No. 21-911

ORIGINAL

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

DAN V. SHARP,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

SUBMITTED BY:

DAN SHARP
Pro Se
Register Number 18547042
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Pollock, Louisiana 71467-4050

QUESTIONS PRESENTED

1. Whether the Court erred in failing to sever the counts by date.
2. Whether the Court erred in requiring the Appellant to appear in shackles in front of the Jury.
3. Whether the trial should be remanded for a new trial due to ineffective assistance of counsel.
4. Whether the 18 USC 924 convictions should be overturned because:
   a. The firearms were not "used" in the commission of a drug offense.
   b. There was no proof of "intent to distribute"
5. Whether the convictions in counts 2-6 should be overturned due to the fact that there was no proof of "constructive possession" of the narcotics by Appellant.
6. Whether or not the Appellant's Confrontation Clause rights were violated by the testimony of Officer Brea about what the informant told him.
7. Whether the Court erred in denying the Motion to Suppress of the Appellant regarding the traffic stop of February 14, 2018.
8. Whether or not the Court Erred in failing to determine on the record if there would have been any delay in allowing the Standby Counsel to resume his role as counsel of record for the Appellant and if this should cause this cause to remanded for a new trial.

PARTIES TO THE PROCEEDING

Petitioner Dan V. Sharp was the Defendant in the district court proceedings and appellant in the court of appeals proceedings. Respondent The United States of America was the Plaintiff in the district court proceedings and the appellees in the court of appeals proceedings.

RELATED CASES

- *United States of America v. Dan Sharp*, No. 3:18-CR-102-1, U.S. District Court for the Northern District of Mississippi, Judgment entered May 18, 2020.
- *Dan Sharp v. United States of America*, No. 20-60437, United States Court of Appeals for the Fifth Circuit.

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PETITION FOR WRIT OF CERTIORARI

Dan V. Sharp petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The Fifth Circuit's opinion is reported in Cause Number 20-60437 and reproduced at App. 1-8. The Opinions of the District Court for the Northern District of Mississippi are reproduced at App.9-22.

JURISDICTION

The Court of Appeals entered judgment on August 17, 2021. App. 1-9. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case does not involve interpretation of statutory or constitutional provisions.

INTRODUCTION AND STATEMENT OF THE CASE

This case began on or about the early morning hours of September 27, 2017, which is the appellant's birthday. The appellant received a text message from his wife stating that she wanted to hear his voice even if it was for the last time. He went to her and an argument happened. After a short period of time, his wife fatally shot herself. The Appellant attempted to do CPR and 911 was called. When the police arrived, they removed The Appellant and the two minor children from the home to investigate. Upon investigation, at least two (2) firearms were found in a closet with the door open, in plain view. Several bottles containing what appeared to be illegal narcotics were also found on the bed. A bag of donuts was also found on the bed. According to one of the officers present, the Appellant stated that he stopped at Krispy Kreme on the way there, however, the Appellant testified that he did not remember that. Regardless, a search of the home was conducted, and the Appellant was charged with possession of the narcotics, with intent to distribute, and possession of firearms by a convicted felon. The Appellant contends that he was only there for a short time and that he and his wife were separated therefore he could not be responsible for any items contained in the home. There was testimony from an employee at a local pawn shop that both the Appellant and his wife were known customers of the pawn shop and that the wife had purchased all of those guns at the pawn shop.

The next several counts in the indictment stem from a traffic stop on or about the early morning hours of February 14, 2018. Officer Bramlett testified that the Appellant swerved into his lane almost hitting his patrol car. As a result of this, Officer Bramlett pulled over the Appellant for careless driving, although no citation was written. After approaching the Appellant's vehicle, Officer Bramlett testified that the Appellant was putting his hands in his pockets and he felt uneasy. Because of this, he asked the Appellant to exit the vehicle and he conducted a Terry pat for his safety. Upon doing so, Officer Bramlett felt what he believed to be a pistol magazine in the pocket of the Appellant's jacket and his testimony is that the Appellant told him he had a pistol in the console. The Appellant testified that he never volunteered that he had a handgun. Officer Bramlett also testified that he smelled a strong odor of burnt marijuana, however, the Appellant testified that he was not under the influence of anything and that he had not smoked any marijuana. Upon search of the car, handguns and narcotics were found and the Appellant was charged with possession of narcotics with intent to distribute and possession of firearms by a convicted felon.

The several counts in the indictment stem from an investigation that was begun either by an anonymous or a confidential informant tip. Detective Brea testified in a June 13, 2018 forfeiture hearing that the investigation was begun by an anonymous tip and in it he denied that a confidential informant was involved. At a later suppression hearing and at trial, Detective Brea

testified that the investigation began with a confidential informant tip. Regardless of the source, the tip was that the Appellant was at the Desoto County courthouse with a large quantity of methamphetamine. Upon receiving the tip, Detective Brea and several other officers went to the area surrounding the courthouse and located the appellant's vehicle. They watched his movement for a time and then he exited his vehicle and went into a tattoo parlor. He was in the tattoo parlor for a short period of time and then he exited and went back to his vehicle and got inside. Later one of the workers from the tattoo parlor came out and opened the passenger door of the Appellant's vehicle and Detective Brea observed what he believed to be a hand to hand narcotics transaction. After the alleged transaction, the worker, later identified as Jason Warren, sat down in the passenger seat of the car and closed the door. Subsequently, the other tattoo parlor worker came out and sat in the passenger side back seat of the Appellant's vehicle. Detective Brea testified that he could not see what they were doing inside the car because the windows were tinted. A marked Desoto County Sheriff Deputy's vehicle then pulled behind the Appellant's car and demanded that the three men exit the vehicle of the Appellant. The two workers told police they were in the car to attempt to purchase narcotics from the Appellant. Upon search of the Appellant's car, narcotics were found, and the Appellant was charged with possession of narcotics with intent to distribute.

REASONS FOR GRANTING THE PETITION

I.

THE COURT ERRED IN DENYING THE APPELLANT'S MOTION TO SEVER THE OFFENSES INTO SEPARATE TRIALS

There are two types of joinder in criminal cases: combining multiple charges against a defendant in a single case ("joinder of offenses") and charging multiple defendants in a single proceeding ("joinder of defendants"). Andrew D. Leipold and Hossein A. Abbasi, The Impact of Joinder and Severance on Federal Criminal Cases: An Empirical Study, 59 Vanderbilt Law Review 349 (2019). First, Joinder is allowed if the alleged crimes are based on the "the same act or transaction." Thus, the defendant who robs a liquor store and discharges a weapon can be required to face both charges in one trial. *United States v. Woody*, 55 F.3d 1257, 1267 (7th Cir. 1995). Second, joinder is permitted if the alleged crimes are part of a "common scheme or plan," such as when a middleman buys drugs from a supplier then sells them to a distributor. *United States v. Johnson*, 130 F.3d 1420, 1427 (10th Cir. 1997). Finally, charges can be joined if they are of the "same or similar character." A defendant who buys stolen goods in June and then again in October may face both counts at once, even if the two charges are distant in time and location and even if they are not part of an overarching criminal plan. *United States v. Tyndall*, 263 F.3d 848, 850 (8th Cir. 2001). Charges and defendants cannot be combined indiscriminately; there must be some nexus among the pieces to justify a single trial. Rule 8(a) of

the Federal Rules of Criminal Procedure provides that the prosecutor can charge a defendant with multiple counts in a single trial in one of three settings. *Andrew D. Leipold and Hossein A. Abbasi, The Impact of Joinder and Severance on Federal Criminal Cases: An Empirical Study*, 59 Vanderbilt Law Review 349 (2019). Even where joinder of defendants or counts is technically proper, severance is required when it is necessary to safeguard the defendant's right to a fair trial. *United States v. Wirsing*, 719 F.2d 859 (6th Cir. 1983). Using statistical models that control for a range of variables, the authors discovered that trial defendants who face multiple counts are roughly 10% more likely to be convicted of the most serious charge than a defendant who stands trial on a single count. *Andrew D. Leipold and Hossein A. Abbasi, The Impact of Joinder and Severance on Federal Criminal Cases: An Empirical Study*, 59 Vanderbilt Law Review 349 (2019). Failure to sever Could erode the presumption of innocence. *United States v. Werner*, 620 F.2d 922, 929 (2d Cir. 1980). (asserting that "[w]hile the mere fact that juries are apt to regard with a more jaundiced eye a person charged with two crimes than a person charged with one" does not require severance, trial judges must be alert to the possibility that juries will cumulate the evidence of the separate charges and convict); see also *United States v. Foutz*, 540 F.2d 733, 736 (4th Cir. 1976) (noting that although "other crimes" are normally inadmissible to prove a criminal disposition, "[one inevitable consequence of a joint trial is that the jury will be aware of evidence of one crime while considering the defendant's guilt or innocence of another." If the rationale of

the 'other crimes' rule is correct, it would seem that some degree of prejudice is necessarily created by permitting the jury to hear evidence of both crimes." (citations omitted)).

Our position is that the more counts in the indictment, the quicker the jury may be to assume that the accused must be guilty of something. Social scientists have found in laboratory experiments that the "halo effect" of multiple charges can lead mock jurors to find the accused less believable, less likeable, and more dangerous than people who are charged with only a single count, with the result that "a defendant is more likely to be convicted by mock jurors of any one charge when that offense is combined with another at trial." *Edith Greene & Elizabeth F. Loftus, When Crimes Are Joined at Trial*, 9 LAW & HUM. BEHAVIOR 193, 194, 197-98 (1985). The researchers are careful to note, however, that their experiment could not clearly determine whether the mock jurors' attitude about the defendant's character was a cause or effect of their conclusion about the defendant's guilt. They could only conclude that "jurors' sentiments toward the defendant is [sic] different when they know that he is charged with multiple crimes." Id. at 198. 25. The social science research supports the notion of jury confusion. *Andrew D. Leipold and Hossein A. Abbasi, The Impact of Joinder and Severance on Federal Criminal Cases: An Empirical Study*, 59 Vanderbilt Law Review 349, footnote 24 (2019). Particularly when the charges are of a "same or similar character," jury might, for example, be so impressed with the evidence on counts one and two that

it fails to notice that there was insufficient evidence on the very-similar count three. *Bean v. Calderon*, 163 F.3d 1073, 1083-86 (9th Cir. 1998); *Drew v. United States*, 331 F.2d 85, 93-94 (D.C. Cir. 1964) (noting the danger of jury confusion over evidence on two distinct but similar crimes). *United States v. Cross*, 335 F.2d 897, 989 (D.C. Cir. 1964). See also *United States v. Fenton*, 367 F.3d 14, 22 (1st Cir. 2004) ("A defendant seeking a severance for the purpose of testifying on one of several counts must make a threshold showing that he has salient testimony to give anent one count and an articulable need to refrain from giving testimony on the other(s)." (citation omitted)). In this case, the Appellant wanted to testify and then he stated to the Court that he did not want to testify. ROA.1357. After the Jury came in, he announced that he did indeed want to testify. ROA.1360. One could presume that the Appellant was struggling with whether he wanted to testify or not because of the multiple counts from multiple dates and with different fact scenarios. If the case had been severed, he would have had the opportunity to testify about some of the counts and not testify about others. Without the Counts being severed, he had no choice but to testify on all counts or none. As a result, the counts should have been severed by date in order to achieve a fair trial for the Appellant. Federal Rule 14 provides that if joinder "appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires." FED. R. CRIM. P. 14(a). "(A)s applied to a criminal trial, denial of due process is the failure to observe that

fundamental fairness essential to the very concept of justice. In order to declare a denial of it . . . [the Court] must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial." *Lisenba v. California*, 314 U.S. 219, 236 (1941). The U.S. Constitution Bill of Rights (under the *Sixth Amendment*) guarantees the right to a speedy trial with an impartial jury for criminal defendants in federal courts.

The Brief of the Appellee states (Brief of Appellee p. 28) that the Appellant did not bring the matter of his having to choose to testify as to all counts or none to the Court's attention at the time when it arose in trial. Due to this, the Government would say that Sharp has failed to show how he was prejudiced. Sharp is not an attorney and was overwhelmed with the trial process. He has no legal training and failed to raise issues necessary at trial. In short, he was denied his Constitutional right to a fair trial. Due to the denial of the Motion to Sever filed and argued by the Appellant, this case should be reversed and remanded for a new trial due to the fact that the Appellant was denied his constitutional right to a fair trial.

II.

THE COURT ERRED IN REQUIRING THE APPELLANT TO APPEAR IN SHACKLES IN FRONT OF THE JURY

It appears that there was no motion hearing to explain the reasons for requiring the Appellant to appear

in shackles in front of the jury. The first mention of it was in the transcript for the Motion to Proceed Pro Se, when on page 35, the Court announced that he was going to leave him shackled. ROA.755. On page 3 of the Trial Transcript, the Court explained to the Appellant that he would instruct the Jury to disregard that he has shackles on his feet. ROA.1487. The use of visible physical restraints, such as shackles, leg irons, or belly chains, in front of a jury, has been held to raise due process concerns. In *Deck v. Missouri*, the Court noted a rule dating back to English common law against bringing a defendant to trial in irons, and a modern-day recognition that such measures should be used "only in the presence of a special need." *Deck v. Missouri* 544 U.S. 622, 626 (2005). In *Illinois v. Allen*, 397 U.S. 337, 344 (1970), the Court stated, in dictum, that "no person should be tried while shackled and gagged except as a last resort." The Court found that the use of visible restraints during the guilt phase of a trial undermines the presumption of innocence, limits the ability of a defendant to consult with counsel, and "affronts the dignity and decorum of judicial proceedings." *Deck v Missouri*, 544 U.S. 622, 630-631.

Counsel opposite says that the Appellant, Sharp did not object to this, therefore the standard is plain error (Brief of Appellee pp 29-30), however, this Court should not hold the fact that Sharp did not object against him. He is not a legal expert and did not understand the difference that this would make in his appeal by his failure to object. As a result of this, the Appellant would submit that his having to wear

shackles in front of the jury denied him his Constitutional right to a fair trial should cause this cause to be remanded for a new trial.

III.

THE APPELLANT SHOULD HAVE HIS CONVICTIONS OVERTURNED DUE TO INEFFECTIVE ASSISTANCE OF COUNSEL

In the case at hand, the appointed counsel handled matters on behalf of the Appellant in the pretrial motions and hearings however, the Appellant was unhappy with their presentation of his arguments and filed his own motions that were never heard. The Appellant felt that his attorneys did not zealously argue his case and failed to bring up key matters in his defense. As a result of his feeling that he was improperly represented he sought and was ultimately granted the right to represent himself. ROA.699.

To prove ineffective assistance, a defendant must show (1) that their trial lawyer's performance.

fell below an "objective standard of reasonableness" and (2) "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."

Strickland v. Washington, 466 U.S. 668 (1984). A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or setting aside of a death sentence requires that the defendant show, first, that counsel's performance was

deficient and, second, that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. *Strickland* 466 U.S. 687-696. The proper standard for judging attorney performance is that of reasonably effective assistance, considering all the circumstances. When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness. Judicial scrutiny of counsel's performance must be highly deferential, and a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. These standards require no special amplification in order to define counsel's duty to investigate, the duty at issue in this case. *Strickland* 466 U.S. 687-691. With regard to the required showing of prejudice, the proper standard requires the defendant to show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. A court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. *Strickland* 466 U. S. 670, 691-696.

The Appellant would submit that due to the defective performance of his appointed counsel that he should be granted a new trial.

IV.

THE APPELLANT SHOULD HAVE HIS CONVICTIONS UNDER 18 USC 924(c)(1) OVERTURNED

A. THE FIREARMS WERE NOT "USED" IN THE COMMISSION OF A DRUG OFFENSE

18 U.S.C. § 924(c)(1)(A) criminalizes the use of a firearm during and in relation to a drug transaction. The sole issue in this case is whether a defendant who receives a firearm, in exchange for drugs, "uses" that firearm in violation of 18 U.S.C. § 924(c)(1)(A). This Court spoke to the reverse scenario in *Smith v. United States*, 508 U.S. 223 (1993). In that case, this Court held that where a defendant brings a firearm to a drug transaction and employs it to barter for drugs, he has "used" the firearm within the meaning of § 924(c)(1). Three Justices dissented, arguing that bartering with a firearm does not constitute "use" within that term's ordinary meaning. Id. at 241-244 (Scalia, J., dissenting). Two years later, in *Bailey v. United States*, 516 U.S. 137 (1995), this Court unanimously clarified that "use" of a firearm under § 924(c)(1) means the "active employment of the firearm by the defendant." Id. at 143. The *Bailey* Court held that "'use' must connote more than mere possession of a firearm by a person who commits a drug offense," and that the "inert

presence of a firearm, without more, is not enough to trigger § 924(c)(1)." Id. at 143, 149.

Therefore, the Appellant would show that the convictions under 18 USC 924 should be reversed and rendered not guilty.

B. THERE WAS NO PROOF OF INTENT TO DISTRIBUTE

> "In reviewing an appeal based on insufficient evidence, the standard is whether any reasonable trier of fact could have found that the evidence established the appellant's guilt beyond a reasonable doubt." *United States v. Jaramillo*, 42 F.3d 920, 922-23 (5th Cir.), cert. denied, ___ U.S. ___, 115 S.Ct. 2014, 131 L.Ed.2d 1013 (1995). We review the evidence in the light most favorable to the verdict. Id. at 923.
>
> To establish a violation of 21 U.S.C. Sec. 841(a)(1), "the government must prove knowing possession of the contraband with intent to distribute." *United States v. Cardenas*, 9 F.3d 1139, 1158 (5th Cir.1993), cert. denied, ___ U.S. ___, 114 S.Ct. 2150, 128 L.Ed.2d 876 (1994). The elements of the offense may be proven either by direct or circumstantial evidence. Id. A quantity of drugs consistent with personal use does not raise an inference of intent to distribute in the absence of additional evidence. See *Turner v. United States*, 396 U.S. 398, 423-25, 90 S.Ct. 642, 656, 24 L.Ed.2d 610 (1970) (14.68 grams of cocaine insufficient to

sustain a conviction for distribution); *United States v. Olvera*, 523 F.2d 1252, 1253 (5th Cir.1975) (1.84 grams of cocaine-sugar mixture insufficient to infer intent to distribute); *United States v. Onick*, 889 F.2d 1425 (5th Cir.1989) (7.7 grams of heroin and cocaine alone not sufficient to infer intent). Such a quantity of a controlled substance, however, is sufficient when augmented by "the presence of distribution paraphernalia, large quantities of cash, or the value and quality of the substance." *United States v. Munoz*, 957 F.2d 171, 174 (5th Cir.), cert. denied, 506 U.S. 919, 113 S.Ct. 332, 121 L.Ed.2d 250 (1992).

We hold as a matter of law that this quantity alone is insufficient to prove intent. Additional evidence is necessary. See *Onick*, 889 F.2d at 1431

1. September 27, 2017- On this date, the Appellant testified that he was out celebrating his birthday when he received a text message from his wife saying that she wanted to speak to him for the last time. ROA.1367-8. As a result of this he went to her and when he arrived there an argument took place. ROA.1368. After the Appellant had been there a short time, his wife shot herself in the chest. ROA.1369. It is alleged that the Appellant was in possession of narcotics with the intent to distribute in Counts 2-6 of the indictment, however, in order to be guilty of possession with intent, you must first possess the narcotics. There was much

discussion of constructive possession in this case and that will be discussed below in section V. In this section we will concentrate on the "intent to distribute" portion. The Appellant was only in the residence for a short time before his wife killed herself. There is no proof that he even saw or knew what the items were on the bed in the bedroom. There is certainly no proof that he intended to distribute those items even if he did see them on the bed and recognize them to be illegal narcotics. As a result of this, the Appellant's convictions in Counts 2-6 should be reversed. Further, if this is so and there is insufficient evidence as to the intent to distribute portion of the proof, then Count 7 does not apply and therefore the conviction under 18 USC 924(c)(1)(C) is improper and should be reversed.

2. February 14, 2018—The Appellant repeatedly told the officers that the narcotics found in his car were for personal use. ROA.1180, 1371. Appellant testified in his own behalf stating that that was his stash of drugs . . . his "don't feel anything". ROA.1371. Further, when officer Randy Davis was questioned about whether these quantities were consistent with personal use, he stated "it could go either way" with these amounts. ROA.1179. Appellant further testified that he "wasn't trafficking no drugs". ROA.1372. As a result of this, we submit to the Court that reasonable doubt indeed

existed in these counts for possession with intent of narcotics in Counts 9-13 of the indictment and these convictions should be reversed. If this is so and there is insufficient evidence as to the intent to distribute portion of the proof, then Count 14 does not apply and therefore the conviction under 18 USC 924(c)(1)(C) is improper and should be reversed.

3. April 19, 2018—The Appellant was at or near the Desoto County Courthouse and law enforcement either received an anonymous tip or a tip from a confidential informant. The officer involved gave different labels to the tip at different stages of the proceedings. At the forfeiture portion of the proceedings, he referred to the tip as an anonymous tip. ROA.602-603. He later explained to the Jury at trial that he only called it an anonymous tip because he didn't want to reveal the identity of the confidential informant and he didn't know at that time if he would be required to do so. ROA.1210. He states that he gave the same testimony both times he testified, only reworded (ROA.1239), however, these two dates and his testimony are very different. Some might say that his testimony at the forfeiture hearing was perjury as he intentionally misled the court and the defense counsel in stating that this was an anonymous tip. Later at a suppression hearing and again at trial, he testified that this was a confidential

informant who had previously given information and had proven reliable. ROA.1208. As a result of this inconsistent, and false testimony, we submit that the testimony of this agent is unreliable. Further, there was testimony from an individual who claims that he purchased cocaine from the Appellant on the day in question. ROA.1252, 1259. This person also testified that he was the second person who went outside that day and that he sat in the back seat of the car. ROA.1252. This same person gave a statement to law enforcement in April of 2018 stating that he went out to the Appellant's car first and sat in the front passenger seat. ROA.1259. These are inconsistent statements and bring questions as to his reliability and to the truthfulness of his testimony. Further still, he testified that he kept a one-dollar bill with cocaine in it in his wallet. ROA.1253. In this case, what we submit to this Court is that this person went out to the Appellant's vehicle to smoke marijuana and when he saw law enforcement, he attempted to get rid of the cocaine that he had in his wallet. This cocaine was not purchased from the Appellant but was the cocaine that this person testified that he always carried in his wallet in a one-dollar bill. As a result of these inconsistencies, the conviction in counts 15-19 should be reversed and rendered not

guilty as there is insufficient proof of intent to distribute.

V.

THERE WAS NO PROOF OF CONSTRUCTIVE POSSESSION OF DRUGS OR FIREARMS ON SEPT 27, 2017

The government can prove possession by showing that a defendant exercised either direct physical control over a thing (actual possession) or "dominion or control" over the thing itself or the area in which it was found (constructive possession. *United States v. Munoz*, 150 F.3d 401, 416 (5th Cir.1998) ("Actual possession means the defendant knowingly has direct physical control over a thing at a given time."); *United States v. De Leon*, 170 F.3d 494, 496 (5th Cir.1999) ("Constructive possession is the ownership, dominion or control over an illegal item itself or dominion or control over the premises in which the item is found.") (citations omitted). Constructive possession may also be proven by showing that contraband was in the direct physical possession of a person over whom a defendant exercised control. See, e.g., *United States v. Willis*, 6 F.3d 257, 262 (5th Cir.1993) overruled on other grounds by *Bailey v. United States*, 516 U.S. 137, 116 S.Ct. 501, 133 L.Ed.2d 472 (1995). In constructive possession cases, knowledge and intent are frequently at issue. A defendant will often deny any knowledge of a thing found in an area that is under his control (e.g., a residence, an automobile) or claim that it was placed there by accident or mistake. The government then

must offer evidence to prove that the defendant knew that the thing was present, and (2) intended to exercised dominion or control over it. *US v. Jones*, Nos. 06-30535, 06-30563, (5th Cir 2007). Constructive possession is "ownership, dominion, or control over the contraband itself or dominion or control over the premises in which the contraband is concealed." *United States v. Mergerson*, 4 F.3d 337, 349 (5th Cir.1993) (citation and internal quotation marks omitted), cert. denied, 510 U.S. 1198, 114 S.Ct. 1310, 127 L.Ed.2d 660 (1994). To prove possession with the intent to distribute, the Government must prove that Jones knowingly possessed the drugs with the intent to distribute. *United States v. Reyes*, 102 F.3d 1361, 1365 n. 4 (5th Cir.1996). To prove possession of a firearm or ammunition, the Government must prove that Jones had been convicted of a felony and that he knowingly possessed a firearm or ammunition in or affecting interstate commerce. 18 U.S.C. §922(g); *United States v. Ybarra*, 70 F.3d 362, 365 (5th Cir.1995), cert. denied, 517 U.S. 1174, 116 S.Ct. 1582, 134 L.Ed.2d 679 (1996). Possession may be actual or constructive and may be proved by circumstantial evidence. *Cardenas*, 9 F.3d at 1158 (drugs); *United States v. Knezek*, 964 F.2d 394, 400 (5th Cir.1992) (firearms); *United States v. McKnight*, 953 F.2d 898, 901 (5th Cir.1992) (firearms). Constructive possession is the knowing exercise of or the knowing power or right to exercise dominion and control over the contraband. *Cardenas*, 9 F.3d at 1158 (drugs); *Knezek*, 964 F.2d at 400 (firearms). One who owns or exercises dominion or control over the premises where contraband is found may be deemed to

possess the contraband. *United States v. Sanchez-Sotelo*, 8 F.3d 202, 208-09 (5th Cir.1993) (drugs); *Knezek,* 964 F.2d at 400.

In this case, there was no proof of ownership, dominion or control over the narcotics listed in counts 2-6. The Appellant was only in the home for a short time before his wife shot herself. ROA.1029. When he arrived, it was a stressful situation, and an argument took place before his wife killed herself. ROA.1028-1029. After she shot herself, the Appellant frantically tried to get EMS to the residence to try to save his wife's life. He also, unsuccessfully attempted to perform CPR on her while he awaited emergency personnel. ROA.1369. Appellant testified that he didn't go there knowing there were drugs or guns there at that moment. ROA.1369. To believe that he took an assessment of the items on the bed and inventoried them for the purpose of identifying if they were illegal narcotics or not is ludicrous and unbelievable. The only proof is that there was an argument and his wife shot herself at which time the Appellant tried desperately to save her life. When Police arrived, the Appellant was escorted from the home. We submit to this Honorable Court that there was no proof of dominion or control and no proof that the Appellant even recognized or knew what the items were on the bed. These are requirements for constructive possession and as a result convictions in Counts 2-6 should be reversed and rendered Not Guilty.

VI.

THE OFFICER TESTIFIED TO WHAT THE CONFIDENTIAL INFORMANT TOLD HIM ON APRIL 19, 2018

In this case Detective Brea testified under oath to what a Confidential informant had told him. ROA.1186. He testified "I received a call from another agent. He had got a call from a confidential informant saying Mr. Sharp was at our courthouse in Desoto County located in Hernando, Mississippi, and he was in possession of a large amount of methamphetamine." ROA.1186. This testimony was improper. Under the Confrontation Clause. The Sixth Amendment provides a criminal defendant with the right "to be confronted with the witnesses against him." U.S. Const. Amend. VI. "[T]his bedrock procedural guarantee" protects against convictions based on out of court accusations that the defendant cannot test "in the crucible of cross examination." *Crawford v. Washington*, 541 U.S. 36, 42, 61 (2004). To satisfy the Confrontation Clause, "[t]estimonial statements of witnesses absent from trial" may be "admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." Id. at 59. We review preserved claims of Confrontation Clause error de novo, subject to harmless error analysis. See *United States v. Kizzee*, 877 F.3d 650, 656 (5th Cir. 2017). "Police officers cannot, through their trial testimony, refer to the substance of statements given to them by nontestifying witnesses in the course of their investigation, when those statements inculpate the defendant." *Taylor v.*

Cain, 545 F.3d 327, 335 (5th Cir. 2008). An officer's testimony need not repeat the absent witness's exact statement to implicate the Confrontation Clause. Rather, "[w]here an officer's testimony leads to the clear and logical inference that out-of-court declarants believed and said that the defendant was guilty of the crime charged, Confrontation Clause protections are triggered." *Kizzee*, 877 F.3d at 657 (quotation omitted).

United States v. Hernandez, 750 F.2d 1256, 1257 (5th Cir. 1985) (rejecting argument that hearsay evidence identifying the defendant as a drug smuggler was permissibly used "to explain the motivation behind DEA's investigation"). "Statements exceeding the limited need to explain an officer's actions can violate the Sixth Amendment—where a nontestifying witness specifically links a defendant to the crime, testimony becomes inadmissible hearsay." *Kizzee*, 877 F.3d at 659; see also *United States v. Vitale*, 596 F.2d 688, 689 (5th Cir. 1979) (explaining that testimony regarding a tip is permissible "provided that it is simply background information showing the police officers did not act without reason and, in addition, that it does not point specifically to the defendant").

Due to this violation of the Confrontation Clause of the United States Constitution, the Appellant submits that this cause should be remanded for a new trial.

VII.

THERE WAS NO PROBABLE CAUSE FOR A TRAFFIC STOP OF THE APPELLANT'S VEHICLE ON FEBRUARY 14, 2018 AND AS A RESULT IT WAS ERROR TO DENY THE MOTION TO SUPPRESS

In the context of traffic stops, the Supreme Court held in *Whren v. U.S.* (1996) that the police had to have probable cause to believe the driver or vehicle is in violation of a traffic law. In the abstract, *Whren* makes perfect sense: If an officer observes a moving violation, he or she can stop a driver to address the issue. *Whren v. United States*, 517 U.S. 806 (1996). Detention of a motorist is reasonable where probable cause exists to believe that a traffic violation has occurred. See, *e. g., Delaware v. Prouse*, 440 U. S. 648, 659 (1979). In this case, the officer stated that he pulled over the appellant for swerving into his lane and almost hitting the officer's vehicle. ROA.1098. But if this were true, why was no citation written for careless driving or DUI? In fact, if there was any violation of the law, a citation should have been written. The officer testified that the Appellant "almost hit" his patrol car. The Appellant testified that the officer told him at the time of the stop that his tire "touched the yellow line". ROA.634. Regardless, there was no traffic citation written and there was no video of the stop or the circumstances leading up to the stop. ROA.566. Due to these facts, the proof is insufficient as to probable cause to stop and as a result all subsequent evidence should not have been allowed into evidence and should have been suppressed.

Therefore, the Appellant submits that his convictions in Counts 8-14 should be reversed.

VIII.

MR. SHARP ASKED FOR ATTORNEY DURING THE TRIAL AND WAS IGNORED OR DENIED BY THE JUDGE IN VIOLATION OF 6TH AMENDMENT

On page 20-60437.1551, it was stated by Mr. Levidiotis that the Appellant was having second thoughts about representing himself. ROA.1551. On pages 800-801 of the Electronic Record on Appeal, Mr. Levidiotis stated on behalf of the Appellant that "he wished to have a lawyer after all and to withdraw his waiver of attorney." ROA.800-801. In response, the Court asked if he doubted his decision. ROA.802. However, the Court did not consider it, nor did he decide if this request would cause undue delay. In *United States v. Pollani*, the Court held that even where a defendant is "vigorously attempting to delay the start of trial," a district court still cannot deny his motion to be represented by counsel without reason to think that the representation would impede the orderly administration of justice. *Pollani*, 146 F.3d 269, 273 (5th Cir. 1998) In *Pollani*, the Court reversed a district court's denial of a pro se defendant's motion to substitute counsel four days before trial. *Pollani*, 146 F.3d 269, 273 (5th Cir. 1998). In doing so, the Court specifically held that if "no delay [is] required for [a defendant] to exercise his right" to be represented by counsel rather than himself, then the defendant shall have "the option to be

represented by counsel to the extent that he [can] do so without interrupting the orderly processes of the court." *Pollani*, 146 F.3d at 273. *Pollani* is plain in its teaching that a district court can deny a motion seeking appointment of counsel—including the elevation of standby counsel to trial counsel—when a defendant's untimely request would result in delay. But there is no showing here that this was the circumstance. *United States v. Smith*, No. 17-30065 (5th Cir. 2018). Smith was entitled to representation to the extent that standby counsel could take over representation "without interrupting the orderly processes of the court." Because the record does not demonstrate that the elevation of standby counsel to trial counsel would invariably work a delay and require a continuance, the Court concluded that Smith was deprived of a fundamental constitutional right, and his convictions must be reversed. *United States v. Smith*, No. 17-30065 (5th Cir. 2018) citing *Pollani*, 146 F.3d at 273–74.

This is identical to this case as there was no determination if allowing Mr. Levidiotis to take over the trial that there would have resulted in delay. Due to this, the Appellant was denied his 6th Amendment right to counsel and the Appellants convictions should all be overturned and remanded for a new trial.

CONCLUSION

As a result of the numerous errors listed above, the Appellant does hereby request that this Honorable

Court Grant this Petition for Writ of Certiorari and review this matter due to the violations of Mr. Sharp's rights as guaranteed by the US Constitution.

SUBMITTED BY:

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