Peterson. As explained in more detail below, Agent Rossi testified to the subjective conclusions he reached as the case agent, including his belief that Mr. Duran and Mr. Birch were part of a conspiracy to distribute drugs and that Mr. Duran was Mr. Birch's supplier. *Id.* For example, Agent Rossi testified that he "believed" and that the investigation "determined" that "Mr. Duran and Mr. Birch had a very close relationship" and that Mr. Duran was Mr. Birch's "source of supply" and they were involved in drug distribution together. *Id.* He also said: "I believed -- and other investigators as well

believed that Mr. Birch was going to assist Mr. Duran in making crack cocaine from the powder cocaine received from Unc's." *Id.* at 051a–052a.

For his part, Agent Peterson testified over objection as an "expert" in drug code/slang. Among others, Agent Peterson offered the following "expert" opinions:

- Drug dealers don't use the words "cocaine" or "crack" when talking on the phone;
- Within drug trafficking, drug dealers refer to money as "bread," "loot," "paperwork," and "titles";
- A "rack" is a code word "used for a thousand-dollar increment of money";
- Drug dealers commonly refer to cocaine and crack cocaine as "work";
- Drug dealers differentiate between cocaine and crack cocaine by referring to the former as "soft" and the latter has "hard";
- In terms of quantity, "heezy" means half a kilo or half an ounce; and
- By using the terms "raindrop" and "gooey-gooey," Mr. Duran and Mr. Birch were referring to the process of "cooking" cocaine and turning it into crack cocaine.

Id. at 052a–053a.

Applying these opinions to the recorded calls between Mr. Duran and Mr. Birch, Agent Peterson concluded that Mr. Duran possessed cocaine on March 8 and that he was boasting about the quality of his drugs. *Id.* at 053a. Regarding March 11, Agent Peterson opined that Mr. Duran distributed and possessed with intent to distribute one and one-half ounces of "hard," that is, crack cocaine. *Id.*

8. The Tenth Circuit's Decision. The Tenth Circuit affirmed Mr. Duran's conviction for distributing and possessing with intent to distribute cocaine on March 8, 2017. *Id.* at 115a–128a. The Court held that due process does not require the government to present evidence of an observed substance the jury could reasonably infer to be a narcotic, even when the government has no evidence that the defendant contemporaneously acknowledged possession of an unlawful drug. *Id.* at 121a–128a.

The Court distinguished its earlier decision in *United States v. Baggett*, which appeared to require evidence "of *an observed substance* that a jury [could] reasonably infer to be a narcotic." *Id.* at 123a (quoting *United States v. Baggett*, 890 F.2d 1095, 1097 (10th Cir. 1989) (emphasis added)). The Court also distinguished its decision in *United States v. Marquez*, which appeared to require a contemporaneous acknowledgment of possession in cases without evidence of an observed substance that a jury could reasonably infer to be a narcotic. *Id.* at 125a–

126a (citing *United States v. Marquez*, 898 F.3d 1036, 1044 (10th Cir. 2018), *cert. denied*, 139 S. Ct. 654 (2018).

In Mr. Duran's case, the government presented no evidence of an observed substance a jury could reasonably infer to be a narcotic (no witness observed any drugs ever), nor did any of the recorded phone calls include an acknowledgment by Mr. Duran (even in code) of the contemporaneous possession of a narcotic (at most, Mr. Duran spoke in code about the possession of drugs by someone else or a plan to possess drugs in the future, but not on March 8).

Despite these evidentiary shortcomings, and notwithstanding the decisions in *Baggett* and *Marquez*, the Court concluded that there was sufficient circumstantial evidence of possession because a jury could reasonably infer that Mr. Duran:

- obtained powder cocaine from Unc,
- referred to the powder cocaine as "it" (in the statement "I want you to raindrop it"),
- brought the powder cocaine to a meeting with Mr. Birch,
- spent roughly 1-1/2 hours with Mr. Birch, converting the powder cocaine into crack cocaine, and

- received crack cocaine from Mr. Birch (which he still had three days later).

Id. at 128a.

Reasons for Granting the Petition

A. The Tenth Circuit reached a decision contrary to the one reached by the Seventh Circuit.

The Tenth Circuit reached a decision contrary to the one reached by the Seventh Circuit.

In Mr. Duran's case, the Tenth Circuit concluded that when the indictment charges drug possession, the government can meet its constitutional burden of proof without either (1) evidence of an observed substance a jury could infer to be a narcotic or (2) evidence of a contemporaneous acknowledgment by the defendant of possession.

The Tenth Circuit's decision conflicts with the decision of the Seventh Circuit in *United States v. Garcia*, 919 F.3d 489, 491, 503–04 (7th Cir. 2019). In that case, as in Mr. Duran's, the government

> offered no direct evidence that Garcia possessed or controlled cocaine, drug paraphernalia, large quantities of cash, or other unexplained wealth. There was no admission of drug trafficking by Garcia, nor any testimony from witnesses (undercover agents, criminal confederates, innocent bystanders, or surveillance officers) that Garcia distributed cocaine. Instead, the government secured this verdict based upon a federal agent's opinion testimony purporting to interpret several

> cryptic intercepted phone calls between Garcia and Cisneros, a known drug dealer.

Id. at 491. Unlike the Tenth Circuit, the Seventh Circuit found the evidence against Mr. Garcia insufficient. *Id.* at 503–04.

Apart from the Seventh and Tenth Circuits, the Second Circuit has also addressed the quantum of evidence required to prove drug possession when no actual drugs are observed. In *United States v. Bryce*, then-Judge Sotomayor concluded that when no drugs are observed or recovered, "inculpatory statements alone are [in]sufficient to convict [the defendant] of narcotics possession and distribution." 208 F.3d 346, 354 (2d Cir. 1999) (Jacobs, J. & Sotomayor, J.).

The Second Circuit's decision in *Bryce* conflicts with the Tenth Circuit's decision in *Marquez*, which held that an admission to the present possession of drugs *was* sufficient to establish guilt even absent an observed substance a jury could reasonably infer to be a narcotic. *Marquez*, 898 F.3d at 1044–45. In this case, of course, there was no evidence of either an observed substance *or* an acknowledgement of present possession by Mr. Duran.

This Court should grant certiorari to resolve this split in authority.

B. This case is an ideal vehicle for resolving the split.

This case is an ideal vehicle for resolving the split in authority.

Mr. Duran preserved his sufficiency of the evidence contention for appeal. There is no procedural barrier to this Court's reaching the merits.

Moreover, although comparing sufficiency of the evidence cases is often a tricky endeavor—every case is different—here, the material facts of *Duran* and *Garcia* are the same: No witness saw any drugs, and neither Mr. Duran nor Mr. Garcia acknowledged contemporaneous possession of drugs. The Tenth Circuit affirmed Mr. Duran's conviction, while the Seventh Circuit vacated Mr. Garcia's.

Had Mr. Duran acknowledged contemporaneous possession of cocaine (which of course he didn't), that would have been sufficient under the Tenth Circuit's decision in *Marquez*. Such a conclusion, however, would have directly conflicted with Justice Sotomayor's conclusion for the Second Circuit in *Bryce* that "inculpatory statements alone are [in]sufficient to convict [the defendant] of narcotics possession and distribution." 208 F.3d at 354.

Although this Court denied certiorari in *Marquez*, 139 S. Ct. 654 (U.S. No. 18-6618, Dec. 10, 2018), that was before the Seventh Circuit issued its decision in *Garcia*. If it wasn't clear before, the split of authority is obvious now.

C. This case presents an issue of surpassing importance.

This case presents an issue of surpassing importance.

Drug cases comprise more than one-fourth of criminal dockets in the federal courts. The number of drug cases appears to be on the rise. As the Chief Justice recently noted, "[d]rug crime defendants, who accounted for 28 percent of total filings, grew five percent" this past year. 2019 Year-End Report on the Federal Judiciary, at 6.[1] And although every drug case is different, the constitutional requirement of proof beyond a reasonable doubt is not. Whether someone can be convicted of drug possession should not depend on where he lives.

D. The Tenth Circuit's decision is wrong.

Finally, the Tenth Circuit's decision was wrong.

No one saw Mr. Duran possess drugs; no actual drugs were observed, recovered, or tested; no search warrants were issued or executed; and no controlled buys were conducted. No one—not a single person—ever saw Mr. Duran in the presence of drugs.

According to the Tenth Circuit, the jury could reasonably infer that on March 8 Unc provided cocaine to Mr. Duran; Mr. Duran provided the cocaine to Mr. Birch; and Mr. Birch and Mr. Duran turned the cocaine into crack cocaine. This logic falls well short of what due process requires.

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[1]Available at: https://www.supremecourt.gov/publicinfo/year-end/2019year-endreport.pdf (last accessed Jan. 1. 2020).

Under the government's theory, accepted by the Court of Appeals, the jury had to draw no fewer than ***five*** separate inferences to conclude that Mr. Duran was guilty, all without evidence of actual drugs:

(1) Unc was Mr. Duran's supplier;

(2) Unc had cocaine;

(3) Unc provided the cocaine to Mr. Duran;

(4) Mr. Duran provided the cocaine to Mr. Birch; and

(5) Mr. Birch and Mr. Duran cooked the cocaine into crack cocaine.

This pile of inferences is just too high.

Moreover, each inference itself is unreasonable. *See Jackson v. Virginia*, 443 U.S. 307, 317 n.10 (1979) (explaining that "in our system . . . the application of the beyond-a-reasonable-doubt standard to the evidence is not irretrievably committed to jury discretion" and that the "power of the factfinder to err upon the side of mercy . . . has never been thought to include a power to enter an unreasonable verdict of guilty"). Take the first and most crucial inference the Tenth Circuit endorsed: Unc was Mr. Duran's supplier.

But the government has no idea who Unc is or was. No one ever saw Unc in the flesh; no one can identify Unc; no one ever saw Unc with drugs; no drugs were ever purchased or obtained from Unc; no warrants or searches were conducted

related to Unc; no evidence of drug possession or distribution was ever seized from Unc; and Unc's voice was never captured on a wiretap. Unc is a name on a phone call. That's it. Concluding that Unc was Mr. Duran's supplier is pure speculation.

What about the next two inferences, that Unc had cocaine and that he provided it to Mr. Duran? Those inferences are based on Mr. Duran's recorded phone call to Mr. Birch in which he says, "Fucking Unc's is here . . . happy as a motherfucker." Pet. App. 118a. Mr. Birch asks Mr. Duran, "What did he [Unc] get?" *Id.* "Raindrops, drop tops," said Mr. Duran. *Id.*

But the inferences are inconsistent with the testimony provided by the government's own expert on drug slang/code. Agent Peterson testified that "raindrops" referred to the *upcoming* process or end result of cooking cocaine into crack cocaine. *Id.* at 120a. If Mr. Duran is telling Mr. Birch that Unc's "got" "raindrops," he is saying that *Unc* had *crack cocaine*, not that Unc provided *cocaine* to *Mr. Duran*.

The Tenth Circuit's decision ignores the context of Mr. Duran's reference to "[r]aindrops, drop tops" on the March 8 call and what prompted him to make it: Mr. Birch's question to Mr. Duran, "What did he [Unc] get?" Even under the government's "translation" of the so-called drug code, Mr. Duran is not talking

about his own possession of cocaine; he's talking about the possession of crack cocaine by Unc (whoever that is).

The government itself admitted at trial its argument was unreasonable. In closing argument the prosecutor admitted to the jury that Mr. Duran's talk of "raindrops" on March 8 was "virtually nonsensical." *Id.* at 062a.

The next unreasonable inference is that Mr. Duran provided cocaine to Mr. Birch. How did the government claim to know that? Because Agent Rossi said that's what happened. *Id.* at 051a–052a ("I believed -- and other investigators as well believed that Mr. Birch was going to assist Mr. Duran in making crack cocaine from the powder cocaine received from Unc's."). That inference is unreasonable because there's no basis to conclude Unc provided cocaine to Mr. Duran (see inferences 2 & 3); because no one ever saw Mr. Duran exchange anything with, or provide anything to, Mr. Birch; because Mr. Birch was not seen with drugs on March 8; and because Agent Rossi's subjective opinion (improper as it was) lacked personal knowledge and was based on hearsay.

That leaves the final inference, that Mr. Duran and Mr. Birch cooked the cocaine into crack cocaine. The basis for this inference is the final call between them on March 8, in which Mr. Duran says, "We're *about to see* bull shit work,"

Mr. Birch responds, "Yeah, *I'm about to* see that gooey, that gooey, gooey," and Mr. Duran says, "yeah right motherfucker." *Id.* at 063a (emphases added).

It is unreasonable to infer from this exchange, however, that Mr. Duran cooked crack cocaine.

- ***First***, the inference itself depends upon the prior unreasonable inferences that Unc was Mr. Duran's supplier, that Unc had cocaine, that Unc provided cocaine to Mr. Duran, and that Mr. Duran provided cocaine to Mr. Birch.
- ***Second***, the reference to "gooey, gooey" is made by Mr. Birch, not Mr. Duran.
- ***Third***, Mr. Birch says, "*I'm* about to see that gooey, that gooey, gooey;" he does not say, "*we're* about to see that gooey, that gooey, gooey."
- ***Fourth***, the statements are conditional and forward looking. Mr. Duran does not admit (even in code) to presently possessing drugs. *Cf. Marquez*, 898 F.3d at 1044–45 (affirming conviction for possession of methamphetamine based on intercepted phone call in which the defendant "unequivocally" and "reliably" admitted to presently possessing methamphetamine and distinguishing *Bryce* and *Baggett*

because those cases involved recorded calls in which the defendants did not admit to present possession).

Because of the weakness in the government's evidence, the likelihood is that the jury convicted Mr. Duran because of his association with Mr. Birch, whom the government referred to below as "a confirmed drug dealer." *United States v. Duran*, (10th Cir. No. 18-1062), Answer Br. at 13. But that is just guilt by association.[2] *See Bridges v. Wixon*, 326 U.S. 135, 163 (1945) (recognizing "the traditional American doctrine requiring personal guilt rather than guilt by association or imputation before a penalty or punishment is inflicted") (Murphy, J., concurring). And while the evidence of Mr. Birch's "confirmed drug dealing" predated Mr. Duran's involvement in the case by up to one year, and while there was no evidence or allegation that Mr. Duran knew of Mr. Birch's earlier conduct (let alone was involved in it), the risk is too high that Mr. Duran was convicted not because of his own conduct but because he was "associated" with someone else. Due process demands more.

Conclusion

This Court should grant the petition for writ of certiorari.

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[2]In the Tenth Circuit, Mr. Duran did not challenge the sufficiency of the evidence for the conspiracy charge.

Respectfully submitted,

s/ Adam Mueller

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