IN THE UNITED STATES SUPREME COURT

21-6894 ORIGINAL

UNITED STATES OF AMERICA

Respondent / Appellee

V.

ARNOLDO ALVARADO

Petitioner / Appellant

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

CAUSE NO. 20-40523

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

MCALLEN DIVISION

HONORABLE JUDGE CRANE PRESIDING

CASE NO. 7:17-CV-110

Arnoldo Alvarado
Reg. No. 16452-379
FCI-Beaumont-Low
P.O. Box 26020
Beaumont, TX 77720
pro se

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER, IN LIGHT OF THE COURT'S RULING IN BORDEN V. UNITED STATES, 593 U.S. _____ (2021), ALVARADO'S CONVICTION UNDER 18 U.S.C. §111(a) AND (b) QUALIFIES AS A VIOLENT CRIME UNDER 18 U.S.C. §924(c)?

II. WHETHER THE TRIAL COURT'S SUA SPONTE ASSERTION OF THE AFFIRMATIVE DEFENSE OF "INEVITABLE DISCOVERY" VIOLATES THIS COURT'S PRONOUNCEMENT IN GREENLAW V. UNITED STATES, 554 U.S. 237, 24-244, 128 S.CT. 2559, 171 L.ED. 2D 399 (2008)?

III. WHETHER THE USE OF A RUSE, IN ORDER TO OBTAIN CONSENT TO SEARCH A HOME, UNDER THE CIRCUMSTANCES AT BAR, VIOLATES THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION?

IV. WHETHER IN LIGHT OF THE ISSUES IN THIS CASE, JURISTS COULD DISAGREE WITH THE DISTRICT COURT'S RESOLUTION OF ALVARADO'S CONSTITUTIONAL CLAIMS UNDER SLACK V. MCDANIEL, 529 U.S. 473, 484 (2000), AND MILLER-EL V. COCKRELL, 537 U.S. 322, 336 (2003), AND COA SHOULD ISSUE?

RELATED PROCEEDINGS / OPINIONS BELOW

Before the Court of Appeals for the Fifth Circuit Causes:

United States v. Pedro Alvarado, Cause No. 20-40361; Cause No. 2021 U.S. Dist. LEXIS 187237; Pedro Alvarado v. United States of America, United States District Court for the Southern District of Texas, McAllen Division, Honorable Ricardo Hinojosa, presiding

U.S.D.C. Cause No. 7:17-cv-104
Crim. No. 7:12-cr-01136-(1)

United States v. Arnoldo Alvarado, Cause No. 20-40523

U.S.D.C. Cause No. 7:17-cv-110
Crim. No. 7:12-cr-01136-(2)

Remaining citations are not available on the legal data base used by the BOP.

These two cases have been filed seeking a Petition for Certiorari to the Fifth Circuit Court of Appeals. Pedro Alvarado is the father and co-defendant of Arnoldo Alvarado.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT

UNITED STATES COURT OF APPEALS

STATE COURTS

STATUTES

RULES

U.S.S.G.

TREATISES, LAW REVIEW

STATEMENT OF JURISDICTION

1) On June 28, 2021, Arnoldo Alvarado's Motion for a Certificate of Appealability was denied (See Appendix).

2) On September 7, 2021, Arnoldo Alvarado's petition for rehearing en banc was denied (see Appendix).

3) Jurisdiction is conferred on this Court pursuant to Rule 12 of the Rules Governing Section 2255 procedings; Rule 10 of the Rules and the Supreme Court of the United States; and 28 U.S.C. §1254.

4) The Appellate Court had jurisdiction pursuant to 28 U.S.C. §2255(d)(f), 1291.

CONSTITUTIONAL PROVISIONS

18 U.S.C. §111(a) and (b)

18 U.S.C. §924(c)(1)(A); §924(c)(3)

18 U.S.C. §924(e)(1); (2)(B)

28 U.S.C. §1254

28 U.S.C. §1291

28 U.S.C. §2255(d) and (f)

Rule 12 of the Rules Governing Section 2255 Procedings

Rule 10 of the Rules of the Supreme Court of the United States

Federal Rules of Civil Procedure 8(a); (b)(1); (6)

Federal Rules of Civil Procedure 56(a); (c)(1); (2)

18 U.S.C. §111(a) and (b)

(a) In general. Whoever--

(1) forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in person 1114 of this title [18 USCS §1114] while engaged in or on account of the performance of official duties; or

(2) forcibly assaults or intimidates any person who formerly served as a person designated in section 1114 [18 USCS §1114] on account of the performance of official duties during such person's term of service,

shall, where the acts in violation of this section constitute only simple assault, be fined under this title or imprisoned not more than one year, or both, and where such acts involve physical contact with the victim of that assault or the intent to commit felony, be fined under this title or imprisoned not more than 8 years, or both.

(b) **Enhanced penalty.** Whoever, in the commission of any acts described in subsection (a), uses a deadly or dangerous weapon (including a weapon intended to cause death or danger but that fails to do so by reason of a defective component) or inflicts bodily injury, shall be fined under this title or imprisoned not more than 20 years, or both.

18 U.S.C. §924(c)(1)(A); 924(c)(3)

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug
trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime--

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(3) For purposes of this subsection the term

"crime of violence" means an offense that is a felony and--

(A) has an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

[ ]

(e)(1) In the case of a person who violates section 922(g) of this title [18 USCS §922(g)] and has three previous convictions by any court referred to in section 922(g)(1) of this title [18 USCS §922(g)(1)] 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, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g) [18 USCS §922(g)].

(2) As used in this subsection--

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding

one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult that--

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another;

§1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

§1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title [28 USCS §§1292(c) and (d) and 1295].

§2255. Federal custody; remedies on motion attacking sentences

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with

respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

(c) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

(d) An appeal may be taken to the court of appeals from the order entered on the motion as from the final judgment on application for a writ of habeas corpus.

(e) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of--

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action.

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Rules Governing §2255

Rule 12. Applicability of the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure

The Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure, to the extent that they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these rules.

Rule 8. General Rules of Pleading

(a) **Claim for Relief.** A pleading that states a claim for relief must contain:

(1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;

(2) a short and plain statement of the claim showing that the pleader is entitled to relief; and

(3) a demand for the relief sought, which may include relief in the alternative or different types or relief.

(b) **Defenses; Admissions and Denials.**

(1) In General. In responding to a pleading, a party must:

(A) state in short and plain terms its defenses to each claim asserted against it; and

(B) admit or deny the allegations asserted against it by an opposing party.

[ ]

(6) Effect of Failing to Deny. An allegation--other than one relating to the amount of damages--is admitted if a responsive pleading is required and the

allegation is not denied. If a responsive pleading is not required, an allegation is considered denied or avoided.

Rule 56. Summary Judgment

(a) **Motion for Summary Judgment or Partial Summary Judgment.** A party may move for summary judgment, identifying each claim or defense--or the part of each claim or defense--on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

[ ]

(c) Procedures.

[ ]

(2) Objection That a Fact Is Not supported by Admissible Evidence. A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

STATEMENT OF THE CASE [1]

A. The Underlying Criminal Charge [2]

At approximately 1:30 a.m., several HSI agents, including Special Agent Kelton Harrison, arrived and established a perimeter around the general area of the tractor trailer. In its opinion on Movant's direct appeal, the Fifth Circuit described what happened next:

> Around 3:00 am ... [an individual named] Rene Garcia--who was allegedly casing the area in preparation for a drug heist--contacted Pedro [Alvarado] and informed him that a suspicious vehicle was parked under a tree on the Alvarado family's property. Pedro told [his son] Arnoldo, then 18 years old, and his other son Marques, then 16 years old, to join him to investigate. Arnoldo and Marques each retrieved a gun and the three got into Pedro's pickup truck and drove down the road towards the suspicious vehicle. The suspicious vehicle was actually the unmarked Jeep of Special Agent Kelton Harrison, who was parked with his engine on and his lights off conducting an undercover stakeout as part of an ongoing Homeland Security investigation. Agent Harrison testified that, upon seeing Pedro's pickup truck slowly approaching, he attempted to leave the property, but he soon heard shots ring out and felt the impact of

[1] The Statement of the Case is drawn, in part, from the Magistrate's rendition of facts, attached in the Appendix in total.

[2] To distinguish between the Alvarados, Pedro (father) and Arnoldo (son) are identified by first name. The facts are drawn from multiple sources, including Movant's Presentence Investigation Report (PSR), the suppression hearing held on April 10, 2013, the trial held March 17-21, 2014, the sentencing hearing held June 5, 2014, and the opinion from the Fifth Circuit Court of Appeals affirming Movant's conviction and sentence. (See Cr. Docket Nos. 471, 527-28, 530-33, and 589.)

> bullets on both sides of his vehicle. As he accelerated in an attempt to escape, another truck, later discovered to be driven by [Rene] Garcia and his coconspirators, blocked his Jeep from leaving. Agent Harrison was able to get around Garcia's truck and drive off the property and onto Route 493, but the Alvarados and Garcia continued to pursue Agent Harrison for about three miles. It is undisputed that Arnoldo and Marques continued to shoot their firearms, but there is conflicting testimony about whether the Alvarados fired at Harrison's Jeep once they left their family's property: Arnoldo testified that after Harrison pulled onto Route 49 he only shot into the air in attempt to scare the driver away. Ultimately, Agent Harrison's truck was struck by approximately 12 bullets, one of which struck the agent in the back. Agent Harrison continued north on 493 until he came to a T-intersection, where his vehicle hit a fence and crashed into a field. Agent Harrison ran from his vehicle and hid in a brush of trees for a short period, then crawled back to his vehicle and called for help.

United States v. Alvarado, 630 F. App'x 271, 272-73 (5th Cir. 2015).[3]

[3] As the Fifth Circuit noted, Agent Harrison was initially parked under a tree that was on property owned by Alvarado's reletaive:

> More specifically, Pedro was informed that a suspicious vehicle was parked under a tree near Arnoldo and Marques's aunt's house, at the intersection of 11th Street (Cemetary Road) and Route 493 in Hargill, TX, which is approximately a quarter mile from the Alvarado's home. Marques testified that the aunt had moved away and left the house in his family's care.

Id. at 272 n.1. The Fifth Circuit's ruling is also docketed in Arnold's criminal case. (Cr. Docket No. 589).

Agent Olivarez, along with about 13 other HSI agents and a Texas state trooper, arrived at the Alvarado residence at around noon on July 3. (Id. at 73-75, 94.) Agent Olivarez, several [heavily armed] HSI agents, and the trooper approached the gate to the property, while the other agents waited across the street. (Id. at 76, 94-95.) Arnoldo and Marques came to the locked gate and the officers identified themselves. (Id. at 76.) The agents asked for consent to search "the house and the property." (Id.) Arnoldo and/or Marques then went to retrieve their father, Pedro. (Id.) When Pedro came out to the gate, the officers again identified themselves and Agent Olivarez asked Pedro for consent to search his property. (Id. at 77.) Agent Olivarez told Pedro they had information that there were illegal aliens inside his home, even though this was not true and was a ruse to obtain Pedro's consent to search his property.[4] (Id.) Pedro replied that he had two illegal aliens inside his home, and Agent

[4] During the suppression hearing, Agent Olivarez was candid that the request to search based on the presence of illegal aliens was a ruse:

MR. ALANIZ:	Okay. And so what happens when he goes and--when this young man gets his father?
AGENT OLIVARES:	His dad comes out. We identified ourselves again. He states his name is Pedro. I asked him for consent of his--of the--his property as well.
MR. ALANIZ:	Did you tell him why you were there?
AGENT OLIVARES:	No, sir.
MR. ALANIZ:	Did you give him any information about--did you have a ruse to get into--to try to get into the property?
AGENT OLIVARES:	Yes, sir. I told him we had information there's illegal aliens inside his property.
MR. ALANIZ:	Okay. That was not true.
AGENT OLIVARES:	Correct.
MR. ALANIZ:	Okay. So when you tell him that, what does he say?

Olivarez again asked for consent to search the Alvarado residence. (Id. at 78.) Pedro then gave verbal consent to search his house, opened the gate, and informed the officers that the illegal aliens were most likely in the attic. (Id.) The agents entered the home and found two undocumented aliens in the attic, just as Pedro had predicted. (Id.)

After the aliens were removed from the Alvarado residence, the agents performed a quick protective sweep of the home. (Id. at 79.) No items were recovered during the protective sweep. (Id. at 79, 95.) Agent Olivarez and the rest of the agents then exited the home and stood outside guarding the Alvarados. (Id. at 95.) Agent Olivarez told Pedro that he was being detained for harboring aliens. (Id. at 78-79, 96.) Agent Olivarez then asked Pedro if an individual named Rene Garcia lived at Pedro's home. (Id. at 79.) Pedro said no but stated that he "knew of Rene Garcia that lived up the road." (Id.) Pedro gave Agent Olivarez directions to Garcia's house. (Id.) At that point, Agent Olivarez left some agents at the Alvarado residence and he, along with some other agents, went to Garcia's purported residence. (Id. at 80.) (Alvarados remained under arrest.)

One of the people found at the new residence identified himself as Rene Garcia. (Id. at 82.) Agent Olivarez asked

---

AGENT OLIVARES: He states that he does have two illegal aliens inside his house.

MR. ALANIZ: And does that--at that point, do you ask for oral consent?

[Agent Olivarez also testified at the suppression hearing that he had no probable cause or reasonable suspicion to be at the Alvarados' residence.]

AGENT OLVIVARES: Correct.

MR. ALANIZ: Okay. And when you asked him for consent, what does he say?

AGENT OLVIARES: He gives us consent and he opens the gate.

(Cr. Docket No. 534, Suppression Hrg. Tr., at 77-78; note that the suppression hearing transcript spells the agent's name "Olivares," while elsewhere in the record his name is spelled "Olivarez.")

Garcia if he knew why the agents were there and Garcia replied, "Yes, probably because of the shooting last night." (Id.) Garcia proceeded to tell Agent Olivarez that the previous night he observed several suspicious vehicles around the neighborhood and that he had also observed a suspicious vehicle near his friend "Pete's" house. (Id.) "Pete" was later identified as Pedro Alvarado. (Id. at 82-83.) Garcia stated that he had called Pedro and told him that there was a "suspicious vehicle" by his home. (Id. at 83.)

HSI Special Agent Victor Hugas was one of the agents who was present at Garcia's home. (Id. at 105.) Agent Hugas learned that "the individual down the street, Pedro at a house where they had already been, that he was--that him and his sons were involved or had knowledge of the shooting." (Id. at 105-106.) Agent Hugas and about other five other agents went from Garcia's residence to the Alvarado residence "just to make sure that the individuals were still there and that it was secure." (Id. at 106, 149.)

Agent Hugas arrived at the Alvarado residence "sometime after lunchtime" and was informed by other agents that they had cleared the house "for bodies" (the illegal aliens) but had not thoroughly searched it. (Id. at 109, 110.) Agent Hugas--who was wearing "full raid gear" [heavily armed] with "all of [HSI's] markings on it"--then approached Pedro, who was standing next to the front door of the house. (Id. at 107, 110.) Arnoldo and Marques were detained "right next to" Pedro at the front door and were sitting on what appeared to be "the rear seat of ... a minivan[.]" (Id. at 108.) Agent Hugas identified himself and

asked Pedro if he was the owner of the residence, which Pedro confirmed. (Id. at 110.)

Agent Hugas then asked Pedro if he had any weapons or guns in the home, and Pedro responded that he did not. (Id. at 110-111.) Because the agents at the house had previously done only a protective sweep, Agent Hugas asked Pedro if he would consent to a search of his home. (Id. at 110-111.) Pedro verbally consented to a search of his home and also signed a written consent-to-search form. (Id. at 111.)

Agent Hugas and two or three other agents then entered the Alvarado residence. (Id. at 112.) One of the agents saw "some rounds" on a table in the foyer. (Id.) Agent Hugas and another agent entered a different room and found some more rounds in a closet, as well as a 9mm magazine and 9mm rounds inside a dresser. (See id. at 112, 155-156.) Upon the discovery of these items, and before completing a more thorough search, Agent Hugas directed all the agents to leave the house. (Id. at 112.) After exiting the house, Agent Hugas confronted Pedro about the ammunition found in the house and asked whether Pedro owned a pickup truck. (Id. at 113.) Pedro told Agent Hugas that he wanted to speak to him in private about why the agents were there. (Id. at 114-115.) Agent Hugas then contacted the FBI command center and was instructed to bring Pedro to the command center so that the interview could take place at the FBI office. (Id. at 116-117.)

Agent Hugas transported Pedro to the FBI office; other law enforcement agents transported Arnoldo and Marques separately to the FBI office for questioning. (Id. at 118, 126.) AT the FBI

office, Arnoldo waived his Miranda rights and gave a statement admitting his role in pursuing and firing shots at Agent Harrison's vehicle. An FBI team later conducted a more thorough search of the Alvarado residence and found a 9mm pistol and a .22 caliber rifle hidden in the attic.

B. Criminal Proceedings

On July 4, 2012, Arnoldo and Pedro were named in a criminal complaint filed in the Southern District of Texas, McAllen Division.[5] (Cr. Docket No. 1.) Arnoldo was charged with assault of a federal agent in violation of 18 U.S.C. §§111(a)(1), and 111(b), and 18 U.S.C. §2, and unlawful use of a firearm during and in relation to a crime of violence in violation of 18 U.S.C. §§924(c)(1)(A), 924(c)(1)(A)(iii), and 18 U.S.C. §2. (Id.)

On July 24, 2012, a federal grand jury returned a three-count indictment charging Arnoldo and Pedro with: (1) attempted murder of a federal agent in violation of 18 U.S.C. §§1114(3), 1113 and 18 U.S.C. §2; (2) assault on a federal agent in violation of 18 U.S.C. §§111(a)(1), 111(b), and 18 U.S.C. §2; and (3) unlawful use of a firearm during and in relation to a crime of violence in violation of 18 U.S.C. §§924(c)(1), 924(c)(1)(A)(iii), and 18 U.S.C. §2. (Cr. Docket No. 23.) On April 30, 2013, a four-count third superseding indictment was filed charging Arnoldo and Pedro on counts 1-3 with the same crimes alleged in the initial indictment. (See Cr. Docket No. 240.) The superseding indictment also included a fourth count charging Rene Garcia and

[5] Marques, was 16 years old at the time he and Arnoldo fired shots at the agent. Marques was prosecuted in state court.

others, including David Olivarez (not to be confused with HSI Special Agent Adrian Olivarez), for their role in the attempt to steal a load of over 1,000 kilograms of marijuana on the night of the shooting.[6] The Alvarados' case was randomly assigned to U.S. District Judge Randy Crane.

Prior to trial, counsel(s) for the Alvarados filed a motion to suppress, seeking to exclude (among other things) all the evidence seized by law enforcement from the Alvarado residence and statements made by Arnoldo on July 3, 2012. (See Arnoldo's Cr. Docket No. 48, and Pedro's Cr. Docket No. 47.) On April 10, 2013, the District Court held a suppression hearing during which eight witnesses testified. (See Cr. Docket Minute Entry for 4/10/2013; Cr. Docket Nos. 280, 534.) After considering the evidence presented at the hearing, the Court found that Pedro voluntarily gave consent to search his home and denied the motion to suppress. (See Cr. Docket No. 534, Suppressing Hrg. Tr., at 163, 220-221.)

The Alvarados pled not guilty and proceeded to trial. Arnoldo took the stand at trial and testified that in the early morning hours of July 3, 2012, his father (Pedro) woke him up and told him to grab his gun. Arnoldo admitted that he shot at Agent Harrison's Jeep with a 9mm pistol as Pedro chased the Jeep with his truck, although Arnoldo claimed that he did so essentially in self-defense.

---

[6] The fourth count of the third superseding indictment charged Rene Garcia, Julio Armando Davila, Arnoldo Adan Davila, Miguel Angel Romo, and David Olivarez with conspiracy to possess with intent to distribute over 1,000 kilograms of marijuana in violation of 21 U.S.C. §§846, 841(a)(1) and 841(b)(1)(A). (See Cr. Docket No. 240.)

On March 21, 2014, the jury found Arnoldo and Pedro guilty as to Counts Two and Three of the third superseding indictment.[7] (Cr. Docket Minute Entry for 3/12/2014.) The District Court ordered the Probation Office to prepare a Presentence Report Investigation (PSR). The PSR calculated Arnoldo's base offense at 14, which was enhanced 7-levels because the victim (Agent Harrison) sustained a permanent or life-threatening bodily injury. Movant also received a 2-level enhancement because he was convicted under 18 U.S.C. §111(b), thus bringing his total offense level to 23. The PSR calculated Arnoldo's criminal history at category I,[8] which resulted in a Guidelines imprisonment range of 46 to 57 months for Count Two. The PSR noted that pursuant to 18 U.S.C. §924(c)(1)(A)(iii) and U.S.S.G. §2K2.4(b), the Guidelines range for imprisonment for Count Three was 120 months, which was the statutory minimum sentence that must run consecutively to the sentence imposed in Count Two.

The Alvarados filed a direct appeal of their convictions and sentences, arguing that (1) the District Court erred by declining to charge the jury with a self-defense instruction; (2) the District Court violated his Sixth Amendment right of confrontation when it refused to allow cross-examination of Agent Harrison on the issue of the federal agents' "bungled operation"; and (3) the District Court erred when it orverruled his objection to the instruction in the jury charge that he need not have known

---

[7] The jury was unable to reach a unanimous verdict on Count One, which the Government later dismissed. (Cr. Docket Nos. 483, 484.)

[8] Arnoldo did not have any criminal history points. Pedro's sentence was 10 years under 18 U.S.C. §111(b) and 10 years under 18 U.S.C. §924(c)(1)(A)(iii) to run consecutively.

he was assaulting a federal agent. The Fifth Circuit rejected the Alvarados' challenge to their convictions and sentence and affirmed the District Court's judgment on November 12, 2015. (Cr. Docket Nos. 588, 589.) Arnoldo filed his §2255 motion on March 17, 2017. Pedro's was filed simultaneously.

C. The Alvarados' Allegations and the Government's Response

The Alvarados assert two grounds for relief in their §2255 motion.[9] First, Alvarado claims that their appellate counsel provided ineffective assistance when he failed to challenge the District Court's ruling that Pedro's consent to search the Alvarado residence was voluntary. (Docket No. 1, at 4, 18-44.) Second, Alvarado claims that both their trial and appellate counsel were ineffective for failing to move to recuse U.S. District Judge Randy Crane under 28 U.S.C. §455.[10] (Id. at 4, 45-47.)

Respondent United States has filed a motion for summary judgment, arguing that Alvarado's claims lack merit and should be dismissed. (Docket No. 7.) The Alvarados filed both a response and a reply to the Government's summary judgment motion. (See Docket Nos. 11, 12.)

In addition, on July 15, 2019, and on August 7, 2019, the Alvarados filed documents titled "Notice of New and Controlling

---

[9] Pedro Alvarado was charged, tried, and convicted along with Arnoldo. Pedro has filed his own §2255 motion. See Pedro Alvarado v. United States, Case No. 7:17-cv-104 (S.D. Texas, McAllen Div.) Pedro's §2255 motion and related filings are nearly word-for-word the same as Arnoldo's motion and filings, except that Pedro asserts an additional claim that does not apply to Arnoldo. The Magistrate has filed a report and recommendation addressing the claims asserted by Pedro, which (not surprisingly) is very similar to this report. (See Case No. 7:17-cv-104, Docket No. 16.)

[10] In its motion for summary judgment, the Government construes this claim as the Alvarados asserting that their counsel provided ineffective assistance for failing to argue that both the district court judge and the prosecutor should have been recused. In their response, the Alvarados clarify that they did not raise any issue about the prosecutor in their §2255. (Docket No. 12, at 15.)

Authority" and a "Motion for Leave to Brief Davis." (Docket Nos. 16, 19.) In those pleadings, Movant essentially requests permission to amend his §2255 motion to include a new claim based on the Supreme Court's recent decision in United States v. Davis, 139 S.Ct. 2319 (2019). Respondent filed an opposition to the attempted amendment. (Docket No. 18.)

The trial court adopted the Recommendation and Report of the Magistrate (R&R attached in appendix) and denied a Certificate of Appealability (COA). Both Alvarados timely appealed.[11]

The Fifth Circuit denied COA for both Alvarados. Both Alvarados moved for en banc consideration, raising the Magistrate's sua sponte assertion of the affirmative defense of inevitable discovery (see appendices) and consideration of Borden v. United States, 593 U.S. _____ (2021) which issued while the denial of the COA was pending. (See Appendix _____ and _____). The Fifth Circuit denied en banc consideration. (See Appendix _____ and _____.)

This Petition for Certiorari follows.

SUMMARY OF ARGUMENT

In Borden v. United States, this Court held that crimes with the mens rea of "recklessness" will not support an enhancement under 18 U.S.C. §924(e). Because the language of 18 U.S.C. §924(e) and 18 U.S.C. §924(c) are substantively identical (See United States v. Davis), a crime with the mens rea of recklessness will not support an 18 U.S.C. §924(c) charge.

[11] The Alvarados timely filed specific objections to the Magistrate's Report and Recommendation, raising all the issues following, save Borden v. United States ruling regarding recklessness, which had not been issued at the time of the Magistrates R&R. (See Appendix.)

Alvarado's underlying offense, 18 U.S.C. §111(a) and (b), can be committed recklessly and are, therefore, unavailable to support a secondary conviction under §924(c).

In Greenlaw v. United States, this Court established the limits of a trial court, sua sponte, asserting a waived (by omission) affirmative defense to that of "statute of limitations." Here, the Magistrate, sua sponte, raised inevitable discovery, an affirmative defense, to justify a ruse used by the Government to obtain consent to search in violation of the Fourth Amendment.

The Government's use of a ruse, in order to obtain consent to search a home, in a rural South Texas environment, close to the border, violates the Fourth Amendment of the United States Constitution.

Reasonable jurists, on considering the issues in this case, could disagree and a Certificate of Appealability should have issued under Slack v. McDaniel, 529 U.S. 473, 484 (2000) and Miller-El v. Cockrell, 537 U.S. 322, 336 (2003).

ARGUMENT

I. The United States Court of Appeals has denied an important question of federal law that has not been, but should be, settled by this Court. The question is:

> "WHETHER, IN LIGHT OF THE COURT'S RULING IN BORDEN V. UNITED STATES, 593 U.S. _____ (2021), ALVARADO'S CONVICTION UNDER 18 U.S.C. §111(a) AND (b) QUALIFIES AS A VIOLENT CRIME UNDER 18 U.S.C. §924(c)?"

In Borden, Justice Kagan, writing for a four justice plurality, found that mere recklessness did not suffice to constitute a "violent felony" under the Armed Career Criminal Act (ACCA) found at 18 U.S.C. §924(e)(2)(B)(i). "The phrase 'against another,' when modifying the 'use of force,' demands that the perpetrator direct his action at, or target, another individual. Reckless conduct is not aimed in that prescribed manner." Borden v. United States, 141 S.Ct. 1817, 1825 (2021) (plurality opinion). The Court reasoned that modern criminal statutes require one of four basic types of mental states "in descending order of culpability: purpose, knowledge, recklessness, and negligence." The Court further in Leocal v. Ashcroft, 543 U.S. 1, 2, 5 (2004), found that negligent conduct did not evince a culpable enough state of mind to satisfy the definition of "crime of violence" under 18 U.S.C. §16(a), "a statutory definition relevantly identical to ACCA's relements clause." Borden, 141 S.Ct. at 1824.

In United States v. Davis, 588 U.S. _____ (2019), and Sessions v. Dimaya,584 U.S. _____ (2018), the Court discussed the similarity of the residual clause of 18 U.S.C. §924(c) and 18 U.S.C. §16(b) (respectively) to residual clause held unconstitutionally vague in Johnson v. United States, 576 U.S. 591 (2015). The Court held the residual clause(s) in §924(c) and 16(b) to be unconstitutionally vague.

The force clause in 18 U.S.C. §924(e)(2)(B)(i) discussed in Borden is identified to the force clause in 18 U.S.C. §924(c)(3)(A). See below:

§924(e)(2)(B)(i)

"the term 'violent felony' ... that--

(i) has an element the use, attempted use, or threatened use of physical force against the person of another; or"...

§924(c)(3) "For purposes of this subsection the term 'crime of violence' means an offense that is a felony and--

(A) has an element the use, attempted use, or threatened use of physical force against the person or property of another, or"

As the District Court found in United States v. Sweat, 2021 U.S. Dist. LEXIS 132909* at 11 (Maryland, July 16, 2021): "Thus, after Borden a crime requiring only recklessnes cannot be a predicate under the elements clause of §924(e), or, by extension, ¶924(c), although the precise reasons is not resolved." This Court's holding in Borden, therefore, logically extends to §924(c)(3)(A).

In this case, the underlying statute at issue is 18 U.S.C. §111(a) and (b). The text of "section 111(a)(1) contains four distinct elements; the Government must show that the defendant (1) forcibly (2) assaulted, resisted, opposed, impeded, intimidated, or interfered with (3) a federal officer (4) in the performance of his duties." United States v. Kimes, 246 F.3d 800, 807 (6th Cir. 2001) (emphasis added). To establish a violation of §111(b) the Government must prove a violation of

§111(a) in addition to the use of a deadly or dangerous weapon or the inflict[ion] [of] bodily injury." United States v. Rafidi, 829 F.3d 437, 445 (6th Cir. 2016) (emphasis added)

In determining whether a §111(a) and (b) offense qualifies as a crime of violence the Courts apply a "categorical approach." United States v. Pam, 867 F.3d 1191, 1203 (10th Cir. 2017). In other words, courts look only to the elements that must be proven to convict a person under §111(a) and (b) in the abstract, "and not to the particular facts underlying" Alvarado's actual conviction for that offense. Id. (internal quotation marks omitted). For 18 U.S.C. §111(a) and (b), Courts have held that the statute contemplates multiple possible offenses and use the modified categorical approach. See United States v. Ama, 684 Fed. Appx. 736, 740-41 (10th Cir. 2017) (Government conceded that §111 as a whole is not categorically a violent felony and that a modified categorical approach applies to determine whether §111(a) and (b) qualifies as a violent felony) (see collection of cases).

As Courts have previously determined recklessness is a sufficient mental state to convict under 18 U.S.C. §111(a) and (b). (See discussion in United States v. Mann, 899 F.3d 898, 901-908 (10th Cir. 2018) (discussing enhancement under 18 U.S.C. §113 and 924(c) and analogizing §111(a) and (b)). Section 111(a) and (b) do not support a §924(c) conviction.

Title 18 U.S.C. §§111(a) and (b) are general intent crimes. See United States v. Feola, 420 U.S. 671, 684-86, 95 S.Ct. 1255, 43 L.Ed. 2d 541 (1975) ("[Section] 111 cannot be construed as embodying an unexpressed requirement that an assailant be aware

that his victim is a federal officer ... [A]n actor must entertain merely the criminal intent to do the acts therein specified."). Some courts of appeal to have addressed whether §111(b) has a specific intent requirement, decided that it does not contain a specific intent requirement. United States v. Johnson, 310 F.3d 554, 556 (7th Cir. 2002) ("[Section] 111(b) does not require proof of intent to injure."); United States v. Arrington, 309 F.3d 40, 45-46 U.S. App. D. C. (D.C. Cir. 2002) (rejecting the argument that the actor must "intentionally use the object as a weapon" and holding that §111(b) simply requires the "intent to use the object" in the committing one of the acts in §111(a), and that "the object be used in a deadly or dangerous manner" (emphasis omitted)). These collectively allow a mens rea of recklness.

Here, the relevant inquiry is the language of the force clause--whether the offense necessarily involves the "use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. §924(c)(3)(A). "If any--even the latest culpable--of the acts criminalized do not entail that kind of force, the statute of conviction does not categorically match the federal standard, and so cannot serve as "a predicate offense for purposes of §924(c)(3)(A)." Borden, 141 S.Ct. at 1822.

Section 111(b) can be committed in one of two ways. First, the elements of a §111(a) can be committed with a deadly or dangerous weapon; or, second, an action in violation of §111(a) that inflicts bodily injury. By way of example, a United States Park Ranger seeks to make an arrest of a defendant. The

defendant resists arrest and the Park Ranger falls off of a narrow trail in the National Park and sustains bodily injury. This example meets all elements of 18 U.S.C. §111(a) (forcibly resisting a Park Ranger in the performance of his duties, and of 18 U.S.C. §111(b) resulting in bodily injury. The "infliction of bodily injury" occurred when the defendant was reckless as to the outcome resulting from his resistance, but was without intent for the Park Ranger to be injured and without the use of a deadly weapon.

Because circumstances exist under which 18 U.S.C. §111(a) and (b) can be committed recklessly, the Alvarados should have been permitted a COA and an opportunity to brief at the Fifth Circuit.

II. The Court of Appeals for the Fifth Circuit has permitted the district court to depart from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's supervisory powers. The question is:

> "WHETHER THE TRIAL COURT'S SUA SPONTE ASSERTION OF THE AFFIRMATIVE DEFENSE OF 'INEVITABLE DISCOVERY' VIOLATES THIS COURT'S PRONOUNCEMENT IN GREENLAW V. UNITED STATES, 554 U.S. 237, 243-244, 128 S.CT. 2559, 171 L.ED. 2D 399 (2008)?"

Greenlaw v. United States, instructs that Courts do not have "carte blanche to depart from the principle of party presentation basic to our adversary system." 554 U.S. at 243-44. C.f. Wood v. Milyard, 566 U.S. 463, 132 S.Ct. 1826, 1833, 182 L.Ed. 2d 733, 743 (2012).

In the underlying suit, the Magistrate raised, sua sponte, the affirmative defense of inevitable discovery. Pre-trial, Alvarado had objected to the Government's use of a Ruse to obtain consent to search. The Government did not raise inevitable discovery pre-trial, or during its brief in response to Alvarado's counsel's failure to raise the improper Fourth Amendment search on appeal (appellate counsel was different from trial counsel) as one (1) ground in support of his ineffective assistance of counsel (§2255).

The Federal Rules of Civil Procedure "govern the procedure in all civil actions and proceedings in the United States District Courts," Fed. R. Civ. P. 1, "to the extent that the practice in [§2255] proceedings ... is not specified in a federal statute ... or the rules Governing Section 2255 cases [("§2255 Rules" or §2255R")], "Fed. R. Civ. P. 71(a)(4)(A). Similarly, §2255 Rule 12 expressly authorizes application of Federal Rules of Civil Procedure to a §2255 proceeding "to the extent that they are not inconsistent with any statutory provisions or [the §2255 Rules]."

Fed. R. Civ. P. Rule 8(c) governs the pleading of affirmative defenses. It requires a party to "affirmatively state any avoidance or affirmative defenses." Fed. R. Civ. P. 8(c).

If a party fails in its answer to assert an affirmative defense identified in Fed. R. Civ. P. 8(c), the party forfeits the defense. Fed. R. Civ. P. 12(b), 15(a).[12]

---

[12] In Alvarado's reply to the Government's response to his §2255 petition, Alvarado noted that the Government's argument appeared to rely on the inevitable discovery affirmative defense, but pointed out that the Government did not raise the affirmative defense in the trial court below (pre-trial or otherwise). Nowhere did the Government raise properly the affirmative defense of "inevitable discovery" and Alvarado has consistently objected to its consideration.

Here, not only does the Magistrate deviate from Supreme Court precedent, the Magistrate also expands the statute and standing of the Government as a party to the proceedings by sua sponte arguing an affirmative defense not raised by the Government, and not contained in the limited exception discussed in Day v. McDonough, 547 U.S. 198, 209, 126 S.Ct. 1625, 164 L.Ed. 2d 376 (2006) (we hold that district courts are permitted ... to consider, sua sponte, the timeliness of a ... habeas petition).

The issue of district courts' unlimited consideration of affirmative defenses, sua sponte, not contained in the limited exception of Wood and Day should not be permitted. See Latimer v. Roaring Tay Z, Inc., 601 F.3d 1224, 1239 (11th Cir. 2010) ("Courts generally lack the ability to raise an affirmative defense, sua sponte.") (citations, quotations, and alternatives omitted)[13]

The Alvarados should have been allowed to brief at the appellate court the Magistrate's sua sponte assertion of an affirmative defense of inevitable discovery in violation of judicial standards and Greenlaw.

III. The trial court and the appellate court, through the Magistrate's adoption of the use of a ruse to obtain consent has

---

[13] Here, the Government filed a botched response. Both Pedro Alvarado and Arnoldo Alvarado filed similar §2255 petitions. The Government did not respond at all to some issues and merely copied their response for the two (2) Alvarados. (Pedro raised some similar and some different issues.) The Magistrate removed his "neutral arbitor" hat and adopted the position advocating for the Government--raising the "affirmative defense" of "inevitable discovery" not raised by the Government.

decided an important question in a way that conflicts with relevant decisions of this Court. The question is:

> "WHETHER THE USE OF A RUSE, IN ORDER TO OBTAIN CONSENT TO SEARCH A HOME, UNDER THE CIRCUMSTANCES AT BAR, VIOLATES THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION?"

In United States v. Mendez, 431 F.3d 420 (5th Cir. 2005), the Fifth Circuit stated that "[t]he standard for measuring the scope of ... consent under the Fourth Amendment is that of 'objective' reasonableness--what would the typical reasonable person have understood by the exchange between the officer and the suspect?" Florida v. Jimeno, 500 U.S. 248, 251, 111 S.Ct. 1801, 1803-04, 114 L.Ed. 2d 297 (1991). And while objective reasonableness is a question of law, "factual circumstances [like the location of the incident, in remote South Texas near the border (See United States v. Escamilla, 852 F.3d 474, 481 (5th Cir. 2017) (Brignoni-Ponce factors) which can contribute to reasonable suspicion [although agents confessed they had none for this ruse] to look for illegal aliens in a vehicle stop (1) the area's proximity to the border; (2) the area's characteristics; [ ] [here, rural nature] ... (4) the agents' previous experience with criminal activity, etc.)] are highly relevant when determining what the reasonable person would have believed to be the outer bounds of the consent that was given." 431 F.3d at 426 (internal citation omitted).

In United States v. Montes-Reyes, 547 F.Supp. 2d 281 (S.D.N.Y. 2008), the Court considered the fabrication of exigent circumstances with a ruse at Montes' hotel room where the DEA

agents lied saying they were looking for a little girl. What Montes-Reyes did not know of at that time, however, was that Agent Luna was a DEA agent and not a police officer, and that he was not looking for a little girl; rather, he wished to search Montes-Reyes' room for evidence of drug dealing, and had determined to use this ruse to obtain Montes-Reyes' consent to search the room. Id. at 284. Using a totality of the circumstances, the Court found that the verbal consent given by Montes-Reyes was not voluntarily given because a "false claim of a missing child is precisely the kind of 'extreme' misrepresentation of investigatory purpose by which a person is 'deprive[d] ... of the ability to make a fair assessment of the need to surrender his privacy.'" Id. at 291. (emphasis added). This is on all four corners with the Alvarado situation.

In United States v. Hernandez-Juarez, 2009 U.S. Dist. LEXIS 22031 *10 (West. Dist. Tex. 2009), the Court concluded that "[v]iewing the totality of all the circumstances, the ICE agents entered the most private of spaces, a home, without a warrant and with only a hunch [agents herein testified to no probable cause and no reasonable suspicion--or any reason to be at the Alvarado home] that the person they were looking for would be inside." [Here, looking for Rene Garcia.] "The questioning of a female American citizen with a nursing infant indicates that the agents used their fraudulent entry for the purposes of a general round up once they realized that Junior was not in the premises."

In the case at bar, the Magistrate, in his analysis did not consider the bulk of the facts to include:

* Alvarados' property location near the border in rural Texas, a notorious illegal alien trafficking area;

* The size and shape of the Alvarado property--a home and out buildings in a gated and fenced property set approximately 150 feet from the highway. After using the ruse to enter the property, the Alvarados [the agents testified at the hearing] were never free to leave, were separated from each other, and restrained in their movements.

* The officers never left the property, but rather restrained the movements of Pedro, Arnoldo, and Marques (under arrest).

These are material under "reasonable person" analysis of Mendez, supra, and Jimeno, supra, and they were completely discounted. Further, the Magistrate selected thematic facts (facts that supported his narrative) rather than applying the totality of the situation and facts.

In Lewis v. United States, 385 U.S. 200, 208-09, 87 S.Ct. 424, 17 L.Ed. 2d 312 (1966), the Supreme Court held that "[I]t has long been acknowledged ... [that] the Government is entitled to use decoys and to conceal the identity of its agents." (citations and footnote omitted); Id. at 210. But the right to deceive, however, is not unbounded. "The various protections of the Bill of Rights ... provide checks upon such official deception for the protection of the individual." Id. at 209. One such limitation is where the government agents' deceptive

tactics prevent an individual from making "an essentially free and unconstrained choice" to forego the constitutional protection of a warrant. Schneckloth v. Bustamonte, 412 U.S. 218, 255, 36 L.Ed. 2d 854, 93 S.Ct. 2041 (1973).

The dynamic in the Alvarado case is substantially different when "police officers identify themselves as such but misrepresent their purpose." Because citizens will respond to law enforcement (especially in remote and rural Texas) with a sense of obligation and presumption of trustworthiness, multiple courts have held that facially consensual searches to be invalid where the "consent" was elicited through officers' lies about the nature and scope of their investigations. See e.g., United States v. Bosse, 898 F.3d 113, 115 (9th Cir. 1990) (per curiam) ("A ruse entry when the suspect is informed that the person seeking entry is a government agent but is misinformed as to the purpose for which the agent seeks entry cannot be justified by cosnent.") Id. at 115 (stating that "entry ... acquired by affirmative or deliberate misrepresentation of the nature of the Govenrment's investigation" violates the Fourth Amendment) (quoting United States v. Little, 753 F.2d 1420, 1438 (9th Cir. 1984); S.E.C. v. ESM Gov't Sec., Inc., 645 F.2d 310, 316-18 (5th Cir. Unit B May 1981) ("When a government agent presents himself to a private individual, and seeks that individual's cooperation based on his status as a government agent, the individual should be able to rely on the agent's representations."); United States v. Twell, 550 F.2d 297, 300 (5th Cir. 1977) (finding consent

vitiated by misrepresentation was civil, not criminal); People v. Daughtery, 161 ILL. App. 3d 394, 374 N.E. 228, 223, 112 ILL. Dec. 762 (ILL. App. Ct. 1987) (Cohene, as here, the law enforcement officer without a warrant uses his official position of authority and falsely claims that he has legitimate police business to conduct in order to gain consent to enter the premises when, in fact, his real reason is to search inside for evidence of a crime, we find that this deception under the circumstances is so unfair as to be coercive and renders the consent invalid"); c.f. United States v. Watzman, 486 F.3d 1004, 1007 (7th Cir. 2007); United States v. Turpin, 707 F. 2d 332, 334 (8th Cir. 1983) (upholding lawfulness of consent search, but stating that "[m]isrepresentations about the nature of an investigation may be evidence of coercion"). This is exactly what the agents did here, used a ruse, "We are looking for illegal aliens, can you help us?"

Courts are further troubled by the public policy implications. "Courts troubled by agents' lies about the searches they seek to conduct have worried that condoning such falsehoods 'would obliterate citizens' widely shared social expectations that they may place some modicum of trust in the words of government officials acting as such,' with that lack of trust providing 'catastrophic consequences'." Parson, 599 F.Supp. 2d at 606. The Fifth Circuit observed that private individuals have "the right to expect that the Government, when acting in its own name, will behave honorably." ESM Gov't Serv., Inc., 645 F.2d at 316. (We think it clearly improper for a government agent to gain access ... which would otherwise be unavailable to him by

involving the private individual's trust in his government, only to betray that trust.) Id. See also Parson, 599 F.Supp. 2d at 606 ("Society expects that law enforcement officers who present themselves and show badges will be honest and forthright with the community that they serve.")

The Eleventh Circuit in United States v. Spivey, 861 F.3d 1207, 1214 (11th Cir. 2017) (Acknowledged that "fraud, deceit, or trickery in obtaining access to incriminating evidence can make an otherwise lawful search unreasonable.") (quoting United States v. Prudden, 424 F.2d 1021, 1032 (5th Cir. 1970).

The jury was hung on one (1) charge, and had the evidence been excluded, as no other exception was even argued by the Government (i.e., inevitable discovery, etc.), the high probability was that the case would have been resolves differently on at least one (1) other count.

In discussing the Court's general consensus on the types of deception used by lying police, the Spivey Court noted that "when an officer lies about the existence of exigent circumstances [presence of illegal aliens in a residence],[14] he also suggests that the occupant has no right to resist and may face immediate danger if he tries. Spivey, 861 F.3d at 1213 (citing United States v. Harrison, 639 F.3d 1273 (10th Cir. 2011) (agents

---

[14] In the Rio Grande Valley (totality of circumstances) Border Patrol vehicles are ubiquitous. One of the major points of entry of illegal aliens is across the Texas-Mexico border. The United States is building a wall/fence to stem the tide of illegal immigrant crossings. ICE agents, Border Patrol agents, along with DEA agents, Customs officials, and local police are constantly pursuing illegals across farms, ranches, back yards, and into houses. While the presence of illegal aliens north of the Hwy 77 and Hwy 281 check points might reasonably be argued to not be exigent circumstances, below those two (2) check points, the search for illegal aliens and the drugs or human trafficking involved therewith, is exigent circumstances (the U.S. has deployed tens of thousands of troops along the border to stop the "invasion" of aliens).

falsely claimed a bomb was planted in an apartment); Montes-Reyes, supra, (false statement to search for missing girl); Krause v. Commonwealth, 206 S.W. 3d 922, 926 (Ky. 2006) (false report of rape occurring on the premises); People v. Jefferson, 43 A.D. 2d 112, 350 N.Y.S. 2d 3, 4 (N.Y. App. Div. 1973) (per curiam) (possible gas leak); c.f. United States v. Hardin, 539 F.3d 404, 424-25 (6th Cir. 2008) (non-existent water leak).

The pantheon of lies told, apparently, by police is infinite. This Court has weighed in on dishonorable police conduct. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that, in the end, life and liberty can be as much endangered from illegal methods used to convict [in this case, to gather evidence] those thought to be criminals as from the actual criminals themselves." Spano v. New York, 360 U.S. 315, 320-21 (1959).

More recently, Courts have noted this under the public policy paradigm. Montes-Reyes, 547 F. Supp. 2d at 288 n.10 ("the potential public policy hazard created when police officers make false claims of exigent circumstances"); United States v. Girardo, 743 F. Supp. 152, 154 (E.D.N.Y. 1990) (Emergency warnings cannot be trusted [whether they be law abiding or law breaking)); see also Krauze, 206 S.W. 3d at 926 (if the court sanctioned ruse of false report [here, of illegal aliens] of a young girl's rape, "citizens would be discouraged from 'aiding to the utmost of their ability in the apprehension of criminals' since they would have no way of knowing whether their assistance was being called upon for the public good or for the purpose of incriminating them" (quoting from Schneckloth, 412 U.S. at 243)).

Academia has recognized this pernicious practice. Laurent Sacharoft, Trespass and Deception, 2015 B.Y.U.L. Rev. 359, 381-82 (discussing the "line of cases" in which "police lie in such a way that the resident feels no choice but to allow the search"); see also 4 Wayne R. LaFave, Search and Seizure: A Tretise on the Fourth Amendment, §8.2(n) (5th ed. 2017) (noting that "[t]he critical fact in Jefferson [the gas leak ruse] ... was that the police in effect deprived the defendant of a free choice in deciding whether to surrender his privacy, for they made it falsely appear that a failure to permit entry might result in injury to persons or property").

While the "fact specific" nature of the analysis from the totality of the circumstances test is still the law within this murky area of analysis concerning consents [to search] obtained by deception as to purpose, it is certainly much less clear than the Magistrate intimated and appellate counsel should have pursued it. 4 Search and Seizure, §8.2(n). Courts have uniformly recognized that the Fourth Amendment is violated when consent is obtained through police lies conveying or implying exigent circumstances to necessitate the search. See Bumper, 391 U.S. at 548-49 (stating that the Government's burden of proving that consent was "freely and voluntarily given" "cannot be discharged by showing no more than acquiescence to a claim of lawful authority"); See also 4 Search and Seizure, §8.2(n) (noting that "[o]ne factor very likely to produce a finding of no consent under Schneckloth voluntariness test is an express or implied false claim by the police that they can immediately proceed to make the search in any event" (footnotes omitted,

emphasis added) [exactly what happened here]; 2 Wayne R. LaFave et al., Criminal Procedure §3.10(c) (4th ed. 2017) (consent obtained by means of "extreme" misrepresentations that allow no meaningful option to refuse "should not be considered valid").

IV. WHETHER IN LIGHT OF THE ISSUES IN THIS CASE, JURISTS COULD DISAGREE WITH THE DISTRICT COURT'S RESOLUTION OF THE ALVARADOS' CONSTITUTIONAL CLAIMS UNDER SLACK V. MCDANIEL, 529 U.S. 473, 484 (2000), AND MILLER-EL V. COCKRELL, 537 U.S. 322, 336 (2003), AND COA SHOULD ISSUE?

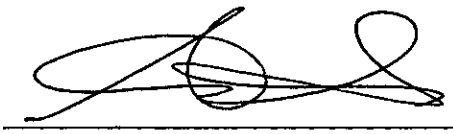
To show that a Certificate of Appealability should issue under 28 U.S.C. §2253(c), Alvarado need only make a substantial showing that jurists of reason could disagree with the district court's resolution of his constitutional claims. See Miller-El, 537 U.S. 322 (2003). Courts of Appeal ask only if the district court's decision was debatable. Id.; see also Bradshaw v. Estelle, 463 U.S. 880, 893 n.4 (1983). A determination related to a Certificate of Appealability is a separate proceeding, one distinct from the underlying merits." Miller-El, 537 U.S. at 342, citing Slack v. McDaniel, 529 U.S. 473, 481 (2000).

Alvarado need not show that his "appeal will succeed," and the Court here should not deny him a Certificate of Appealability just because this Court might believe he will not show he is entitled to relief under §2254. See Miller-El, 537 U.S. at 337. Alvarado must simply demonstrate "a substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c)(2). In this case, that right is to effecting assistance of counsel pursuant to the Sixth Amendment of the United States Constitution.

PRAYER

For these reasons, Alvarado requests full briefing and on review of same, Certiorari issued to the United States Court of Appeals for the Fifth Circuit. Alvarado requests such other and additional relief to which he may be entitled.

Respectfully submitted,



Arnoldo Alvarado
Reg. No. 16452-379
P.O. Box 26020
Beaumont, TX 77720
pro se