NO.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2020

ORISTEL SOTO-PEGUERO,

PETITIONER

V.

UNITED STATES OF AMERICA,

RESPONDENT

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

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December 22, 2020

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QUESTION PRESENTED FOR REVIEW

Whether the court erred when it denied Petitioner's motion to suppress evidence discovered during an illegal search of Petitioner's residence on the basis that the evidence was independently discovered, the following day, during a search pursuant to a valid warrant. This decision was erroneous because the illegally obtained evidence, a firearm and two kilos of heroin, was included in the detective's affidavit in support of the warrant and presented to the Magistrate and affected her decision to issue the warrant. Moreover, the failure to suppress the evidence sullies the prophylaxis of the Fourth Amendment because the officers illegally searched Petitioner's residence and then falsely testified about the search at the suppression hearing and at trial.

Whether the district court erred when it enhanced Petitioner's sentence under USSG §3B1.1(c) for a leadership role in the conspiracy to distribute heroin based on the single phrase "I am sending my wife" in reference to a delivery of heroin to a coconspirator. This single phrase does not meet the government's burden of proving by a preponderance of the evidence that Petitioner "exercised control over, organized, or was otherwise responsible for superintending the activities of" his common law wife.

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The Petitioner, Oristel Soto-Peguero, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered on October 19, 2020.

OPINION BELOW

On October 19, 2020, the Court of Appeals entered its Opinion affirming the Petitioner's conviction and sentence. Judgment is attached at Appendix 1.

JURISDICTION

On October 19,2020, the United States Court of Appeals for the First Circuit entered its Opinion affirming Petitioner's conviction and sentence. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitutional Amendment V:

> No person shall…be deprived of life, liberty, or property without due process of law…

STATEMENT OF THE FACTS

This is a Petition for Certiorari following a appeal from a conviction after trial and sentence to one count of Possession with Intent to Distribute 100 grams or more of heroin, in violation of 21 U.S.C § 841 (a)(1), one count of Possession with Intent to Distribute a kilogram or more of heroin, in violation of 21 U.S.C. § 841 (a)(1), and one count of Conspiracy to Distribute and Possess with Intent to Distribute one kilogram or more of heroin, in violation of 21 U.S.C. 846, and one count of Use of a Firearm during and in relation to a drug offense, in violation of 18 U.S.C. § 924 (c). Petitioner was charged in an eight-count superseding indictment returned on March 23, 2016. (D.E. at 9 No. 82).

On April 2, 2016, Petitioner was convicted after trial to counts two, three, five and eight of the indictment. (D.E. at 17, No. 217). Petitioner was found not guilty of count 6, Conspiracy to Distribute and Possess with intent to distribute one kilogram or more of heroin with Luis F. Guzman-Ortiz, in violation of 21 U.S.C. §846. Count 7, Illegal Possession of a Firearm, in violation of 18 U.S.C. 922 (g)(1) was dismissed prior to trial. (D.E.at 12, No 132).

Introduction

In mid-January of 2015, the Drug Enforcement Administration (DEA) began a wiretap investigation of a suspected heroin trafficking organization operated by Eddyberto Mejia-Ramos. Intercepted communications between Mejia-Ramos and

Petitioner led the government to suspect Petitioner and his girlfriend, Mercedes Cabral were selling heroin to Mejia-Ramos.

On July 6, 2015, an intercepted a call led DEA agents to believe that Petitioner, and his common law wife, Cabral, were delivering heroin to Mejia-Ramos. Agents stopped Ms. Cabral and searched the car she was driving and discovered a kilogram of heroin. Minutes after the stop, police officers surrounded Petitioner's home and without a warrant, forcibly entered the home. They searched the home and discovered one kilogram of heroin and a small handgun. The next day, after the entry and search of the home agents applied for and were granted a warrant to search the residence.

Petitioner was arrested the same day and was indicted on July 9, 2015. A superseding indictment was returned on March 23, 2016. (D.E. at 4. 9, Nos. 6, 82).

The Suppression Motion

On December 12, 2016, Petitioner filed a Motion to Suppress and a Memorandum of Law in Support of the Motion to Suppress. Petitioner moved to suppress all wiretap communications intercepted on target telephone 2 and 4, all evidence seized from the stop of the car driven by Ms. Cabral and the searches of the apartment located at 632 Norwest Lane, Norwood, Massachusetts. (Defendant's Motion to Suppress and Memorandum of Law in Support, 12/12/16, [hereinafter "Defendant's Memorandum at __"], D.E. at 11, Nos. 118, 119). The

Petitioner argued, inter alia, that no exigent circumstances justified the police's entry into Petitioner's home. Petitioner argued that delaying the entry and search of the home to obtain a warrant would not have posed "a great likelihood that evidence would be destroyed." (Defendant's Memorandum at 12). Petitioner also argued that even if the police were justified in entering Petitioner's home to secure it, "the officer's subsequent decision to search under the auspices of conducting a "protective sweep "is unsustainable." (Defendant's Memorandum at 13). Petitioner argued that the second search pursuant to a warrant was tainted by the illegality of the first search. (Defendant's Memorandum at 16).

The government filed a Response to the Motion on December 22, 2016. The government requested the district court deny the motion without a hearing. (Government's Response to Defendant's Motion to Suppress, 12/22/19, [hereinafter "Government's Response at __"], D.E. at 12, No 123). The government argued exigent circumstances existed to enter and secure Petitioner's home because it was necessary to secure the residence to prevent the destruction or removal of evidence. (Government's Response at 25). The government argued the protective sweep was justified because a shot was fired through the door while agents attempted to break down the door and that the agents' actions, in searching the residence, did not exceed the proper scope of a protective sweep. (Government's Response at 28-29). And in any event, the evidence uncovered

during the sweep would have been inevitably discovered pursuant to the warrant. (Government's Response at 30). The government argued that "if the discovery of the heroin and firearm is excised from the affidavit in support of the search warrant, there is still overwhelming probable cause to justify the issuance of the warrant" (Government's Response at 30-31).

Petitioner filed a reply to the government's response with a supporting affidavit from Petitioner. (Reply in Support of Defendant's Motion to Suppress, 1/17/17, [hereinafter "Reply at __"] D.E. at 12, No. 126) The Reply alleged facts significantly different from the facts alleged in the government's motion and from the grand jury testimony of Detective Kevin Mahoney and Agent Angelo Meletis, which the government attached to its response. (Reply at 7-11, Government's Response, Exhibit 1 and 2, D.E. at 12, Nos 123-1 and 123-2). Petitioner requested a hearing on the suppression motion. (Reply at 1). The government filed a Response to Defendant's Reply. (Government's Motion For Leave to File a Response to Defendant's Reply, and Response to Motion, 1/19/17, [hereinafter "Response to Reply, at __"), D.E. at 12, No 129).

Suppression Hearing

On January 19, 2017, the district court held a hearing on Petitioner's Motion to Suppress. (D.E. at 12, No. 130, 131). The parties jointly agreed that issue of suppression of the wiretap communications could be decided based on the

affidavits that were submitted in support of the application to intercept wire communications and there would be no testimony on that issue. (Hearing on Motion to Suppress, Day One, 2/6/17, at 7-8, D.E. 12, No. 135, [hereinafter "S.H. Day One at __"]).

In the early part of 2015, the Drug Enforcement Agency (DEA) began an investigation of Eddyberto Mejia-Ramos, a resident of Tauton Massachusetts. The DEA obtained wiretaps of Mr. Mejia-Ramos telephones because they suspected he was distributing heroin. (S.H. Day One at 13). In April of 2015, the DEA identified Petitioner and his girlfriend Mercedes Cabral as a new source supplying heroin to Mr. Mejia-Ramos. (S.H. Day One at 15,16,). Petitioner and Ms. Cabral lived at 632 Northwest Drive in Norwood Massachusetts. (S.H. Day One at 17).

The DEA continued to monitor Mejias-Ramos' phone. On July 6, 2015 agents intercepted several phone conversations between Mejias-Ramos and Petitioner. (S.H. Day One at 17). Agents believed that Ms. Cabral would be delivering heroin to Mejias-Ramos that day. The first conversation alerting agents to a potential delivery was intercepted at 1:43 pm. (S.H. Day One at 29, Exhibit 2,). In the mid to late afternoon, approximately 10-15 law enforcement officers were placed outside the front and back of Petitioner's residence and charge with surveilling the residence. (S.H. Day One at 66, 67,78, S.H. Day Two at 20). At approximately 9:30 pm following a phone call from Petitioner to Mejias-Ramos,

informing Mejias that Ms. Cabral was on her way to Tauton, the officers observed Ms. Cabral leave the Northwest Drive residence.

Agents followed the car Ms. Cabral was driving and instructed Massachusetts State Police to stop the car. (S.H. Day One at 20, 22). The police stopped and searched the car. On the front seat of the car they found Ms. Cabral's pocketbook. They opened the pocketbook and found 1 kilogram of heroin. (S.H. Day One at 25, 31, 37, 56).

Immediately upon the seizure of the heroin, the agent in charge, Special Agent Carl Rideout, instructed the agents "to secure 632 Northwest Drive". Agent Rideout testified that "to secure" meant to "freeze the scene so I could go and apply for a search warrant for the location." (S.H. Day One at 25, 28, 40, S.H. Day Two at 19).

Agents and officers at the residence approached the residence within minutes of the car stop. The officers approached the house and knocked on the door, calling out "police". They knocked three to four times, twice (S.H. Day One at 83, 84, S.H. Day Two at 24). They did not hear anything from inside the apartment as they knocked. (S.H. Day One at 69, 84, 85, S.H. Day Two at 23). Within two minutes the officers began to ram the door with a pole-shaped device (S.H. Day One at 70). They rammed the door five to six times when a shot came through the front door. None of the officers were injured. (S.H. Day One at 71,

S.H. Day Two at 25). The officers continued to ram the door but were unsuccessful in breaking the door open. Officers stationed at the back of the house then entered the house by breaking the glass sliding doors at the rear of the house. (S.H. Day One at 71, S.H. Day two at 27). The officers from the rear of the house let the officers at the front into the residence, both teams of officers searched the first floor for any people, but no one was present on the first floor. The officers called upstairs and ordered anyone upstairs to crawl down the stairs. Petitioner and Guzman-Ortiz crawled down the stairs backwards. (S.H. Day One at 72, 88, S.H. Day Two at 28). Petitioner and Guzman-Ortiz were then arrested. (S.H. Day One at 72).

Special agent Angelo Meletis and Detective Kevin Mahoney then went upstairs. They entered the front bedroom. It was sparsely furnished with only an air mattress. (S.H. Day One at 73). The officers searched the area, making sure that no one was in the closet or around the bed. Detective Mahoney testified that "I saw a block of an unknown object that I believe was wrapped like I have seen kilo packages before, half kilo packages sticking out of the floor vents below the window". (S.H. Day One at 74, 91). "It was right in the floor beneath that window. It's an air conditioning and heating vent on the floor, and the grate was not on, and sticking out of that vent was that taped wrapped object.". (S.H. Day One at 74, 77,). Agent Meletis also testified that a rectangular package was protruding out of

the air vent. And that the air vent had no cover on it. (S.H. Day Two at 30, 31,) When the court queried if the block was "above the level of the floor, the witness said it was. (S.H. Day One at 74). The detective testified that he pulled the wrapped object out of the vent and discovered a firearm beneath it. (S.H. Day One at 75, S.H. Day Two at 33). The Detective stated that the vent was a hole that went all the way down to the first floor. (S.H. Day One at 76, 93). Detective Mahoney testified he looked inside the vent for his own protection (S.H. Day One at 75, 93, 94). He denied that he was "searching" the vent for the gun. (S.H. Day One at 94, 95). The detective admitted sticking the drugs and gun in an open vent with the drugs sticking out "was not a very good hiding place" (S.H. Day One at 95).

The second officer, Agent Angelo Meletis, searched the second bedroom on that floor. The agent described a fully furnished bedroom. (S.H. Day Two at 31). The agent testified that between the bed and the nightstand there was a black plastic bag which was "partially closed". The agent opened that bag "to determine that there wasn't any other weapon in the house" and discovered heroin in the bag. (S.H. Day Two at 32).

Petitioner testified at the hearing. Petitioner testified that the police did not announce themselves as they testified. Rather they immediately began breaking the door down. Petitioner said he thought he was being robbed by other drug dealers and he fired one shot through the front door. (S.H. Day Two at 58-60,). In

direct opposition to the testimony of Detective Mahoney and Agent Meletis, Petitioner said he ran upstairs with Mr. Guzman-Ortiz and hid the heroin in the heating vent in the front bedroom.[1] (SH Day Two at 60-61). He stated that he put a t-shirt in the vent then the gun and then the drugs. Then he placed the cover back on the vent. (S.H. Day Two at 61,63, 65). Petitioner said he had previously practiced hiding the drugs and gun in the vent because he thought it was a good hiding place. He stated he practiced with putting the t-shirt in first because otherwise the items would drop all the way down to the first floor. (S.H. Day Two at 63, 64. 67). After the cover was in place the drugs and gun were not visible (S.H. Day Two at 66). Petitioner said the vent cover had tabs on either end that clicked into place when the vent cover was removed or replaced. (S.H. Day Two at 67). Petitioner and Guzman-Ortiz hid in a closet but when the officers told them to come downstairs, they complied. The officers then went upstairs and Petitioner who was handcuffed remained in the living room. Petitioner heard furniture breaking upstairs. (S.H. Day Two at 71, 72). The officers called downstairs "Bingo under the kilo we found a gun". (S.H. Day Two at 71). Petitioner testified that his bed his bed was intact before the officers went upstairs, not broken apart as it appeared in the pictures of the room taken the next day. (S.H. Day Two at 68, 70). Petitioner stated the drugs found in his bedroom were not located between the

[1] Defendant testified he only realized he wasn't being robbed when he saw

bed and the nightstand but were a plastic bag in the bottom drawer of the nightstand together with some money. (S.H. Day Two at 68-69, 72).

After Petitioner and Mr. Guzman-Ortiz were arrested and taken from the house the officers locked the house and stationed themselves outside overnight to ensure that no one entered the house. (S.H. Day Two at 34).

The Search Warrant

The next morning, Agent Rideout applied for a warrant to search the house at 632 Norwest Lane. (S.H. Day One at 42). In his affidavit in support of the search warrant for 632 Northwest Drive, Agent Rideout stated probable cause existed to believe that heroin and evidence of heroin distribution was stored in the house. (Government Exhibit 3, Affidavit of Carl Rideout, July 7, 2015, at 3, [hereinafter "Affidavit at __"}). Agent Rideout stated that Petitioner and Ms. Cabral resided at 632 Norwest lane. In the course of a wiretap investigation, Ms. Cabral was observed delivering heroine to Mejia-Ramos. (Affidavit at 3). Agent Rideout stated that Petitioner took a trip to New York City, which the agent believed was for the purpose of drug trafficking activity, although no drug trafficking was observed. (Affidavit at 4). Rideout detailed several telephone calls between Mejia-Ramos and Petitioner that he "believed concerned requests for a large quantity of heroin." (Affidavit at 5). And that after such calls Ms. Cabral or

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the officers at the glass sliding back door (S.H. Day Two at 59-60).

Petitioner was observed driving to Mejia-Ramos house or his mother's house. (Affidavit at 6-8). In his affidavit Rideout stated that on July 2, 2015, Petitioner called Mejia-Ramos and told him he had "pesos of some shit left" and seemed ask Mejia-Ramos if he wanted to buy it. Although nothing in this conversation refers to additional heroin at Petitioner's residence, Agent Rideout opines in the affidavit that this conversation concerned Petitioner supplying heroin to Mejias-Ramos and "I further believe that [Petitioner] is indicating that he has additional heroin in his possession, most likely at his residence, which is the premises." (Affidavit at 8-9).

In the affidavit Rideout details the conversations to set up the delivery on July 6, 2015 which ultimately resulted in the police stopping Ms. Cabral's car and recovering a kilogram of heroin. (Affidavit at 9-10). Rideout details the law enforcement's subsequent entrance into the residence and then states "During the security sweep, officers observed in plain view two large brick shaped objects believed to be kilograms of heroin, one in each bedroom. An officer moved one of the bricks and observed a firearm beneath it." (Affidavit at 11) (emphasis added).

Post Hearing Pleadings

Both the government and Petitioner filed post hearing briefs. (D.E. at 13, No. 141, 142). The government acknowledged the discrepancies in the testimony of the Agent Meletis and Detective Mahoney and that of Petitioner concerning whether or not the two kilograms of heroin were "in plain view" and whether or

not the officers announced their presence (Government's Post-Hearing Brief in Response to Defendant's Motion to Suppress at 33, [hereinafter Govt's Post Hearing Response at __"]). However, the government argued there was "no reason to discredit the testimony of Detective Mahoney and SA Meletis" because their testimony was "consistent, reasonable, and consistent with standard police practice" and because "Mahoney admitted he moved the heroin to discover the firearm and Meletis admitted he moved the bag to discover the heroin in the back bedroom." (Govt's Post Hearing Response at 35). The government acknowledged that the discovery of the firearm and the heroin was made part of the affidavit in support of the search warrant but stated that if the evidence was excised from the affidavit there was still probable cause to justify issuance of the warrant. (Govt's Post Hearing Response at 35-36).

Petitioner underlined the discrepancy between the officer's testimony and Petitioner's testimony. Petitioner argued that the officer's testimony standing alone shows that they were searching for evidence and not conducting a protective sweep when they found the drugs and firearm. (Post-Hearing Brief in Support of Defendant's Motion to Suppress at 13, [hereinafter Defendant's Post-Hearing Brief at__]). Agent Meletis testified he moved the heroin to reveal the gun and Detective Mahoney testified he opened the bag to discover the heroin. Id. Petitioner however, also argued that the officers were untruthful when they

testified the heroin was visibly protruding from the vent or that the bag in the second bedroom was partially open on the floor. Petitioner argued it was not believable that the Petitioner, who had practiced placing the drugs in the hiding place, even to the point of placing a t-shirt in the vent to prevent the drugs from falling through to the first floor, would have left the drugs protruding from the uncovered vent. Petitioner argued that the detectives testified the vent cover was missing, but in fact the vent cover was photographed in the bedroom, lying on the floor. Petitioner also argued that there was plenty of time between running upstairs and surrendering to completely hide the drugs. (Defendant's Post-Hearing brief at 14-15). Moreover, the next day when the officers "meticulously photographed the scene to document the "way things were" they took no photos of how the vent appeared when the drugs were supposedly protruding from it or when the gun was tucked away inside." (Defendant's Post-Hearing Brief at 15). Petitioner argued that applying the inevitable discovery rule to the officer's misconduct would sully the prophylaxis of the Fourth Amendment. (Defendant's Post-Hearing Brief at 18).

The Court's Decision

The court held that exigent circumstances justified the warrantless entrance into 632 Norwest Lane. (Memorandum and Order, 5/9/17, at 14, D. E. at 14, No. 159, [hereinafter "Order at __"], Addendum at 14). The court found that Cabral's arrest and her subsequent failure to return to 632 Norwest while being unreachable

gave rise to a reasonable belief that Petitioner would have disposed of the evidence before police obtained a warrant. (Order at 16, Addendum at 16).

The court also held that it "was not persuaded by the officers' account that a block of heroin was sticking out of a floor vent in the front bedroom." The court also did not credit the officer's testimony that the bag in the back bedroom containing heroin was lying on the floor and not in the drawer of the nightstand. "I do not resolve the conflicting evidence as to whether a bag in the back bedroom containing heroin was in a drawer or next to the bed." (Order at 19, Addendum at 19).

Rather, the court found that the government's own version of events went beyond the scope of a protective sweep, "manipulating an object in a vent and opening a bag goes beyond the scope of a protective sweep." (Order at 19, Addendum at 19). Nonetheless the court did not suppress the evidence under the theory that the evidence would have been inevitably discovered. Even though the evidence unlawfully discovered in the apartment was used to obtain the search warrant, the court found that "the officers had sufficient probable cause by the time they began the protective sweep to obtain a warrant without the evidence they found in the apartment.". The court found that allowing the evidence to come in did not sully the prophylaxis effect of the Fourth Amendment. (Order at 20, Addendum at 20).

The Trial

On March 26, 2018 trial commenced. Trial took place over six days. Of the approximately 600 pages of witness testimony, approximately 300 pages, half the testimony presented, concerned the search, the seizure and the evidence recovered from, 632 Norwest Lane. Approximately half of the prosecutor's opening and closing statements were also dedicated to 632 Norwest Lane seizure and search.

In late March of 2015, the government began intercepting phone calls between Eddy Mejia-Ramos and Petitioner. (Transcript of Trial, Day 2, 3/27/18 at 60 [hereinafter "T. Day 2 at __"]). The telephone calls were in the Spanish language and were simultaneously translated to English at the time the call was intercepted. (T. Day 2 at 61). Twenty-nine intercepted calls were introduced into evidence. (T. Day 2 at 71, Govt's Ex 2). The government claimed that in each telephone call Mejia-Ramos and Petitioner discussed the Petitioner delivering heroin to Mejia-Ramos. (T. Day 2 at 74-111, Transcript of Trial, Day 3, 3/28/18 at 7-11[hereinafter "T. Day 3 at _"]). During the telephone calls Petitioner told Mejia-Ramos several times that Ms. Cabral was on her way over to Mejia-Ramos house. Petitioner referred to Ms. Cabral as "mujer" which is translated as wife or women. (Suppression Hearing, Government's Exhibit 2, Transcript of Wiretap Calls on July 6, 2015,) (https://www.spanishdict.com/translate/mi%20mujer "mi mujer is translated "my wife.") In two of the four calls where Petitioner refers to

Ms. Cabral, he says "my wife is on her way" (Ex. 2.8, T. Day 2 at 82) and "the wife is around there on her way" (Ex. 2.31, T. Day 3 at 11) and twice Petitioner says "I am going to send my wife" (T. Day 2 at 79, Govt's Ex. 2.5, T. Day 3 at 9, Govt's Ex. 2.30).

Following several of the intercepted calls agents who were conducting surveillance on both Petitioner's and Mejia-Ramos' residence follow Petitioner and or Cabral as they travel from Petitioner's residence to Mejia-Ramos residence. (T. Day 2 at 83, 92, 108, 111). Agents also attach a GPS to the Nissan Murano driven by Petitioner and Cabral. (T. Day 2 at 87-88).

On July 6, 2018, at 1:43 pm, agents intercept a telephone call between Petitioner and Mejia-Ramos in which Petitioner states he has a lot of "food" around. (Govt's Ex. 2.28, T. Day 3 at 8). The agents intercept two more telephone calls that day, one at 8:57 pm and one at 9:38 pm. (T. Day 3 at 9-10, Govt's Ex. 2.30 and 2.31). In the final one Petitioner referring to Cabral states "she is around there on her way", and the agents who were conducting surveillance of Petitioner's residence observed Ms. Cabral leave the residence, 632 Norwest Ave, Norwood in a Hyundai Sonata and head southbound. (Transcript of Jury Trial Day 1, 3/26/18 at 40-41, [hereinafter "T. Day 1 at __"], T. Day 2 at 40, 50-52, T. Day 3 at 11). Detective Christine Theodore of the Massachusetts State Police, who was conducting surveillance of Petitioner's residence spoke to two State Troopers and

asked them to stop the Hyundai. Troopers stopped the car as it entered on to Route 44 in Raynham (T. Day 1 at 44, T. Day 3 at 11-12). Troopers arrested Ms.Cabral and searched her pocketbook. The pocketbook contained one kilogram of heroin, packaged in 8-10 blocks wrapped in green cellophane. (T. Day 1 at 44, T. Day 2 at 14, Day 4 at 54-55). Agents then notified the officers remaining at 632 Norwest Ave to seize the residence and arrest the occupants.

Both Agent Meletis and Detective Mahoney testified about the seizure of the residence and arrest of Petitioner and Guzman-Ortiz in substantial conformity with their testimony at the Suppression hearing. Both Mahoney and Meletis repeated their testimony that the block of heroin was "sticking out of the vent", protruding above floor level. (T. Day 3 at 89-90, T. Day 4 at 89). However, Detective Mahoney also added that he removed the block of drugs from the vent because he was worried it would fall through the floor. (T. Day 3 at 90). Agent Meletis also repeated his testimony that he looked inside a black bag that was lying open on the floor. (T. Day 4 at 88).

The government introduced testimony that Petitioner tested positive for gunshot residue on his hands. Guzman-Ortiz tested negative for gunshot residue (T. Day 4 at 183, T. Day 5 at 62-67). The blocks of drugs found at Petitioner's residence contained heroin. (T. Day 4 at 52-61).

The next day the government obtained a search warrant for 632 Norwest Ave. The search of the residence pursuant to a warrant revealed drug paraphernalia, money in a drawer of the nightstand, more heroin in a drawer of a bureau, a bullet in a drawer of the bureau, and six cell phones (T. Day 2 at 26, 31, 32, T. Day 4 at 106).

Sentencing Hearing

The Presentence Investigation Report grouped counts 2, 3, and 5 for guideline calculation purposes. Count 8 was calculated separately because the statutorily mandated term of imprisonment was required to run consecutively. (Presentence Investigation Report, 6/28/18, at 16, para.36, 37. [hereinafter PSI at __]). Probation found Petitioner's base offense level for the grouped counts to be 32, based on Petitioner's accountability for 3.48 kilograms of heroin. Petitioner received a two-point increase for role in the offense, because probation found "The defendant directed his significant other at the time, Mercedes Cabral, to deliver drugs for him on at least four separate occasions." Petitioner's total offense level was 34. (PSI at 17, para. 43-51). Probation calculated the guideline sentence on count 8 to be a ten-year consecutive term of imprisonment, because a firearm was discharged. (PSI at 16, para. 37). Petitioner's criminal convictions resulted in a subtotal criminal history score of 6 and two points were added because Petitioner committed the instant offense while under a criminal sentence for a total criminal

history score of 8, resulting in a criminal history category of IV. (PSI at 24, para. 62-64). A total offense level of 34 with a criminal history category of IV resulted in a guideline range of 210 months to 262 months on the grouped counts and a mandatory ten-year consecutive sentence imposed consecutively to the grouped counts. (PSI at 35, para. 113,114).

Petitioner submitted a lengthy memorandum with an attached psychiatrist's report. (Sentencing Hearing, 9/12/19 at 3[hereinafter Sentencing at __]). Petitioner objected to the two-point enhancement for Role in the Offense. (Defendant's Memorandum in Support of Sentencing Recommendation, 9/6/2018, at 2, [hereinafter "Def. Sen. Memo. at __"], Sentencing at 5-6). The government requested a sentence of 330 months, the minimum guideline sentence of 210 months together with the consecutive 120 months on count 8. Petitioner calculated the total offense level at 32, resulting in a guideline sentencing range of 168-210 months. Petitioner requested the minimum mandatory sentence of 20 years. Petitioner argued that more than most Petitioner suffered from a plethora of disadvantages. Petitioner had serious mental health issues since childhood, beginning at the age of four. Petitioner has polysubstance abuse disorder, limited learning abilities and almost no family support. He was also a victim of repeated child sexual abuse. (Sentencing at 14-15).

The court stated:

> This is a very, sad case for anybody who had anything to do with it. It is quite clear that Mr. Soto-Peguero suffers from major mental illness and has since early childhood. He has had a difficult childhood. He was sexually abused at some point. He is, and I now largely rely on the psychiatrist's report, limited academically. He suffers from polysubstance abuse disorder, depression. And despite the family's presence here today, I gather he's had very little family support through most of his life. (Sentencing at 20).

The court sentenced Petitioner to a total term of incarceration of 262 months, 120 months on counts 3,5, 60 months on count 2, to run concurrently and a consecutive 10 year sentence on count 8, to run consecutively to the sentence imposed on counts 2,3, 5, with a five-year term of supervised release and a $400 special assessment. (Sentencing at 20, Amended Judgment of Conviction, 10/12/18 at 2).

Appellate Decision

The First Circuit held that the district court did not err in denying Defendant's motion to suppress. The appeals court held that the officer' illegal search and lying on the stand about the search in the suppression hearing and trial did not sully the prophylactic effect of the Fourth Amendment**.** (United States v. Soto-Peguero, No. 18-1897, October 19, 2020)

REASON FOR GRANTING THE WRIT

Point I

The court erred when it denied Petitioner's motion to suppress evidence discovered during an illegal search of Petitioner's residence on the basis that the evidence was independently discovered, the following day, during a search pursuant to a valid warrant. This decision was erroneous because the illegally obtained evidence, a firearm and two kilos of heroin, was included in the detective's affidavit in support of the warrant and presented to the Magistrate and affected her decision to issue the warrant pursuant to which the residence was searched. Moreover, the failure to suppress the evidence sullied the prophylaxis of the Fourth Amendment because the officers illegally searched Petitioner's residence and falsely testified about the search at the suppression hearing and the trial.

Argument

Evidence obtained as a direct result of an unconstitutional search or seizure is plainly subject to exclusion. Segura v. United States, 468 U.S. 796, 804 (1984). However, under the independent source exception to the Fourth Amendment exclusionary rule "evidence acquired by an untainted search which is identical to …evidence unlawfully acquired is admissible". United States v. Dent, 867 F.3d 37, 40 (1st Cir. 2017), citing Murray v. United States, 497 U.S. 533.536-37 (1988) (internal quotations omitted). A search pursuant to a warrant following an illegal search can cure the illegal search if it is a genuinely independent source of the evidence. Murray, 497 U.S. at 542. A search pursuant to a warrant is not independent where the "information obtained during that entry was presented to the Magistrate and affected [her] decision to issue the warrant". Id., Segura, 468

U.S. at 814 (a warrant is not genuinely independent if information obtained during the initial [illegal] entry or occupation of the [residence] was needed or used by the agents to secure the warrant.")(emphasis added). In the present case, the information, obtained pursuant to the illegal search, that a firearm and two kilograms of heroin could be found in the residence, was included in the affidavit presented to the Magistrate and used to secure the warrant. That information that necessarily "affected the Magistrates decision to issue the warrant. United States v. Feliz, 182 F.3d 82, 86 (1st Cir. 1999) (a warrant application must demonstrate probable cause to believe a crime has been committed and that enumerated evidence of the crime will be found at the place to be searched). Moreover, admitting the evidence sullies the prophylaxis of the Fourth Amendment. The officers illegally searched the residence and then falsely testified about the search at the suppression hearing and at trial. United States v. Zapata, 18 F.3d 971 (1st Cir. 1994) (application of the doctrine of independent source in a particular case must not sully the prophylaxis of the Fourth Amendment.) Therefore, the district court erred when it found that the warrant was an independent source for the illegally obtained evidence.

The exclusionary rule bars the admission of evidence obtained from a warrantless search. Mapp v. Ohio, 367 U.S. 643,648 (1961). However, the exclusionary rule has no application [where] the Government learned of the

evidence from an independent source" Segura, 468 U.S. at 806, citing Wong Sun v. United States, 371 U.S. 471, 487 (1963). Under the independent source doctrine, where law enforcement, following an illegal search, subsequently obtains a valid search warrant, evidence discovered during the subsequent search will not be suppressed if the warrant "issued wholly on information know to the officers before the entry into the apartment" and "no information obtained during the initial illegal search was needed or used by the agents to secure the warrant" Segura, 468 U.S. at 798. (emphasis added). See also, Murray, 487 U.S. at 541. (a subsequent search pursuant to warrant is not an independent source if "the agents' decision to seek the warrant was prompted by what [agents] had seen during the initial entry [or illegal search] or if information obtained during that entry [or illegal search] was presented to the Magistrate and affected his decision to issue the warrant."

The independent source[2] exception derives from the "fruit of the poisonous tree" doctrine excluding "not only primary evidence obtained as a direct result of an illegal search or seizure, but also evidence later discovered and found to be derivative of an illegality or "fruit of the poisonous tree" Segura, 468 U.S. at 805. (internal citations omitted). A subsequently issued search warrant is an

[2] In the present case the district court admitted the evidence under the inevitable discovery doctrine, a "close relative" of the independent source exception. (Memorandum and Order, 5/9/17 at 19, Addendum at 19), United States v. Dent, 867 F.3d 37, 41(1st Cir. 2017). Inevitable discovery doctrine applies to evidence that would have been (but was not) inevitably discovered by lawful means, and independent source doctrine refers to

independent source only where "the lawful seizure is genuinely independent of the earlier, tainted one" Murray 487 U.S. at 542. To be an independent source the valid warrant search must be "means sufficiently distinguishable to purge the evidence of any taint arising from the [illegal search]" Segura, 468 U.S. at 814.

In the present case, the subsequent search pursuant to the warrant cannot be an independent source of the illegally obtained evidence. The information obtained during the illegal search was "used by the agents to secure the warrant." Id. at 798. Moreover, the information was present to the Magistrate and affected her decision to issue the warrant. Murray, 487 U.S. at 541. In the present case, the evidence obtained through an unlawful search and present to the Magistrate was so prejudicial as to make it unnecessary for the Magistrate to rely on and analyze the other evidence in the affidavit. In this case, law enforcement was seeking a warrant to search a residence. The warrant application had to demonstrate two elements, a commission element, (it had to show a crime had been committed), and a nexus element, (it had to show enumerated evidence of the offense would be found in the residence). United States v. Zayas-Diaz, 95 F.3d 105,111 (1st Cir.1995). The nexus element of the warrant application was met, in its entirety, by the two sentences in the warrant application detailing the illegally obtained evidence. "officers observed in plain view two large brick shaped objects believed to be kilograms of heroin,

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evidence rediscovered by lawful means. United States v. Siciliano, 578 F.3d 61, 68, n.

one in each bedroom. An officer moved the brick and observed a firearm beneath it". (Affidavit of Carl Rideout at 11). Thus, there is no way this Court or the district court could say that the illegal evidence "did not affect the Magistrate's decision to issue the warrant. Murray, 487 U.S. at 541. Nor is there any way to dissipate the taint caused by inclusion of the illegally obtained evidence in the warrant application. Segura, 468 U.S. at 814

It is true that the district court found that without the information "gleaned from the unlawful search", the search warrant affidavit contained information sufficient to support probable cause to issue the warrant. (Order and Memorandum at 20, Addendum at 20), United States v. Jadlowe, 628 F.3d 1, 9 (1st Cir. 2010) (where illegally obtained evidence is included in the warrant application, this Court examines whether the search warrant affidavit contains sufficient information to support probable cause without any information gleaned from the unlawful search). That finding was clearly erroneous. The affidavit in support of the warrant application did meet the commission element of the warrant requirement. The information in the application was sufficient to show that a crime had been committed. The affidavit detailed telephone calls to and from Petitioner and the supplier and it detailed the heroin uncovered in the car stop of Cabral. (Affidavit of Carl Rideout at 3-10). However, the warrant application did not meet the nexus

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4 (1st Cir. 2009).

element. There was no information, aside from the illegally obtained evidence, supporting a finding that enumerated evidence of contraband or of a crime would be found in Petitioner's residence. United States v. Feliz, 182 F.3d 82, 86 (1st Cir. 1999). Agent Rideout did opine that he "believed that there is more heroin in Petitioner's residence", but this was pure speculation, unsupported by any reference in the intercepted telephone calls. (Affidavit of Carl Rideout at 8-9). United States v. Cordero-Rosario, 786 F.3d 64, 71 (1st Cir. 2015) ("[A} simple assertion of police suspicion is not itself a sufficient basis for a magistrate's finding of probable cause."). In contrast, inclusion of the illegally obtained evidence (two kilograms of heroin and a firearm found in the residence) in the warrant application showed beyond any doubt that contraband and evidence of a crime was to be found in the residence. Faced with the possibility of insufficient evidence on the nexus requirement, the government had nothing to lose by inserting the reference to the illegal obtained evidence in the warrant application. Jadlowe, 628 F.3d at 9. (the test for determining whether the warrant is a genuinely independent source is to simply excises the illegally obtained evidence from the application). Thus, the government understood that there was no downside to including the illegally obtained information in the application. Brown v. Illinois, 422 U.S. 590, 599-600 (The purpose of the exclusionary rule "is to deter—to compel respect for the

constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.")

Moreover, assuming without conceding, that there was probable cause without the illegally obtained information, to support the warrant, the closeness of the question in the present case, makes it impossible to conclude, as the district court did, that the Magistrate's decision to issue the warrant was unaffected by the illegal evidence. Although in many cases, the fact that there exists probable cause to issue a search warrant will guarantee that the issuance of the warrant is "sufficient to purge the earlier taint" of the illegal search or that the magistrate's decision was unaffected by the illegally obtained information, that is not the case in the present instance. Segura, 468 U.S. at 814, Murray, 487 U.S. at 541. As the Eighth Circuit stated in a similar case, "It is clear that a Franks analysis [excising the illegally obtained or false information from the warrant application] is the proper method for determining whether a warrant is supported by probable cause. "While probable cause is necessary, we are uncertain whether it is sufficient or possible to show that the decision to issue the warrant was unaffected by the illegally obtained information as required by Murray". United States v. Madrid, 152 F.3d 1034, 1040 (8th Cir. 1998). In the present case, it is impossible that the Magistrate's decision to issue the warrant was not affected by the inclusion of the illegal evidence. The illegally obtained evidence was so compelling that it would

be impossible for the Magistrate to ignore it. It is important to note that both Segura and Murray, never held that a search pursuant to a warrant can be a genuinely independent source where the illegally obtained evidence is included in the application. In both cases, the Magistrate issuing the warrant was not aware of the illegally obtained evidence. Thus neither, Murry or Segura talk about excising the illegally obtained evidence from the warrant. Instead these cases hold that a later search pursuant to a warrant is not an independent source "if information obtained during that entry was presented to the Magistrate and affected his decision to issue the warrant." Murray 487 U.S. 542. Because the illegally obtained evidence included in the application, two kilograms of cocaine and a firearm, was so conclusively prejudicial, and because the application included minimal information in support of the nexus requirement, a finding that there existed probable cause to support the warrant is not sufficient to insure that the later search pursuant to a warrant was genuinely independent. Murray, 487 U.S. at 542, Segura, 468 U.S. at 814.

Moreover, in the present case, concluding the search pursuant to the warrant was an independent source for illegally obtained evidence sullies the prophylactic effect of the Fourth Amendment. To apply either the independent source or inevitable discovery or independent source exception the government must show that the application of the exception would not "provide an incentive for police

misconduct or significantly weaken Fourth Amendment protection." United States v. Silvestri, 787 F.2d 736, 744 (1st Cir. 1986), United States v. Zapata, 18 F.3d 971, (1st Cir. 1994) (Evidence which comes to light by unlawful means will nonetheless be admitted at trial if it is revealed in an independent and lawful way, provided the application of the doctrine in a particular case will not sully the prophylaxis of the Fourth Amendment).

In the present case, the district court found the officers improperly pried off the cover of a closed vent, searched the vent and opened a bag. (Order and Memorandum at 19, Addendum at) Petitioner testified the officers destroyed furniture, including his bed, opened drawers and containers in draws, opened the vent and removed items from all these places. (SH Day Two at 70-71). The search in the present case is similar to the search in the Madrid case.[3] In Madrid officers "went upstairs or downstairs on two occasions, detained and searched the occupants, seized wallets and placed them in envelopes marked 'evidence' and leafed through personal mail and a notebook." Madrid, 152 F.3d at 1036. The information gleaned in this illegal search was included in the affidavit and used to secure a warrant. The Madrid Court held that because the agents "exploited their

[3] In the present case, law enforcement did not merely illegally "seize" the residence they illegally "searched" the residence. "Different interests are implicated by a seizure than by a search." Segura, 468 U.S. at 806. "A seizure affects only a person's possessory interest; a search a person's privacy interest. A seizure is generally less intrusive than a search. Id. In most cases analyzing independent source the courts are dealing with cases involving illegal entry into a residence and not an illegal search.

presence" in the residence to conduct an illegal search and because of the severity of the police misconduct" the inevitable discovery exception should not apply. Id at 1040.

In the present case, the police also "exploited their presence" in the residence, having probable cause to enter the residence, the officers tore the residence apart, destroying furniture, opening drawers, opening containers, and prying the lid off air conditioning vent. The government then used this illegally obtained evidence to secure the warrant. This sullied the prophylactic effect of the Fourth Amendment. "Whatever balance is to be achieved by the inevitable discovery doctrine; it cannot be that police officers may violate constitutional rights the moment they have probable cause to obtain a search warrant." Madrid, 152 F.3d at 1041.

More importantly, admitting this evidence under the independent source doctrine makes the court complicit in the officers' false testimony at the suppression hearing. The court found "I am not persuaded by the officers' account that a block of heroin was sticking out of a floor vent in the front bedroom.". (Order and Memorandum at 19, Addendum at 19). Nor was the court persuaded by the officers' account that the bag containing heroin found in the back bedroom was next to the bed, not in the drawer of the nightstand. (Order and Memorandum at 19, Addendum at 19). In this case, not only was the search illegal, the officers

compounded that illegality by lying on the stand about their actions. Id. In the present case, the court's finding that the later search pursuant to the warrant was an independent source of the evidence means that the court is enabling the officer's untrue testimony at the suppression hearing concerning the illegal search. Moreover, the ruling insured that the officers continued to offer false testimony at trial, once again testifying that the heroin was "sticking out of the vent", that the bag was lying, partially open, on the floor next to the bed. (T. Day 3 at 89-90, T. Day 4 at 88, 89).

This Court in United States v. Dent, declined to consider applying the holding in Madrid to that case, because the search in Dent, unlike the present case, was minimal (the officers lifted an air mattress) and because the information obtained in that search was not included in the warrant application. 867 F.3d 37, 40-41 (1st Cir. 2017) ("Whether we would follow Madrid we need not decide today."). However, in the present case, the illegal search was not minimal, and the illegally uncovered evidence was used to secure the warrant and the officers testified falsely about the search. Thus, this Court should apply the rule in Madrid, refuse to extend the independent source exception to the present case, and suppress the evidence obtained in the search of the residence. "If we were to extend the doctrine to the facts of this case, the warrant requirement would become the warrant application requirement, thereby enabling police officers to take shortcuts

clearly prohibited by the Fourth Amendment. The warrant requirement must mean something, and we cannot allow the exception to swallow the rule". Madrid, 152 F.3d at 1041.

Point II

The court erred when it enhanced Petitioner's sentence under USSG §3B1.1(c) for a leadership role in the conspiracy to distribute heroin based on Petitioner's use of the single phrase "I am sending my wife" about a delivery of heroin to a coconspirator. This single phrase does not meet the government's burden of proving by a preponderance of the evidence that Petitioner "exercised control over, organized, or was otherwise responsible for superintending the activities of" his common law wife.

Argument

The United States Sentencing Guidelines prescribes a two-level, enhancement where Petitioner "was an organizer, leader, manage, or supervisor in any criminal activity" involving one to three participants. USSG §3B1.1(c). The test for determining the application of the guideline is two part. A district court must find (1) "the criminal activity involved at least two, but fewer than five, complicit individuals (the Petitioner included); and (2) "in committing the offense the defendant exercised control over, managed, organized, or superintendent the activities of at least one other participant." Id. The government bears the burden of proving the role in the offense enhancement by a preponderance of the evidence. United States v. Cruz, 120 F.3d 1, 3 (1st Cir. 1997) (en banc). In the present case, the entirety of the government's evidence consists of Petitioner twice uttering the single sentence "I am sending my wife" in relation to his wife's delivery of drugs to Mejia-Ramos. This is insufficient to support the enhancement. Al-Rikabi, 606 F3d. at 15. ("There must be some additional fact or facts that will permit a fact-

finder to draw a founded inference about the nature of the particular relationship.") (emphasis added). Additionally, other record evidence supports a co-equal domestic relationship. They were involved in an age-appropriate domestic relationship, in fact, Ms. Cabral was two years older than Petitioner. Cruz, 120 F.3d at 4 (Defendant, who was 44 exercised dominion and control over his pregnant 14-year-old girlfriend.). Both Petitioner and Cabral made deliveries of heroin to the coconspirator, exercised similar control over the car used for the deliveries. And the record contained no other evidence of Petitioner's domination over Cabral. There is no evidence that Petitioner paid Cabral, took a greater share of the profits or directed Cabral's activities. United States v. Picanso, 333 F.3d 21,24 (1st Cir. 2003) (case law makes pellucid that more than shared criminal activity is needed to give rise to a managerial role adjustment). Thus, there is insufficient evidence to support the enhancement. This error in incorrectly imposing a two-point enhancement for leadership requires resentencing. Molina-Martinez v. United States, 136 S. Ct 1338, 1346 (2016) ("[w]hen a defendant is sentenced under an incorrect guidelines range—whether or not the defendant's ultimate sentence falls within the correct range—the error itself can, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error.").

At Sentencing the government argued Cabral "made her choice to be involved" but that "her actions were clearly directed by Mr. Soto-Peguero". (Sentencing at 8) The government based this conclusion on the fact that Petitioner was "the one deciding price, deciding quantity, deciding when to deliver it, deciding how it would be delivered and saying he was going to send his woman to make the deliveries to Mr. Mejia-Ramos, (Sentencing at 8). The fact that Petitioner made the telephone calls relating to the delivery of the drugs perhaps shows that Petitioner had an organizational and managerial role in the conspiracy. It is not evidence that Petitioner managed, organized or supervised Ms. Cabral. United States v. Jones, 523 F.3d 31, 43 (1st Cir. 2008) ("[I]t is not enough that the defendant merely controlled, organized, or managed criminal activities [; he] must instead control, organize, or manage criminal actors."); see also Cruz, 120 F.3d at 3 (1st Cir. 1997) (noting that upward adjustment under 3B1.1(c) requires a finding that "the defendant, in committing the offense, exercised control over, organized, or was otherwise responsible for superintending the activities of, at least one of those other persons"), U.S. v. Ofray-Campos, 534 F.3d 1, 40 (1st Cir. 2008) ("It is not enough, however, that the defendant merely controlled, organized, or managed criminal activities; rather he must control, organize or manage criminal actors), United States v. Ramos-Paulino, 488 F.3d at 464 (1st Cir. 2008) (we are constrained by the unambiguous case law holding the management of criminal

activities, standing alone, does not constitute basis for a role-in-the-offense enhancement). Thus, the only evidence the government offers to support the claim that Petitioner managed Ms. Cabral is the single phrase, which Petitioner uttered twice, "I am sending my wife".

It is true that Petitioner twice said, "I am sending my wife". (Govt's Ex 2.5, 2.30). But it is also true that Petitioner twice said, "my wife is on her way". (Govt's Ex. 2.8, 2.31) These two phrases impart the same information. Nonetheless, the government wants to base a two-level enhancement on the fact that in two instances, Petitioner chose the words "I am sending my wife" instead of "my wife is on her way". The difference in these two phrases will not bear the weight the government chooses to assign it. In fact, the first time Petitioner says "I am sending my wife" he is in the process of making a delivery himself and gets lost attempting to follow the GPS directions and concludes he can't follow the direction and is therefore "sending the wife" who can follow directions. (Govt's Ex. 2.5). Both Petitioner and Cabral delivered heroin to Mejia-Ramos. Cabral delivered the heroin four times and Petitioner delivered the heroin six times. (Govt's Ex 2.5, 2.14, 2.15, 2.16-17, 2.19, 2.24-27). There is nothing in the record aside from this single phrase to suggest that Petitioner and Cabral were anything other than equal participants in criminal activity. United States v. Picanso, 333

F.3d 21,24 (1st Cir. 2003) (case law makes pellucid that more than shared criminal activity is needed to give rise to a managerial role adjustment).

It is true that in the past this Court has found a domestic relationship can be evidence of a male organizing the activities of his female domestic partner. But in that case the defendant was 44 years old and his 'girlfriend' was a pregnant 14-year-old. Cruz, 120 F.3d at 4. This Court found the district court did not err in imposing the enhancement but stated, "we recognize that whether Cruz might be deemed an organizer or manager is a close question." Nonetheless, the en banc Court did not reverse the district court because, "the facts of record reasonably can be interpreted to attribute managerial status, more likely than not, to [the defendant]" Id. In the present case, Cabral is not 14 years old, she is 27 years old, two years older than Petitioner. Petitioner and Cabral had an age-appropriate co-equal relationship. In fact, during one recorded telephone conversation Petitioner schedules the timing of a delivery of heroin around Cabral's birthday celebration. (Govt's Ex. 2.15).

The PSI found that Petitioner directed Cabral to deliver drugs for him on at least four occasions. (PSI at 17, para 46). There is evidence in the record that Cabral delivered heroin on four occasions to the coconspirator Mejia-Ramos. But there is no evidence in the record that Cabral delivered drugs for the Petitioner or that Petitioner directed her to deliver the drugs aside from the two times that

Petitioner says, "I am sending my wife.". There is no evidence Petitioner paid Cabral, or that Petitioner took a larger share of the drug money. Al-Rikabi, 606 F.3d at 16 (where no record of profit margin or no record of division of proceeds, no basis for inferring "relative compensation is an indicium of control").

In imposing the enhancement, the district court found that "Defendant was running the show". The court based this finding on the fact that Petitioner told Cabral to go to deliver the drugs and "she went out to buy a meal". (Sentencing at 10). It seems the court was referring to the fact that Cabral was observed entering the residence with bags of groceries. (SH Day One at 46-47).[4] The fact that Cabral grocery shopped or went out to buy a meal on one occasion is not probative of Petitioner's supervising Cabral in relation to the drug conspiracy.

"In the last analysis, the sparse record leaves too much to guesswork." Id. The evidence in the record shows Cabral and Petitioner were working together in the drug conspiracy. However, in the absence of any probative evidence about the nature of the "hierarchical relationship" between Petitioner and Cabral the finding that Petitioner exercised control over another individual is clearly erroneous. Id. at 16. The evidence in the record was insufficient to support a potential increase of over four years in Petitioner's guideline sentencing range.

[4] Moreover, the testimony concerning the grocery shopping was that both Defendant and Cabral took groceries into the house. Therefore, it is unclear what the court is referring to when the court states "she went out to buy a meal". (SH Day One at 46-47).

The government will argue that Petitioner received the mandatory minimum sentence and therefore the difference in his guideline sentencing range would not affect his ultimate sentence. (Amended Judgment of Conviction,10/12/18, D.E. at 20, No. 272, Addendum at 28). However, it is pellucid that when sentencing Petitioner to 262 months the district court aggregated all charges and determined a total term of imprisonment. (Sentencing at 20). In fact, the original Judgment of Conviction reflected an aggregate term of imprisonment of 262 months. (Judgment of Conviction, 9/12/18, at 2, Addendum at 22). United States v. Hudson, 823 F.3d 11, 19 (1st Cir.2016) (a calculation error that artificially increases the GSR is unlikely to be harmless error). Therefore, the erroneous guideline sentencing range affected Petitioner's sentence.

In the present case, the government, who bears the burden of proving knowing distribution by a preponderance of the evidence, failed to meet that burden. The district court had insufficient evidence to impose the enhancement under USSG §3B1.1(c) and therefore Petitioner's sentence should be vacated, and the case remanded for resentencing without the enhancement under. Molina-Martinez, 136 S. Ct at 1346.

CONCLUSION

For the above reasons, this Court should grant the Petition for a Writ of Certiorari.

Dated at Portland, Maine this 22nd day of December 2020.

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APPENDIX