No. _____

In The
Supreme Court of the United States

ROBERT LOYA, JR.,
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

SANDRA A. EASTWOOD
Counsel of Record
LAW OFFICE OF SANDRA EASTWOOD
CJA
3636 S. Alameda Street, Suite B197
Corpus Christi, Texas 78411
(361) 688-4900
sandraeastwoodlaw@yahoo.com
Texas State Bar No. 00789274

Counsel for Petitioner

QUESTION PRESENTED

I. Is there insufficient evidence to warrant a finding of guilty for Count 1: possessing with intent to distribute methamphetamine over 50 grams and Count 2: being a felon in possession of a firearm?

II. Whether evidence of gang affiliation was unfairly prejudicial and should have been excluded?

III. Whether Mr. Loya's sentence of 360 months' imprisonment and five years of supervised release was substantively unreasonable?

PARTIES TO THE PROCEEDING

The parties to the proceeding are named in the caption of the case before this Court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

CASES

CONSTITUTIONAL PROVISION

STATUTES AND RULES

SENTENCING GUIDELINES

PRAYER

Petitioner Robert Loya, Jr. respectfully prays that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Fifth Circuit issued on November 15, 2022.

———————♦———————

OPINIONS BELOW

On November 15, 2022, the United States Court of Appeals for the Fifth Circuit entered its judgment and opinion affirming the judgment of conviction and sentence. The Westlaw version of the Fifth Circuit's opinion is reproduced in the appendix to this petition.

———————♦———————

JURISDICTION

As noted, the Fifth Circuit entered its judgment on November 15, 2022. Appendix at 1. This petition is filed within 90 days after that date and thus is timely. See Sup. Ct. R. 13.1. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

———————♦———————

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

I. The Due Process Clauses of the Fifth and Fourteenth Amendments "[protect] the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 90 S.Ct. 1068 (1970).

The Fifth Amendment to the United States Constitution provides:

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

U.S. Const. amend. V.

II. The Sixth Amendment guarantees a fair trial for the accused, "Chapman v. California, 386 U.S. 18 (1967).

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury ***, and to be informed of the nature and cause of the accusation; to be confronted by the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have assistance of counsel for his defense.

U.S. Const. amend. VI.

III. The Cruel and Unusual Punishment Clause of the Eighth and Fourteenth Amendments "[protect] the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." Miller v. Alabama, 567 U.S. 460 (2012).

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. amend. VIII.

The Fourteenth Amendment to the United States Constitution provides:

> ***No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV.

STATEMENT OF THE CASE

A federal grand jury in Corpus Christi returned a two-count indictment charging Defendant-Appellant Robert Loya, Jr. ("*Mr. Loya*") with possessing with intent to distribute more than fifty (50) grams of methamphetamine- 6.72 kilograms of methamphetamine, and felon in possession of a firearm. ROA.32.

Mr. Loya pled not guilty and his jury trial began on May 19, 2021. ROA.9-10, 196. Prior to trial, the Government sought to admit evidence Mr. Loya was associated with the Mexican Mafia prison gang, and this case originated after two Mexican Mafia leaders in Laredo mentioned during a wire-tap a Lil'Rob who sold narcotics and guns, and the Court overruled the defense's objection of prejudice. ROA.100-108, 112-115, 223-230, 235-236, 244-248, 569-571. The Court made a finding *the membership in the Texas Mexican Mafia* issue was inextricably intertwined, and it was not 404(b) because it provided context to the jury, but recognized how inflammatory membership in the Texas Mexican Mafia is, and advised the Government "to tread lightly on this." ROA. 587.

Throughout trial, the Government sought to prove the following purported inculpatory evidence:

> During a long-term investigation of the Laredo *Mexican Mafia ("MM"),* the highest ranking leaders in Laredo were overheard on February 17, 2020 discussing a "potential violent crime" and a 'Lil Rob' in Corpus Christi, of whom Agents were familiar. ROA. 764-767. Based on information *unrelated* to Mr. Loya, Laredo Agents obtained a search warrant for a Laredo hotel room, and detained the Laredo M.M. *second in command*, along with a confidential informant ("*C.I.*"), who provided to Agents a February 17th photograph of a gun at Lil Rob's house at 4625 Odem Street in Corpus Christi, Texas. ROA. 767-770. Agents, including DEA and ATF, had been involved in a long term investigation of a *specific organization* in Corpus Christi since 2013, and one of those members was believed to be the defendant aka 'Lil Rob'. ROA. 774-776. Based on the information from the CI, Agents obtained and executed on February 21st a search warrant at 4625 Odem Street targeting Mr. Loya. ROA. 776-777. On February 20th and 21st an Agent observed Loya's Jaguar parked on the lawn area of 4621 Odem on all three occasions he had driven by, noted Loya's girlfriend's Malibu was also parked there at 8:33AM, and on the day of

> the search warrant Loya went into 4621 Odem for two or three minutes and then departed the area in his Jaguar at 3:50PM, which was ten minutes before the warrant at 4625 was executed, and during the search warrant(s) Loya never returned. ROA. 778-783. Upon entering 4625, Agents realized the couch and floor tiles did not match the CI's photo, so Agents peeked in through a tear in the tin-foil next door at 4621 Odem, and it did match, and obtained another warrant. ROA. 804-807. The 4621 home was run-down with garbage and bottles, had two lived-in bedrooms, and Agents found a large quantity of methamphetamines and firearms, including the firearm in the photo, at 4621. ROA.787-788. Nothing was seized from 4625, which was occupied by Loya's family, including his father who went by the same name. ROA. 829. Mr. Loya's 16 year old son tried to enter the 4621 house while Agents were conducting the search. ROA. 839-840. Agents observed T-Shirts with Loya's business name hanging from a bedroom wall at 4621 and found paperwork related to Loya in the nicer bedroom. ROA. 845-846. Loya's US Probation Officer testified Loya had an alias of Lil Rob; and she visited his residence at 4625 Odem Drive on November 25, 2019 and determined he had his own bedroom and was living with his parents and teenage son, and at the time of her visit, his girlfriend, Katrina Solis, was there. ROA.333-334, 336. A Laredo DEA Task Force Officer testified that following the search warrant at the hotel and then at 4625 and 4621 Odem, a call was intercepted and recorded in which Lil Rob called the Laredo MM leader, and they discussed the two searches at the hotel and in Corpus Christi the day after, and Lil Rob accused him of bringing a snitch, "the white guy" to his house resulting in the search. ROA.402-404, 408. Agents identified Loya's voice and said the CI was Caucasian. ROA. 407-408, 797-798. A gang Officer testified Loya was known to drive a Jaguar and his son a Dodge Charger, the defendant was known as Lil Rob per his contacts with the *gang* unit, he self-admitted and was *documented*. ROA.419-420.

The Court gave a limiting instruction instructing the jury that evidence regarding the Texas Mexican Mafia was "admitted only for the purpose of providing background and context" and the jury was "not to consider or infer that Loya was more likely to have committed the acts alleged in the indictment on this basis." ROA. 133. The jury found Mr. Loya Guilty of counts 1 and 2 in the Indictment. ROA.122. After Mr. Loya was found guilty, the court ordered that a presentence report ("PSR") be prepared to assist the court in sentencing him. ROA. 514, 964. Using the 2018 edition of the United States Sentencing Guidelines ("USSG"), ROA. 968, the PSR as adopted by the district court, ROA.514, calculated Mr. Loya's total offense level as shown in the table below:

Calculation	Levels	USSG §	Description	Where in record?
Base offense level	38	2D1.1(c)(1)	21U.S.C. § 841(a)(1) and U.S.S.G. § 2D1.1(c)(1)	ROA.968 (PSR ¶ 15)
Enhancement(s)	+2 +2	U.S.S.G.§ 2D1.1.1(b)(1) U.S.S.G. § 2L1.2(b)(12)	Possessing dangerous weapon Maintain premises for manufacturing or distributing controlled substance	ROA.968 (PSR ¶ 16) ROA.968 (PSR ¶ 17)
Total offense level	**42**			ROA.969 (PSR ¶ 23)

The PSR assessed Mr. Loya a base offense level of 42. ROA.969 (PSR ¶ 23).

The PSR placed Mr. Loya in a criminal history category of VI with a total criminal history score of thirteen. ROA.972 (PSR ¶ 35). Based on a total offense level of 42 and a criminal history category of VI, the PSR calculated an advisory Guidelines imprisonment range of 360 months to Life. ROA.980 (PSR ¶ 75).

At *sentencing* and *to consider the possible revocation of Mr. Loya's supervised release* in one hearing on October 7, 2021, the Court considered that Mr. Loya was found guilty by a jury on the two counts. ROA.513-514, 972. Neither the Government nor the Defense called witnesses. ROA.515. The Court stated it received the letters submitted by Mr. Loya from his family. ROA.515-516. The Government introduced Exhibits 1 through 6, without objection, which were photographs of weapons found on a phone. ROA.516-518. The Government recommended a Life sentence, stating the "details of personal history were concerning" in paragraph 50, ROA.976, because the prosecutor could not find significant sentences to prison for "Brother Loya Senior's criminal history," even though the PSR stated Mr. Loya grew up

with an incarcerated father and a mother who was subsequently committed for mental health reasons. ROA.518. Paragraph 50 states:

"Loya described an atypical childhood. The defendant stated that his father was incarcerated when he was eight years old and his mother was committed to the San Antonio State Hospital shortly after. The defendant was not sure of the reason for his father's incarceration. Loya explained that his mother took his father's legal situation very hard. With his father and mother gone the defendant stated he and his sisters lived alone. His older sister, Rose, got a job and managed the household. The defendant stated that they were all just children but did not reach out or ask for help because they feared that if someone knew about their living situation they would be put in state custody and be separated. The defendant expressed a fondness for his sister Rose and labeled her his "mother figure". He went on to say that when he was fourteen his parents returned, but that he continued to reside with Rose and her husband." ROA.976. (PSR ¶ 50). The Court inquired as to what was the longest sentence he had served, which was eight years. ROA.532. After evidence presented and argument, the court sentenced Mr. Loya to a sentence within the guideline range of 360 months- 240 months as to Count 1 and 120 months as to Count 2, to run consecutively, in the custody of the Bureau of Prisons, to be followed by a 5-year term of supervised release. ROA.552-553. The district court waived imposition of a fine. ROA.553.

The Appeal

On October 8, 2021, Mr. Loya filed a timely notice of appeal to the United States Court of Appeals for the Fifth Circuit. And on November 15, 2022, the Fifth Circuit affirmed the judgment of conviction and sentence. See United States v. ROBERT LOYA, JR, 2022 WL 16945900 (5th Cir. November 21, 2022) (per curiam) (Appendix). The panel held that a reasonable jury could conclude beyond a reasonable doubt that Loya knowingly possessed the

firearms and methamphetamine; the limiting instruction minimized the danger of undue prejudice from evidence of his affiliation with Texas Mexican Mafia and in light of other substantial evidence of guilt, any error in the admission of Loya's gang affiliation was harmless; and the within guidelines 360 months' sentence was presumptively reasonable, and Loya had failed to demonstrate his sentence was substantively unreasonable.

———————♦———————

BASIS OF FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

The district court has jurisdiction pursuant to 18 U.S.C. § 3231.

———————♦———————

REASONS FOR GRANTING THE PETITION

I. As to the first question presented, this Court should grant certiorari to address whether the evidence was sufficient to find Mr. Loya guilty of knowingly possessing the firearms and methamphetamine. The evidence introduced against Mr. Loya at trial, generally, consisted of: Corpus Christi 'Lil Rob' being mentioned by purported leaders of the Laredo Texas Mexican Mafia, an unknown CI providing a photo to Agents of a firearm in Loya's purported living room, a search warrant in which Agents found methamphetamine and the same firearm, along with t-shirts of Loya's company and mail, Loya's and his girlfriend's vehicles parked in front of the house, Loya observed entering and exiting the house shortly before the search warrant, Loya's purported affiliation with the Texas Mexican Mafia and nickname of 'Lil Rob', and a recorded call afterwards in which purportedly Loya discussed the search warrant(s) with leaders of the Laredo Mexican Mafia and complained they brought a white snitch to his house.

Mr. Loya was convicted under Count 1 of Possessing with intent to deliver over 50 grams of methamphetamine and Count 2:Felon in possession of a firearm.

The elements of possession with intent to distribute a controlled substance are (1) knowing, (2) possession of a controlled substance, (3) with the intent to distribute it, *United States v. Ortega Reyna*, 148 F.3d 540 (5th Cir.1998). The government may prove actual or constructive possession by either direct or circumstantial evidence, *U.S. v. Ruiz*, 860 F.2d. 615 (5th Cir.1988). Intent to distribute may be inferred from the possession of a large quantity of narcotics, street value of the narcotics and/or purity of the narcotics, *U.S. v. Pigrum*, 922 F.2d 249 (5th Cir.1991).

A conviction for felon in possession of a firearm under 18 U.S.C. § 922(g)(1), requires proof of (1) a previous felony conviction, (2) knowing possession of a firearm,

and (3) the firearm had traveled in or affected interstate commerce, *United States v. Meza*, 701 F.3d 411 (5th Cir.2012).

The evidence was insufficient to show Mr. Loya knowingly possessed the drugs or weapons seized at the residence on February 21, 2020.

Both the possession and knowledge of possession can be proved by circumstantial evidence, *Montoya v. United States*, 402 F.2d 847 (5th 1968). Possession may be actual or constructive but there must be dominion and control over the item or a power to exercise dominion and control, and when there is circumstantial evidence, there are numerous caveats regarding "knowing possession," *U.S. v. Phillips*, 496 F.2d 1395 (5th 1974).

The word "possession" is so ambiguous that it is "fraught with danger" and "courts must scrutinize its use with all diligence, *Guevara v. United States*, 242 F.2d 745 (CA5, 1957)."

Constructive possession is the "knowing exercise of, or the knowing power or right to exercise dominion and control over the proscribed substance." *United States v. Cisneros*, 112 F.3d 1272 (5th Cir.1997).

Mere proximity to contraband, without more, is not sufficient to establish actual constructive possession or the element of knowledge, *United States v. Canada*, 459 F.2d. 687 (CA5, 1972).

There was no evidence presented by the Government Mr. Loya made inconsistent or implausible statements, nor evidence of any controlled buys, nor any witnesses who came forward to testify he was seen in possession of drugs or firearms,

nor evidence of high drug trafficking activity, nor any testimony from cooperating witnesses of narcotic or firearm activity, nor of suspicious activity in the days before the incident, nor large amounts of cash found, nor fingerprints, nor DNA, nor cell phone extraction, nor testimony from neighbors he lived at that location. There was no evidence presented he was physically in the room or house where the methamphetamine and weapons were seized, other than: papers with his name, shirts with his company's name, an Agent who saw him e*nter and exit two to three minutes* which was ten minutes prior to the execution of the first search warrant, his Jaguar and his girlfriend's car parked at the home on the 20th and 21st, a gang task force officer's vague statement he was known to live there, without more, a photo from a confidential informant who did not testify showing firearm(s) that matched the couch and flooring of the home, and testimony he advised his U.S. Probation Officer he lived next door, which was the home of his parents. While there was a recorded call attributed to him referencing the "white guy" and "snitch," there was no expert testimony it was his voice, nor were there any other wire-tapped communications or cell phone extractions linking Mr. Loya to guns or narcotics. Of note, the Agents did not examine the DVR camera footage found within the home. ROA.847-848. There was no evidence of a completed drug transaction or of any instances where Mr. Loya was seen at a known drug house or engaging in drug-related activity. Indeed, in a safe found inside the home, there was no money and one bank band of unknown denomination. ROA.327-330. There was no evidence presented Mr. Loya was known to package drugs in this manner, nor that he carried the weapons found. There was

no evidence presented Mr. Loya participated in any activities involving guns, other than hearsay statements from a CI who did not testify.

Reliance upon the photo provided by the CI, who did not testify, is unreasonable. Indeed, the Fifth Circuit has expressed concern about informants because "there exists a danger that the informant sought to implicate another in order to curry the favor of the police and perhaps gain immunity for himself ... mak[ing] the statement less reliable." *see* *United States v. Martin*, 615 F.2d 318 (5th Cir. 1980). Further, there was no evidence of a buyer/seller relationship between the CI and Mr. Loya, other than the statements of the CI. There was no video or photographs or other evidence presented showing Mr. Loya within the proximity of the weapons or drugs. There was no evidence presented that Mr. Loya, nor his son or girlfriend, was depicted in the alleged CI photo(s).

The Fifth Circuit in *United States v. Smith*, 997 F.3d 215 (5th Circ.2021) found there was no factual basis to convict for felon in possession of a firearm when the defendant said the only interaction he had with the firearm was that he had "touched it" at a friend's house. Here, there was no evidence presented regarding the context of the CI's alleged meeting with Mr. Loya nor of how long he or Mr. Loya were present, no evidence presented that Mr. Loya brandished or used the weapons, nor had weapons on his person nor carried them, nor was he tied to the firearm by forensic evidence. The same holds true for the narcotics. There was no evidence presented Mr. Loya exercised dominion and control over the firearms or the narcotics. Shirts with his business name, a ten minute visit, his car parked in front, his girlfriend's car

parked in front in a two day period does not arise to the level of exercising dominion and control of items found in a bedroom.

The Government failed to meet its burden of proof regarding either Count 1 or Count 2.

———————♦———————

II. As to the second question presented, this Court should grant certiorari to address whether evidence of gang affiliation was unfairly prejudicial and should have been excluded.

Federal Rule of Evidence 402 provides that relevant evidence is admissible. Rule 403 provides that evidence "although relevant... may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." "Testimony presented by the government will invariably be prejudicial to a criminal defendant," and therefore Rule 403 only excludes evidence that would be unfairly prejudicial." *U.S. v. Townsend*, 31 F.3d 262 (5th Cir. 1994). Because Rule 403 excludes relevant evidence, application of the rule " 'must be cautious and sparing.' " *U.S. v. Pace*, 10F.3d 1106 (5th Cir. 1993).

Under Rule 404(b),"[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith" but is "admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Admissibility of evidence under Rule 404(b) is typically governed by the two-part test set out in *United States v. Beechum*, 582 F.2d 898, 911 (5th Cir.1978)(*en banc*). First, it must be determined whether "the extrinsic evidence is relevant to an issue other

than the defendant's character." *Id* at 911. Second, the evidence must possess "probative value that is not substantially outweighed by its undue prejudice" and meet the other requirements of Rule 403.

Rule 404(b) is designed to guard against the inherent danger a jury might be led to convict a defendant not of the charged offense, but of the extrinsic "other acts" evidence, *United States v. Ridlehuber*, 11 F.3d 516 (5th Cir.1993), especially if the extrinsic activity was not the subject of a conviction and a jury may feel the defendant should be punished for that activity even if he is not guilty of the offense charged.' " *Id.* (quoting *Beechum*, 582 F.2d 914).

At the pretrial conference, in a brief and again on the first day of trial, defense counsel argued that Texas Mexican Mafia affiliation did not touch on the elements of the crime and would only serve to prejudice the jury against Mr. Loya. ROA.100-115, 223-230, 235-236, 240, 243-248, 569-585.

During opening statements, the prosecution mentioned the Texas Mexican Mafia, and gave ranks of two individuals not charged in the case. ROA. 752-754. 756. 758-759. Throughout the trial, the prosecution made reference to the "organization," "gang officer," and called a gang officer who stated Mr. Loya self-admitted, was documented, and his organization was very active. ROA. 417-420.

The Government argued Texas Mexican Mafia evidence was intrinsic and intertwined in the case. Arguably, there was no need to mention gang affiliation nor the rankings of those on the wiretap. Nor was it necessary to have a gang officer testify about gang affiliation . Surely, evidence Mr. Loya was a convicted felon was

prejudicial enough without the need to further prejudice the jury. The evidence was not strong against Mr. Loya as argued above. Most certainly, gang affiliation tainted the jury and was unduly prejudicial. The Government's argument the jury would be confused that ATF was not the only agency investigating, .ROA. 586-587., did not make it more probative than prejudicial. In fact, the author of the search warrant and the case agent was an ATF Agent. ROA.808.

A. The Fifth Circuit's decision conflicts with other Fifth Circuit decisions

The Government argued evidence of Mr. Loya's Texas Mexican Mafia affiliation should be admitted for purposes of showing identity. ROA. 573. However, the identity exception has a much more limited scope; it is used either in conjunction with some other basis for admissibility or synonymously with Modus operandi, *United States v. Jackson*, 451 F.2d 259 (5th Cir 1971). A prior or subsequent crime or other incident is not admissible for this purpose merely because it is similar, but only if it bears such a high degree of similarity as to mark it as the handiwork of the accused, *U.S. v. Goodwin*, 492 F.2d 1141 (5thCir. 1974). No such handiwork was shown here. Being affiliated with a gang is not such a high degree of similarity as to warrant admission.

In *U.S. v. Hamilton*, 723 F.3d 542 (5th Circ.2013), the Fifth Circuit held in a felon in possession of a firearm case that the arresting officer's testimony of the defendant's probable current gang membership was inadmissible "other acts" evidence and was not harmless. In that case, an officer pursuant to an undercover

gang-related activity investigation, observed Hamilton acting suspiciously, began following his car, Hamilton caught on, abruptly changed lanes, turned into a shopping center, parked, made throwing movements while dropping a baseball cap, walked around the parking lot and businesses, then drove away; at which time he was traffic stopped, officers smelled marihuana, found a scale and $1800 in his pocket, officers went back to the parking lot and found a loaded Block pistol under the right front tire of an SUV next to where Hamilton was parked, and the SUV occupants denied knowledge. *Id* at 544. The officer asked Hamilton, "Hey, you're a Black Disciple," and Hamilton replied "He *was* (past tense)." At trial, the jury heard Hamilton was a member of the Black Disciples gang whose members often carry narcotics and guns, for the purposes of showing motive. *Id* at 544. There was no limiting instruction. The Fifth Circuit found that had the testimony been limited to Hamilton's BD tattoo and record in the gang database that he *was* (past tense), it would have been intrinsic to the case because it was part of the on-scene investigation and not governed by *United States v. Beechum*, 582 F.2d 898 (5thCir.1978).

Although there was a limiting instruction in Mr. Loya's case, evidence of gang affiliation was not an intrinsic part of Mr. Loya's case- there was no dialogue between Mr. Loya and officers over gang membership, there was no evidence presented his possession of weapons or narcotics was related to gang activity nor gang memorabilia in the residence nor on packaging, nor gang related narcotics ledgers; indeed, he was not charged with a conspiracy or RICCO violation. There was no testimony from anyone that his alleged possession of a firearm and narcotics was related to gang

activity, and as discussed above, the CI did not testify.

In *United States v. Sumlin*, 489 F.3d 683 (5thCir. 2007), the Government argued the arresting officer's "testimony regarding his suspicion of Sumlin's drug transportation was not extrinsic, but intrinsic, as it completed the story of the crime by proving the immediate context of events in time and place" which the Fifth Circuit rejected, holding that such testimony was extrinsic and affected Sumlin's substantial rights. *Id* at 689. Similarly, there was no need for gang affiliation or rankings or activity or documentation to be presented to the jury in Mr. Loya's trial, and it greatly prejudiced the jury.

B. The Fifth Circuit's decision conflicts with decisions of other United States court of appeals

As the Eighth Circuit Court of Appeals has explained, "there is great potential for prejudice when evidence regarding gangs is at issue," United States v. Bradford, 246 F.3d 1107 (8th Cir.2001). In United States v. Roark, 924 F.2d 1426 (8th Cir. 1991), the 8th Circuit held that generalized and repeated testimony regarding drug dealing activities of the Hell's Angels motorcycle gang prejudiced the defendant's trial.

Mr. Loya's substantial rights were affected because, given the lack of evidence, as analyzed above, there is a reasonable probability that the improperly admitted evidence contributed to his conviction on both counts.

III. As to the third question presented, this Court should grant certiorari to address whether a sentence of 360 months was substantively unreasonable

In its PSR, the Probation Office calculated Mr. Loya's base offense level as 38

enhanced to 42[1] because the offense involved a net weight of over 6 kilograms of methamphetamine. *See U.S.S.G.* §2D1.1(c)(1). With a criminal history score of 13, he fell into the highest criminal history category of VI. The advisory guideline range was 360 months to Life.

Mr. Loya filed no objections to the Probation Office's calculation of the guideline range, but at the sentencing hearing, his counsel argued that the PSR-recommended sentence was greater than necessary to meet the goals of sentencing, "out of whack," "did not make sense," and was "much too high for a drug offense," given Loya's new business, family history, and children. ROA.545, 972, 980 (PSR ¶ 35. 75).

Further, his subtotal criminal history score of 11 (establishing a criminal history category of V) was increased by two points "for committing the instant offense while under a criminal justice sentence in docket number 2:18CR000331-001,"[2] establishing a score of 13 in criminal history category VI. (PSR ¶ 33-35) . Mr. Loya's prior Felon in Possession of a Firearm conviction formed the basis of the Count 2 predicate offense; therefore, using it to compute his criminal history category as a +3 offense and as a +2 for being under a criminal justice sentence, was not proper. Had the 5 points not been used in his calculation, he would have a criminal history category of IV. The 5th Circuit has held the Guidelines do not prohibit double counting except when the particular Guideline at issue expressly does so, *United States v.*

[1] The guideline range for an offense level of 38 with criminal history category of V or VI is 360 months to life, but is 324 months to Life for category IV.
[2] Which formed the basis of the predicate Count 2 offense of Felon in Possession of a Firearm.

Luna, 165 F.3d 316 (5th Cir. 1999).

Although the sentencing record shows that the district court considered all of the §3553(a) factors, sentenced at the lowest end of the guideline range, arguably, the Court may not have balanced the factors adequately because it may have based the sentence more on the type and quantity of drugs at issue, the type of firearms involved, gang affiliation and Mr. Loya's criminal history, and did not give enough weight to the other §3553(a) factors, such as the fact that Mr. Loya had a difficult childhood, had created a new business, had children including a new born child and a supportive family, which were detailed in the PSR, which the court adopted. In addition, the double counting of his prior conviction should have weighed more heavily towards a lower sentence.

While there is no requirement that the sentencing court give all of the §3553(a) factors equal weight, *See United States v. Hernandez*, 633 F.3d 370 (5th Cir.2011), in light of his young children, desire to start a new life and new business, and age, the 360–month sentence Mr. Loya received was greater than necessary to effectuate purposes of sentencing under 18 U.S.C. §3553(a), making it unreasonable.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Date: February 10, 2023

SANDRA A. EASTWOOD
Counsel of Record
LAW OFFICE OF SANDRA EASTWOOD
3636 S. Alameda Street, Suite B197
Corpus Christi, Texas 78411
(361) 688-4900
sandraeastwoodlaw@yahoo.com

Counsel for Petitioner

APPENDIX A- United States Court of Appeals, Fifth Circuit- per curiam Opinion (November 15, 2022)

2022 WL 16945900
Only the Westlaw citation is currently available.
United States Court of Appeals, Fifth Circuit.

UNITED STATES of America, Plaintiff—Appellee,

v.

Robert LOYA, Jr., Defendant—Appellant.

No. 21-40756
|
Summary Calendar
|
FILED November 15, 2022

Appeal from the United States District Court for the Southern District of Texas, USDC No. 2:20-CR-832-1, Drew B. Tipton, U.S. District Judge

Attorneys and Law Firms

Amy Howell Alaniz, Carmen Castillo Mitchell, Assistant U.S. Attorneys, U.S. Attorney's Office, Houston, TX, for Plaintiff—Appellee.

Sandra Eastwood, Law Office of Sandra Eastwood, Corpus Christi, TX, for Defendant—Appellant.

Before Smith, Dennis, and Southwick, Circuit Judges.

Opinion

Per Curiam:*

***1** A jury convicted Robert Loya, Jr., of possession with intent to distribute methamphetamine and possession of a firearm after a felony conviction. The district court sentenced him to 360 months of imprisonment and five years of supervised release. On appeal, Loya argues the evidence was insufficient to support his convictions, the district court erred in admitting evidence of his gang affiliation, and his sentence was substantively unreasonable.

Because Loya moved for a judgment of acquittal at the close of the Government's case, which was also at the close of all evidence, we review his challenge to the sufficiency of the evidence *de novo*. *See United States v. Jimenez-Elvirez*, 862 F.3d 527, 533 (5th Cir. 2017). Under this standard, we must determine whether a reasonable jury could have found that the evidence established Loya's guilt beyond a reasonable doubt. *See United States v. Barnes*, 803 F.3d 209, 215 (5th Cir. 2015).

Loya argues that there is insufficient evidence demonstrating that he knowingly possessed the firearms or the methamphetamine. The evidence included an intercepted phone conversation in which he discussed a raid by the Government and complained that the guns and other items had been seized from the house. Additionally, law enforcement testified that the bedroom containing the drugs and firearms also had receipts bearing Loya's name and had several work shirts from his business bearing his name. Also, Loya was seen entering and exiting the home. Viewing this evidence in the light most favorable to the Government, a reasonable jury could conclude beyond a reasonable doubt that Loya knowingly possessed the firearms and methamphetamine. *See United States v. Masha*, 990 F.3d 436, 444-45 (5th Cir. 2021).

We review a district court's evidentiary rulings for an abuse of discretion, subject to harmless error review. *United States v. Martinez*, 921 F.3d 452, 481 (5th Cir. 2019). For an evidentiary ruling to constitute a reversible error, the appellant must demonstrate the admission substantially prejudiced his rights. *United States v. Valas*, 822 F.3d 228, 242 (5th Cir. 2016).

Loya argues that the district court abused its discretion by admitting evidence of his affiliation with the Texas Mexican Mafia because it was not an intrinsic part of his case and was unduly prejudicial. The district court, however, instructed the jury that evidence regarding the Texas Mexican Mafia was "admitted only for the purpose of providing background and context" and that the jury was "not to consider or infer that [Loya] is more likely to have committed the acts alleged in this indictment on this basis." The court further stated that this evidence "should play no role in your deliberations." Such limiting instructions minimize the danger of undue prejudice. *See id.* at 241. For this reason, and in light of other substantial evidence of guilt, any error in the admission of Loya's gang affiliation was harmless. *See United States v. Lugo-Lopez*, 833 F.3d 453, 461 (5th Cir. 2016).

***2** We review the substantive reasonableness of a sentence for an abuse of discretion. *Gall v. United States*, 552 U.S. 38, 51 (2007). Loya argues his 360-month sentence is substantively unreasonable. A within-guidelines sentence is presumptively reasonable. *See United States v. Cooks*, 589 F.3d 173, 186 (5th Cir. 2009). While Loya contends that

the district court failed to consider mitigating factors, he has not demonstrated that the district court failed to account for a factor that should have received significant weight, gave significant weight to an improper factor, or clearly erred in balancing the factors. *See* *United States v. Naidoo*, 995 F.3d 367, 382 (5th Cir. 2021). Thus, Loya has failed to demonstrate his sentence is substantively unreasonable. *See* *Cooks*, 589 F.3d at 186.

AFFIRMED.

All Citations

Not Reported in Fed. Rptr., 2022 WL 16945900

Footnotes

* Pursuant to 5th Circuit Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Circuit Rule 47.5.4.