NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2020

BRAULIO PEREZ,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1

Whether Mr. Perez's Fourth Amendment rights were violated when his motion to suppress the firearm was denied?

2

Whether Mr. Perez's Fifth Amendment rights were violated when body camera footage of statements made by Mr. Perez were allowed into evidence?

3

Whether the exclusion of a 911 call from a key witness violated Mr. Perez's constitutional right to a fair trial?

4

Whether Mr. Perez qualifies as an armed career criminal?

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

RELATED PROCEEDINGS

United States District Court (S.D. Fla.):

United States v. Braulio Perez, No. 19-20003-Cr-Ruiz (December 11, 2019)

United States Court of Appeals (11th Cir.):

United States v. Braulio Perez, No. 19-15083 (January 25, 2021)

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Braulio Perez respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 19-15083 in that court on January 25, 2021, which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida.

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida, is contained in the Appendix (A-1).

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and PART III of the RULES OF THE SUPREME COURT OF THE UNITED STATES. The decision of the court of appeals was entered on January 25, 2021. On March 19, 2020, this Court extended the time within which to file a petition for a writ of certiorari due on or after that date to 150 days from the date of the lower court judgment. Under that order, the deadline for filing a petition for writ of certiorari is June 24, 2021. This petition is timely filed pursuant to SUP. CT. R. 13.1. The district court had jurisdiction because petitioner was charged with violating federal criminal laws. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, which provide that courts of appeals shall have jurisdiction for all final decisions of United States district courts.

STATUTORY AND OTHER PROVISIONS INVOLVED

Petitioner intends to rely on the following constitutional and statutory provisions:

> **U.S. CONST. amend. IV**: "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. V**: "No person shall be . . .compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . ."
>
> **U.S. CONST. amend. VI**: "In all criminal prosecutions, the accused shall enjoy the right to . . .be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor and to have the assistance of counsel for his defence."
>
> **18 U.S.C. § 924(e)**, the Armed Career Criminal Act ("ACCA") provides in pertinent part:
>
> (e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions . . . for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years.
>
> (e)(2) As used in this subsection --
>
> > (B) the term 'violent felony' means any crime punishable by imprisonment for a term exceeding one year, . . . that –
> >
> > (i) has as an element the use, attempted use, or threatened use of physical force against the person of another.

STATEMENT OF THE CASE

On July 11, 2019, a federal grand jury in Miami-Dade County, in the Southern District of Florida, filed a one count superseding indictment against Braulio Hilario Perez charging him with possession of a firearm and ammunition by a convicted felon, in violation of 18 U.S.C. § 922(g)(1).

Before trial Mr. Perez filed a motion to suppress the firearm. A hearing was held on the motion along with various motions in limine on August 5, 2019. After the hearing, the district court denied the motion to suppress. A jury trial began on August 6, 2019. At the conclusion of trial, the jury returned a verdict of guilty.

Before sentencing, Mr. Perez filed objections to the presentence investigation report in which he objected to his classification as an Armed Career Criminal. The government filed a motion for upward variance based on "a need to deter the Defendant from further criminal conduct and to protect the public." On December 11, 2019, the district court overruled the objection to classification of ACCA status and sentenced Mr. Perez to 188 months' imprisonment and five years' supervised release. Mr. Perez timely filed a notice of appeal.

I. Motion to Suppress

Before trial, Mr. Perez filed a motion to suppress the firearm based on an improper civilian search and also made an ore tenus motion to suppress on the additional ground that Mr. Perez was not given any *Miranda* warnings before making

statements to police officers on the law enforcement body cameras and that those statements should not be introduced at trial. The district court held a hearing on the motion on August 5, 2019.

At the hearing, the district court heard testimony in order to determine whether civilian, Julio Hernandez, was instructed by law enforcement to conduct a search for the .38 revolver. The government called three witnesses in opposition to the motion to suppress. The first witness was Reinerio Curbelo, a retired Miami-Dade police officer who was employed at Miami-Dade Police Department on August 2, 2018, and who responded to a residence located at 2784 Northwest 30th Street on that date. Upon arrival at the residence, he approached the officer on the scene "to make sure he was okay." The officer had a subject in custody. Curbelo then followed another officer at the scene, who was a captain, to the front of the residence and made contact with two males at the scene -- one was the landlord and the other was the victim in the case. They then went through the house and proceeded to the backyard. Once he was in the backyard Curbelo tried to find out what took place. He said the two males "described to me what led to – what led to the reason why we were there and then they advised that the defendant was armed with some type of handgun and that he had discarded the handgun somewhere in the area." As a result of this information, they conducted a "cursory search around the backyard trying to find/locate the handgun." At that point, a couple of officers the captain and the two civilians, the landlord and the victim, were in the backyard.

Curbelo noticed an efficiency located to the right side of the residence. He approached the front door and "noticed the doors down on the ground" and the frame appeared to be damaged. Curbelo said he did not search inside the efficiency but noticed that, "The house is in disarray to include a couple of holes in the wall." He did not search inside the efficiency and did not observe any other officers search inside the efficiency.

As they conducted a search of the backyard looking for the gun, he said the two citizens "were searching all over the place." He said, "They were looking inside garbage cans, towards the back." He couldn't say if the citizens searched anywhere else and the search probably didn't last more than an hour. He said, "It was basically a cursory search just trying to locate it real quick, hasty type of searching." He doesn't recall if he gave a flashlight to any of the civilian witnesses and said he did not tell the civilian witnesses to search inside the efficiency. He also did not hear anyone tell the civilian witnesses to search the efficiency. He said he did not give the civilian witnesses gloves and did not give them any instructions about how to preserve evidence if they would have found anything. At one point, Curbelo said, the civilians opened and looked in the trashcan. He said when he left the scene, he "left no instructions to anyone at the scene. None."

The Defense played body camera video from Officer Curbelo and then asked, "At the end of the video when you say, 'We're going to help you,' and then you turn your body camera video off, why was that?" Curbelo responded, "I wanted to speak to

the police officer on the scene." He said, it's "a possibility" that he spoke to the civilian witnesses after the body cam video was turned off. On the video at one point he told Mr. Hernandez, "Hey, do me a favor, let's look over that fence. Do me a favor, you know, is there anything beyond that fence?" Curbelo said that he asked him spontaneously "Hey, do me a favor, just look over the other side, see if you see a handgun." He said he never sustained any conversation with them about a plan to find that firearm that day.

Next, the government called Getro Exantus, a police officer with Miami-Dade who was employed on August 2, 2018, and who was also called to the 2700 block of Northwest 30th Street on that date. He was working with partner, Bryan Fernandez, on that date and once they arrived at the scene they encountered the defendant in the backyard area and eventually removed him from the backyard area and to the patrol vehicle. After the defendant was moved to the patrol vehicle, Exantus returned to the backyard and made contact with the victim and a couple of other officers. At that point they attempted to look for the weapon that was allegedly used in the case but did not locate the weapon. He said that he never gave the witness and/or victim any specific instructions and never told them to attempt to locate the firearm. He also said that he never went inside the efficiency, never saw anyone go into the efficiency, and did not ever instruct anyone to go into the efficiency. Exantus said that he does not typically allow witnesses to walk around the crime scene when there's an ongoing investigation and does not typically allow them to

assist in looking for evidence that's going to be part of the crime. He testified that he did not instruct either Tommy Nieves or Julio Fernandez to stop searching for the firearm after they left.

Julio Hernandez, who was residing at 2784 Northwest 30th Street on August 2, 2018, with his mother and father, was the final witness the government called. He said the house had two efficiencies and that tenants lived in the efficiencies. In the afternoon on the day the events happened, he was in his own room working on the computer. He said he heard someone screaming and the loud noise of something being hit. He said the defendant was shouting and he came into the yard. He went to the yard in the back of the house, and when he looked to the side he noticed that the door to the efficiency "was sort of like broken a little bit, as if someone had, you know, hit it with their foot, kicked it."

Just around that time, his friend Tommy, also known as "Macho," came over to pick up a punching bag and some weights and came into the backyard. When Hernandez saw the damaged door to the efficiency he said, "Heck," "What the hell, what did this guy do already?" And his friend Tommy said, "What happened? What occurred?" (Hernandez started to go inside to pick up his phone in the kitchen when the defendant said, "Mack, get him," Mack is the defendant's dog. Tommy got freaked out and Hernandez said, "Macho don't do anything. Mack, Mack chill." After the defendant said, "Mack, get him" he said, "Hold on, mother fucker, I got something for you" and he went to the back of the efficiency and in less than 15-20 seconds he's

motioning toward his waist and grabbing towards his waist and walking forward "by what he was doing, you could tell he had a weapon" so Hernandez called 911. Hernandez identified the defendant as the person he was referring to.

At some point Hernandez was in the backyard with the police officers and he searched in the backyard with the officers for a weapon. He said there did not come a time when any officer told him to search inside the defendant's efficiency and no officer gave him any instructions to continue searching after they were gone from the scene. He also didn't remember if officers ever told him to stop looking for the gun. Hernandez never saw a gun on Perez that day.

Later that day Hernandez went into the efficiency and saw a gun. He said he went into the apartment, "Because the dog was barking, and my mom was afraid of the dog." After he saw the gun he called 911. He explained that after the police left, his mother said to put the dog inside because he was barking and "getting very freaky." He didn't have a leash so he secured him inside the efficiency using his belt. He said the dog is a bulldog, looks like a pit bull mixed with bulldog, and he's very large. Hernandez also said that the only door that could lock in the efficiency was the bathroom which is where he put the dog. As he was tying up the dog he saw the gun and then he immediately left the bathroom and didn't finish tying up the dog and called 911.

After hearing testimony, the district court denied the motion, finding that in looking at the totality of the circumstances:

> The Court does not find that Officer Exantus or Officer Curbelo in some way, shape or form instructed Mr. Hernandez to go on and look for the gun. There's temporal breaks, there's different motives for him to enter the premises, and I think he just happened to stumble across the firearm going into an efficiency for purposes of assisting his mother, who was very stressed given the barking of the dog. So for the reasons stated on the record, the Court will be denying the motion to suppress that has been filed by the defense.

II. Trial

Officer Bryan Fernandez with the Miami-Dade Police Department, was called to the 2700 block of Northwest 30th Street on August 2, 2018, in response to a call which was "a violent landlord/tenant dispute which escalated to an aggravated assault." When he arrived at approximately 3:30 p.m., he found the family on the front porch of the house and then went to the backyard where he encountered a potential subject. The subject was in the backyard of the house breaking the front door of an efficiency with a broomstick. As he tried to place the defendant in custody, the defendant's dog came out and the defendant said, "Don't shoot my dog." Fernandez allowed the defendant to take the dog back into the efficiency and went inside with him as he took the dog to the bedroom. After the dog was secure, Fernandez took the defendant and put him into his patrol vehicle. Fernandez explained that standard operating procedure for the Miami-Dade Police Department requires calling animal services if a dog is not secure and the dog was secure when he left. Fernandez never saw a firearm on Mr. Perez.

Tommy Nieves testified that he had known Julio Hernandez for years "from growing up and church." He said they lift weights and go to the gym together. He said he makes a living doing private security for different people and sometimes at clubs. On August 2, 2018, he went over to Hernandez's house to pick up some weights. When he arrived, he met Julio and then walked to the back where the weights were. When he got to the back he said, "I bump heads with Braulio. And then he gives me attitude like he's on drugs or something, like get aggressive with me." Nieves said, "Yo, what's up, what's up?" Then Perez went inside and came back out and lifted up his shirt and Nieves said he saw a gun. He said, "It was a gun with a black handle and chrome." Once that happened, "So we ran – we went inside the house and Julio began to call the officers." Nieves was there when the officers arrived. Nieves said he didn't know Perez and had never had a conversation with him before. Nieves said he didn't know if Hernandez had a gun but that he himself has a gun. After his interaction with Perez, Nieves never saw the gun again. Nieves identified Mr. Perez as the person he encountered in Hernandez's backyard that day.

Officer Albert Jackson with the Miami-Dade Police Department was dispatched to the 2000 block of Northwest 30th Street on August 2, 2018, in reference to a complainant who found a firearm. He arrived at the residence at 5:56 p.m. and made contact "with the victim and the witness" at the front of the house. There was a dog loose in the yard and he asked them to contain the dog. He went to the rear

of the house to secure the efficiency pending the arrival of the detective who had gone to get a warrant. Once the detectives arrived, he turned the investigation over to them. At some point a phone call was made to animal control to attend to the dog because the owner of the dog was not there.

Maria Amparo lives at 2784 Northwest 30th Street in Miami. The house has two efficiencies in the back of the house. At some point she rented one of the efficiencies to Braulio Perez beginning March 7, 2018. Amparo identified Mr. Perez as the person she rented the efficiency to. In late May of 2018, she filed for his eviction because of nonpayment. After she filed for eviction, she said Mr. Perez's behavior changed. She said, "He would throw things, say things, and he was always aggressive." She was home on August 2, 2018, when the police were called out. There came a point when she asked her son to put up Mr. Perez's dog. She said he put the dog in and then they called the police because he saw a gun. She never saw Perez with a gun.

Detective Jean Rivas with the Miami-Dade Police Department, responded to the residence at 2784 Northwest 30th Street on August 2, 2018, along with his squad, at approximately 7 p.m. He went there because they "were advised of an incident that took place, an aggravated assault with a firearm." Upon arrival he made contact with the officers that were already there at the residence along with the victim and the witness, Mr. Julio Hernandez and Tommy Nieves. They gathered statements from both individuals and then returned to the police station to author a

search warrant for the efficiency located at the residence. They then returned to the efficiency and executed the search warrant. In the search, they found a firearm on a shelf inside the bathroom. It was a loaded .38 Special Smith and Wesson revolver with six live rounds. Rivas identified Govt Ex 22 as the same revolver he recovered during the search. No gun case, holster, extra bullets or gun cleaning kit were found in the efficiency. The firearm was submitted for fingerprint analysis but not DNA analysis. The detective did not take anything from the efficiency that could be used for DNA analysis and did not ask for a DNA sample from Julio Hernandez or Tommy Nieves.

Julio Hernandez lives at 2784 Northwest 30th Street with his mother and father. His parents own the house. He was living there on August 2, 2018. 163. Around 3 p.m. on that day he was working on his computer and looked out the window and saw the defendant and his dog coming into his efficiency and he slammed the gate door really hard. Then he heard the sound of the front door of the efficiency being slammed really hard. So, he walked outside towards the backyard saw that the door "was sort of broken." Hernandez had previously spoken to his friend Tommy Nieves, also known as "Macho," who was planning to come over that day to get a punching bag and some weights. Nieves arrived around 3:00 or maybe a little after 3:00 to get the weights. They met in the backyard and the defendant came out. Mr. Perez said, "Mack, get him," referring to his dog and the dog started coming at Tommy. Hernandez told the dog, "Mack, Mack, Mack, you know, easy." Then Mr.

Perez went back inside the efficiency and came out and made some hand movements. Hernandez heard Perez make threats but never saw a handgun. As a result of what he observed and heard, Hernandez called 911. The police came to the residence after receiving the 911 calls. While the police were there they searched for a gun in the backyard. After the police left, the defendant's dog kept barking and his mother was afraid. There was no leash so Hernandez used his belt to put the dog into the bathroom in the efficiency. Hernandez said he was trying to tie the dog up on the toilet paper holder and while he was doing so he saw something "glinting and shiny" on a shelf, or closet, he had built for the efficiency. He said, "It has to be the gun." He stopped tying up the dog and went outside and called the police. Hernandez never saw Perez with a gun.

Cameron Stauffer, a latent fingerprint examiner with the Miami-Dade police department, processed the .38 special revolver, Govt. Ex. 22, for fingerprints and the firearm was negative for fingerprints. Stauffer testified that although there is the ability to test bullets for fingerprints, the instructions submitted with the firearm and ammunition in this case specifically directed that the bullets ***not*** be processed for fingerprints. The processing request also failed to request that the firearm and ammunition be processed for DNA.

After the government rested its case, the district court denied the defense request to introduce the 911 call from that day, which came from Lisbeth Perello, who claimed to be the homeowner's daughter, who told the 911 operator that she was the

one who went into Mr. Perez's efficiency and found the firearm instead of Hernandez. The defense argued that the 911 call was critical defense evidence demonstrating a lack of credibility on the part of the government's key witness, Hernandez, who testified that he was the person who entered Mr. Perez's efficiency and found the firearm.

III. Sentencing

Before sentencing, Mr. Perez filed objections to the presentence investigation report in which he objected to his classification as an Armed Career Criminal. The government filed a motion for upward variance based on "a need to deter the Defendant from further criminal conduct and to protect the public." At sentencing, the district court determined that the three predicate offenses objected to were the ones listed in paragraphs 30, 32 and 37 in the presentence investigation report. The court noted that "two of the three really did not receive much attention in the defense's moving papers." Regarding robbery while armed with a weapon listed in paragraph 37, the court noted to defense counsel that "it didn't appear from your papers that you were taking issue with that qualifying offense." Defense counsel responded, "Under the current state of the law, I believe those qualify." Accordingly, the district court found "that one does qualify." Defense counsel also agreed, while preserving the issue for further review, that resisting with violence qualified under the current state of the law. The district court noted, "Those objections have been made for the record should the law at some point change."

The district court then turned to the final conviction, listed in paragraph 2, strong-arm robbery. Citing *United States v. Golden*, 786 Fed. Appx. 164 (11th Cir. 2019), the district court found the argument foreclosed. Defense counsel conceded that at the district court level the argument regarding this conviction was foreclosed based on Eleventh Circuit precedent but stated, "The only thing I would say is that *Golden* is an unpublished decision and therefore it's not binding." The district court ruled as follows:

> So there are three qualifying offenses. The case law from the 11th Circuit unequivocally establishes it as such. There really isn't much room for debate and not much room for argument on this because I think it's pretty textbook. And to the extent there's any argument or concern that there is insufficient factual background or information to establish the nature of these offenses, I would disagree. Having looked at probation's review of it and knowing, as probation properly cited the case law that guides them when they're looking to see if they have a qualifying offense, they properly went through the arrest affidavits and the charging documents in order to determine that these were, indeed, strong-arm robbery, that these had threats of violence. This was not, for example, a snatch – a sudden snatch-type crime. The same thing with the resisting with violence was pretty clear. We saw battery documentation. The government supported that as well. I will also point out, I think, on the battery, if my memory is correct, that's the one where there was a second-degree murder that he was ultimately found not guilty of, I believe, but the jury returned the battery, I think, if my memory serves me right, that's that one. . . .So you have cited *Shepard*, which I would just reiterate for the record, 544 U.S. 13 from '05, that we look to the statutory definition of the offense of the prior conviction, which legally we just did, and also the charging document, the written plea agreement, transcript of any plea colloquies, and any explicit factual findings by the trial judge. Here we have charging documents, statutory definitions, and quite honestly, the documents that have been provided to me don't give me any cause for concern that the qualifying offenses lack factual predicate to establish what really happened for

> purposes of qualifying. So as far as I'm concerned, they are – all three of them are applicable, and they bring him into the ACCA territory."

Accordingly, the district court overruled the objection to the ACCA classification. The district court then sentenced Mr. Perez to 188 months' imprisonment and five years' supervised release.

On appeal, the Eleventh Circuit Court of Appeals affirmed Mr. Perez's conviction. The Eleventh Circuit found that the denial of the motion to suppress was proper because "Hernandez was not acting as the government's agent when he found the firearm." The Eleventh Circuit also found that Mr. Perez's Fifth Amendment right was not violated when statements on the body camera footage was introduced because although the statements were made when Perez was in custody, "they weren't the product of interrogation." Finally, the court found that Mr. Perez's constitutional right to put on a complete defense was not violated and that Mr. Perez was properly classified as an armed career offender.

REASON FOR GRANTING THE WRIT

Issue 1

Whether Mr. Perez's Fourth Amendment rights were violated when his motion to suppress the firearm was denied?

The district court denied Mr. Perez's motion to suppress the firearm because:

> The Court does not find that Officer Exantus or Officer Curbelo in some way, shape or form instructed Mr. Hernandez to go on and look for the gun. There's temporal breaks, there's different motives for him to enter the premises, and I think he just happened to stumble across the firearm going into an efficiency for purposes of assisting his mother, who was very stressed given the barking of the dog. So for the reasons stated on the record, the Court will be denying the motion to suppress that has been filed by the defense.

The court ignored the fact that law enforcement officers initially engaged Hernandez and Nieves in assisting to search for the firearm on the property. Once that course of action began, officers did nothing to stop or interrupt that search. No officer directed Hernandez or Nieves to stop the search that began along with the officers.

When a private individual acting as a government agent conducts a search, the search implicates the Fourth Amendment. U.S. Const. amend. IV; *United States v. Ford*, 765 F.2d 1088, 1090 (11th Cir. 1985). To determine whether a private search is actually the work of a government agent, the Eleventh Circuit examines (1) whether the government knew of and acquiesced in the intrusive conduct, and (2) whether the private actor's purpose was to assist law enforcement efforts rather than to further his own ends. *United States v. Steiger*, 318 F.3d 1039, 1045 (11th Cir. 2003).

In this case, the answer to both inquiries is "yes." As to the first question, the evidence showed that Miami-Dade police officers encouraged Julio Hernandez and Tommy Nieves to assist in searching for the firearm that Mr. Perez was alleged to have possessed. There was no dispute that Julio Hernandez and Tommy Nieves searched outside for the firearm along with police officers. After officers left, Hernandez searched Perez's efficiency and found the firearm. This is important because when a private search occurs before the searcher makes contact with law enforcement, that fact strongly suggests purely private, non-government agent, conduct. *See e.g.*, *United States v. Hyatt*, 383 Fed. Appx 900, 906 (11th Cir. 2010) ("Here, the evidence demonstrated that Ball acted as a private citizen when she searched Hyatt's computer, and not as a government agent. Ball discovered the thumbnail images and suggestive image titles before she called the police. Accordingly, the police were not aware of Ball's search at the time that it occurred.") (emphasis added); *United States v. Simpson*, 904 F.2d 607 (11th Cir. 1990) (affirming denial of suppression motion where Federal Express employee discovered child pornography following standard company policy of opening a box with no waybill before company contacted U.S. Attorney). But in this case, Mr. Hernandez searched Mr. Perez's apartment after he had called the police on Mr. Perez, after he discussed the case with them when they arrived to his house, and after he assisted them in searching for the firearm. Police officers knew of and acquiesced in Hernandez's search for the firearm because they initiated the search and searched along with him.

The fact that Hernandez's discovery occurred after officers left makes no difference because the course of action was already set in motion with the officers and no directive was ever given to refrain from continuing the search after officers left.

As to the second question – the private party's motive in undertaking the search – Mr. Hernandez's sole motivation was to assist the officers with the prosecution of Mr. Perez. The investigation began with Mr. Hernandez's 911 call. Mr. Hernandez's search could only reasonably be seen as a part of his effort to assist the police with the prosecution of Mr. Perez. Thus, as to both prongs of the *Steiger* analysis, Mr. Hernandez was acting as a government agent. Accordingly, the Fourth Amendment governed his conduct and the Eleventh Circuit erred in affirming the district court's failure to suppress the firearm unlawfully taken from Perez's efficiency.

Issue 2

Whether Mr. Perez's Fifth Amendment rights were violated when body camera footage of statements made by Mr. Perez were allowed into evidence?

The starting place for evidentiary admissibility is relevance. Evidence is "relevant" under Rule 401 of the Federal Rules of Evidence if "it has any tendency to make a fact more or less probable than it would be without the evidence" and "the fact is of consequence in determining the action." Fed. R. Evid. 401. And under Rule 402, "[r]elevant evidence is admissible" unless provided otherwise by the

Constitution, federal statute, the other Federal Rules of Evidence, or other rules made by the Supreme Court. Fed. R. Evid. 402. Conversely, "[i]rrelevant evidence is not admissible." *Id*.

Once evidence is deemed relevant, the question turns to whether the district court abused its discretion in admitting the evidence because, despite its undeniable relevance, the danger of unfair prejudice substantially outweighed its probative value. Rule 403 provides that a "court may exclude relevant evidence if its probative value is substantially outweighed by a danger of ... unfair prejudice." Fed. R. Evid. 403. This Court has said that Rule 403 "is an extraordinary remedy which should be used sparingly, and, indeed, the trial court's discretion to exclude evidence as unduly prejudicial is narrowly circumscribed." *United States v. Cross*, 928 F.2d 1030, 1051 (11th Cir. 1991) (quotations omitted); *see United States v. King*, 713 F.2d 627, 631 (11th Cir. 1983) ("[B]ecause it permits a trial court to exclude concededly probative evidence, Rule 403 is an extraordinary remedy which should be used sparingly.") (quotations omitted); *see also United States v. Lopez,* 649 F.3d 1222, 1247 (11th Cir. 2011) (same); *United States v. Dodds*, 347 F.3d 893, 897 (11th Cir. 2003) (same); *United States v. Meester*, 762 F.2d 867, 875 (11th Cir. 1985) (same).

The Federal Rules of Evidence generally prohibit the admission of hearsay statements at trial. Fed. R. Evid. 802. "Hearsay is a statement, other than one made by a declarant while testifying at trial, offered in evidence to prove the truth of

the matter asserted." *United States v. Rivera*, 780 F.3d 1084, 1092 (11th Cir. 2015); see Fed. R. Evid. 801(c).

A suspect may waive his Fifth Amendment privilege against self-incrimination if the waiver is voluntary, knowing, and intelligent. *See Colorado v. Spring*, 479 U.S. 564, 572, 107 S. Ct. 851, 93 L.Ed.2d 954 (1987) (citing *Miranda*, 384 U.S. at 436, 86 S. Ct. 1602). The inquiry into the voluntary, knowing, and intelligent nature of a waiver has "two distinct dimensions." *Id.* at 573, 107 S. Ct. 851 (citation and internal quotation marks omitted). First, to be voluntary, the waiver must have been "the product of a free and deliberate choice rather than intimidation, coercion, or deception." *Id.* (citation omitted). Second, to be knowing and intelligent, a waiver "must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Id.* (citation omitted). A court must consider the totality of the circumstances surrounding the interrogation to determine whether a suspect's decision was voluntary, knowing, and intelligent. *See id.*

In this case, over defense counsel's objection, the district court allowed the government to introduce post-arrest body camera evidence of statements Mr. Perez made before he was given *Miranda* warnings. *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966). The alleged crime had already occurred and concluded. The statements made on the body camera in Govt Ex. 15 were directed at Nieves and included threats and bad language not pertaining to possession of a firearm.

Statements in Govt Ex. 16 were also statements made by Mr. Perez but directed at Hernandez's brother-in-law who was not a witness in the case and who had no connection to the events that day. The statements related to general complaints on Mr. Perez's part about people in the backyard and had no relevance to the possession of a firearm charge. There is no dispute that Mr. Perez was in custody at the time the statements were made and that he had not been given any *Miranda* warnings. Neither video was relevant to the crime charged and served only to put Mr. Perez in a bad light and to prejudice him with the jury. Therefore, the Eleventh Circuit erred in affirming the admission of these statements in violation of the Fifth Amendment and also erred in allowing the statements in as relevant. And even if there was some kind of probative value in their admission, the prejudice far outweighed any probative value.

Issue 3

Whether the exclusion of a 911 call from a key witness violated Mr. Perez's constitutional right to a fair trial?

"[T]he Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense ...." *Nevada v. Jackson*, 569 U.S. 505, 509, 133 S. Ct. 1990, 186 L.Ed.2d 62 (2013) (alteration in original) (quotations omitted) (quoting *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L.Ed.2d 636 (1986)). Specifically, the Sixth Amendment to the United States Constitution guarantees defendants the right to have "compulsory process for obtaining witnesses in his

favor." *U.S. Const.* amend. VI. Implicit in the Sixth Amendment compulsory process right, along with the basic notion of "due process of law" from the Fifth Amendment, is the idea that criminal defendants must be afforded the opportunity to present evidence in their favor. *See Specht v. Patterson,* 386 U.S. 605, 610, 87 S. Ct. 1209, 1212, 18 L.Ed.2d 326 (1967) ("Due process ... requires that [the defendant] ... have an opportunity to be heard ... and to offer evidence of his own."); *United States v. Ramos,* 933 F.2d 968, 974 (11th Cir. 1991) ("A criminal defendant's right to present witnesses in his own defense during a criminal trial lies at the core of the fifth and fourteenth amendment guarantees of due process."). Therefore, it is clear that criminal defendants "must be afforded the opportunity to present evidence in their favor" in compliance with Fifth Amendment due process protections and Sixth Amendment compulsory process rights. *Crane v. Kentucky*, 476 U.S. 683, 690 (1986).

A district court's exclusion of evidence violates a defendant's Fifth and Sixth Amendment rights to a fair trial when "[the] evidence ... is material in the sense of a crucial, critical, highly significant factor." *United States v. Hurn*, 368 F.3d 1359, 1363-64 (11th Cir. 2004). Such a violation occurs in four instances:

> First, a defendant must generally be permitted to introduce evidence directly pertaining to any of the actual elements of the charged offense or an affirmative defense.
>
> Second, a defendant must generally be permitted to introduce evidence pertaining to collateral matters that, through a reasonable chain of inferences, could make the existence of one or more of the elements of the charged offense or an affirmative defense more or less certain.

> Third, a defendant generally has the right to introduce evidence that is not itself tied to any of the elements of a crime or affirmative defense, but that could have a substantial impact on the credibility of an important government witness.
>
> Finally, a defendant must generally be permitted to introduce evidence that, while not directly or indirectly relevant to any of the elements of the charged events, nevertheless tends to place the story presented by the prosecution in a significantly different light, such that a reasonable jury might receive it differently.

Id. at 1363.

In this case, the district court denied Mr. Perez's request to introduce evidence of a 911 call made the same day and at the same approximate time as the events that occurred on August 2, 2018, in which Lisbeth Perello claimed that she was the one who entered the efficiency and found the gun on that day. This information was in direct conflict with Mr. Hernandez's testimony in which he claimed that ***he*** was the person who entered Mr. Perez's efficiency and found the gun. The evidence was not offered for the truth of the matter asserted but for the purpose of calling into question the credibility of the government's key witness, Julio Hernandez. This information would have had a substantial impact on the credibility of the government's main witness, Julio Hernandez and would have placed the prosecution's story in a significantly different light such that a reasonable jury might receive it differently. By affirming the exclusion of this evidence, the Eleventh Circuit court denied Mr. Perez the opportunity to present a full and fair defense, and denied him the constitutional right to a fair trial.

Issue 4

Whether Mr. Perez qualifies as an armed career criminal?

Mr. Perez objected to his classification as an Armed Career Criminal pursuant to U.S.S.G. § 4B1.4(a). Specifically, Mr. Perez argued that he did not have three qualifying convictions to trigger the Armed Career Criminal enhancement. Mr. Perez argued that his 1993 Florida strong-arm robbery conviction did not qualify as an ACCA predicate, nor did his conviction for resisting an officer with violence. The district court disagreed and found that Mr. Perez's convictions qualified as predicates for Armed Career Criminal status. Mr. Perez acknowledged that Eleventh Circuit precedent was contrary to his position but preserved this issue for further review and now suggests that his arguments should be reconsidered in light of *Borden v. United States*, 19-5410, ___ S. Ct. ___ , 2021 WL 2367312 (June 10, 2021); *see United States v. Welch*, 958 F.3d 1093 (11th Cir. 2020); *United States v. Hill*, 799 F.3d 1318 (11th Cir. 2015).

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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