No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

GERSON SERRANO-RAMIREZ,
Petitioner
vs.
UNITED STATES OF AMERICA,
Respondent

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

APPENDIX

United States v. Serrano-Ramirez, ____ F. 3d _____ (6th Cir. 2020)
(opinion affirming district court judgment)

United States v. Serrano-Ramirez, No. 3:17-cr-00164-1 (M.D. Tennessee May 20, 2019)

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QUESTIONS PRESENTED

Mr. Gerson Serrano-Ramirez was tried and convicted on in the United States District Court for the Middle District of Tennessee. Prior to and during trial, the District Court made various erroneous rulings that prevented Mr. Serrano-Ramirez from receiving a fair trial to which he is entitled.

I. THE DISTRICT COURT ERRED WHEN IT DENIED MR. SERRANO-RAMIREZ'S MOTION TO SEVER OFFENSES

II. THE DISTRICT COURT ERRED WHEN IT IMPROPERLY PERMITTED THE GOVERNMENT TO SOLICT EVIDENCE IN CONTRAVENTION OF FEDERAL RULE OF EVIDENCE 404(b)

III. THE DISTRICT COURT ERRED WHEN IT FAILED TO PROHIBIT THE GOVERNMENT FROM REFERENCING MR. SERRANO-RAMIREZ'S ALLEGED GANG AFFLIATION

IV. THERE IS INSUFFICIENT EVIDENCE TO SUPPORT MR. SERRANO-RAMIREZ'S CONVICTION IN COUNT FIVE OF THE SUPERSEDING INDICTMENT AS THERE WAS NO PROOF THE WEAPON WAS AN AUTHENTIC FIREARM

V. THERE IS INSUFFICIENT EVIDENCE TO SUPPORT MR. SERRANO-RAMIREZ'S CONVICTION IN COUNT EIGHT OF THE SUPERSEDING INDICTMENT AS THERE WAS INSUFFICIENT EVIDENCE HE WAS MAINTAINING A PREMISES FOR THE PURPOSE DISTRIBUTING CONTROLLED SUBSTANCES

VI. THERE IS INSUFFICIENT EVIDENCE TO SUPPORT MR. SERRANO-RAMIREZ'S CONVICTION IN COUNTS FOUR AND SIX AS THERE WAS INSUFFICIENT PROOF PRESENTED TO ESTABLISH THAT MR. SERRANO-

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I. OPINIONS BELOW

The non-reported opinion of the Court of Appeals for the Sixth Circuit and the judgment of conviction in the United States District Court for the Middle District of Tennessee are attached to this petition as the Appendix.

II. JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on May 1, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1), the petitioner having asserted below and asserting in this petition the deprivation of rights secured by the United States Constitution.

III. STATUTORY PROVISIONS INVOLVED

This matter involves violations of the United States Code, specifically, 18 U.S. § 924(c), 21 U.S. § 841, and 21 U.S. § 856. It also involves evidentiary matters related to F.R.E. 404(b) and F.R.C.P. 8 and 14.

IV. STATEMENT OF THE CASE

A. Procedural Background

The matter was briefed for the Sixth Circuit Court of Appeals and, after considering the matter on the briefs submitted, the Court issued an Opinion dated May 1st, 2020, denying all relief. Mr. Serrano-Ramirez now makes this timely application.

B. Statement of Facts

SPECIAL AGENT REGINALD JOHNSON

At trial, the Government Special Agent Reginald Johnson of the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) testified that his agency was involved in investigating Mara Salvatrucha, a gang commonly known as MS-13. (R. 185, Trial Transcript, Vol. II, PageID#1024-1025) As part of various investigations related to MS-13, he came in contact with Mr. Xavier Alvarado who had information about Mr. Gerson Serrano-Ramirez that led Metropolitan-Nashville Police Department (MPD) to seek a search warrant of Mr. Serrano-Ramirez's residence at 88 Palm Tree Court in Nashville, Tennessee, located in the Middle District of Tennessee. (R. 185, T.T., Vol. II, PageID#1029-1031) At about 9 A.M. on August 8th, 2017, ATF along with members of the MPD executed a search warrant at 88 Palm Tree Court. (R. 185, T.T., Vol. II, PageID#1033) Agent Johnson participated in the search and seized a video surveillance system inside the residence which was connected to several cameras inside the residence. (R. 185, T.T., Vol. II, PageID#1037-1038; Ex. #4) He also recovered a cellular telephone in the residence. (R. 185, T.T., Vol. II, PageID#1039-1040; Ex. #5)

Agent Johnson requested and obtained a search warrant to review anything stored on the devices. (R. 185, T.T., Vol. II, PageID#1041-1042) Based on extractions from the system, Agent Johnson reviewed videos recorded over the course of several weeks. (R. 185, T.T., Vol. II, PageID#1045-1046) Agent Johnson, reviewing specific video clips, described seeing Mr. Xavier Alvarado and Mr. Serrano-Ramirez who was holding what appeared to be a rifle. (R. 185, T.T., Vol. II, PageID#1046-1047; Ex.#42) Agent Johnson further described events wherein a third person entered the residence,

Mr. Alvarado was tied up and then choked by the strap of the weapon Mr. Serrano-Ramirez was holding. (R. 185, T.T., Vol. II, PageID#1048-1049; Ex.#43) Agent Johnson described additional scenes wherein Mr. Serrano-Ramirez held Mr. Alvarado's fingers in a pair of pliers. (R. 185, T.T., Vol. II, PageID#1049; Ex.#45) Agent Johnson described scenes from a different video determined to be from August 8th, 2017, where MPD raided the residence and arrested Mr. Serrano-Ramirez. (R. 185, T.T., Vol. II, PageID#1058; Ex.#49) He also described a video taken from one of the cell phones recovered wherein Mr. Serrano-Ramirez appears to be holding a rifle that was later recovered during the search. (R. 185, T.T., Vol. II, PageID#1059-1060; Ex.#39)

Agent Johnson agreed that he did not know Mr. Alvarado prior to Mr. Alvarado making a police report on July 25th, 2017. (R. 185, T.T., Vol. II, PageID#1062) He also agreed that the weapon recovered from 88 Palm Tree Court was not the same weapon used during the incident with Mr. Alvarado. (R. 185, T.T., Vol. II, PageID#1062:1-7) Agent Johnson agreed that, after Mr. Serrano-Ramirez's arrest, there had been a second search of the residence conducted and, during both of the two searches, law enforcement was only able to recover 2.5 grams of marijuana and .27 grams of cocaine which the Agent said may or may not have been a resale amount. (R. 185, T.T., Vol. II, PageID#1064-1066) Agent Johnson had viewed all approximately thirty days worth of footage of the recorded videos and he believed there were additional incidents of Mr. Serrano-Ramirez selling and "manipulating" narcotics contained on those videos, but the jury had not seen any videos other than

those from July 25th and August 7th, 2017, related to what he believed to be drug activities. (R. 185, T.T., Vol. II, PageID#1066-1068) He agreed that, prior to the incident with Mr. Alvarado, there was an hours long period of time when he was drinking alcohol and doing what appeared to be cocaine with Mr. Serrano-Ramirez. (R. 185, T.T., Vol. II, PageID#1069-1070) Agent Johnson agreed that he could not say if the substance Mr. Serrano-Ramirez appeared to be packaging in the video from August 7th, 2017, was narcotics, or some other substance. (R. 185, T.T., Vol. II, PageID#1070)

SPECIAL AGENT STANLEY JONES

Special Agent Jones, having been designated an expert in the drug trade, testified that he had worked for the United States Drug Enforcement Agency (DEA) for approximately twenty years, with law enforcement experience prior to that, and he had had extensive training and experience in the area of illegal narcotics. (R. 185, T.T., Vol. II, PageID#1119-1127)

Agent Jones reviewed Government's Exhibit 42 from July 25th, 2017, and stated the two individuals on the video were nasally ingesting what he thought was cocaine. (R. 185, T.T., Vol. II, PageID#1134-1138) The Agent then testified about a portion of the same video where a third individual entered the room and made what he believed to be a "cash transaction" with Mr. Serrano-Ramirez related to exchange of items in the room. (R. 185, T.T., Vol. II, PageID#1138-1140)

Agent Jones was then asked to review different recorded video clips, Government's Exhibits 46-48, and on those videos he described Mr. Serrano-Ramirez

using what he believed to be a digital scale. (R. 185, T.T., Vol. II, PageID#1140-1141) He then described Mr. Serrano-Ramirez taking a an item wrapped in black cloth and striking it with an object which he claimed was consistent with breaking up a kilogram of cocaine. (R. 185, T.T., Vol. II, PageID#1141) Agent Jones then described Mr. Serrano-Ramirez taking the items from the black cloth and putting portions of it into smaller plastic bags after weighing it on the digital scales, then wrapping the items back up in electrical tape, all of which he described as consistent with drug packaging. (R. 185, T.T., Vol. II, PageID#1141-1147)

Agent Jones acknowledged that he was unable to tell if the substance in the videos was cocaine, heroin, or methamphetamine, and that it was also consistent with the manner in which methamphetamine is packaged, but he believed it to be cocaine. (R. 185, T.T., Vol. II, PageID#1145) He stated that there were numerous items such as weapons, plastic bags, digital scales, and other things that were commonly found in the residences of people in the drug trade. (R. 185, T.T., Vol. II, PageID#1146-1147)

On cross-examination, Agent Jones was showed Government's Exhibit 29, a photograph of the .25 grams of cocaine located in the residence and he believed, by viewing the picture, that it contained single gram amount of cocaine. (R. 185, T.T., Vol. II, PageID#1148-1149) He stated that he was unfamiliar with people weighing very small amounts of cocaine of 3.5 grams or less to insure the exact quantity but a digital scale would help in this if one wanted to be sure of the weight. (R. 185, T.T., Vol. II, PageID#1150-1152) Agent Jones described having used wiretapping,

confidential sources, and surveillance as methods of investigating drugs crimes and track the comings and goings at a suspected residence. (R. 185, T.T., Vol. II, PageID#1153-1154) Agent Jones agreed that a person selling counterfeit controlled substances would want them to look "as close as you can get" to a true controlled substance. (R. 185, T.T., Vol. II, PageID#1155)

XAVIER ALVARADO

Mr. Alvarado testified, through a sworn translator, he had illegally entered the United States from Honduras about six years prior, but had not been promised any assistance from the Government relating to his immigration status in exchange for his testimony. (R. 185, T.T., Vol. II, PageID#1179-1180) Through growing up in Honduras and his work at the bar, he was familiar with and had contact with members of MS-13. (R. 185, T.T., Vol. II, PageID#1180-1181) He was friends with Mr. Serrano-Ramirez, a frequent patron of the bar and a member of MS-13, who informed him that MS-13 controlled things in the bar and the street. (R. 185, T.T., Vol. II, PageID#1181-1183) Mr. Alvarado both purchased and was given cocaine by Mr. Serrano-Ramirez in the bar on a weekly basis and he witnessed other MS-13 members selling drugs in the bar. (R. 185, T.T., Vol. II, PageID#1183-1185)

In the summer of 2017, MS-13 members began harassing patrons at the bar, so Mr. Alvarado, due to his relationship with Mr. Serrano-Ramirez, offered to talk to him. (R. 185, T.T., Vol. II, PageID#1185-1188) They agreed to talk at Mr. Serrano-Ramirez's residence and they arrived approximately 12 A.M. on July 25th, 2017, where they proceeded to drink beer and use cocaine which Mr. Serrano-Ramirez

supplied. (R. 185, T.T., Vol. II, PageID#1189-1190) When discussing problems at the bar, Mr. Serrano-Ramirez stated that the gang would give the orders and "do whatever they want". (R. 185, T.T., Vol. II, PageID#1192) He reviewed Government's Exhibit 42 and confirmed he was present at 88 Palm Tree Court using cocaine on July 25th, 2017, when Mr. Serrano-Ramirez claimed to hear noises from underneath the trailer. (R. 185, T.T., Vol. II, PageID#1192-1193) Mr. Serrano-Ramirez produced an item that appeared to be a rifle. (R. 185, T.T., Vol. II, PageID#1195-1196) He reviewed further video wherein he used more drugs and Mr. Serrano-Ramirez continued to state he heard someone under the house. (R. 185, T.T., Vol. II, PageID#1196-1198) At some point, Mr. Serrano-Ramirez told Mr. Alvarado that he would shoot him with the rifle which he says was loaded. (R. 185, T.T., Vol. II, PageID#1199-1200) On the video, Mr. Alvarado shows him his cell phone to demonstrate he had not talked to anyone and gets onto his knees asking him not to shoot him. (R. 185, T.T., Vol. II, PageID#1200-1201)

Later, Mr. Serrano-Ramirez jumped up and down on his couch asking who is under the residence and then a third party arrived that assisted in tying Mr. Alvarado's hands, but he could not understand this conversation because it was in English. (R. 185, T.T., Vol. II, PageID#1201-1202) Mr. Serrano-Ramirez proceeded to choke Mr. Alvarado with the strap on the rifle and demanded to know who was underneath the house. (R. 185, T.T., Vol. II, PageID#1203-1204) Later, Mr. Serrano-Ramirez placed a plastic bag over his head and suffocated him temporarily while accusing him of working with the police to investigate drugs. (R. 185, T.T., Vol. II,

PageID#1205-1206) At some point, Mr. Serrano-Ramirez held a knife and Mr. Alvarado was told to remove clothing so he could check to see if he was wearing a wire. (R. 185, T.T., Vol. II, PageID#1207-1209) Mr. Serrano-Ramirez had him call his mother so he could say goodbye to her, he sprayed bleach in his face and used a pair of pliers to squeeze his finger. (R. 185, T.T., Vol. II, PageID#1210-1211) Mr. Serrano-Ramirez later told Mr. Alvarado he could leave the residence but he would kill his family if he spoke to the police about the incident. (R. 185, T.T., Vol. II, PageID#1212-1213)

Mr. Alvarado agreed he had not been promised any assistance related to immigration status for his testimony, he had not been removed from the country, he did not know of any proceedings that had begun relating to his immigration status and he was familiar with, and hoped to use, a Government program that permitted victims to remain in the United States. (R. 186, T.T., Vol. III, PageID#1230-1232) He had known Mr. Serrano-Ramirez for several years and visited him socially on multiple occasions, even staying at his house. (R. 186, T.T., Vol. III, PageID#1232-1233) He agreed that before they arrived at 88 Palm Tree Court and after they got there, both he and Mr. Serrano-Ramirez consumed quantities of beer and cocaine for a lengthy period of time. (R. 186, T.T., Vol. III, PageID#1233-1236) He thought, nonetheless, he was sober and he did not think Mr. Serrano-Ramirez was intoxicated either. (R. 186, T.T., Vol. III, PageID#1236-1237) Mr. Alvarado reiterated that for some 30 to 45 minutes, Mr. Serrano-Ramirez walked around the residence claiming to hear noises, thinking that someone is underneath the house, or outside the

windows, and continually asked him if he heard it. (R. 186, T.T., Vol. III, PageID#1238-1239)

Mr. Alvarado stated that, when he discussed the issues at his bar, Mr. Serrano-Ramirez was calm in demeanor and the attack did not start until hours later. (R. 186, T.T., Vol. III, PageID#1239) The reason that the attack began was due to Mr. Serrano-Ramirez's increasing paranoia that someone was underneath his residence after hours of cocaine use and alcohol consumption. (R. 186, T.T., Vol. III, PageID#1239-1240) Prior to this incident, Mr. Alvarado had no intention of reporting any of the illegal activities at the bar to law enforcement, but he cooperated with law enforcement extensively afterwards. (R. 186, T.T., Vol. III, PageID#1240-1244)

On redirect examination, Mr. Alvarado stated he hoped to remain in the United States because he was afraid of gangs and Mr. Serrano-Ramirez accused him of bringing someone to his house repeatedly. (R. 186, T.T., Vol. III, PageID#1245-1246) On re-cross, Mr. Alvarado agreed that Mr. Serrano-Ramirez produced the rifle in response to perceived noises underneath the house. (R. 186, T.T., Vol. III, PageID#1252)

DOUGLAS MAYFIELD

Mr. Mayfield testified that he was an employee of the trailer park which contained 88 Palm Tree Court and, on July 25th, 2017, he had occasion to come into contact with Mr. Alvarado who appeared to have various injuries and no shirt on, events that were recorded on security cameras and introduced as exhibits by the Government. (R. 186, T.T., Vol. III, PageID#1253-1259; Exhibit#72)

On cross-examination, Mr. Mayfield stated he had worked at the trailer park for over two years, he was familiar with the entire property and he did not notice anything unusual or improper about the residence of 88 Palm Tree Court during the summer of 2017. (R. 186, T.T., Vol. III, PageID#1260-1261) He was aware of another unit that had had drug activity in the past and there were many people coming and going from that unit. (R. 186, T.T., Vol. III, PageID#1261-1262)

LAURA HERNANDEZ

Ms. Hernandez worked in the management office of the trailer court on July 25th, 2017, she is fluent in Spanish and she observed Mr. Alvarado on the day he came to the office with multiple injuries and looking frightened. (R. 186, T.T., Vol. III, PageID#1263-1265) She insisted he call the police to make a report after Mr. Alvarado explained to her what had happened to him. (R. 186, T.T., Vol. III, PageID#1272-1274)

Ms. Hernandez stated one of her duties at the trailer park is security, she had been there for at least two years and, during the summer of 2017, she did not notice anything unusual or suspicious about 88 Palm Tree Court which she would have investigated and/or reported to authorities. (R. 186, T.T., Vol. III, PageID#1274-1275) If she had noticed a lot of people coming and going from a unit, a lot of people staying for short periods of time, more people residing there than were on the lease, or any indicia of drug activities, she would have noticed but did not about 88 Palm Tree Court. (R. 186, T.T., Vol. III, PageID#1276)

DETECTIVE ANDREW CHOUANARD

Detective Chouanard worked for the MPD and, in the summer of 2017, was conducting investigations into MS-13 in the Nashville area. (R. 186, T.T., Vol. III, PageID#1284-1285) He specifically was familiar with a member of the gang whose nickname was Frijol, a name previously associated with Mr. Serrano-Ramirez. (R. 186, T.T., Vol. III, PageID#1285-1286) Detective Chouanard spoke with Mr. Alvarado along with other law enforcement on August 3rd, 2017, and, based on that interview, he obtained a search warrant for 88 Palm Tree Court and participated in the search of that residence on August 8th, 2017. (R. 186, T.T., Vol. III, PageID#1293-1295)

On cross-examination, Detective Chouanard stated he was investigating a possible kidnapping, he had reviewed portions of the recorded video from 88 Palm Tree Court, but not all of it, and they recovered 2.23 grams of marijuana and 2.5 grams of cocaine during their search.[1] (R. 186, T.T., Vol. III, PageID#1295-1299) He also participated in a second search several days after Mr. Serrano-Ramirez's arrest that revealed nothing of evidentiary value. (R. 186, T.T., Vol. III, PageID#1299) During the August 8th search, the MPD located several thousand dollars in cash in the residence but it was not seized or deemed to be proceeds from drug activities. (R. 186, T.T., Vol. III, PageID#1299-1300) He agreed that there was no prior investigation into drug activities at that residence. (R. 186, T.T., Vol. III, PageID#1300-1301) The Detective also agreed that, in a drug an investigation, the police would surveil a location and a large volume of people coming and going was often indicative of drug activities. (R. 186, T.T., Vol. III, PageID#1301-1302) There

[1] Prior sections of the transcript discuss .25 grams of cocaine being recovered, but 2.5 would appear to be the accurate amount based on the totality of the record and evidence presented

was no mention of drug activities in the search warrant that the Detective obtained. (R. 186, T.T., Vol. III, PageID#1303)

SPECIAL AGENT BRADLEY GANT

Special Agent Gant worked with the Department of Homeland Security (HSI) and he participated in the search of 88 Palm Tree Court during which he noted the presence of Mr. Alvarado's shoe, the small amount of marijuana, four digital scales, and boxes of ammunition for various types of firearms which were then introduced into evidence. (R. 186, T.T., Vol. III, PageID#1341-1351) Agent Gant testified that he had investigated Mr. Serrano-Ramirez's immigration status and Mr. Serrano-Ramirez had no lawful status in the United States. (R. 186, T.T., Vol. III, PageID#1351-1356)

On cross-examination, he agreed that all the weapons and ammunition were located in the back bedroom and none were located in the central living room area. (R. 186, T.T., Vol. III, PageID#1357)

C. Sixth Circuit Opinion

The Opinion issued by the Sixth Circuit in this matter upheld the rulings of the District court. In its Opinion, the Sixth Circuit, in reference to Mr. Serrano-Ramirez's argument relating his motion to sever the offenses in the indictment because the offenses were improperly joined under F.R.C.P. 8 and, even if they were determined to be properly joined, the prejudice engendered by a joint trial should have warranted severance under F.R.C.P. 14.

The Circuit Court also erred in affirming the District Court's erroneous analysis of other acts evidence that was overly prejudicial for its probative value given the drug related nature of the prior alleged acts and the charges in the instant indictment and should have been excluded pursuant to F.R.E. 404(b). Further, the Government had no other legitimate alternate purpose other than propensity in seeking the introduction of this evidence.

The Circuit Court also erred in affirming the District Court's decision in permitting the Government to elicit evidence related to his purported gang affiliation as a way of explaining his conduct towards the victim in this offense.

The Circuit Court also erred in determining the Government produced sufficient evidence that the "firearm" that served as the factual basis in count five of the indictment was a "firearm" within the statutory definition because the item was never recovered.

The Circuit Court also erred in determining there was sufficient proof as to count eight of the indictment that he was maintaining his residence for drug activities. There is scant evidence of drug distribution, if any, in the record and, even in the light most favorable to the Government, that evidence is insufficient to establish that an important or significant purpose of maintaining the residence was for drug distribution.

The Circuit Court also erred in determining the Government adduced sufficient proof that he was in possession of and/or distributed cocaine in counts four and six. The evidence adduced could not establish that there was any distribution in

count four and the evidence was insufficient to demonstrate he possess cocaine in count six instead of another substance.

STANDARDS OF REVIEW

This Court will apply the abuse of discretion standard in its review of severance and gang references. "A district court abuses its discretion when it relies on clearly erroneous findings of fact, or when it improperly applies the law or uses an erroneous legal standard." *Ross v. Duggan*, 402 F.3d 575, 581 (6th Cir.2004)

Multiple standards of review are used in analyzing a F.R.E. 404(b). Reviewing a 404(b) challenge, the court should first review "for clear error the factual determination that other acts occurred", then secondly "*de novo* the legal determination that the acts were admissible for a permissible 404(b) purpose" and lastly "for abuse of discretion the determination that the probative value of the evidence is not substantially outweighed by unfair prejudicial impact". *United States v. Clay*, 667 F.3d 689, 693 (6th Cir., 2012).

When reviewing the sufficiency of the evidence, this Court will uphold the verdict of the jury unless it would be impossible for any rational trier of fact to find the defendant guilty beyond a reasonable doubt based on the evidence adduced. *United States v. Morrow*, 977 F.2d 222, 230 (6th Cir. 1992).

ARGUMENT

I. THE DISTRICT COURT ERRED WHEN IT DENIED MR. SERRANO-RAMIREZ'S MOTION TO SEVER OFFENSES

The District Court denied Mr. Serrano-Ramirez's motion to sever the offenses in the indictment. (R. 75, Motion to Sever Offenses) In part, F.R.C.P. 8(a) states "[t]he indictment or information may charge a defendant in separate counts with 2 or more offenses if the offenses charge …. are of the same or similar character, or are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan". F.R.C.P. 14(a) provides, in part, that "[i]f the joinder of offenses or defendants in an indictment … for trial appears to prejudice a defendant …. the court may order separate trials of counts" based on an assessment of the issues presented to the trial court. "[F]ailure to meet the requirements of [F.R.C.P. 8] constitutes misjoinder as a matter of law" and, the Government's indictment does not comply, the District Court has "no discretion on the question of severance." *United States v. Hatcher,* 680 F.2d 438, 440 (6th Cir.1982) First, the Court must determine if Rule 8 has been breached and joinder was impermissible in which case severance was mandated. Even if there has been no violation of F.R.C.P. 8, the Court must determine if there has been a violation of F.R.C.P. 14 where joinder was permissible but severance was warranted due to unfair prejudice to Mr. Serrano-Ramirez.

The defense must show a "compelling, specific, and actual prejudice from [the] court's refusal to grant the motion to sever" in order to prevail. *United States v. Driver*, 535 F.3d 424, 427 (6th Cir. 2008); quoting *United States v. Saadey*, 393 F.3d 669, 678 (6th Cir. 2005). Severance should be granted "only if there is a serious risk

that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *Zafiro v. United States,* 506 U.S. 534, 539, 113 S.Ct. 933, 122 L.Ed.2d 317 (1993). Joint trials promote judicial economy and society's interest in the efficient administration of justice when "charges will be proved by the same evidence and result from the same acts." *United States v. Caver,* 470 F.3d 220, 238 (6th Cir. 2006)(quoting *United States v. Beverly,* 369 F.3d 516, 534 (6th Cir. 2004). While "[t]he risk of prejudice will vary with the facts in each case", when considering sufficient prejudice "[n]o matter the adjective employed, …. whatever prejudice a defendant endured …. must be something more than the run-of-the-mill, plain vanilla prejudice that is incident to, or at least likely to arise in, any criminal trial". *Zafiro* 506 U.S. at 539; *United States v. Martinez*, No.06-4407*6 (6th Cir. 2011).

Mr. Serrano-Ramirez motioned the District Court to sever the various counts of the indictment into three sets of offenses to be tried in separately. (R. 79, Motion to Sever Offenses) The Government, for joinder, relied on the provision of F.R.C.P. 8 that the various counts of the indictment should be joined because they "are of the same or similar character". (R. 80, Response to Motion to Sever, Page ID#259) No other permissible reason exists under F.R.C.P. 8 and the facts of the case. However, the Government has no legitimate basis for linking the incidents from July 25th, involving Mr. Alvarado to the allegations arising after the search of his residence on August 7th and 8th. Other than taking place in the same location, the two sets of charges have nothing to do with one another and are not similar in nature. To link

these charges, the Government added count eight of the indictment for the sole purpose of circumventing F.R.C.P. 8 as well as F.R.C.P. 14. By alleging Mr. Serrano-Ramirez used his residence as a drug premises, the Government was able to argue that proof of any drug activities of Mr. Serrano-Ramirez, both at the residence and elsewhere, was necessary to enable them to meet their burden in count eight of the indictment. The mere fact that the Government charged a violation of 21 U.S § 856(a) does not permit them to violate F.R.C.P. 8 and impermissibly join the offenses in the indictment. More succinctly, alleging that 88 Palm Tree Court is a drug premises does not mean that any criminal activity on that premises becomes "of the same or similar character" simply because drugs are involved in either a direct or tangential way.

The proof the Government asserts as evidence of Mr. Serrano-Ramirez's guilt is largely in the form the internal surveillance recordings recovered from his residence. The incidents recorded on July 25th and on August 7th do not support the contention that Mr. Serrano-Ramirez was engaged in selling or possessing narcotics in general, nor does it specifically support the contention that he was maintaining the residence for the purposes of drug sales. The Government must establish that a "significant or important" purpose of the residence was for distributing drugs. *United States v. Russell*, 595 S.W.3d 633, 642-643 (6th Cir.2010) The proof does not support that contention. At most, there are two incidents of either sale or possession of narcotics within two weeks of one another. However, the Government has used these

two incidents and their charging decisions to convince the district court that otherwise unrelated and dissimilar offenses should be tried in the same indictment.

The proof demonstrates that the Government added count eight for the purpose of impermissibly joining the various counts of the indictment under F.R.C.P. 8, despite the dearth of evidence as to count eight in light of the requirements of 18 U.S. § 856(a). This circumvented the purpose of Rule 8 by adding a charge that could not be supported by the proof in the hopes that its addition will allow the Government to then hold a joint trial on all charges regardless of the otherwise impermissibility of the joinder of those charges. The Government's assertion that they are similar in nature is inaccurate as one involved tampering with a witness related to potential disclosure of drug activities at a location unrelated to 88 Palm Tree Court and the other counts involve alleged drug possession at 88 Palm Tree Court. This does not meet the requirements of F.R.C.P. 8 that the offenses be of "the same or similar character" nor does the allegation of maintaining a drug premises tie these dissimilar offenses together and permit joinder. The district court erred in denying the defense request to sever under F.R.C.P. 8. The Government has created misjoinder which requires severance pursuant to *Hatcher* and this Court should reverse the district court's decision.

Notwithstanding the above argument, the various sets of offenses should be severed nonetheless pursuit to F.R.C.P. 14. The admission of the evidence against Mr. Serrano-Ramirez on the offenses from August 7th would be highly prejudicial to him regarding his defense to the charges from July 25th and vice versa. The inclusion

of count eight, which spans the entire timeframe between July 25th or August 7th, creates unfair prejudice to Mr. Serrano-Ramirez for all of the other offenses in the indictment. The plain language of F.R.C.P. 14 states that if the district court finds that joinder "appears to prejudice a defendant" then the district court should take remedial measures, including severance. Evidence and allegations of additional drug and weapons possession and/or sale would be highly prejudicial to him as it relates to each set of charges in this indictment and no remedy is sufficient to alleviate the prejudice other than severance. Admission of multiple alleged drug transactions and/or possessions distracts the "jury from making a reliable judgment about guilt or innocence" as to each incident being tried as *Zafiro* warns against. The risk of confusion for the jury when assessing proof versus propensity provides the Court with the "compelling, specific, and actual prejudice" for severance of offenses as required by the *Driver* court. Evidence that he possessed a weapon and drugs on different dates would make it difficult for the jury to avoid the tendency towards treating this as propensity evidence even if the Court gave curative instructions.

While maintaining that the District Court erred when it did not sever these offenses as a matter of law pursuant to F.R.C.P 8, he further asserts it erred in failing to sever them pursuant to F.R.C.P 14.

II. THE DISTRICT COURT ERRED WHEN IT IMPROPERLY PERMITTED THE GOVERNMENT TO SOLICT EVIDENCE IN CONTRAVENTION OF FEDERAL RULE OF EVIDENCE 404(b)

Federal Rule of Evidence 404(b) bars prior acts evidence introduced "in order to show that on a particular occasion the person acted in accordance with the

character", however, the Rule permits introduction for several alternate purposes. When reviewing Rule 404(b) evidence, the district court uses a three-step process to decide if:

(1) the "other act" actually occurred,

(2) the evidence is offered for a permissible purpose, and

(3) its probative value is not substantially outweighed by unfair prejudice.

United States v. De Oleo, 697 F.3d 338, 343 (6th Cir.2012); See *Clay* 667 F.3d at 696. "In the Rule 404(b) context, similar act evidence is relevant only if the jury can reasonably conclude that the act occurred and that the defendant was the actor." *Huddleston v. United States,* 485 U.S. 681, 689, 108 S.Ct. 1496, 99 L.Ed.2d 771 (1988).

The District Court must determine whether the evidence is offered for a permissible purpose other than character or propensity of the defendant. The Court should recall that the Government may only introduce evidence for one of the alternate purposes if a defendant "has placed, or conceivably will place" that evidence "in issue". *United States v. Bell,* 516 F.3d 432, 442 (6th Cir. 2008). The District Court must engage in a three-part inquiry regarding the proffered evidence. "Evidence of other acts is probative of a material issue other than character if (1) the evidence is offered for an admissible purpose, (2) the purpose for which the evidence is offered is material or 'in issue', and (3) the evidence is probative with regard to the purpose for which it is offered." *United States v. Rayborn,* 495 F. 3d 328, 342 (6th Cir.2007)(quoting *United States v. Jenkins,* 345 F.3d 928, 937 (6th Cir.2003)).

"When prior acts evidence is introduced, regardless of the stated purpose, the likelihood is very great that the jurors will use the evidence precisely for the purpose it may not be considered: to suggest that the defendant is a bad person, a convicted criminal, and that if he 'did it before he probably did it again.'" *United States v. Johnson,* 27 F.3d 1186, 1193 (6th Cir.1994), *cert. denied,* 513 U.S. 1115, 115 S.Ct. 910, (1995). The district court may attempt to insulate the effects of this evidence through a limiting instruction, but this is not "a sure-fire panacea for the prejudice resulting from needless admission of such evidence." *United States v. Haywood,* 280 F.3d 715, 724 (6th Cir.2002). The Court must be cognizant of the difficulty juries have with differentiating an alternate purpose for prior acts and the natural inclination to deem it evidence of the defendant's propensity to commit similar or other criminal offenses. See *United States v. Hardy,* 643 F.3d 143, 161 (6th Cir.2011) (Cole, J., dissenting) (stating that "empirical studies confirm that 'juries treat prior bad acts evidence as highly probative of the charged crime' ") (quoting *United States v. Amaya–Manzanares,* 377 F.3d 39, 49 (1st Cir.2004)); see also Abraham P. Ordover, *Balancing the Presumptions of Guilt and Innocence: Rules 404(b), 608(b) and 609(a),* 38 Emory L.J. 135, 175–78 (1989).

The "term 'unfair prejudice' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." *United States v. Old Chief*, 519 U.S. 172, 180, 117 S.Ct. 644 (1997). "[G]eneralizing a defendant's earlier bad act into bad character and taking that as raising the odds that he did the latter

bad act now charged (or, worse, as calling for preventive conviction even if he should happen to be innocent momentarily)" is a risk that always remains at the core of the equation to determine admissibility. *Id.* at 180-81, 117 S.Ct. 644. The District Court should also consider whether there are alternate sources of evidence that may serve to prove the same facts that the prior acts evidence attempts to support or demonstrate. See *Haywood* 280 F.3d at 723 (6th Cir.2002); see also *United States v. Merriweather,* 78 F.3d 1070, 1077 (6th Cir.1996) ("One factor in balancing unfair prejudice against probative value under Rule 403 is the availability of other means of proof.").

The District Court denied Mr. Serrano-Ramirez's pretrial motion requesting that the Government be prohibited from introducing other alleged drug sales he had engaged in at locations other than his residence and at times that preceded the dates of the indictment. (R. 94, Motion in Limine Other Acts Evidence) Based on this ruling, Mr. Alvarado was permitted to testify about alleged drugs sales and drug possession that he witnessed Mr. Serrano-Ramirez engage in. Pursuant to *De Oleo*, the district court erred in its analysis of required the three-part test. Mr. Alvarado's testimony was that Mr. Serrano-Ramirez had given him cocaine, used cocaine with him and sold him cocaine on different occasions over an undetermined period of time. (R. 185, T.T., Vol. II, PageID#1183-1185) This vagueness does not serve to make clear that the prior acts were, in fact, distribution of a controlled substance, so the Government has not established even the first prong of the test satisfactorily.

The Government asserted that it needed to present this evidence to prove count eight of the indictment, despite the fact that the other acts did not take place at 88 Palm Tree Court, and because they were attempting to prove the intent of Mr. Serrano-Ramirez in his possession of the alleged narcotics in counts four and six. The district court, in denying the motion, relied, in part, on the holding of *United States v. Johnson* to permit evidence of prior drug activities in Mr. Serrano-Ramirez's trial to help establish his intent in these offenses. *Johnson* 27 F.3d. at 1191-1193. (R. 127, Order Denying Motion to Exclude Other Acts Evidence, Page ID#506-507) This is erroneous certainly as to counts four and eight of the indictment which charge him, in part, with the completed criminal acts of distribution and maintaining a premises to distribute controlled substances. The evidence of Agent Jones supports the contention that the Government intended to prove the completed act of distributing and maintaining a premises for distributing, not merely the intent to distribute. The district court stated that it was permitting such evidence under *Johnson* because this was a specific intent crime and not merely the prohibited act and *Johnson* takes pains to state that such prior acts are inadmissible if the crime charged is merely the prohibited act as it is under one theory in count four and under count eight of the indictment. *Id.* at 1192; citing *United States v. Ring*, 513 F.2d 1001 (6th Cir.1975)("In *Ring*, this circuit squarely rejected the rule that would allow the government to introduce other acts evidence simply to prove *mens rea*")

More critically, the district court's ruling overlooks the admonition in *Merriweather*. The Government's theory was many of the items recovered in Mr.

Serrano-Ramirez's residence were indicia of drug sales, there was clear evidence that drugs had been used in the home and were located in the residence when searched and they introduced Agent Jones as an expert in an effort to paint Mr. Serrano-Ramirez's activities as consistent with possession with intent for resale. They had multiple sources of evidence other than the alleged prior acts of Mr. Serrano-Ramirez they used to attempt to meet their burden, but using these alleged prior sales was not necessary and highly prejudicial.

The argument relating to other sources of proof dovetails with the last prong in *De Oleo*. The use of alleged prior drug sales at another location purportedly to prove intent was far more prejudicial to Mr. Serrano-Ramirez than it was probative of his intent for the Government. As the *Johnson* and *Hardy* decisions make plain, a jury is vastly more likely to find Mr. Serrano-Ramirez guilty of the crime charged in this indictment when it heard, for whatever purpose, of prior drug dealing. The District Court abused its discretion in finding the evidence was more probative than prejudicial. Mr. Serrano-Ramirez was overly prejudiced by this evidence given the relatively limited value it brought to the Government's case and he is entitled to a new trial.

III. THE DISTRICT COURT ERRED WHEN IT FAILED TO PROHIBIT THE GOVERNMENT FROM REFERENCING MR. SERRANO-RAMIREZ'S ALLEGED GANG AFFLIATION

Evidence of a defendant's alleged affiliation in a criminal gang may be relevant when such evidence is used to demonstrate the relationship between certain people and that relationship between those parties is an issue in the case. See *United States*

v. Williams, 158 Fed.Appx. 651, 653–54 (6th Cir. 2005); *United States v. Gibbs*, 182 F.3d 408, 429–30 (6th Cir. 1999) (using certain evidence of gang affiliation did not assist proving defendant's participation in charged conspiracy and was inadmissible) Notwithstanding that limited purpose, gang affiliation evidence "is inadmissible if there is no connection between the gang evidence and the charged offense." *United States v. Anderson*, 333 Fed.Appx. 17, 24 (6th Cir.2009); see also *United States v. Newsom*, 452 F.3d 593, 602–04 (6th Cir.2006) (holding that evidence of a gang tattoo was not relevant when the sole charge was being a felon in possession of a firearm). This represents, in essence, a narrow exception to F.R.E. 403 which prohibits evidence where the unfair prejudice substantially outweighs its prohibitive value, tacitly admitting that, otherwise, gang affiliation evidence would violate F.R.E. 403. See *Gibbs* 182 F.3d at 429-430.

Mr. Serrano-Ramirez motioned the District Court to prohibit the Government referencing his alleged gang activities and affiliation. (R. 66, Motion to Exclude Gang References) The Government sought to introduce his alleged gang affiliation in order to explain his actions in threatening Mr. Alvarado. This was both highly prejudicial to Mr. Serrano-Ramirez and not necessary for the Government to prove its case. The decision in cases such as *Gibbs* and *Williams* permits evidence of gang affiliation when it is necessary to explain "the relationship between certain people". In this case, Mr. Alvarado testified that Mr. Serrano-Ramirez and his fellow gang members were disrupting business in the bar where he worked and he was present with him on July 25th, 2017, to discuss this disruptive behavior. This testimony could have

been effectively restricted to sanitize the alleged gang affiliation of Mr. Serrano-Ramirez while still allowing the Government to present its case as to why the threats were made to and believed by Mr. Alvarado. If the district court permitted the Government to solicit evidence of alleged drug dealing by Mr. Serrano-Ramirez in the bar, which it had, and there was testimony about the harassment of the bars' patrons, the reason for the conversation and subsequent threats and assault was apparent without the necessity of mentioning that he and his friends were allegedly part of criminal gang. The information imparted to the jury by Mr. Alvarado related to MS-13 membership and activities was tangential to the Government's case, but it was very prejudicial to Mr. Serrano-Ramirez's ability to receive a fair trial given general public perception of criminal gangs and its perception of MS-13 in particular. This erroneous decision created an unfair trial and represents an abuse of its discretion as it is far afield of the narrow instances permitted by the *Gibbs* and *Williams* decisions. Mr. Serrano-Ramirez is entitled to a new trial on this basis.

IV. THERE IS INSUFFICIENT EVIDENCE TO SUPPORT MR. SERRANO-RAMIREZ'S CONVICTION IN COUNT FIVE OF THE SUPERSEDING INDICTMENT AS THERE WAS NO PROOF THE WEAPON WAS AN AUTHENTIC FIREARM

Failure to prove even one of the essential elements of an offense beyond a reasonable doubt is fatal to the Government's ability to supply sufficient evidence to support a conviction for that offense.

18 U.S. §921(a)(3) defines the term "firearm" as:

> (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Such term does not include an antique firearm.

18 U.S. §924(c)(1)(A) provides that it is a violation for:

> any person who, during and in relation to any crime of violence or drug trafficking crime ….. uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm

The Government must demonstrate a defendant's use or carry a "firearm" within the definition provided in 18 U.S. §921(a)(3).

The proof showed that Mr. Serrano-Ramirez possessed an item in several of the video clips from July 25th, 2017, that were presented to the jury which appeared to be a rifle. (R. 185, T.T., Vol. II, PageID#1045-1049; Ex. #42) However, Agent Johnson's testimony was clear that this supposed firearm was different in style than the one recovered during a search of his residence on August 8th, 2017. (R. 185, T.T., Vol. II, PageID#1063:1-7) Agent Johnson had the following exchange with defense counsel related to the item that appeared to be a rifle from the video with Mr. Alvarado:

> Defense Counsel: Now, the video -- the very short one from the cell phone that we just saw, you stated that that weapon was the same one that was recovered from 88 Palm Tree Court?
>
> Agent Johnson: Yes.
>
> Defense Counsel: But I'm correct in that the weapon that was on the video with Mr. Alvarado is not the same one; is that correct?
>
> Agent Johnson: That's correct.

The item that was used in the video clips from July 25th, 2017, was never introduced into evidence at the trial and, as such, the Government failed to present any evidence to the jury that the item was actually a firearm within the definition of 18 U.S. §921(a)(3). The Government failed to prove an essential element of the offense and has failed to prove beyond a reasonable doubt that Mr. Serrano-Ramirez violated 18 U.S. §924(c)(1)(A)(ii). Without some form of proof that the item in the video from July 25th, 2017, was an actual firearm, no reasonable jury could conclude, merely on the appearance of the item from the video and nothing more, that it was a "firearm" within the statutory definition. Further, neither Mr. Alvarado's assertion that it was a firearm, nor that Mr. Serrano-Ramirez threat to shoot him is sufficient to establish that it was a firearm within the statutory definition. Mr. Alvarado was not qualified as a firearms expert and no testimony demonstrated any familiarity with firearms on his part as well as the circumstances under which he observed the item, namely in the middle of being attacked, were poor. If this type of lay evidence was sufficient to sustain a conviction for firearms possession by itself, the Government would not need, and did for counts one, seven and nine in this indictment, to use a firearms expert to demonstrate that a firearm that was actually recovered is, in fact, a genuine and operable firearm. The evidence adduced by the Government as to this count, which is limited to the lay assertions by Mr. Alvarado that he thought the item was a firearm, is insufficient to support a conviction on this count. This Court should dismiss this count of the indictment and vacate the judgment in Count Five.

V. THERE IS INSUFFICIENT EVIDENCE TO SUPPORT MR. SERRANO-RAMIREZ'S CONVICTION IN COUNT EIGHT OF THE SUPERSEDING INDICTMENT AS THERE WAS INSUFFICIENT EVIDENCE HE WAS MAINTAINING A PREMISES FOR THE PURPOSE DISTRIBUTING CONTROLLED SUBSTANCES

In order for the Government to prove the offense in Count Eight of maintaining a drug-involved premises under 21 U.S.C. § 856(a), they are required to present proof that Mr. Serrano-Ramirez "knowingly open[ed], lease[ed], rent[ed], use[d], or maintain[ed] any place, whether permanently or temporarily, for the purpose of manufacturing, distributing, or using any controlled substance." The Sixth Circuit has stated, in reference to the statutory language of the term "purpose" in 21 U.S. § 856(a):

> the definition of 'purpose' adopted by the district judge—that the government need only prove that the defendant's drug-related purpose for maintaining a premises be 'significant or important'—is the proper definition of 'purpose' in this circuit in the context of § 856

Russell, 595 S.W.3d at 642-643. (6th Cir.2010) The *Russell* court further clarified that its ruling as it relates to the "use" of controlled substances in a residence stating:

> Each court to have addressed this issue has agreed that the "'casual' drug user does not run afoul of [§ 856] because he does not maintain his house for the purpose of using drugs but rather for the purpose of residence, the consumption of drugs therein being merely incidental to that purpose."

Russell, 595 S.W.3d at 643; quoting *United States v. Lancaster*, 968 F.2d 1250, 1253 (D.C.Cir., 1992)

The proof as to count eight comes primarily from the videos recovered at the residence. The videos have no audio, there was no police investigation of the

residence at the time of the alleged possession and exchange that would support the contention that he was distributing narcotics from the residence, there are no statements from Mr. Serrano-Ramirez or his co-defendant that would support this assertion and very little recovered during the search of the premises would support the assertion that the residence was being maintained for the purposes of drug sales. Even taken in the light most favorable to the Government, the proof does not support that a "significant" purpose of 88 Palm Tree Court was for distributing drugs as *Russell* requires. While the Government can prove that controlled substances were used at the residence, there was no proof in the record of anyone manufacturing controlled substances on the premises. Further, the "use" of controlled substances by Mr. Serrano-Ramirez and Mr. Alvarado, as well as the small amount of cocaine located in the search, support the assertion that they were "casual" drug users that this statute was not designed to punish. The Government has also failed to present adequate proof to demonstrate, beyond a reasonable doubt, that a significant or important purpose for Mr. Serrano-Ramirez maintaining 88 Palm Tree Court was for the distribution of controlled substances. The only instances in all of the record, gleaned from the thirty days of footage recorded, are the incident from July 25th, 2017, with the alleged exchange between Mr. Serrano-Ramirez and the third-party individual and the incident from August 7th, 2017, where Mr. Serrano-Ramirez is allegedly packaging drugs, incidents which took place approximately two weeks apart. The Government cannot prove beyond a reasonable doubt that a significant or important purpose of the residence was the distribution of controlled substances on

this basis. Even if all the other allegations in the indictment are true, two incidents of drug distribution or possession with intent to distribute in thirty days does not equate to a significant or important use of the premises. Mr. Serrano-Ramirez is entitled to relief and this Court should dismiss count eight of the indictment.

VI. THERE IS INSUFFICIENT EVIDENCE TO SUPPORT MR. SERRANO-RAMIREZ'S CONVICTION IN COUNTS FOUR AND SIX AS THERE WAS INSUFFICIENT PROOF PRESENTED TO ESTABLISH THAT MR. SERRANO-RAMIREZ WAS IN POSSESSION OF A CONTROLLED SUBSTANCE

21 U.S. § 841(a) provides that "it shall be unlawful for any person knowingly or intentionally to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute or dispense, a controlled substance". In this matter, Mr. Serrano-Ramirez was convicted of possession with intent to distribute a controlled substance in counts four and six of the indictment. The proof was insufficient to convince any rational trier of fact beyond a reasonable doubt that he "distributed" cocaine in violation of the statute in count four of the indictment. Likewise, the proof was insufficient to convince any rational trier of fact beyond a reasonable doubt that he was in possession of cocaine with intent to distribute as to the proof in count six.

In count four, the Government relies on the testimony of Mr. Alvarado, Agent Johnson and Agent Jones as it relates to an encounter Mr. Serrano-Ramirez had with a third individual on July 25th, 2017, at his residence as the basis for the conviction. Mr. Alvarado described a third party arriving at the residence during the assault and assisting in tying him up, but did not know what he and Mr. Serrano-Ramirez discussed because the conversation was in English. (R. 185, T.T., Vol. II,

PageID#1201-1202) Agent Johnson merely describes the scene wherein a third individual enters the residence and assists in tying up Mr. Alvarado. This testimony is an insufficient basis to support a conviction for this count. (R. 185, T.T., Vol. II, PageID#1048-1049; Ex. #43) Agent Jones testified, based on his review of the video in Exhibit 43, that he believed there was a "cash transaction" taking place between Mr. Serrano-Ramirez and the third individual that entered the apartment. (R. 185, T.T., Vol. II, PageID#1139-1140; Ex. #43) This is also insufficient to establish guilt beyond a reasonable doubt. A witness with no personal knowledge of what transpired and no tangible proof that there was an exchange or that that exchange was for cocaine or that that exchange constituted distribution within the meaning of the statute is an insufficient basis to support the jury's verdict in count four.

In support of its conviction in count six of the indictment, the Government relies on the video clips from August 7th, 2017, in Government's Exhibits 46-48. Agent Jones stated that the activities by Mr. Serrano-Ramirez recorded in the videos wherein he takes an unknown substance, beats it with an object, weighs it, and places it into separate smaller bags appeared to be most consistent with cocaine sales, but he acknowledged that he could not say whether the substance in the video was cocaine, methamphetamine, heroin or a counterfeit controlled substance. (R. 185, T.T., Vol. II, PageID#1141-1147) This information was the entirety of the proof to support this charge and is insufficient for any rational trier of fact to find Mr. Serrano-Ramirez guilty of the charged offense. Agent Jones admitted that the substance in the video could have been either multiple other controlled substances

other than cocaine, or a non-controlled substance, no rational trier of fact could determine that no reasonable doubt existed as to whether the substance in question was cocaine. He also stated the activities were consistent with packaging methamphetamine. This Court should overturn the jury's verdict due to the absence of sufficient evidence and dismiss the conviction offense in count six of the indictment.

CONCLUSION

For the aforementioned reasons, Mr. Serrano-Ramirez prays that this Honorable Court will grant his request for a writ of certiorari in order to review the questions of sufficiency of the evidence presented to support the conviction offenses and the various erroneous and prejudicial evidentiary rulings by the District Court, affirmed by the Circuit Court, that created reversible error.

Respectfully submitted,

/s/ Manuel B. Russ
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CERTIFICATE OF SERVICE

I certify that the foregoing writ of certiorari and the accompanying appendix has been served via electronic mail upon counsel for the Respondent, Mr. Ahmed Safeeluah, Assistant United States Attorney, Office of the United States Attorney, 110 Ninth Avenue South, Suite 961-A, Nashville, TN 37203, and Mr. Noel Francisco, Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Avenue, N.W., Washington D.C. 20530-0001, this 15th day of July, 2020.

/s/Manuel B. Russ
Manuel B. Russ