No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MARK RANDALL JONES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
to the U.S. Court of Appeals for the Fifth Circuit

_____

PETITION OF DEFENDANT PETITIONER MARK RANDALL JONES

_____

By: Matthew M. Robinson
Robinson & Brandt, PSC
Attorney for the Appellant
629 Main Street, Suite B
Covington, KY 41011
(859) 581-7777 phone
(859) 581-5777 fax
administrator@robinsonbrandt.com
assistant@robinsonbrandt.com

`

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MARK RANDALL JONES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

_____

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner Mark Randall Jones, respectfully asks leave to file his petition for writ of certiorari without prepayment of costs and to proceed in forma pauperis. Mr. Jones encloses his affidavit of indigence in support of this motion.

Dated: March 15, 2021

/s/ Matthew M. Robinson
Matthew M. Robinson, Esq.
Robinson & Brandt, P.S.C.
629 Main Street, Suite B
Covington, KY 41011
(859) 581-7777 voice
(859) 581-5777 facsimile
Counsel of Record for Petitioner

QUESTIONS PRESENTED FOR REVIEW

A. **Whether the Warrantless Seizure of Packages from the Mail Chute at the U.S. Post Office Based on Nothing More than a "Gut Feeling" Violates the Fourth Amendment?**

B. **Whether Petitioner's Right to Due Process and a Fair Trial was Violated when Evidence Extrinsic to the Charged Conspiracy and Admissible only under Rule 404(b) was Wrongfully Admitted at Trial as Evidence that was Intrinsic to the Charged Conspiracy and Direct Evidence of Guilt?**

C. **Whether the Confrontation Clause Was Violated When the Government Introduced Testimonial Statements of Others but Failed to Call those individuals as a Witness at Trial?**

II. TABLE OF CONTENTS

III. TABLE OF AUTHORITIES

Case Law:

Other Authorities:

IV. OPINIONS BELOW

The United States District Court for the Southern District of Mississippi entered final judgment of conviction on October 10, 2017. See Judgment, United States v. Jones, 3:09-cr-00096-DCB-LRA (SD Miss.). The U.S. Court of Appeals for the Fifth Circuit affirmed the district court's judgment in an unpublished opinion dated October 23, 2020. The Fifth Circuit subsequently denied petition for rehearing en banc on December 14, 2021. See, United States v. Jones, No. 17-60285 (5th Cir). Neither decision is reported, but both are attached.

V. STATEMENT FOR THE BASIS OF JURISDICTION

The district court had jurisdiction, as Petitioner was charged with crimes under the United States Code, including conspiracy to distribute five kilograms or more of cocaine and possession with intent to distribute 500 grams or more of cocaine, in violation of 21 U.S.C. § 841(a), and 846. District Court Document ("Doc.") 4, Indictment. The district court entered judgment against Petitioner on October 10, 2017. Petitioner filed a timely notice of appeal from that judgment on October 17, 2017. Doc. 203 Notice of Appeal. See Fed. R. App. P. 4(a)(1)(A). Accordingly, the Fifth Circuit had jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

This Court has jurisdiction under 28 U.S.C. § 1254(1), as the Fifth Circuit rendered an opinion affirming Petitioner's conviction on October 23, 2020 and a final decision December 14, 2020, denying Petition for Rehearing En Banc. Petitioner is filing this petition within 90 days from that decision. See, United States v. Jones, No. 17-60285 (5th Cir. Dec. 14, 2020), attached

VI. STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV.

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

U.S. Const. Amend. V.

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.

U.S. Const. Amend. VI.

VII. STATEMENT OF THE CASE

On October 20, 2009, a two count indictment was handed down by a grand jury sitting in the Southern District of Mississippi. ROA357-359. Count One charged Petitioner with conspiracy to "possess with intent to distribute in excess of five (5) kilograms of a mixture or substance containing a detectable amount of cocaine hydrochloride," in violation of 21 U.S.C. § 846, § 841(a)(1), and 18 U.S.C. § 2. ROA.357. Pedro Phillips, Derrick Beals, Tammy Lamb, and Tamara Flowers were named as co-conspirators. Id. The conspiracy was charged to have occurred from June 15, 2006 until June 9, 2008. Id. Count Two charged that on June 9, 2009, Appellant, Phillips, and Beals "aided and abetted by each other" possessed with intent to distribute 500 grams or more "of a mixture or substance containing a detectable amount of cocaine hydrochloride," in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2. ROA.358.

Petitioner moved to suppress evidence procured by the Government as a result of improper

seizures and searches of packages by the United States Postal Inspection Service (UAPIS) on June 4, 2008. ROA134-149. On that day, Jaworowski, a USPIS employee, pulled from a mail chute at a U.S. Post Office in Los Angeles, California two packages based on nothing more than Jaworoski's gut feeling that he should intercept the packages. After seizing the packages from the mail chute, Jaworoski deemed the packages suspicious because of the address information found on the mailing labels.

Subsequently, a dog sniff was conducted by Agent Still and his K-9 and cocaine was allegedly discovered in the packages. Still was not produced as a witness. But, Inspector Kay testified that he observed the dog alert on the packages and subsequently search warrants were obtained to open the packages. ROA569-571.

The district court denied the motion to suppress, finding a reasonable suspicion existed to seize the packages because they were being mailed from California, but had Mississippi return addresses. ROA.740-742, 746.

Petitioner also moved to exclude items discovered during the execution of warrants in Los Angeles, California. ROA.150-155. Petitioner argued that the evidence from the searches conducted in California was extrinsic and not relevant to the charged conspiracy. Id. Petitioner filed a motion seeking to exclude evidence stemming from the execution of a search warrant at 2945 Layfair Dr., Flowood, MS for the same reasons. ROA189-193. Petitioner also argued that the evidence was inadmissible under Rule 404(b). ROA191-192.

Petitioner also moved to dismiss the indictment based on the fact the government had lost or destroyed the seized cocaine and the investigative notes of Stills and that forcing Petitioner to trial without the aid of the exculpatory evidence would violate due process. ROA166-170.

The district court did not resolve any of Petitioner's pretrial motions prior to trial. Instead the district court took up the motions as the trial was proceeding and in the presence of the jury. With respect to Petitioner's motion to in limine to exclude extrinsic evidence, Agent Kay testified "Pedro Phillips stated that he would take the parcels to [the Layfair] address and drop them off and get payment for the parcels, and he would also return the keys at that time to that apartment." ROA.607-09. Phillips allegedly told Kay that he would drop off the parcels at the apartment and receive payment. Id. Phillips also picked up packages at the UPS PO Box location in Flowood. Id. Petitioner objected because Kay was testifying as to the truth of what Phillips had told him.

The district court instructed the jury prior to closing arguments. The district court gave a standard Rule 404(b) instruction but did not specify that the instruction covered the California and Layfair Evidence. See Opinion, p 6. Instead, that evidence was presented to the jury by the Government as intrinsic to the charged offense and evidence of Petitioner's guilt. During closing arguments, the Government repeatedly referenced the California and Layfair evidence as part of the proof that Jones committed the crimes charged in the indictment. Id.

Following his conviction, the district court denied each of Petitioner's post-trial motions. ROA.296-309. Significantly, in its order denying the post-trial motions, the court made clear that the evidence recovered from the search warrants executed in California and the Layfair Apartments was extrinsic evidence that was admitted as evidence of intent. ROA.303-305. The jury was never instructed of this finding.

Sentencing took place on October 3, 2017. ROA.962-1061. The court sentenced Appellant to 360 months in prison on Count One and 60 months imprisonment, serve concurrently, on Count Two. ROA.1056.

VIII. STATEMENT OF FACTS

The following facts are taken directly from the Fifth Circuit's Opinion affirming Petitioner's conviction:

> On June 4, 2008, Norbert Jaworowski, a contractor hired by the United States Postal Inspection Service (USPIS), observed a man enter a Los Angeles post office carrying a large box with two smaller boxes inside of it. The man placed the two smaller boxes in the mail chute and left carrying the larger box.
>
> After observing the man's behavior,[1] Jaworowski developed "a gut feeling that something was going on." Jaworowski watched the man leave the post office in a Chrysler Pacifica and noted the license plate. Jaworowski then retrieved the two smaller boxes (to which we will refer as the "Packages") from the mail chute. Both Packages listed "Horace Hampton" as the recipient and "Delilah Maddox, YMI Incorporated" as the sender and had Jackson, Mississippi return addresses. The delivery address on the first Package was in Clinton, Mississippi. The second package was addressed to a different delivery address in Flowood, Mississippi. Jaworowski determined from the vehicle registration for the Chrysler Pacifica that it was licensed to defendant–appellant Mark Randall Jones.
>
> Jaworowski contacted Postal Inspector Robert Kay in Jackson, Mississippi, to report what he had witnessed and to convey his suspicions. Kay asked Jaworowski to mail the Packages to him, and Jaworowski obliged. After receiving the Packages, Kay arranged for a canine inspection within a parcel lineup. Kay and Agent Geoff Still, the canine handler, were present at the lineup. The canine alerted to the Packages.
>
> Kay obtained a search warrant for the Packages on June 6, 2008, and opened them later that day. Each Package contained a speaker box filled with two vacuum-sealed bundles of a substance that tested positive for cocaine. The USPIS Crime Laboratory determined that each Package contained approximately two kilograms of cocaine.
>
> Kay determined that the delivery addresses on the Packages were the addresses of two private postal stores that rented boxes for the receipt of mail. After further investigation, Kay concluded that Jones's co-defendant Pedro Phillips had rented the postal boxes to which the Packages were addressed using the alias "Horace Hampton." Kay learned that the two stores regularly received similar packages and that Phillips usually picked them up.

---

[1]The behavior observed was a man walking in to the post office, placing two packages in a mail chute and then exiting the post office.

On June 9, 2008, Kay organized a controlled delivery of the Package sent to the rental box in Flowood. During the controlled delivery, Jones's codefendant Derrick Beals took possession of the Package and was arrested. Following Beals's arrest, Kay learned that other packages sent to that rental box were usually taken to an apartment on Layfair Drive (Layfair Apartment).

After obtaining a search warrant, agents searched the Layfair Apartment and found scales, wrappings for money, six speaker boxes "identical" to those in the Packages, and a property bag from the Madison County Jail in the name of Derrick Beals. A powdery substance on the floor of the apartment tested positive for cocaine.

Jaworowski also notified Detective Tom Logrecco of the Los Angeles County Sheriff's Department about the Packages and the Chrysler Pacifica. Logrecco discovered that the address on the Pacifica's vehicle registration was that of a postal rental box at a business called "Copies Plus." Logrecco discovered that Jones also used a postal rental box at another business called "Mail Plus." Mail seized from those two rental boxes revealed various residential, business, and storage addresses associated with Jones.

Logrecco obtained a search warrant for some of the California addresses associated with Jones on June 13, 2008. At one address, Logrecco found paperwork containing Jones's name; envelopes with the sender listed as "Mary L. Harrison, YMI, Incorporated" and a Michigan return address; another envelope with "Mary Harrison" listed as the sender and a Jackson, Mississippi return address; a money counter; a "food saver heat seal machine"; and a note instructing the reader "to maintain several FedEx accounts, business addresses [and] keep money on prepaid credit." Logrecco also found a receipt from a Wal-Mart in Mississippi and a flight itinerary for Jones to travel to Jackson, Mississippi. Most importantly, Logrecco discovered ten kilograms of cocaine and unopened envelopes containing almost $400,000 in currency. Jones's fingerprints were on two of the envelopes of currency. In 2011, the cocaine seized from the Packages and the California address was destroyed pursuant to USPIS procedure.

At a second California address, Logrecco seized several speakers, two money counting machines, two scales, checks from a checking account for a business named "Supreme Enterprises," and paperwork in Jones's name. At a third California address, Logrecco recovered envelopes with "Mary Harrison" listed as the sender and Mississippi and Michigan return addresses as well as paperwork in the name of "Mark R. Jones and Supreme Enterprises." Logrecco also recovered a California driver's license with Jones's photograph and the name "Jeffrey Anderson"—the name of the addressee on certain envelopes found at the first two California locations.

IX. Argument Addressing Reasons for Allowing the Writ

Under Supreme Court Rule 10, the Court will review a United States Court of Appeals decision for compelling reasons. A compelling reason exists when "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." S.Ct.R. 10(a).

In the instant case, the Fifth Circuit's decision approves the use of Government officials to monitor the flow of U.S. Mail and randomly seize and inspect packages placed in the mail, in violation of this Court's precedent in United States v. Van Leeuwen, 397 U.S. 249, 251- 252 (1970), Reid v. Georgia, 448 U.S. 438, 440, 100 S.Ct. 2752, 2753-54 (1980), and the Fourth Amendment to the United States Constitution. In reaching its decision, the Fifth Circuit has "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." S.Ct.R. 10(a).

Additionally, the district court had found the evidence stemming from a separate conspiracy in California and extrinsic to the charged conspiracy to be admissible to prove intent. However, the district court never instructed the jury as to this fact and considered the extrinsic evidence to be direct evidence of guilt. This allowed the jury to convict Petitioner based on charges not reflected in the indictment and occurring on dates and at places outside the scope of the indictment. Although the Government had not appealed the district court's evidentiary decision that the evidence was extrinsic, the Fifth Circuit found that evidence stemming from a separate offense in California and

the Layfair Apartments was intrinsic evidence to the charged conspiracy and therefore properly admitted. The Fifth Circuit's decision conflicts with Greenlaw v. United States, 554 U.S. 237, 244-245 (2008), United States v. Yi, 460 F.3d 623, 632 (5th Cir. 2006), United States v. Coleman, 78 F.3d 154, 156 (5th Cir. 1996), United States v. Fortenberry, 860 F.2d 628, 632 (5th Cir. 1988) and United States v. Ford, 784 F.3d 1386, 1393 (11th Cir. 2015). Therefore, certiorari should be granted under S.Ct.R.10(a).

Finally, Petitioner's rights under the Confrontation Clause were violated when the Government introduced testimonial statements made by Pedro Phillips and Agent Still, but failed to call either as a witness. The Fifth Circuit found that the district court committed error in permitting the testimonial statements to be introduced, but refused to reverse, finding that the error was harmless. The Fifth Circuit's decision conflicts with Melendez-Diaz v. Massachusetts, 557 U.S. 305, 313-14 (2009), Richardson v. Mash, 481 U.S. 200, 207 (1987), United States v. Duron-Caldera, 737 F .3d 995 (5th Cir 2013), and United States v. Kizzee, 877 F.3d 650, 661 (5th Cir. 2017). Therefore, certiorari should be granted under S.Ct.R.10(a).

A. Whether the Warrantless Seizure of Packages from the Mail Chute at the U.S. Post Office Based on Nothing More than a "Gut Feeling" Violates the Fourth Amendment.

While recognizing that Agent Jaworowski removed packages from the U.S. Mail based on nothing more than a "gut feeling," the Fifth Circuit found that this "did not meaningfully interfere with any possessory interest that Jones retained in the packages by removing them from the mail chute and inspecting their labels." Opinion, p. 9. The Fifth Circuit found, "Any Fourth Amendment seizure occurred after Jaworowski read the labels on the Packages, and any detention of the Packages was reasonable." The court then found, without reference to any authority, that the labels on the

packages gave rise to a reasonable suspicion of illegal activity sufficient for Jaworowski to detain the packages. Opinion, p. 11-12.

The Panel equates what occurred in the instant case with simply inspecting the label of the packages. But that is not what happened. Instead, Jaworowski was a contractor with the Postal Inspection Services who was placed in the post office to "monitor people coming into the lobby specifically to mail drugs." ROA.386-87. While monitoring people using the U.S. Mail, he witnessed a Black man walk into the post office, place two packages in the mail chute for mailing, and then exit the post-office. Based on this observation Jaworoski had a "gut feeling" that something was amiss and decided to seize the packages from the mail chute. Jaworowski removed the packages from the mail chute and inspected the packages. He noticed that the return address was listed as an address in Mississippi, which he deemed to be "suspicious" because the packages were being mailed from a post-office in Los Angeles. Subsequently, a "dog sniff" was performed on the packages and a warrant to open the package was obtained.

"The Supreme Court has long recognized that '[l]etters and other sealed packages are in the general class of effects in which the public at large has a legitimate expectation of privacy.'" United States v. Villarreal, 963 F.2d 770, 774 (5 Cir. 1992) (citing United States v. Jacobsen, 466 U.S. 109, 104 S. Ct. 1652, 80 L. Ed. 2d 85 (1984); United States v. Van Leeuwen, 397 U.S. 249, 251, 90 S. Ct. 1029, 25 L. Ed. 2d 282 (1970)). The Supreme Court has emphasized that the government cannot encumber the flow of mail "by setting administrative officials astride the flow of mail to inspect it, appraise it . . ." Van Leeuwen, 397 U.S. at 251- 252.

Whether the Fourth Amendment is violated by the "detention" of a package depends on whether the detention was based on a reasonable suspicion. Reid v. Georgia, 448 U.S. 438, 440, 100

S.Ct. 2752, 2753-54 (1980). Once an item is placed into the stream of mail an agent of the United States must have a reasonable suspicion in order to remove it from the stream of mail for inspection. Id. If a reasonable suspicion does not exist, the seizure violates the Fourth Amendment. Reid, 448 U.S. at 440. An unparticularized suspicion or hunch, by definition, cannot provide a reasonable suspicion for an initial seizure. Reid, 448 U.S. 438, 440.

The seizure of the packages in the instant case could be justified only if the "totality of the circumstances" demonstrate that Jaworowski had a reasonable suspicion or "particularized and objective basis for suspecting legal wrong doing" when he pulled the packages from the mail to detain them for investigation. United States v. Arvizu, 534 U.S. 266, 273 (2002). He did not. Here, Jaworowski provided the only evidence of why he decided to pull the packages from the mail his testimony conclusively demonstrates he did not have a reasonable suspicion to pull the packages from the U.S. Mail. ROA.384-404. While monitoring the people coming and going from the post office, Jaworowski stated, "a male walked by me carrying a brown box with [] two other boxes inside of it," and he put two boxes into the mail chute. This gave Jaworowski a "gut feeling that something was going on" and he decided to pull the packages from the mail chute. ROA.387, 398-99. When pressed, Jaworowski confirmed that he lacked a reasonable suspicion to seize the packages:

> Q And the only thing you based the seizure of those two box was your gut feeling.
> A Yes.
> Q That was it.
> A That's what I did. I've done thousands of these things and so –

ROA.398-399.

Under a totality of the circumstances, these factors do not provide a reasonable suspicion

necessary to remove the packages from the stream of U.S. Mail. No authority exists to support the contention that it is suspicious to carry a box containing two packages into the post office, remove the packages from the box and place the packages into the mail chute. Yet, these were the factors that caused Jaworowski to have a "gut feeling" that he should remove them from the mail chute. See, Reid, supra. Because Jaworowski lacked a reasonable suspicion to pull the packages from the stream of mail, the Fourth Amendment was violated. Id.

In acting as an administrative official for the Government, Jaworowski's conduct in monitoring the flow of mail and inspecting packages at random flies in the face of this Court's well established precedent in Van Leeuwen, 397 US as 251. Jaworowski's conduct in seizing packages from the U.S. Mail based on nothing more than a "gut feeling" flies in the face of this Court's well established precedent in Reid v. Georgia, 448 U.S. 438, 440, 100 S.Ct. 2752, 2753-54 (1980). Furthermore, even if the initial removal of the packages from the mail chute was lawful, the addresses listed on the mailing labels cannot provide reasonable suspicion necessary under the Fourth Amendment to detain the packages. See, United States v. Pitts, 322 F.3d 449, 459 (7th Cir. 2003), see also, Villarreal, 963 F.2d at 774.

The Fifth Circuit's decision to ignores this precedent and sponsors the free and random violation of the Fourth Amendment whenever a citizen places a package in the U.S. Mail. It provides the blanket authority for government officials to arbitrarily seize packages from the U.S. Mail and then detain the packages for investigation and inspection. This cannot be accurate.

Furthermore, the Panel found that reasonable suspicion existed to seize the packages because the address labels indicated they were being mailed to the same person at different mailing addresses. However, precedent indicates that the names and addresses found on the label of a package cannot

generate a reasonable suspicion to seize the package. See, United States v. Villarreal, 963 F.2d 770, 774 (5th Cir. 1992) ("individuals may assert a reasonable expectation of privacy in packages addressed to them under fictitious names"), United States v. Pitts, 322 F.3d 449, 459 (7th Cir. 2003). Thus, the Panel's decision that the address labels gave rise to a reasonable suspicion is in conflict with precedent in Villarreal, 963 F.2d 770, 774, and Pitts, supra.

Because the Fifth Circuit decision conflicts with United States v. Van Leeuwen, 397 U.S. 249, 251- 252 (1970), Reid v. Georgia, 448 U.S. 438, 440 (1980), United States v. Arvizu, 534 U.S. 266, 273 (2002), and United States v. Pitts, 322 F.3d 449, 459 (7th Cir. 2003), this Court should grant certiorari.

B. Whether Petitioner's Right to Due Process and a Fair Trial was Violated when Evidence Extrinsic to the Charged Conspiracy and Admissible only under Rule 404(b) was Wrongfully Admitted at Trial as Evidence that was Intrinsic to the Charged Conspiracy and Direct Evidence of Guilt.

Prior to trial Petitioner sought to exclude the introduction of evidence stemming from search warrants executed at properties on in Los Angeles and Rancho Cucamonga, California, ROA.150-155; and to the introduction of evidence stemming from the execution of a search warrant at 2945 Layfair Dr, Flowood, MS. ROA189-193. Petitioner had argued that the evidence was extrinsic to the charged conspiracy and highly prejudicial. Therefore it should be excluded.

"Evidence of acts other than conduct related to the offense is intrinsic when the evidence of the other act and the evidence of the crime charged are inextricably intertwined or both acts are part of a single criminal episode or the other acts were necessary preliminaries to the crime charged." United States v. Yi, 460 F.3d 623, 632 (5th Cir. 2006), United States v. Coleman, 78 F.3d 154, 156 (5th Cir. 1996), United States v. Ford, 784 F.3d 1386, 1393 (11th Cir. 2015).

Here, the evidence from the California investigation suggested a different conspiracy. The evidence found was in a different jurisdiction and discovered during a time period different than charged in the indictment. The government failed to produce evidence that the drugs recovered in the California investigation were to be mailed to Mississippi or anyone charged in the indictment. The evidence from the California investigation was not "inextricably intertwined" or part of a single criminal episode or necessary preliminaries to the crime charged in the indictment. Thus, the district court correctly determined the evidence to be extrinsic.

Evidence found during the Layfair apartment search was also extrinsic. The government claims the Layfair evidence is intrinsic because the package seized from the post office was to be picked up by an individual who would then take the package to the Layfair apartments. However, neither of the packages seized at the post office were addressed to the Layfair apartments and Petitioner's fingerprints were not on the boxes found at the Layfair apartment. ROA.757-760. The district court noted "...I think it's awfully peripheral. I just don't think it has a lot to do with your case." ROA.761-762. Accordingly, the district court correctly found the evidence to be extrinsic.

In denying Petitioner's post-trial motions, the district court confirmed that the evidence was extrinsic evidence, but was admissible under Rule 404(b), in order to prove intent. ROA304-305. Yet the jury was never instructed of this fact and heard the evidence as intrinsic evidence and direct evidence of guilt. Regardless of the post-trial determination that the evidence was extrinsic to the charged conspiracy, the Government presented the evidence as being intrinsic and the jury had already relied upon the evidence as being intrinsic in determining Petitioner's guilt. Therefore, Petitioner argued on appeal that his conviction should be overturned.

Flatly overturning the district court's order, Fifth Circuit found that the evidence is intrinsic

evidence of the conspiracy charged, and thus properly admitted. The Fifth Circuit found that "because the California and Layfair Evidence is relevant evidence of the conspiracy charged in the indictment requires us to reject Jones's argument that the district court improperly admitted the California and Layfair Evidence." Id p 15.

But whether the evidence was intrinsic never an issue in this appeal. The district court held the evidence to be extrinsic and the Government did not appeal from the district court's evidentiary decision. As such, the Fifth Circuit did not have the authority to alter the judgment of the district court. Greenlaw v. United States, 554 U.S. 237, 244-245 (2008)("an appellate court may not alter a judgment to benefit a nonappealing party").

As a result of the Fifth Circuit exceeding its authority under Greenlaw and reversing the finding below that the evidence was extrinsic, the court also found that the "decision that the California and Layfair Evidence relates to the conspiracy charged in the indictment also requires [the Panel] to reject Jones's argument that its admission resulted in a constructive amendment to the indictment." Opinion, p 16-17. And, because the California and Layfair evidence is evidence of the conspiracy charged in the indictment, the Panel found that "its introduction did not permit the jury to convict on an alternative basis not charged in the indictment and consequently did not result in a constructive amendment." Id p 17. And because the court found the evidence to be intrinsic to the charged conspiracy, it rejected Petitioner's argument that insufficient evidence was presented to sustain the conspiracy conviction or that the government engaged in prosecutorial misconduct in relying on the California and Layfair evidence during closing argument. Id p 19-20.

The court correctly noted that "If a reasonable juror would have understood the California and Layfair Evidence as evidence of the conspiracy charged in the indictment, he would not have

understood the district court's Rule 404(b) instruction to apply to the California and Layfair Evidence." Opinion p, 18. Indeed, the external offenses evidenced from the inclusion of both the California investigation and the Layfair apartments "so dominated [Appellant]'s trial, that the prejudice it created 'substantially out-weighed' its probative value" despite the instruction to the jury. United States v. Fortenberry, 860 F.2d 628, 632 (5th Cir. 1988). The prosecution relied on the evidence as intrinsic evidence of Petitioner's participation in the crimes charged.

Accordingly, the inclusion of the evidence allowed the jury to convict Petitioner based on charges not reflected in the indictment and occurring on dates and at places outside the scope of the indictment. Id. Because Fifth Circuit's decision conflicts with Greenlaw v. United States, 554 U.S. 237, 244-245 (2008), United States v. Yi, 460 F.3d 623, 632 (5th Cir. 2006), United States v. Coleman, 78 F.3d 154, 156 (5th Cir. 1996), United States v. Fortenberry, 860 F.2d 628, 632 (5th Cir. 1988) and United States v. Ford, 784 F.3d 1386, 1393 (11th Cir. 2015), this Court should grant certiorari.

C. Whether Petitioner's Rights Under the Confrontation Clause Were Violated When the Government Introduced Testimonial Statements Made by Pedro Phillips and Agent Still, but Failed to Call Either as a Witness.

The Confrontation Clause of the Sixth Amendment states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. Amend. VI. In Crawford v. Washington, 541 U.S. 36, 53-54, 68, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), the Supreme Court held that the right to confrontation bars the "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." Id. See also, Dutton v. Evans, 400 U.S. 74, 91 S. Ct. 210, 27 L. Ed. 2d 213 (1970)(right to confront witnesses is a fundamental right).

The purpose of the right to confront a witness is not only to allow the defendant a chance at cross-examination, but to allow the jury to observe, and judge the credibility of the witnesses. Id. "[T]he Confrontation Clause … applies to witnesses against the accused–in other words, those who bear testimony, and that even if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object, and interrogations by law enforcement officers fall squarely within that class." Crawford, supra.

Here, search warrant returns and affidavits submitted as evidence at trial included testimonial statements from Agent Still concerning when the dog search occurred and when search warrants were executed. ROA.1223-1238. For example, Kay's affidavit states, "Agent Still stated Rudy alerted to the odor of narcotics emanating from the packages." ROA.1227. Additionally, the information submitted states that Still witnessed Kay prepare the parcel line up sheets (ROA.1230, 1234), and that Still witnessed the inventory of the packages when the warrants were executed.ROA.1223-1238. Still must have been called as a witness so that he could be cross examined concerning those statements which were used against Petitioner at trial.

Additionally, through the hearsay testimony of Inspector Kay, the Government introduced testimonial statements made by Pedro Phillips that he and Derrick Beals used the false name Horace Hampton to rent P.O. Boxes where cocaine was delivered through the US Mail. ROA.562-566. Accordingly, Phillips must have been called as a witness so that he could be cross examined concerning those statements, especially if this evidence was intrinsic to the conspiracy as the Fifth Circuit later held. Thus, the failure to call Still or Phillips as a witness violated Petitioner's right to confrontation and a fair trial.

Importantly, the Fifth Circuit recognized that it was error to admit these testimonial

statements. See, Melendez-Diaz v. Massachusetts, 557 U.S. 305, 313-14 (2009) ("The text of the Sixth Amendment contemplates two classes of witnesses-those against the defendant and those in his favor... There is not a third category of witnesses, helpful to the prosecution, but somehow immune from confrontation."), United States v. Duron-Caldera, 737 F.3d 995 (5th Cir 2013). However, the court found that the errors were harmless, stating that "the introduction of Still's testimonial statements was harmless and thus did not violate the Confrontation Clause." Opinion, p 26. The court found that Petitioner likely would have been convicted even if he could have cross examined Still at trial.

With respect to Kay's testimony about what Phillips told Kay about Beals' involvement and the Layfair Apartments, the court found "because Phillips did not name Jones or directly implicate him in any way, his testimony is not facially incriminating but "inferentially incriminat[ing] . . . when linked to other evidence introduced at trial." Therefore, "Kay's recollection of Phillips's testimonial statements did not violate the Sixth Amendment as the district court instructed the jury not to consider Kay's statements when determining whether the Government had proved its case." Opinion, 27.

While the Fifth Circuit found the error to be harmless, the court did not find that the error was "harmless beyond a reasonable doubt" as required for the Confrontation Clause analysis under United States v. Kizzee, 877 F.3d 650, 661 (5th Cir. 2017). Further, the decision that the testimonial statements of Pedro Phillips did not "facially incriminate" Petitioner cannot be supported. "Police officers cannot, through their trial testimony, refer to the substance of statements given to them by nontestifying witnesses in the course of their investigation, when those statements inculpate the defendant."Kizzee, 877 F.3d at 656. Questioning of a witness may trigger the Confrontation Clause

"by revealing to the jury that a nontestifying witness conveyed incriminating information." Id at 658. Like Kizzee, Kay's answers to questions from both the prosecutor and the district court introduced testimonial statements of Phillips. Id at 657.

Contrary to the court's finding, the testimonial statements of Phillips offered by inspector Kay at trial were relied upon to show Petitioner's connection to the Layfair apartment and direct evidence of his guilt in the charged conspiracy. The testimony was harmful because, based on Kay's testimony, "the jury would reasonably infer that information obtained in an out of court conversation between a testifying police officer and [Phillips] . . . implicated [the Petitioner] in narcotics activity." Kizzee, 877 F.3d 657.

The admission of Phillip's testimonial statements, though the testimony of Kay; and, the statements of Agent Still, through the admission of the search warrants and warrant returns, violated Petitioner's right to confrontation. "A defendant deprived of the right to confront adverse witnesses is entitled to a new trial unless the Government proves harmless error beyond a reasonable doubt." Kizzee, at 661. The court never reached, and indeed cannot reach, the conclusion that the error was harmless beyond a reasonable doubt. Kizzee at 661-662.

"[A]non-testifying witness's out-of-court statement, including a co-defendant's confession, that facially incriminates a defendant violates the defendant's Sixth Amendment right to confrontation, even when the jury is instructed not to consider the prior statements as evidence against the defendant." Richardson v. Mash, 481 U.S. 200, 207 (1987). Thus, even though the district court instructed the jury not to consider Kay's testimony concerning what Phillips told Kay in deciding whether the Government has proved its case beyond a reasonable doubt, the instruction could not cure the Sixth Amendment violation. Id. Accordingly, the hearsay testimony of Kay

resulted in a violation of Petitioner's right to confrontation requiring that his convictions be vacated.

Because the court's decision conflicts with Melendez-Diaz v. Massachusetts, 557 U.S. 305, 313-14 (2009), Richardson v. Mash, 481 U.S. 200, 207 (1987), United States v. Duron-Caldera, 737 F .3d 995 (5th Cir 2013), and United States v. Kizzee, 877 F.3d 650, 661 (5th Cir. 2017), this Court should grant certiorari.

CONCLUSION

Petitioner respectfully submits that he has demonstrated compelling reasons to grant writ of certiorari in this case. Accordingly, certiorari should be granted.

Respectfully submitted,

Robinson & Brandt, PSC

/s/ Matthew M. Robinson
Counsel for the Appellant
629 Main Street, Suite B
Covington, KY 41011
(859) 581-7777 voice
(859) 581-5777 facsimile
administrator@robinsonbrandt.com
assistant@robinsonbrandt.com

CERTIFICATE OF SERVICE

The undersigned certifies that a on March 15, 2021, a true and accurate copy of Mr. Jones' petition for writ of certiorari was electronically filed and was sent via U.S. Mail with sufficient postage affixed to Assistant U.S. Attorney, Gregory Layne Kennedy, Office of the Assistant United States Attorney for the Southern District of Mississippi, Suite 4.430, 501 E. Court Street, Jackson, Mississippi 39201; and Office of the Solicitor General, Room 5614, 950 Pennsylvania Ave., NW, Washington, D.C. 20530-0001 and a PDF copy was emailed to the Office of the Solicitor General to SupremeCtBriefs@USDOJ.gov.

/s/ Matthew M. Robinson
Matthew M. Robinson, Esq.
629 Main Street, Suite B
Covington, KY 41011
(859) 581-7777 voice
(859) 581-5777 facsimile
administrator@robinsonbrandt.com
assistant@robinsonbrandt.com