No. _____

In the
Supreme Court of the United States
OCTOBER TERM, 2020

ANTHONY KEITH FREENEY,
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

AMY R. BLALOCK
Attorney-At-Law
P.O. Box 765
Tyler, TX 75710
Texas Bar Card No. 02438900
Attorney for Petitioner

QUESTIONS PRESENTED FOR REVIEW

QUESTION #1

WAS THE EVIDENCE INSUFFICIENT TO SUSTAIN THE JURY'S GUILTY VERDICT?

QUESTION #2

DID THE DISTRICT COURT ERR IN ADMITTING AUDIO RECORDINGS OF MR. FREENEY'S JAIL PHONE CALLS?

QUESTION #3

DID THE SENTENCE IMPOSED BY THE DISTRICT COURT UNREASONABLE BECAUSE IT IS GREATER THAN NECESSARY TO ACCOMPLISH THE GOALS OF 18 U.S.C. § 3553(a)?

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The decision of the Court of Appeals for the Fifth Circuit is reported as *United States v. Anthony Keith Freeney*, No. 19-11178 (5th Cir. August 13, 2020)(not published). It is attached to this Petition in the Appendix.

JURISDICTION

The decision by the United States Court of Appeals for the Fifth Circuit affirmed the District Court's judgment of conviction and sentence in the Northern District of Texas.

Consequently, Petitioner files the instant Application for a Writ of Certiorari under the authority of Title 28, U.S.C., § 1254(1).

BASIS OF FEDERAL JURISDICTION

IN THE COURT OF FIRST INSTANCE

Jurisdiction was proper in the United States District Court for the Northern District of Texas because Petitioner was indicted for violations of Federal law by the United States Grand Jury for the Northern District of Texas.

STATEMENT OF THE CASE

1. Procedural History.

On May 15, 2019, Mr. Freeney was charged by a Second Superseding Indictment returned by the Grand Jury for the United States District Court, Northern District of Texas, Dallas Division for the following: (1) Convicted Felon in Possession of Ammunition on December 27, 2016, in Violation of 18 U.S.C. §922(g)(1) and §924(a)(2), (2) Convicted Felon in Possession of a Firearm in Violation of 18 U.S.C. §922(g)(1) and §924(a)(2), (3) Possession with Intent to Distribute a Controlled Substance in Violation of 21 U.S.C. §841(a)(1) and (b)(1)(C), and (4) Possession of a Firearm in Furtherance of a Drug Trafficking Crime in Violation of 18 U.S.C. §924(c)(1)(A)(I). ROA. 190-197.[1]

Mr. Freeney appeared before United States District Judge Honorable Sam A. Lindsay, U.S. District Judge, for trial. Mr. Freeney entered a plea of "not guilty" and the case proceeded to a jury trial. On May 28, 2019, the jury returned a guilty verdict for Counts 2, 3, and 4 of the Second Superseding Indictment. ROA.279.

Mr. Freeney was sentenced on October 16, 2019. The District Court sentenced Mr. Freeney to a 72-month term of imprisonment for Counts Two and

[1]In the references to the Record on Appeal, references are made according to the pagination assigned by the Clerk of the Court.

Three, to run concurrently. ROA.951-952. The District Court sentenced Mr. Freeney to a 60-month sentence for Count Four, to run consecutively to the other sentence. ROA. 952.The District Court also ordered a special assessment of $300 and a term of supervised release for three years after release from incarceration. ROA. 953.

Mr. Freeney then timely filed a notice of appeal. The Fifth Circuit affirmed the conviction and sentence in an unpublished decision on August 13, 2020.

2. Statement of Facts.

Anthony Keith Freeney is a 42-year old man who is a native of Dallas, Texas. His mother raised him and his three siblings by herself. Mr. Freeney's father had no contact with any of the children and was never a part of Mr. Freeney's life. Mr. Freeney described his childhood as "tough" and noted they did not always have enough to eat.ROA.1011. He advised they grew up in a poor neighborhood, shared clothing, and wore "hand-me-downs".ROA.1011. Despite these circumstances, Mr. Freeney's family was close-knit and helped each other. Mr. Freeney also has two children and one grand-child. His relatives, including his children, remain supportive of him despite his legal situation. ROA.1012.

Mr. Freeney is an intelligent and hard-working man. Although he did not graduate from high school, he later earned his G.E.D. He is skilled at automobile

repair and is a talented barber. ROA.1013. In the future, he hopes to own his own auto repair shop.

This criminal case arose from the following factual context. On August 25, 2017, law enforcement officers conducting surveillance at 1708 Morris Street in Dallas, Texas, allegedly observed Mr. Freeney depart the residence in a Lincoln Navigator. Officers conducted a traffic stop of the Navigator and detained Mr. Freeney. ROA.604-07. Officers then executed a search warrant of the 1708 Morris Street location and located two firearms in the middle bedroom. ROA.604-07.[2] Black tar heroin, packaging for selling heroin, and a razor blade to cut the heroin were also found on the bed. ROA.646-47. Mr. Freeney, at this point in the trial, stipulated that he was a felon, that the firearms found in the bedroom had traveled in interstate commerce, and that the substance that officers discovered in his bedroom weighed approximately 3.2 grams and contained heroin. ROA.658-59. Whether the State proved he was connected to the middle bedroom in this residence remained a point of contention throughout the trial.

[2]The two firearms were an American Tactical, Model M1911 Military, .45 caliber pistol, bearing Serial No. ML106424, and a Smith & Wesson, Model 915, 9mm pistol, bearing Serial No. VCD3401. The American Tactical .45 caliber pistol was subsequently determined to have been stolen.

Following the presentation of evidence found in the bedroom, the government played recordings of phone calls Mr. Freeney made from jail after he was arrested. These phone calls were admitted over the objection of Mr. Freeney.[3] The jury found Mr. Freeney guilty of the offenses alleged in the Indictment. ROA. 174-175.

Grouping the Counts, the PSR assigned Mr. Freeney a base offense level of 20 for Counts Two and Three.[4] The PSR officer applied several upward adjustments to the base offense level. The PSR officer applied a two-level upward adjustment pursuant to USSG §2K2.1(b)(1)(A) because the PSR officer found that the offense involved the AR-style assault rifle (possessed on December 27, 2016) and an American Tactical, Model M1911 Military, .45 caliber pistol, and a Smith & Wesson, Model 915, 9mm pistol (possessed on August 25, 2017). The PSR officer also found that the increase was warranted because Mr. Freeney, in a jail call from August 29,

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[3]On one call, Mr. Freeney spoke with a man named "Willie," and "Willie" informed Mr. Freeney that the officers got both firearms out of the bedroom. ROA.721-23; GX 110. Mr. Freeney then said "I was meaning to take them out and I fucked up." ROA.721-23; GX 110. Mr. Freeney also asked Willie to take the gun charge for him. ROA.721-23; GX 110. On another call, Mr. Freeney told a female that Willie could take the gun charge because Willie is not a felon. ROA.726; GX 113. Mr. Freeney also said on one call that the police were incorrect about where he sold drugs—he claimed not to sell them out of the house, but from the field *next* to the house. ROA.729; GX 116. Finally, when talking to his mother, Mr. Freeney said "that heroin was mine." ROA.730-31; GX 118.

[4]"PSR" refers to the Presentence Investigation Report filed by the United States Probation Department (under seal).

2017, asked someone if a little chrome firearm was still in a trash can outside. The PSR officer also applied a two-level increase pursuant to USSG §2K2.1(b)(4)(A) because one of firearms was stolen. The PSR officer determined that the 2-level increase was warranted. The PSR officer applied a four-level increase pursuant to USSG §2K2.1(b)(6)(B) because the officer made a finding that Mr. Freeney used or possessed a firearm in connection with another felony offense. The officer found that Mr. Freeney used the AR-style assault rifle to commit the offense of Aggravated Assault With A Deadly Weapon on December 27, 2016, by discharging the firearm at the undercover police vehicle occupied by an undercover police officer and a cooperating source. The PSR did not assign a three-level downward adjustment for acceptance of responsibility because Mr. Freeney proceeded to trial. Based upon a Total Offense Level of 28 and a Criminal History Category of V, the Guideline imprisonment Range is 130 months to 162 months.

Mr. Freeney filed objections to the PSR. Mr. Freeney maintained his factual innocence. The District Court sustained his objection to the relevant conduct but overruled the objection to the PSR based on the possession of the stolen firearm. ROA. 932. At Mr. Freeney's sentencing hearing, the district court calculated his guideline range at 51 to 63 months, to which a five-year sentence would be added for the Section 924(c) conviction. ROA.935-36.

During the sentencing hearing, Mr. Freeney's attorney argued for a sentence at the low end of the advisory guideline range, stating:

> Mr. Freeney is a young man, relatively speaking. He's got some skills that I think he can put to use, both while in prison and when he gets out of prison, Judge. He's got family support here. His mother is here, Linda Freeney. Ma'am, if you'll just stand up and be acknowledged. Thank you, ma'am. His mother would tell you that he has a great heart, Your Honor, and that he's been misguided in life, that he took the wrong path, and that's why you find him before you today. But he's not somebody who is a disposable human being, and we all run across those kind of people in this business.But I believe that Anthony Freeney is somebody who has got a redeemable sense of self-worth and also qualities that I think will guide him through this process of going to prison and hopefully coming out a better person rather than a worse person in the end. I think he's been impressed with the criminal justice system, Your Honor, to the extent that his case has proceeded along. He certainly has had his day in court, and I think he's very appreciative of that. ROA. 937-938.

The District Court subsequently sentenced Mr. Freeney to a total of 72 months imprisonment for Counts Two and Three, to run concurrently. The District Court sentenced Mr. Freeney to a sixty-month sentence for Count Four, to run consecutively to Counts Two and Three. ROA. 951-952.

The notice of appeal was then timely filed. Mr. Freeney's His conviction and sentence was affirmed by a Panel of the Fifth Circuit on August 13, 2020 in an unpublished decision.

REASONS WHY CERTIORARI SHOULD BE GRANTED

Question#1

The evidence introduced during the jury trial is insufficient to sustain the jury's verdict. There is little compelling evidence to support the jury's verdict that Mr. Freeney was guilty of the offenses alleged in the indictment. It should be noted that Mr. Freeney was not charged with any conspiracy. In affirming Mr. Freeney's conviction, the Fifth Circuit stated:

> Against the record in this case, Freeney fails to demonstrate either plain error or insufficiency of the evidence. Freeney stipulated that the firearms that he was charged with possessing had previously traveled in interstate commerce. He also stipulated that he had a prior felony conviction and that, on the date he allegedly possessed the firearms in question, he knew he had been previously convicted of a felony offense. The evidence at trial showed that firearms and heroin were found at the residence of Freeney's mother, within a room agents described as Freeney's bedroom. Freeney had departed the residence shortly before it was searched, and the firearms, heroin, and items consistent with the distribution of narcotics were found near a cell phone associated with Freeney. Additionally, Freeney's jail telephone calls indicated his knowledge of the firearms found at the residence, as well as his possession of the heroin. This evidence was sufficient, under the applicable standard of review, to sustain Freeney's convictions for possession of firearms by a felon and possession of a controlled substance with intent to distribute.

Count Two charged Mr. Freeney with being a felon in possession of a firearm. In this case, the government failed to prove that Mr. Freeney knowingly possessed a firearm as charged in the indictment. To convict under 18 U.S.C. § 922(g)(1), the

Government must prove: (1) the defendant was previously convicted of a felony, (2) the defendant knowingly possessed a firearm, and (3) the firearm traveled in or affected interstate commerce. *See United States v. Ferguson*, 211 F.3d 878, 885 n.4 (5th Cir. 2000). Mr. Freeney stipulated that he was a felon, and that he knew he was a prohibited person.[5] ROA. 658-659.

Count Three charged Mr. Freeney with Possession with Intent to Distribute a Controlled Substance in Violation of 21 U.S.C. §841(a)(1) and (b)(1)(C). The elements of possession with intent to distribute a controlled substance under 21 U.S.C.§841 are (1) knowledge, (2) possession, and (3) intent to distribute the controlled substance. *United States v. Mata*, 491 F.3d 237 (5th Cir. 2007).

Possession of contraband may be actual or constructive, and may be proved by circumstantial evidence. *United States v. De Leon*, 170 F.3d 494, 496 (5th Cir. 1999).

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[5] Mr. Freeney stipulated that he knew his status as felon when he possessed the guns. In *Rehaif v. United States*, 139 S. Ct. 2191 (2019), this court held that the mens rea requirement in 18 U.S.C. §924(a)(2)—"knowingly"—applies to both the "conduct" and "status" elements in § 922(g). *See* 139 S. Ct. at 2194. That is, the Government "must show that the defendant knew he possessed a firearm and also that he knew he had the relevant status when he possessed it." *Id*.

In *Rehaif*, the defendant was convicted under § 922(g)(2), which prohibits unlawful aliens from possessing firearms, but argued at trial that he did not realize his lawful status as a nonimmigrant student had expired after he failed out of school. *Id*. at 2201 (Alito, J., dissenting). Having held the Government must show that the defendant "knew he belonged to the relevant category of persons barred from possessing a firearm," this court remanded the case. *Id*. at 2200.

This was a constructive possession case. "In general, a person has constructive possession if he knowingly has ownership, dominion, or control over the contraband itself or over the premises in which the contraband is located." *United States v. McKnight*, 953 F.2d 898, 901 (5th Cir. 1992); *see* also *De Leon*, 170 F.3d at 496.

"Constructive possession need not be exclusive, it may be joint with others." *McKnight*, 953 F.2d at 901. "When a residence is jointly occupied, however, a more exacting standard applies." *United States v. Meza*, 701 F.3d 411, 419 (5th Cir. 2012). In joint occupancy cases "something else (e.g., some circumstantial indicium of possession) is required besides mere joint occupancy before constructive possession is established." *United States v. Mergerson*, 4 F.3d 337, 349 (5th Cir. 1993). This Court will affirm a finding of constructive possession in cases of joint occupancy "only when there is some evidence supporting at least a plausible inference that the defendant had knowledge of and access to the illegal item." *Meza*, 701 F.3d at 419; *see* also *United States v. Hinojosa*, 349 F.3d 200, 204 (5th Cir. 2003). "Ultimately, the determination of whether constructive possession exists is not a scientific inquiry, and the court must employ a common sense, fact-specific approach." *Id*. at 419.

In *Mergerson*, federal agents discovered an inoperable handgun "between the mattress and boxsprings of the bed in a bedroom in the residence in which [defendant] occupied." *Id*. at 348. The residence had two bedrooms— the one in

which the gun was found was the only one containing adult clothing. *Id*. at 348 n.14. The defendant stipulated that he had shared the residence with his girlfriend for approximately one month before his arrest, but introduced a receipt indicating his girlfriend purchased the gun "well before" the time he moved in. *Id*. at 348. This Court rejected the Government's argument that "the fact that [defendant] was living in the bedroom in which the weapon was found is enough to establish constructive possession" and concluded the evidence was "constitutionally insufficient" to support a conviction. *Id*. at 349.

The residence belonged to Mr. Freeney's mother. Mr. Freeney did not reside with his mother. He was not present when the search warrant was executed. ROA.611. Mr. Freeney's mother and other individuals were present at the house. ROA.610. Mail addressed to other individuals was recovered from the residence. ROA.671-672. Athough surveillance of the residence was allegedly conducted for a brief time, no photographs, pictures, video or audio of anyone entering the residence were taken or offered into evidence. ROA. 667.No fingerprints were found on the firearms or drugs. There was no testimony regarding who purchased the firearms.

Mr. Freeney was not present in his mother's residence when the search warrant was executed; however, he was detained during a traffic stop. When Mr. Freeney was arrested, he was not in possession of any firearms or controlled substances.

Officers alleged that the contraband belonged to Mr. Freeney because a cellular phone in that bedroom contained numerous videos and photographs of Mr. Freeney, and surveillance allegedly showed Mr. Freeney to be the only male leaving that residence and selling black-tar heroin from it. (ROA.650.) There was a video allegedly depicting Mr. Freeney present in the bedroom. ROA.662-64; GX 185; ROA.685-90; GXs 184-85.

Regarding Count Four, Mr. Freeney was convicted of possession a firearm during and in relation to a drug-trafficking offense, in violation of 18 U.S.C. § 924(c)(1)(A)(ii). (ROA.262). The evidence presented was insufficient to support a conviction under 18 U.S.C. 924(c) for possessing a firearm in furtherance of a drug trafficking crime. The record is completely devoid of even an allegation, much less conclusive proof on such allegation, against Mr. Freeney that would support the 924(c) conviction. The 924(c) count was not indicted as a conspiracy.

The Fifth Circuit affirmed the conviction for Count Four, stating that

> Freeney contends that the evidence insufficiently linked the firearms to drug trafficking. But the illegally possessed firearms were found loaded, operable, and in close proximity to heroin and other items related to drug distribution. We therefore conclude that the evidence was sufficient, under the applicable standard of review, to sustain Freeney's

conviction for possession of a firearm in furtherance of a drug trafficking crime.[6]

The testimony linking his alleged possession of a firearm to the heroin is too attenuated to support this conviction. Mr. Freeney is entitled to an acquittal on this count. Further, because the evidence was insufficient with respect to the drug possession, the firearm conviction related to the furtherance of the controlled substances should vacated.

This evidence was insufficient to support the Government's contention that the possession of the firearm was related to drug-trafficking. The evidence was insufficient to prove that the firearm had some purpose, role, or effect with respect to drug-trafficking. Moreover, the government relied on improper evidence, to prove that the firearm was related to the drug-trafficking conspiracy.

Section 924(c)(1) "requires the prosecution to make two showings. First, the prosecution must demonstrate that the defendant possessed the firearm. Second, it must prove that the possession was 'during and in relation to' a 'crime of violence or drug trafficking crime.'"*Smith v. United States*, 508 U.S. 223, 227-28 (1993); *United States v. Polk*,118 F.3d 286, 293 (5th Cir. 1997).

[6]The Fifth Circuit referred to the drug trafficking as his "third count" (*See Freeney* at 3) but this offense is actually Count Four of the Superseding Indictment.ROA.

The limited evidence against Mr. Freeney is insufficient to sustain a verdict. This court can conclude as a matter of law that reasonable minds, as triers of fact, could agree that a reasonable hypothesis other than guilt could be drawn from the evidence. Mr. Freeney contends that the Government failed to introduce sufficient evidence for the jury to find Appellant guilty beyond a reasonable doubt of Possession with Intent to Distribute, and his firearm offenses, as charged in the Indictment. Therefore, this Court should reverse the conviction and enter a finding of acquittal. The government's evidence that allegedly connects Mr. Freeney to the offenses charged was insufficient. It is not enough that the defendant merely associated with those participating in criminal offenses, nor is it enough that the evidence places the defendant in a climate of activity that reeks of something foul. *United States v. Rosas-Fuentas*, 970 F.2d 1379, 1381-82 (5th Cir.1992).

Mr. Freeney contends that the evidence presented at trial was insufficient to establish that he was guilty of the offenses. Therefore, the evidence was insufficient to establish that Mr. Freeney was sufficiently connected to the offenses. Therefore, there is insufficient evidence to support this conviction. This conviction should be vacated.

Question #2

The District Court by admitting Mr. Freeney's phone calls with other individuals while he was in jail. These were offered as Government's Exhibits 110-118. These phone calls recorded while Mr. Freeney was an inmate in the county jail were inadmissible hearsay. They were also prejudicial and improper because they implicated Mr. Freeney's participation in the offenses and were introduced against Mr. Freeney in violation of Rule 802 and Rule 403 of the Federal Rules of Evidence, and in violation of the Confrontation Clause. *See Bruton v. United States*, 391 U.S. 12 (1968) (admission of codefendant's confession that implicated defendant at joint trial constituted prejudicial error even though trial court gave clear, concise and understandable instruction that confession could only be used against codefendant and should be disregarded with respect to *Bruton*).

The Sixth Amendment of the United States Constitution states that "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend VI. The Confrontation Clause of the Sixth Amendment in effect "guarantees a defendant the opportunity for effective cross-examination." *United States v. Lockhart*, 844 F.3d 501, 510 (5th Cir. 2016); *see* also *Delaware v. Fensterer*, 474 U.S. 15, 19-20 (1985).

Testimonial statements implicate the right to confrontation. "Under Supreme Court precedent, a statement is testimonial if made for the primary purpose of establishing 'past events potentially relevant to later criminal prosecution.'" *United States v. Duron-Caldera*, 737 F.3d 988, 995 (5th Cir. 2013); *see* also *Davis v. Washington*, 547 U.S. 813, 822 (2006), *Bullcoming v. New Mexico*, 131 S.Ct. 2705, 2714 n.6, 2716-17 (2011); *Michigan v. Bryant*, 131 S.Ct. 1143, 1155-57, 1165 (2011); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 310-11 (2009) and *Crawford v. Washington*, 541 U.S. 36, 51-51 (2013).

The right to confrontation is abridged when a testimonial statement is put before the jury that a defendant cannot confront:

> Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.

See Crawford v. Washington, 541 U.S. at 68 (2004).

The Sixth Amendment prohibits prosecutors from introducing an out-of-court testimonial statement at trial unless the declarant is unavailable to testify and the accused has had a prior opportunity to cross-examine the declarant. *Crawford v. Washington*, 541 U.S. at 68. The Confrontation Clause applies to testimonial hearsay and does not bar the admission of nonhearsay statements. *See Williams v. Illinois*, 567

U.S. 50, 57 (2012). A "statement," for purposes of the hearsay rule, is "a person's oral assertion, written assertion, or nonverbal conduct[.]" FED. R. EVID. 801(a). The U.S. Supreme Court held in *Crawford* that any out of court declaration that is testimonial in nature, is inadmissible if the declarant does not testify at trial and the Defendant has not had a prior opportunity to cross examine the witness. *Id.*

Statements not subject to the Confrontation Clause can still be inadmissible hearsay. Hearsay is "a statement that . . . the declarant does not make while testifying at the current trial or hearing; and . . . a party offers in evidence to prove the truth of the matter asserted in the statement." FED. R. EVID. 801 (c). A district court can admit hearsay at trial pursuant to a recognized exception. *See* generally, Fed. R. Evid. 803. A party claiming such an exception, however, must lay the proper foundation for it. *See United States v. Towns*, 718 F.3d 404, 422 (5th Cir. 2013)("Rule 803 requires that the custodian of the business records or another qualified witness must lay a foundation before records are admitted.").

The statements were inadmissible hearsay because they were out of court statements made by a declarant who was not testifying at trial and offered in evidence to prove the truth of the matter asserted. Fed. R. Evid. 801(c), 802. Additionally, the statement did not qualify as an exception to the hearsay rule as co-conspirator's statement under Rule 801(d)(2)(E) because the statement was not made "during the

course and in furtherance of the conspiracy" but rather, was mere chatter. Further, Mr. Freeney was not charged with any conspiracy offenses.

Additionally, the evidence was highly prejudicial to Mr. Freeney because it insinuated that Mr. Freeney possessed an additional firearm and was involved in illegal drug activity. Under Rule 403 of the Federal Rules of Evidence, the evidence was excludable because the probative value of the evidence was outweighed by a danger of unfair prejudice. The statement implicated Mr. Freeney in charged and uncharged criminal conduct in violation of the Confrontation Clause.

The following colloquy occurred regarding the admission of the jail calls:

> **MR. BARRETT:** And so, then the third issue has to do with jail calls which my client made to various people at the county jail, and -- or jail calls that were made possibly different places. But in any event, we're not objecting to the calls themselves. We have a hearsay objection and a confrontation objection to putting on any hearsay statements, which would have been dialogue between the Defendant and other people, if those people are not present to sponsor that testimony.
>
> **THE COURT**: Okay. I think there are several things. First of all, you say hearsay and confrontation. I know there is Fifth Circuit authority that -- well, let's do it like this. First of all, a statement made by a defendant that constitutes an admission as a matter of law would not constitute hearsay under the Federal Rules of Evidence 801(d)(2), is my recollection. So you're not objecting to what Mr. Freeney may have said, but you are objecting to what any third person may have said. Is that correct?
>
> **MR. BARRETT:** That's correct, Your Honor.

THE COURT: There's also authority out there in the Fifth Circuit, you know, that the Court can give a limiting instruction so that the jury understands that the matter is not admitted for the truth of what's asserted, but to put the conversation in context. There is Fifth Circuit authority that allows that. So tell me why, with the limiting instruction, based on the applicable Fifth Circuit authority, such evidence would not be admissible.

MR. BARRETT: Well, Your Honor --

THE COURT: Let me ask you this. You're not disputing, are you, the statements that he made?

MR. BARRETT: No, we're not.

THE COURT: Okay. To me that's not an exception to the hearsay rule. What that rule says is it is not hearsay, so it's not even an exception. All right. So we get to the third parties. Now, if their statements are necessary to contextualize the overall conversation, tell me why that would not be admissible under applicable Fifth Circuit authority.

MR. BARRETT: Yes, sir, Your Honor. I still think that we have a right to confront the witnesses and cross examine them in open court, and, you know, particularly if it goes to the elements of the offenses which are charged in this case, Your Honor. I understand that just banter back and forth or dialogue in and of itself could be contextual evidence, but if it's something that is specifically incriminating to the Defendant, I think we would have the right to cross examine those witnesses in open court.

THE COURT: Mr. Tromblay, what's your response to that last portion of Mr. Barrett's argument?

MR. TROMBLAY: Your Honor, Fifth Circuit case law is abundantly clear. *United States versus Dixon*, which is at 132 F.3d, 192, and it's a 1997 Fifth Circuit case, which is settled that basically says that a recording in which the defendant is participating with a non-testifying

third party, that those statements are indeed admissible in order to put the defendant's statement in proper context and it does not constitute hearsay under 801(d)(2).

THE COURT: I understand it's not hearsay, but what about the confrontational issue?

MR. TROMBLAY: There is no confrontation. And also, too, there is *United States versus Gutierrez-Chavez*, which is cited at 842 F.2d, 77, it's a 1988 Fifth Circuit case in which --

THE COURT: Okay. Let's hold on. You're talking over me. When I said confrontation, you said there's no confrontational issue. What I am noting is this. The confrontation case from the Supreme Court was the *Crawford* case. That came out in 2003. Now, I'm not saying I agree or disagree with Mr. Barrett, but what Mr. Barrett is raising and what I understand is two separate issues. One is the hearsay and the other is the Confrontation Clause of the Constitution. Is that correct, Mr. Barrett?

MR. BARRETT: That is correct, Your Honor. ROA.344-350.

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THE COURT: Okay. Now, there were several objections lodged. One is to hearsay. I think there is ample authority that if the defendant makes a statement implicating himself or herself in a crime, the comments by the person to whom the defendant is talking may be allowed in context, place them in context. That is allowed by the Fifth. That goes way back -- I know it goes back to at least 1969 or 1970. I think there is a published opinion in 1976. I cannot recall the case at this time. But my question is this. Under 801(d)(2), as the Court stated earlier, admissions by an opponent or statements by an opponent as a matter of law are not hearsay, so there is no hearsay exception to be dealt with. As I stated before, if what another person says is necessary to place the conversation in context, the Fifth Circuit has said that is allowed. It may be necessary for the Court to give a limiting instruction to make certain that the jury does not confuse the matter. In other words, a limiting

instruction may be necessary to make certain that the jury does not misunderstand or confuse the issue or fail to understand the purpose for allowing that statement by the other individual. What specific statements do you have a problem with? The reason I'm asking you is because in your earlier filing you asked or requested or inferred that the Court may need to have a pretrial hearing as to the admissibility of certain tapes. So what I'm really trying to get to is this. Which tapes are really in controversy?

MR. BARRETT: Your Honor, the statement that sticks out in my mind, first of all, is a statement where my client is having a conversation with a person who is unknown, and – at least is designated as unknown in discovery. And the unknown person says something to the effect of my client, you know, how come they found the guns or how come you didn't do something with the guns. And my client says, quote unquote, I F'd up. And that's the primary statement that I would be objecting to, Your Honor. But there is other similar -- not a lot, but a few other similar type banter back and forth with unknown persons. I didn't make a list of each one of those, Your Honor.

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THE COURT: Mr. Barrett, I think the distinction is really this. It is because the Defendant injected himself into those calls. Had this been a situation where a police officer is testifying about what an informant told him, I would agree with you a hundred percent, because there is a case hot off the press from the Fifth Circuit that directly addresses that, and that is that if a police officer starts talking about what an informant told him, then it is a clear violation of the Confrontation Clause. There is a case just decided last Friday that directly addresses that point. But we are not -- but we are not talking about a situation with these jail calls in which a police officer was told something by an informant. And that case made it clear that under *Crawford* you have to show that the declarant was unavailable and also that the defendant had a chance to cross examine him regarding that statement. We are not talking about that with respect to these jail calls. **So that's my ruling**. Your objection is duly noted. If prior to the admission you want to approach the bench

> and raise an objection, we can discuss it, but I would have to see something that we have not discussed at this point to change my ruling. ROA.373-388 (Emphasis added).

The Government introduced the evidence for no other reason than to inflame the jury. *United States v. Raney*, 633 F.3d 385, 398 n.4 (5th Cir.2011) ("government is prohibited from appealing to passion or prejudice in order to inflame the jury"). The government's case against Mr. Freeney was slim to non-existent without the hearsay jail calls. The Government's other evidence did not place Mr. Freeney at the bedroom where the contraband was found. Considering the lack of evidence that would tie Mr. Freeney to the alleged criminal conduct, the jail phone calls impacted Mr. Freeney's rights to a fair trial. *Dudley* at 490 (Courts that have taken a similar approach have concluded that threat testimony is inappropriately admitted where the record suggests that the prosecutor is using the evidence under a pretext, i.e.more to prejudice the defendant than to explain away the witness's conduct).

The Court should reverse and order a new trial. *Bruton v. United States*, 391 U.S. 12 (1968) (reversing for new trial where admission of codefendant's confession implicated defendant and even though trial court gave clear, concise and understandable instruction that confession could only be used against codefendant and should be disregarded with respect to *Bruton*).

Question #3

The District Court imposed a procedurally unreasonable sentence when it sentenced Mr. Freeney. In this case, the imposition of an upward variance was substantively unreasonable because the District Court erred in balancing the sentencing factors in 18 U.S.C. § 3553(a) by overvaluing Mr. Freeney's unscored criminal history and in considering his criminal history when the Guidelines already accounted for it with a criminal history category V.

The Fifth Circuit affirmed the District Court's decision, stating:

> Considering the totality of the circumstances and giving appropriate deference to the district court's consideration of the § 3553(a) factors, we cannot conclude that the district court abused its discretion in imposing Freeney's sentence. *See United States v. Fraga*, 704 F.3d 432, 439–41 (5th Cir. 2013). We have upheld significantly greater variances.*See, e.g.*, *United States v. Key*, 599 F.3d 469, 475–76 (5th Cir. 2010) (upholding a 216-month sentence where the upper limit of the guidelines range was 57 months); *United States v. Smith*, 417 F.3d 483, 492–93 (5th Cir. 2005) (affirming a 120-month sentence where the maximum under the guidelines range was 41 months).

Freeney, supra at 3.

The information used as a basis for an upward departure under USSG § 4A1.3 must reasonably indicate that the criminal history category 'substantially under-represents' the seriousness of Mr. Freeney's criminal history, or that it 'substantially under-represents' the likelihood that Mr. Freeney will commit other

crimes. These expressed standards for an upward departure under U.S.S.G. § 4A1.3 cannot be reasonably maintained by the evidentiary record in this case.

While district courts have great discretion to vary or depart from guideline sentences, this discretion is not unbridled. *See United States v. Jones*, 531 F.3d 163, 174 (2d Cir. 2008) (noting district courts do not "have a blank check to impose whatever sentences suit their fancy"). A non-guideline sentence unreasonably fails to reflect statutory sentencing factors when it (1) does not account for a factor that should have received significant weight; (2) gives significant weight to an irrelevant or improper factor; or (3) represents a clear error of judgment in balancing all of the sentencing factors. *See United States v. Smith*, 440 F.3d 704, 707 (5th Cir. 2006); *see* also *United States v. Haack*, 403 F.3d 997, 1003 (8th Cir. 2005); *United States v. Long Soldier*, 431 F.3d 1120, 1122–23 (8th Cir. 2005). "A sentence is substantively unreasonable when, after taking into account the totality of the circumstances, 'the sentence is 'greater than necessary' to achieve the sentencing goals set forth in 18 U.S.C. § 3553(a)." *United States v. Wright*, 426 F. App'x 412, 414 (6th Cir. 2011); *see* also *United States v. Tristan-Madrigal*, 601 F.3d 629, 633 (6th Cir. 2010), and *United States v. Bolds*, 511 F.3d 568, 581 (6th Cir. 2007).

To determine the reasonableness of a sentence, this Court examines whether the sentence failed to "account for a factor that should have received significant

weight," gave "significant weight to an irrelevant or improper factor," or represented "a clear error of judgment in balancing the sentencing factors." *United States v. Nikonova*, 480 F.3d 371, 376 (5th Cir. 2007). In the present case, the sentence represents a plain error of judgment in balancing the sentencing factors by overstating Mr. Freeney's criminal history.

Section 3553(a) of Title 18 instructs the district court to impose a sentence sufficient but not greater than necessary to comply with certain factors enumerated in that statute. See 18 U.S.C. §3553(a). The district court's compliance is reviewed to determine whether it is a "reasonable" application of those factors. *See United States v. Booker*, 543 U.S. at 262. Reasonableness review is also described as review for abuse of discretion. *See Gall*, 552 U.S. at 51.

The Guidelines remain "an initial benchmark," but a district court may not presume them reasonable. *Gall*, 522 U.S. at 49. Rather, the district court must consider all of the §3553(a) factors and must "make an individualized assessment based on the facts presented." *Id*. at 50. Accordingly, a sentence within the Guideline range is presumed reasonable, but this presumption is not conclusive. *See Rita v. United States*, 551 U.S. 338, 347 (2005).

This non-guideline sentence fails to reflect statutory factors. A non-guideline sentence unreasonably fails to reflect statutory sentencing factors when it (1) does not

account for a factor that should have received significant weight; (2) gives significant weight to an irrelevant or improper factor; or (3) represents a clear error of judgment in balancing all of the sentencing factors. *See United States v. Smith*, 440 F.3d 704, 707 (5th Cir. 2006); *see* also *United States v. Haack*, 403 F.3d 997, 1003 (8th Cir. 2005); *United States v. Long Soldier*, 431 F.3d 1120, 1122–23 (8th Cir. 2005).

The District Court erred when it compounded its wrongful basis for an upward departure with the increase in the total offense level for other factors. Although an upward departure of nine months may not appear to be heinous, Mr. Freeney contends that one day of imprisonment longer than what is legally justified is egregious and must be vacated.

There is not enough evidence in the record to justify the sentence imposed when compared to the advisory sentencing range. Mr. Freeney's criminal history was not so appalling as to merit a sentence in excess of the Guideline range. The guidelines had already significantly accounted for Mr. Freeney's criminal history with a criminal history category of V. The District Court gave an unreasonable amount of weight to Mr. Freeney's unscored prior criminal history. Justice does not require him to suffer an enhanced sentence here. Therefore, this Court should vacate Mr. Freeney's sentence.

CONCLUSION

This Petition for Writ of Certiorari should be granted and the decision of the Fifth Circuit should be vacated, and the case should be remanded for proceedings consistent with this Court's opinion.

Respectfully submitted,

/s/ Amy R. Blalock
AMY R. BLALOCK
Attorney-At-Law
P.O. Box 765
Tyler, TX 75710
(903) 262-7520
amyblalock@outlook.com
Texas Bar Card No. 02438900
Attorney for Petitioner

RELIEF REQUESTED

FOR THESE REASONS, the Petitioner moves this Court to grant a Writ of Certiorari in order to review the Judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

/s/ Amy R. Blalock
AMY R. BLALOCK
Attorney-At-Law
P.O. Box 765
Tyler, TX 75710
(903) 262-7520
amyblalock@outlook.com
Texas Bar Card No. 02438900
Attorney for Petitioner

CERTIFICATE OF SERVICE

I certify that on the 11th day of January 2021, I served one (1) copy of the foregoing Petition for Writ of Certiorari on the following individuals by mail (certified mail return receipt requested) by depositing same, enclosed in post paid, properly addressed wrapper, in a Post Office or official depository, under the care and custody of the United States Postal Service, or by other recognized means pursuant to the Rules of the Supreme Court of The United States of America, Rule 29:

Solicitor General
U.S. Department of Justice
Washington, D.C. 20530

Joseph Andrew Magliolo and Leigha Amy Simonton
US Attorney's Office
Northern District of Texas
Dallas, Texas

ANTHONY KEITH FREENEY
USM #31366-177
FCI EL RENO
FEDERAL CORRECTIONAL INSTITUTION
P.O. BOX 1500
EL RENO, OK 73036

/s/ Amy R. Blalock
AMY R. BLALOCK

No. _____

In the

Supreme Court of the United States

OCTOBER TERM, 2020

ANTHONY KEITH FREENEY,

Petitioner,

V.

UNITED STATES OF AMERICA

Respondent.

APPENDIX

OPINION OF THE UNITED STATES COURT

OF APPEALS FOR THE FIFTH CIRCUIT

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

August 13, 2020

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing or Rehearing En Banc

No. 19-11178 USA v. Anthony Freeney
USDC No. 3:17-CR-664-1

Enclosed is a copy of the court's decision. The court has entered judgment under Fed. R. App. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

Fed. R. App. P. 39 through 41, and 5TH Cir. R. 35, 39, and 41 govern costs, rehearings, and mandates. **5TH Cir. R. 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following Fed. R. App. P. 40 and 5TH Cir. R. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

Direct Criminal Appeals. 5TH Cir. R. 41 provides that a motion for a stay of mandate under Fed. R. App. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under Fed. R. App. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

Court Appointed Counsel. Court appointed counsel is responsible for filing petition(s) for rehearing(s) (panel and/or en banc) and writ(s) of certiorari to the U.S. Supreme Court, unless relieved of your obligation by court order. If it is your intention to file a motion to withdraw as counsel, you should notify your client promptly, **and advise them of the time limits for filing for rehearing and certiorari**. Additionally, you MUST confirm that this information was given to your client, within the body of your motion to withdraw as counsel.

Sincerely,

LYLE W. CAYCE, Clerk

Christina Rachal

By:_____
Christina C. Rachal, Deputy Clerk

Enclosure(s)

Ms. Amy R. Blalock
Mr. Joseph Andrew Magliolo
Ms. Leigha Amy Simonton

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
August 13, 2020
Lyle W. Cayce
Clerk

No. 19-11178
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

ANTHONY KEITH FREENEY,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:17-CR-664-1

Before KING, SMITH, and WILSON, *Circuit Judges*.

PER CURIAM:*

A jury convicted Anthony Keith Freeney of three offenses: (1) possession of firearms by a felon; (2) possession of a controlled substance with intent to distribute; and (3) possession of a firearm in furtherance of a drug-trafficking crime. On each of the first two counts, the district court

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

imposed concurrent 72-month sentences, upwardly varying from the guidelines range of 51 to 63 months. On the remaining count, the district court imposed a mandatory consecutive sentence of 60 months under 18 U.S.C. § 924(c)(1)(A)(i), for a total of 132 months of imprisonment.

Aggrieved, Freeney appeals. He contends that the evidence was insufficient to support the jury's verdict and that the district court erred in admitting audiotapes of his jail telephone calls. Freeney also asserts that the district court's above-guidelines sentence was substantively unreasonable.

First, Freeney asserts that the evidence was insufficient to support the jury's verdict. We review Freeney's sufficiency challenge for plain error because he did not preserve it in the district court. *See United States v. Campbell*, 775 F.3d 664, 668 (5th Cir. 2014). Under this standard, Freeney must show (1) a forfeited error (2) that is clear or obvious and (3) that affects his substantial rights. *See United States v. Delgado*, 672 F.3d 320, 329 (5th Cir. 2012) (en banc). If Freeney meets these three requirements, we may correct the error only if it "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Id.* (internal quotation marks and citation omitted). Given the "obviousness" requirement of the second prong of the plain-error standard, we reverse only if "the record is *devoid of evidence* pointing to guilt or if the evidence is so tenuous that a conviction is shocking." *Id.* at 330–31. (internal quotation marks and citation omitted).

Against the record in this case, Freeney fails to demonstrate either plain error or insufficiency of the evidence. Freeney stipulated that the firearms that he was charged with possessing had previously traveled in interstate commerce. He also stipulated that he had a prior felony conviction and that, on the date he allegedly possessed the firearms in question, he knew he had been previously convicted of a felony offense. The evidence at trial showed that firearms and heroin were found at the residence of Freeney's

mother, within a room agents described as Freeney's bedroom. Freeney had departed the residence shortly before it was searched, and the firearms, heroin, and items consistent with the distribution of narcotics were found near a cell phone associated with Freeney. Additionally, Freeney's jail telephone calls indicated his knowledge of the firearms found at the residence, as well as his possession of the heroin. This evidence was sufficient, under the applicable standard of review, to sustain Freeney's convictions for possession of firearms by a felon and possession of a controlled substance with intent to distribute. *See Rehaif v. United States*, 139 S. Ct. 2191, 2194 (2019); *United States v. Huntsberry*, 956 F.3d 270, 279 (5th Cir. 2020); *Delgado*, 672 F.3d at 330–31; *United States v. Sagaribay*, 982 F.2d 906, 912 (5th Cir. 1993).

As for his third count, Freeney contends that the evidence insufficiently linked the firearms to drug trafficking. But the illegally possessed firearms were found loaded, operable, and in close proximity to heroin and other items related to drug distribution. We therefore conclude that the evidence was sufficient, under the applicable standard of review, to sustain Freeney's conviction for possession of a firearm in furtherance of a drug trafficking crime. *See Delgado*, 672 F.3d at 330–31; *United States v. Ceballos-Torres*, 218 F.3d 409, 414–15 (5th Cir.), *as amended on denial of reh'g en banc*, 226 F.3d 651 (5th Cir. 2000).

Next, Freeney challenges the authenticity of the audiotapes of his jail telephone calls. However, Freeney waived his authentication challenge by failing to object on this basis in the district court. *See United States v. Monkey*, 725 F.2d 1007, 1011 n.4 (5th Cir. 1984). Alternatively, Freeney has not shown plain error regarding the authentication issue. *See United States v. Barlow*, 568 F.3d 215, 219–20 (5th Cir. 2009).

Freeney also asserts that the audiotapes' admission into evidence violated the Confrontation Clause, the audiotapes were substantially more prejudicial than probative under Federal Rule of Evidence 403, and they constituted hearsay under Federal Rule of Evidence 802. But we decline to address these evidentiary issues because Freeney first raised them in his reply brief. *See United States v. Anderson*, 5 F.3d 795, 801 (5th Cir. 1993).

Finally, Freeney contends that his 72-month sentence is substantively unreasonable. Freeney asserts that the district court failed properly to balance the sentencing factors of 18 U.S.C. § 3553(a) and instead overemphasized his criminal history and risk of violence. We review the substantive reasonableness of above-guidelines sentences for abuse of discretion. *See Gall v. United States*, 552 U.S. 38, 51 (2007).

Considering the totality of the circumstances and giving appropriate deference to the district court's consideration of the § 3553(a) factors, we cannot conclude that the district court abused its discretion in imposing Freeney's sentence. *See United States v. Fraga*, 704 F.3d 432, 439–41 (5th Cir. 2013). We have upheld significantly greater variances. *See, e.g.*, *United States v. Key*, 599 F.3d 469, 475–76 (5th Cir. 2010) (upholding a 216-month sentence where the upper limit of the guidelines range was 57 months); *United States v. Smith*, 417 F.3d 483, 492–93 (5th Cir. 2005) (affirming a 120-month sentence where the maximum under the guidelines range was 41 months).

AFFIRMED.