No._____

IN THE

SUPREME COURT OF THE UNITED STATES

RAUL RAMOS,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent.

On Petition for Writ of Certiorari
To the Texas Court of Criminal Appeals

PETITION FOR A WRIT OF CERTIORARI

Respectfully submitted,

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QUESTION PRESENTED FOR REVIEW

Whether the district court's reliance on hearsay evidence to impose a guideline sentence of life violates Ramos's right to confront and cross-examine witnesses under the Sixth Amendment to the United States Constitution, as provided by *Crawford v. Washington*, 541 U.S. 36 (2004), and this Court's precedent, as most recently developed in *United States v. Haymond*, 588 U.S. ____ (2019); 139 S. Ct. 2369 (2019)?

PARTIES TO THE PROCEEDING

Petitioner is Raul Ramos, who was the Defendant Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, RAUL RAMOS, (Petitioner) respectfully prays that a writ of certiorari be granted to review the judgment and opinion of the Fifth Circuit Court of Appeals, against the Petitioner, reverse the judgment of the Fifth Circuit Court of Appeals, and remand this case for reconsideration of the merits.

OPINIONS BELOW

On February 1, 2021, the Fifth Circuit Court of Appeals issued an opinion affirming Ramos's sentence of life confinement, in *United States v. Ramos*, *United States v. Ramos*, 834 F. App'x 946 (5th Cir. 2021) (unpublished)

On March 22, 2021, the Fifth Circuit Court of Appeals issued an order denying Mr. Ramos's panel petition for rehearing.

JURISDICTION

On February 1, 2021, the Fifth Circuit Court of Appeals affirmed Mr. Ramos's sentence of confinement for life in the Bureau of Prisons. *See United States v. Ramos*, *United States v. Ramos*, 834 F. App'x 946 (5th Cir. 2021) (unpublished)

On March 22, 2021, the Fifth Circuit Court of Appeals refused Mr. Ramos's motion for panel rehearing.

The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Petitioner's question implicates the Sixth Amendment's right to confront and cross-examine witnesses, which provides in relevant part as follows:

> "[i]n all criminal prosecutions, the accused shall enjoy the right *** to be confronted with the witnesses against him."
>
> *U.S. Const. amend.*

STATEMENT

A. Procedural History of the Case:

On June 21, 2017, Petitioner Raul Ramos, (Mr. Ramos), was indicted *via* superseding indictment in relevant part, in Count 1 with conspiracy to interfere with commerce by threats or violence See Record of Appellate Court at page 118 (ROA. 118-37); Count 2, conspiracy to distribute and possess with intent to distribute controlled substances (ROA.137-138); and Count 5, possession of a firearm by a convicted felon. ROA.139. On April 27, 2018, the government filed a notice of enhanced penalty, under 21 U.S.C. § 851. ROA.262

On May 2, 2018, Mr. Ramos entered a "cold" plea of guilty, that is, without a plea agreement, to Counts 1, 2 and 5 of the indictment, without a written plea agreement. ROA.457-488. On October 8, 2019, the district court sentenced Ramos to 20 and 10 year, statutory maximum sentences on Counts 1 and 5, respectively, and to a life (without the possibility of early release) in prison, guideline sentence on Count 2. (ROA.571), with all sentences running concurrent.

Mr. Ramos appealed his sentence to the Fifth Circuit Court of Appeals on October 17, 2019. ROA.339-340. He contended that the district court erroneously relied on hearsay testimony at sentencing, acknowledging that his contention is

foreclosed under Fifth Circuit precedent (*United States v. Beydoun*, 469 F.3d 102, 108 (5th Cir. 2006)), seeking only to preserve it for review by this Court. The Court issued an unpublished opinion affirming Mr. Ramos's sentence on February 1, 2021. *See United States v. Ramos*, 834 F. App'x 946 (5th Cir. 2021) (unpublished). Mr. Ramos filed a motion for panel rehearing which was denied on March 22, 2021.

Mr. Ramos's Certiorari Petition was timely filed on June 21, 2021.

B. Facts

1. Indictment

On May 17, 2017, Mr. Ramos, was indicted, in relevant part, in **Count 1** with unlawfully, knowingly and intentionally conspiring together and with others known and unknown, to obstruct, delay, and affect commerce and the movement of articles and commodities in commerce by extortion, as that term is defined in Title 18, United States Code, Section 1951(b)(2), in violation of Title 18, United States Code, Section 1951 (ROA.118-137), which carried a maximum statutory term of 20 years; **Count 2,** conspiracy to distribute and possess with intent to distribute methamphetamine and heroin, contrary to Title 21, United States Code, Sections 841(a)(1) & 841(b)(1)(B) and in violation of Title 21, United States Code, Section 846 (ROA.137-138); which carried a minimum mandatory sentence of 10 years,

and a maximum term of life (following the filing of a notice of enhanced penalty, under 21 U.S.C. § 851, ROA.262), and, **Count 5** (first filed *via* superseding indictment on June 21, 2017), possession of a firearm by a convicted felon, which carried a maximum term of 10 years, under Title 18, United States Code, Sections 922(g)(1) and & 924(a)(2). ROA.139. On May 2, 2018, Mr. Ramos entered a "cold" plea of guilty, that is, without a plea agreement, to Counts 1, 2 and 5 of the indictment. ROA.462-463,457-488.

2. Presentence Report (PSR), Calculations and Objections

The following are the PSR's computations and recommended guidelines for each of the Counts that Ramos pled to:

As to Count I of the superseding indictment, grouped under *USSG* §3D1.2(c) and USSG §3D1.4 as "Count group I," (ROA.688) the PSR recommended a total guideline level of 52 (ROA.690), broken down as follows:

The guideline calculation, controlled by Count II, (involving heroin and methamphetamine) as the group with the highest offense level, calculated 4.5 or more kilograms of methamphetamine, which resulted in a guideline level of 38, under *USSG* §2D1.1(c)(1);

This was increased by two levels for possession of a firearm, under *USSG* §2D1.1(b)(1);

This was increased by another two levels for participating or ordering multiple home invasions - using violence - during the course of the conspiracy, under *USSG* 2D1.1(b)(2);

This was increased by an additional two levels because the TMM distributed narcotics in TDCJ and BOP facilities throughout the conspiracy and while the case was pending - because the object of the offense was the distribution of a controlled substance in a prison, correctional facility, or detention facility, under USSG §2D1.1(b)(4);

This was increased by another two levels because the Appellant was a leader/organizer in the conspiracy and the offense involved the importation of methamphetamine from Mexico, and he committed the offense as part of a pattern of criminal conduct engaged in as a livelihood, under USSG §2D1.1(b)(16)(C) and (E);

This was increased by an additional four levels for his position as general of the Texas Mexican Mafia (TMM), specifically, as organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, under *USSG* §3B1.1(a), and

This was increased by another two levels for obstruction of justice, because the Appellant willfully obstructed or impeded, or attempted to obstruct or impede,

the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction, and the obstructive conduct related to the defendant's offense of conviction and any relevant conduct; or a closely related offense, under USSG §3C1.1, for a total guideline level of 52. ROA.688-89.

Pursuant to Chapter 5, Part A (comment n.2), in those rare instances where the total offense level is calculated in excess of 43, the offense level will be treated as a level 43. Ramos netted a subtotal guideline level, for Counts I and II, of 52, resulting in a net, default guideline level of 43, which provides for a sentence of life, notwithstanding Ramos's specific criminal history computation - a guideline level of 43 provides for a life sentence across the criminal history category spectrum. ROA.690.

As to Count I, the guideline for a violation of 18 U.S.C. § 1951 is *USSG* §2B3.2, and the base offense level is 18. *USSG* §2B3.2(a). Because the offense involved an express or implied threat of death, bodily injury, or kidnapping, specifically, the enforcement of payment of the "dime" tax by robbing, beating, and threatening to kill those who did not comply, two levels were added, under *USSG* § 2B3.2(b)(1). Under the defendant's leadership, TMM members were involved in a shootout with individuals while attempting to collect the "dime."

Because a firearm was discharged in connection with this activity, seven levels were added, under USSG §2B3.2(b)(3)(A)(i). Lastly, because Ramos was identified as a TMM General, and an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, four levels were added, under USSG §3B1.1(a). ROA.689.

3. Sentencing Hearing

On October 8, 2019, The district court held Ramos's sentencing hearing. From the outset, The district court noted "[w]e have a number of objections [from the defense]. Frankly, everything is objected to in this presentence report." ROA.499 (emphasis in bold, added) *See* ROA.702-706 (Defendant's Objections to the PSR); 706-718 (Sentencing Memorandum - which contained objections as well). As noted by the district court, Ramos's objections went beyond sentencing issues, and constituted flat denials to criminal conduct that Ramos was charged with in each count. The prosecutor "ask[ed] the district court to take judicial notice of the record in the trial of the case, the exhibits related to it, and the other proceedings that we've already had with that. I have witnesses available. I think we could take up kind of the objections. If there are any of those that you would like additional evidence on, I would be prepared to put that on. And, if not, if you feel like the record is adequate for you to rule at this time, then we could do it without

the need for that." ROA.499-500. Defense counsel objected to the use of exhibits by the government at the sentencing hearing, stating that he'd not had a chance to review them before the hearing. ROA.500-01. The following discussion ensued:

THE COURT (to Defense Counsel, Dombart): So, in light of that, do you want me to have the case agent be put on the stand for a summary of all these objections, or how do you want to proceed?

> MR. DOMBART (defense counsel): **Your Honor, I think we have a right under *Crawford* to confront the persons that are making the allegations.**
>
> THE COURT (to prosecutor, Leachman): So why don't you put on the case agent for the summary.
>
> MR. LEACHMAN (prosecutor): I can do that, Judge. May I respond to just a couple things briefly just for the record, your Honor?
>
> THE COURT: Yes.
>
> MR. LEACHMAN: The exhibits in the trial were largely derived from the discovery that was provided to the defendants in the case. The only exceptions to that really are like hierarchy charts or things like that, that were developed by the witnesses themselves. They testified about those extensively in the transcripts. Of course, they point to defendant Ramos as being the head of this organization. That's in the transcripts, in addition to the exhibits, so it really doesn't change very much.
>
> ***
>
> MR. DOMBART: And, your Honor, I don't dispute that I have received some of these ledgers that were presented in the trial, but just

> as for just a point of order, your Honor, as far as blanketly admitting or taking judicial notice of all of the exhibits, when they are talking about the hierarchy charts, those were completed by codefendants and witnesses, and so forth, and so, therefore, **we would like the opportunity -- and they weren't cross-examined for the issues about the veracity about the allegations against Mr. Ramos.**
>
> Even from the transcript, your Honor, I even have one of the witnesses, Mr. Angel Cantu Garcia, on direct, he calls my client Arturo Ramos, and so there is -- but nobody, since my client wasn't on trial for that, there is nobody that would have contested those issues, **and so therefore I think that it would be a violation under *Crawford* to just admit those exhibits in.** That's one of the things that we're specifically denying, is that he was the leader/organizer of this organization, and that's our objections.
>
> THE COURT: Okay. That's enough guys. **So the objections are noted but overruled…**
>
> **…To resolve the objections, let me hear from the case agent, and give me the summary on the base offense level; the objection on the possession of a firearm by this defendant; the objection by this defendant that he did not order or participate in home invasions; the objection by the defendant that he wasn't responsible or directed distribution of narcotics in the BOP/GEO facilities; and that he's not a leader or organizer in this conspiracy. And so let me just resolve those objections.**

ROA.501-503 (emphasis in bold, added). The government called FBI Agent Katherine Gutierrez, who presented a long and comprehensive, hearsay-based narrative in support of the enhanced sentencing recommendations in the PSR. ROA.504-526. Further along, defense counsel cross-examined Agent Gutierrez, drawing the Court's attention:

THE COURT: **Mr. Dombart, let me stop you here, because I'm confused. I mean, your client did plead guilty to conspiracy to interference with commerce by threats or violence; did he not?**
MR. DOMBART: Your Honor, he pled that in basically in like -

THE COURT**: That's what I'm trying to figure out because you seem to be arguing that he had nothing to do with this.** But that's what he pled guilty to; isn't that correct?

MR. DOMBART: He did, your Honor.

THE COURT: I understand you are disputing amounts and the enhancements, **but I just want to make sure I understand. Your client did plead to this charge; right?**

MR. DOMBART: He did, your Honor.

THE COURT: Okay. Go ahead.

MR. DOMBART: Okay.

ROA.534-535 (emphasis in bold, added) Further along, defense counsel asked the agent:

Q. (By Mr. Dombart) Now, as far as the gun that was located in Mr. Ramos's residence, did you ever test that gun to see if it was operational?

A. I have not tried to fire it, no.

THE COURT: So, Counsel, again, this is where you are confusing me. Did your client plead guilty to felon in possession of a firearm?

MR. DOMBART: Well, your Honor, but that's what we're -- we're objecting to the fact that they also gave him a two-point enhancement for having a firearm in possession of a drug trafficking.

THE COURT: So did he plead guilty to possessing, using, carrying, and discharging firearms during and in relation to drug trafficking crimes? [1]

MR. DOMBART: Well, your Honor, he pled to the indictment, your Honor.

THE COURT: And that was part of the indictment. That's what's confusing me. **You seem to be disregarding the plea.** Am I confused, or not?

MR. DOMBART: Well, your Honor, it's -- in conversations with my client, your Honor, it's -- **these are the objections that he wanted me to make and I'm making on his behalf.**

THE COURT: Well, does your client want acceptance of responsibility points?

MR. DOMBART: Your Honor, at a level 54, I don't know if acceptance of responsibility makes a difference one way or the other, quite frankly.

ROA.545-46. (emphasis in bold, added)

At the conclusion of the hearing, the district court made findings as to each of the recommended guideline levels in the PSR. ROA.560-64. The district court

[1] The district court appears to have misunderstood Ramos's firearm charge as stemming from 18 U.S.C. § 924(c)(1)(A)(i), and not his actual charge alleging that he was a felon in possession of a firearm, under 18 U.S.C. § 922(g).

sentenced the Appellant, on Count 1 to 20 years; on Count 2, to life, and on Count 5, to ten years, with all sentences running concurrent. ROA.571.

REASON FOR GRANTING THE WRIT

> This Court should declare that the district court's reliance on hearsay evidence to impose a guideline sentence of life violates Ramos's right to confront and cross-examine witnesses under the Sixth Amendment to the United States Constitution, as provided by *Crawford v. Washington*, 541 U.S. 36 (2004), and this Court's precedent as most recently developed in *United States v. Haymond*, 588 U.S. ____ (2019); 139 S. Ct. 2369 (2019).

I. Introduction to Legal Arguments

Ramos submits that the clear terms of the Sixth Amendment require confrontation "[i]n all criminal prosecutions," which draws no distinction between trial and sentencing proceedings. *See U.S. Const. Amend. VI*. The defendant possessed a right to cross-examine every witness whose testimony might affect his sentence. *See Apprendi v. New Jersey*, 530 U.S. 466, 478-479 (2000). Yet the *Crawford* rule has not been extended by lower courts to sentencing proceedings. *See United States v. Bras*, 483 F.3d 103, 109 (D.C. Cir. 2007)("…we join our sister circuits in holding that nothing in *Crawford* or *Booker* " 'alter[s] the *pre-Crawford* law that the admission of hearsay testimony at sentencing does not violate confrontation rights.'")(citing *United States v. Brown*, 430 F.3d 942, 944 (8th Cir.2005); *United States v. Chau*, 426 F.3d 1318, 1323 (11th Cir.2005); *United States v. Littlesun*, 444 F.3d 1196, 1199-1200 (9th Cir.2006); *United States v.*

Katzopoulos, 437 F.3d 569, 576 (6th Cir.2006); *United States v. Stone*, 432 F.3d 651, 654 (6th Cir.2005); *United States v. Roche*, 415 F.3d 614, 618 (7th Cir.2005); *United States v. Luciano*, 414 F.3d 174, 179 (1st Cir.2005); *United States v. Martinez*, 413 F.3d 239, 243-44 (2nd Cir.2005); *United States v. Beydoun*, 469 F.3d 102, 108 (5th Cir. 2006).

Although the error complained of did not occur at trial, Ramos's defense counsel repeatedly objected to the admission of evidence at the sentencing hearing, including all guideline calculations that were recommended in the PSR, to Agent Gutierrez's testimony, to testimony from co-defendants at their trial (*See* ROA.570-571 (of which the district court took judicial notice: "I take judicial notice of the trials that we've had in this 17CR391 case.")) and to any exhibits introduced by the government to support his guideline calculations on *Crawford*, Sixth Amendment grounds. Ramos challenges the introduction of all evidence presented by the government, and relied on by the district court, to determine Mr. Ramos's sentence as to each count of conviction. Ramos presents his reason for review, on two fronts.

First, Ramos requests that this Court at the very least extend Crawford's protection at sentencing, to federal capital, death penalty and life sentences, and

Second, that extending *Crawford's* holding sentencing proceedings is necessary to preserve, and is consistent with a defendant's jury trial guarantee under the Sixth Amendment, as most recently expounded in *Haymond*.

This Court should reconsider its current precedent, especially in light of the process through which Ramos received a life sentence. Under the current system, the district court must assume that the hearsay evidence submitted by the government, hearsay that is often two to three times removed, and, as was the case here, and derived from witnesses with long criminal histories who testify in exchange for negotiated expectations of leniency *via* cooperation agreements, can somehow bear the stamp of reliability that is afforded to testimony that is the product of a full, and meaningful cross-examination at trial, with the assistance of counsel. This wholly illogical assumption should not pass constitutional muster.

II. Mr. Ramos's Life Sentence is a *De Facto* Death Sentence

As noted, Ramos's federally-imposed life sentence is for incarceration until his death. The United States Supreme Court has ruled that a life sentence without parole (LWOP, or early release) is the equivalent of a death sentence, under the Eighth Amendment's cruel and unusual punishment analysis. LWOP shares some of the same characteristics of the death penalty. *See Graham v. Florida*, 560 U.S. 48, 69-70 (2010) (The State does not execute the offender sentenced to life without

parole, but the sentence alters the offender's life by a forfeiture that is irrevocable. It deprives the convict of the most basic liberties without giving hope of restoration, except perhaps by executive clemency--the remote possibility of which does not mitigate the harshness of the sentence." (citing *Solem v. Helm*, 463 U.S. 277, at 300-301 (1983) (overruled on other grounds)).

On the premise that Mr. Ramos's life sentence is no different from a death sentence, he relies on Justice Fortunato Benavides's eloquent partial dissent in *United States v. Fields*, 483 F.3d 313, 363 (5th Cir. 2007) (J. Benavides, Partially Dissenting), which involved a challenge to a death sentence that was supported by testimony that was not subject to cross-examination. Ramos adopts all arguments presented by Justice Benavides's dissent in *Fields*, for the proposition that a sentencing in which an appellant like Ramos is exposed to - and receives - a LWOP sentence, should receive special consideration from all other federal sentences, and be afforded all of the protections that *Crawford*, and the Sixth Amendment, provide.

III. This Court's Recent Ruling in *Haymond v. United States* Supports *Crawford's Application to the Federal Sentencing Process*

> ***"Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes."***

Crawford, 541 U.S. at 62.

The Fifth and Sixth Amendments to the United States Constitution provide federal criminal defendants with the right to have each element of their offense found by a grand jury and placed in the indictment, then proven to a jury beyond a reasonable doubt. *See United States v. Cotton*, 535 U.S. 625, 627 (2002). Non-elements need not be placed in the indictment, need not be proven to a jury, and need not be proven beyond a reasonable doubt, even if they affect the sentence. *See United States v. Booker*, 543 U.S. 220 at 259 (2005) The defendant's procedural protections, therefore, depend critically on whether they are characterized as "elements" of the defendant's offense, or merely as "sentencing factors."

In *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), the Supreme Court held that the constitution did not require legislatures to treat the defendant's possession of a firearm during an offense as an element, even if it triggers a mandatory minimum punishment. *See McMillan*, 477 U.S. at 91-92. According to *McMillan*, that fact could be proven to judge by a mere preponderance of the evidence. *See id*. *McMillan* acknowledged, however, "that there are constitutional limits to the State's power in this regard; in certain limited circumstances *Winship*'s reasonable-

doubt requirement applies to facts not formally identified as elements of the offense charged." *Id*. at 86. (citing *In re Winship*, 397 U.S. 358 (1970)).

The *McMillan* court found that the Pennsylvania at issue law did not transgress these limits because neither established a presumption, nor shifted any burden of proof to the defendant. *See id*. 87. Further, it noted that the finding did not increase the statutory maximum of the offense. *See id.* 87. And the Court saw no evidence that the Pennsylvania legislature "had restructure[ed] existing crimes in order to 'evade' the commands of *Winship*…" *Id*. As such, the Court concluded that the statute at issue "gives no impression of having been tailored to permit the visible possession finding to be a tail which wags the dog of the substantive offense." *Id*. at 88.

Ten years later, the Supreme Court added a *caveat* to its holding in *United States v. Watts*, 519 U.S. 148 (1997), noting that the circuits had offered diverging opinions "as to whether, in extreme circumstances, relevant conduct that would dramatically increase the sentence must be based on clear and convincing evidence," and it expressly declined to resolve this divergence of opinion. *See Watts*, 519 U.S. at 156. Further, it limited *McMillan*'s approval for the preponderance standard to cases where "there was no allegation that the sentencing

enhancement was 'a tail which wags the dog of the substantive offense.'" *Id*. at 156, n.2 (quoting *McMillan*, 477 U.S. at 88).

In *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), the Court closed the opinion with the same *caveat* it offered in *Watts*: it "express(ed) no view on whether some heightened standard of proof might apply to sentencing determinations that bear significantly on the severity of sentence." *Id*. 248. Accordingly, after *Almendarez-Torres*, defendants could still plausibly argue that some facts affecting the sentence might have to be treated as elements, even if they did not affect the minimum or maximum.

In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), finally set a bright line rule: "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490. Twelve years after *Apprendi*, the Court extended its holding to facts that established a mandatory minimum, largely overruling *McMillan*. *See Alleyne v. United States*, 570 U.S. 99 (2013). Facts that establish a mandatory minimum punishment must now be proven to a jury beyond a reasonable doubt. *See Alleyne*, 570 U.S. at 107.

The Supreme Court's recent decision in *Haymond v. United States*, __U.S. __, 139 S.Ct. 2369 (2019), however, strongly suggests that facts may be due

elemental treatment based on a holistic evaluation of their similarity to elements, and the risk that constitutional guarantees will be "evaded." *Haymond* addressed the constitutionality of 18 U.S.C. §3583(k), which requires a five year term of imprisonment for certain supervised release revokees who a specified sex offense. *See Haymond*, 139 S.Ct. at 2375 (Gorsuch, J., plurality op.). Five Justices found that the provision (Subsection (k)), violated the jury trial guarantee of the Sixth Amendment, though they did not join a common opinion. *See Haymond*, 139 S.Ct. at 2385 (Gorsuch, J., plurality op.); *Haymond*, 139 S.Ct. at 2386 (Breyer, J., concurring).

A global assessment of the Guideline enhancements applied to Mr. Ramos here, and an objective assessment of the risk that sentencing has been used to "evade" constitutional guarantees, shows that these findings should be treated as elements of the defendant's offense. This is so for four reasons: 1) the findings are of "distinct criminal offenses," as in *Haymond*, *see Haymond*, 139 S.Ct. at 2386 (Breyer, J., concurring), 2) the findings result from a presumption of guilt or reallocation of the burden of proof, as discussed by *McMillan*, *see McMillan*, 477 U.S. at 86-87, 3) the findings do not involve recidivism or a prior conviction, unlike that in *Almendarez-Torres*, see *Almendarez-Torres*, 523 U.S. at 247, and, most importantly, 4) the findings radically altered the sentence.

In Mr. Ramos's case, focusing solely on his drug conspiracy conviction, most of the guideline findings that enhanced his sentence could form the basis for distinct charges. For example, that Ramos possessed a firearm in connection with drug trafficking (*USSG* §2D1.1(b)(1) PSR par. 45 (ROA.688), compare to 18 U.S.C. §924(c); providing or possessing contraband in prison (*USSG* §2D1.1(b)(4), PSR par. 47 (ROA.688), compare to 18 U.S. Code § 1791; that Ramos participated or ordered multiple home invasions during the course of the conspiracy (*USSG* §2D1.1(b)(2), PSR par. 46 (ROA.688), compare to 18 U.S. Code § 1959, involving violent crimes in aid of racketeering activity (VCAR)); that he obstructed justice (*USSG* §3C1.1., PSR par. 51 (ROA.689), compare to any number of offenses by the same name, under 18 U.S. Code CHAPTER 73, and that he committed the offense as part of a pattern of criminal conduct engaged in as a livelihood (USSG §2D1.1(b)(16)(E), PSR par. 48 (ROA.688-690), could form the basis for distinct charges. As such, they resemble the findings of "distinct criminal offenses" that Breyer regarded as disguised elements in *Haymond*. *See Haymond*, 139 S.Ct. at 2365 (Breyer, J., concurring).

Second, this Court has long expressed the view that all allegations in a PSR must be rebutted by the defendant. *See United States v. Vital*, 68 F.3d 114 (5th Cir. 1995). As such, it cannot be said here, as it could in *McMillan*, that Ramos was not

subject to a presumption of guilt. *See McMillan*, 477 U.S. at 86-87. To the contrary, he was expected to exculpate himself from the allegations of the PSR.

Third, the facts at issue here, have not, like the prior conviction in *Almendarez-Torres*, resulted from other criminal proceedings at which the defendant enjoyed the rights of trial by jury, proof beyond a reasonable doubt, and confrontation. *See Apprendi*, 530 U.S. at 488 (distinguishing *Almendarez-Torres* because in *Almendarez-Torres* the "three earlier convictions for aggravated felonies … all … had been entered pursuant to proceedings with substantial procedural safeguards of their own …"). No jury has ever found, nor has Ramos ever made a judicial confession to the effect that he committed any of the acts for which he was given upward adjustments in relation to his drug conspiracy conviction, discussed above.

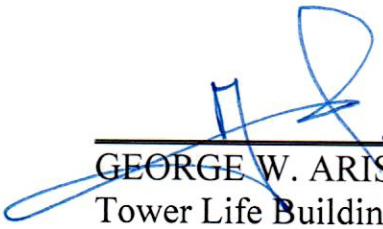
Finally, the findings made here elevated the defendant's Guideline range from 30 years to life, to automatic life, the difference between a minimum 25 year sentence (with good time credit), and a life without parole sentence, *aka* a death sentence by confinement. *See Graham v. Florida*, *supra.* A finding that produces so drastic an expansion of sentencing liability can be fairly characterized as a tail that wags the dog of the substantive offense.

The findings at issue here carry a serious risk that they will stand in for criminal trials. To be sure, this Court has held that facts that alter the Guidelines need not be treated as elements of the defendant's offense. *See United States v. Tuma*, 738 F.3d 681, 693 (5th Cir. 2013). That conclusion, however, has been sufficiently complicated by *Haymond* as to merit reconsideration. The substance of the defendant's critical constitutional guarantees to jury trials, proof to a moral certainty, and grand jury screening cannot be squared with the use of so many enhancements to elevate the sentence to such degree as occurred here. The sentence should be vacated.

CONCLUSION

This Court should grant certiorari, reverse the Fifth Circuit's ruling, and remand his case for a new sentencing hearing that affords Ramos all of the protections that the Sixth Amendment provides at trial, under *Crawford v. Washington*, 541 U.S. 36 (2004), and its progeny.

Respectfully submitted,



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BRIEF DATE: June 21, 2021.

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
February 1, 2021
Lyle W. Cayce
Clerk

No. 19-50932
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

RAUL RAMOS,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 5:17-CR-391-1

Before WIENER, SOUTHWICK, and DUNCAN, *Circuit Judges*.

PER CURIAM:*

Defendant-Appellant Raul Ramos pleaded guilty to: (1) one count of conspiracy to interfere with commerce by threats or violence, a violation of 18 U.S.C. § 1951; (2) one count of conspiracy to distribute and possess with intent to distribute 50 grams or more of methamphetamine and 100 grams or

* 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.

more of heroin, a violation of 21 U.S.C. § 841(b)(1)(B) and 21 U.S.C. § 846; and (3) one count of possession of a firearm by a convicted felon, a violation of 18 U.S.C. § 922(g)(1) and 18 U.S.C. § 924(a)(2). Ramos was a leader and member of the Texas Mexican Mafia (TMM) and was involved in the group's conspiracy to commit drug trafficking activities in defined territories. The TMM mandated that nonmembers who distributed narcotics pay a tax, known as "the dime," on the proceeds of their drug transactions. Ramos denied collecting the dime but acknowledged that it was occurring. The district court sentenced Ramos to concurrent terms of 240 months of imprisonment on the § 1951 conviction, life imprisonment on the § 846 conviction, and 120 months of imprisonment on the § 922(g)(1) conviction.

Ramos contends that there was an insufficient factual basis to support each of his guilty plea convictions. Because he did not raise this challenge in the district court, we will review Ramos's claims for plain error. *See United States v. Marek*, 238 F.3d 310, 315 (5th Cir. 2001) (en banc). To succeed on plain error review, Ramos must establish that there was (1) an error (2) that was clear or obvious and (3) that affected his substantial rights. *United States v. Delgado*, 672 F.3d 320, 329 (5th Cir. 2012) (en banc). For an error to affect Ramos's substantial rights, he must show that there is a "reasonable probability that, but for the error, he would not have entered the plea." *United States v. Dominguez Benitez*, 542 U.S. 74, 83 (2004). If Ramos makes this showing, we then have discretion to remedy the error, which we should exercise only if the error "seriously affects the fairness, integrity or public reputation of judicial proceedings." *Delgado*, 672 F.3d at 329 (internal quotation marks, brackets, and citation omitted).

A district court may not enter a judgment of conviction based on a guilty plea unless there is a factual basis for the plea. FED. R. CRIM. P. 11(b)(3). To determine whether the factual basis supports a guilty plea, "[t]he district court must compare (1) the conduct to which the defendant

admits with (2) the elements of the offense charged in the indictment or information." *United States v. Hildenbrand*, 527 F.3d 466, 474–75 (5th Cir. 2008) (internal quotation marks and citation omitted). In assessing the sufficiency of the factual basis under the plain error standard, we "may look beyond those facts admitted by the defendant during the plea colloquy and scan the entire record for facts supporting his conviction." *United States v. Trejo*, 610 F.3d 308, 313 (5th Cir. 2010).

Ramos contends that the factual basis for his § 1951 guilty plea conviction was insufficient because he never admitted to participating in a conspiracy, including collecting the "dime," or knowing which individuals did so. However, considering Ramos's admitted knowledge of "dimes" being collected by TMM members, testimony about the organization of the TMM and its drug trafficking activities, and statements of his co-conspirators about Ramos's orders to commit acts of violence, there was sufficient evidence, under plain error review, that Ramos was part of a conspiracy to interfere with commerce by threats or violence under § 1951. *See Delgado*, 672 F.3d at 329; *United States v. Robinson*, 119 F.3d 1205, 1212 (5th Cir. 1997). During the change of plea hearing, the district court properly compared Ramos's admissions and the statements of his co-conspirators with the elements of a § 1951 offense, and therefore it had a sufficient factual basis to accept Ramos's § 1951 guilty plea. *See United States v. Cooper*, 979 F.3d 1084, 1089 (5th Cir. 2020).

Ramos argues that the factual basis for his § 846 conviction was insufficient because it did not establish that he conspired with the TMM to possess with intent to distribute methamphetamine and heroin. He also asserts that the Government failed to establish that he possessed more than 100 grams of heroin. However, considering Ramos's admitted knowledge of the TMM's drug trafficking activities, evidence that he conceded ownership of at least one kilogram of heroin, and other testimony and evidence about

the organization of the TMM and its drug trafficking activities, there was sufficient evidence under plain error review that Ramos was part of a conspiracy to possess with intent to distribute methamphetamine and heroin under § 846. *See United States v. Nieto*, 721 F.3d 357, 367 (5th Cir. 2013); *Delgado*, 672 F.3d at 329. Furthermore, during the change of plea hearing, the district court fulfilled its duty by comparing Ramos's admissions and other evidence against him to the elements of a § 846 offense. *See Cooper*, 979 F.3d at 1089.

Ramos contends that the factual basis for his guilty plea to the § 922(g)(1) firearm charge was insufficient because the Government failed to prove that the firearm was operable. However, the Government was not required to present evidence that the firearm was operable because the gun need not be operable as long as it was designed to expel a projectile. *See United States v. Ruiz*, 986 F.2d 905, 910 (5th Cir. 1993). Moreover, although at rearraignment, Ramos might have expressed doubt about the functionality of the firearm, he clarified that he had never tried to fire it. In light of those statements and testimony by an FBI agent that the firearm had a loaded receiver, there was sufficient evidence that Ramos committed a § 922(g)(1) offense. It thus was not clear or obvious error for the district court to find a sufficient factual basis for Ramos's guilty plea to the offense. *See United States v. Broadnax*, 601 F.3d 336, 341 (5th Cir. 2010); *Delgado*, 672 F.3d at 329. Also, the district court adequately compared the elements of a § 922(g)(1) offense with Ramos's admissions and the evidence against him during the change of plea hearing. *See Cooper*, 979 F.3d at 1089.

Ramos also contends that the district court erroneously relied on hearsay testimony at sentencing. Ramos correctly concedes, however, that we have held that a defendant's confrontation right does not extend to sentencing proceedings, and he acknowledges that his contention is

foreclosed under our precedent. *See United States v. Beydoun*, 469 F.3d 102, 108 (5th Cir. 2006). He seeks only to preserve the issue for further review.

AFFIRMED.

United States Court of Appeals for the Fifth Circuit

No. 19-50932

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

RAUL RAMOS,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 5:17-CR-391-1

ON PETITION FOR REHEARING

Before WIENER, SOUTHWICK, and DUNCAN, *Circuit Judges*.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.