22-7853

No:

ORIGINAL

In the
Supreme Court of the United States

CARLOS MIGUEL CONCEPCION-GULIAM,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Carlos Miguel Concepcion-Guliam
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QUESTIONS PRESENTED FOR REVIEW

Agents had served a search warrant on a self-storage location where narcotics were located. Carlos Concepcion-Guliam was observed in the same location but was not associated with the self-storage locker. The Agents detained and arrested Concepcion-Guliam without observing him commit an offense. The First Circuit affirmed. With this brief explanation, the following question is presented:

> Should a writ of certiorari be granted to clarify whether an exception to the Fourth Amendment can be applied randomly or if law enforcement officers need more than mere assumption of the defendant's offense, even if no offense was observed at the time of the detention

PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

In addition to the parties named in the caption of the case, the following individuals were parties to the case in the United States Court of Appeals for the First Circuit and the United States District Court for the District of Massachusetts.

None of the parties is a company, corporation, or subsidiary of any company or corporation.

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PETITION FOR WRIT OF CERTIORARI

Carlos Miguel Concepcion-Guliam, ("Concepcion") the Petitioner herein, respectfully prays that a writ of certiorari is issued to review the judgment of the United States Court of Appeals for the First Circuit, entered in the above-entitled cause.

OPINION BELOW

The opinion of the Court of Appeals for the First Circuit, whose judgment is herein sought to be reviewed, was entered on March 10, 2023, an unpublished decision in *United States v. Concepcion-Guliam,* 62 F.4th 26 (1st Cir. 2023), is reprinted in the separate Appendix A to this Petition.

STATEMENT OF JURISDICTION

The Judgment of the Court of Appeals was entered on March 10, 2023. The Jurisdiction of this Court is invoked under Title 28 U.S.C. § 1654(a) and 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES AND RULES INVOLVED

The Fourth Amendment to the Constitution of the United States provides in relevant parts:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

Id. Fourth Amendment

The Fifth Amendment to the Constitution of the United States provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Id. Fifth Amendment.

STATEMENT OF THE CASE

Concepcion was arrested on June 20th, 2019. Five days after a Criminal Complaint was filed an arrest warrant was issued the same day. An Indictment was filed on July 24th, 2019, charging Concepcion with Attempted Possession with Intent to Distribute 400 Grams or More of Fentanyl (21 U.S.C. § 846). Exercising his constitutional rights, Concepcion proceeded to trial where the jury returned a verdict of guilt. Two post-trial motions for a directed verdict were filed but were denied. On January 6, 2022, Concepcion was sentenced to 108 months of incarceration followed by 3-years of supervised release. A timely notice of appeal was filed, however, on March 10, 2023, the First Circuit Court

of Appeals affirmed the sentence and conviction. See, *United States v. Concepcion-Guliam,* 62 F.4th 26 (1st Cir. 2023). This petition for writ of certiorari follows.

STATEMENT OF THE FACTS

On June 19, 2019, a representative from the Extra Space Storage Facility in Stoughton, Massachusetts, called the Stoughton Police Department and reported that there were suspected narcotics inside Unit 171 of that facility. Officers responded to the storage facility and, after the manager opened Unit 171 and the officers saw suspected narcotics and drug paraphernalia inside. No warrant had been obtained at this stage. Eventually, the Agents obtained a search warrant for that Unit. As a result of the search, the Agents discovered fentanyl, lactose (a cutting agent), scales, blenders, sifters, and plastic baggies, all of which were indicative of drug trafficking. Unit 171 was rented by Janice Bryant. The agents found multiple documents inside that unit bearing the name "Jason Torres." After obtaining records from the storage facility, officers learned that Unit 1435 also had been rented to a "Jason Torres," and obtained a search warrant for that unit. There was no probable cause to determine that Unit 1435 was involved in any illicit

activity at the time. On June 20, 2019, officers executed the search warrant for Unit 1435. The door to Unit 1435 was secured with a combination lock, which officers cut off with a pair of bolt cutters. Inside Unit 1435, officers found drugs, an electronic scale, a blender, a backpack with a vacuum-sealed bag of drugs inside, an empty sandwich, and vacuum-sealed bags, boxes, and bins. The drugs were packaged both in large bricks and small, individually wrapped baggies.

As is protocol, the Officers seized all the drugs, the backpack, and the scale, and left the search warrant on top of a storage bin that was front and center in Unit 1435, visible to anyone who entered the door. Officers then closed the door to Unit 1435 and placed the clasp back in place, and, after transporting the drugs back to the police station, set up surveillance at the storage facility around 4:30 p.m. to see if anyone would come back to access Unit 1435. A little more than three hours later, at approximately 7:40 p.m., a black SUV drove to the access gate at the storage facility and the driver keyed in a unique access code to open the gate. After the SUV entered the facility, it drove around the building and parked immediately adjacent to the entrance nearest to Unit 1435. The driver exited his vehicle and entered the door leading to the second floor

of the storage facility. A short time later, surveillance officers saw the driver exit and walk back to the black SUV, open the driver's side door, and enter. The driver put the SUV in reverse while leaving. Officers in two marked vehicles with their blue lights flashing blocked the path of the SUV and it stopped momentarily. Since none of the officers wore uniforms and fearing for his life and under the impression he was being robbed, Conception accelerated in reverse and crashed into one of the cruisers. The Officers placed Concepcion under arrest and found narcotics packaged in "corner bags" in his pocket. According to the Officers, they were wrapped in the same manner as the drugs found in Unit 1435.

According to the officers, once they returned to the second floor of the storage facility, they saw that the door to Unit 1435 – which had been closed after officers executed the search warrant – had been opened. However, before this point, and before arresting Concepcion, the officers did not know Concepcion's involvement, if any, had never met Concepcion, and had no reason to believe Concepcion was involved in the offense.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD ISSUE A WRIT OF CERTIORARI BECAUSE THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT COURT OF APPEALS HAS DECIDED A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH THE APPLICABLE DECISIONS OF THIS COURT

Supreme Court Rule 10 provides relevant parts as follows:

Rule 10

CONSIDERATIONS GOVERNING REVIEW ON WRIT OF CERTIORARI

(1) A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons, therefore. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

> (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States Court of Appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> (b) When a ... United States court of appeals has decided an important question of federal law which has not been but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decision of this Court.

Id. Supreme Court Rule 10.1(a), (c).

QUESTIONS PRESENTED

SHOULD A WRIT OF CERTIORARI BE GRANTED TO CLARIFY WHETHER AN EXCEPTION TO THE FOURTH AMENDMENT CAN BE APPLIED RANDOMLY OR IF LAW ENFORCEMENT OFFICERS NEED MORE THAN MERE ASSUMPTION OF THE DEFENDANT'S OFFENSE, EVEN IF NO OFFENSE WAS OBSERVED AT THE TIME OF THE DETENTION

The Fourth Amendment of the United States Constitution protects individuals from unreasonable searches and seizures by the government. It establishes that searches and seizures should generally be conducted with a warrant, which must be based on probable cause supported by oath or affirmation. However, it is well-established that the Fourth Amendment's warrant requirement is not absolute, and certain exceptions exist that allow law enforcement to detain a defendant without a warrant.

This Court has recognized certain exceptions to the Fourth Amendment's warrant requirement. The fundamental principle of the Fourth Amendment is "reasonableness." One of these exceptions is known as exigent circumstances. *Brigham City v. Stuart*, 547 U.S. 398, 126 S. Ct. 1943 (2006). Therefore, while a warrant is generally needed to search a person's home or make an arrest inside a home, this court has ruled that if the situation is urgent and requires immediate action, a

warrantless search can be considered reasonable under the Fourth Amendment. This exception is based on the *needs of law enforcement being compelling enough* to justify bypassing the warrant requirement. This court's cases have determined that "[w]here a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, . . . reasonableness generally requires the obtaining of a judicial warrant." *Vernonia School Dist. 47J v. Acton*, 515 U. S. 646, 653, 115 S. Ct. 2386, 132 L. Ed. 2d 564 (1995). Such a warrant ensures that the inferences to support a search are "drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States*, 333 U. S. 10, 14, 68 S. Ct. 367, 92 L. Ed. 436 (1948); *Riley v. California*, 573 U.S. 373, 382, 134 S. Ct. 2473, 2482 (2014). But the matter is further complicated when a defendant is arrested, *without probable cause* that an offense has been committed *after a warrant for a search* has been obtained. In Concepcion's case, at most what the agents had observed was an individual leaving the area of the surveillance. Before that stage, no one had observed Concepcion violate any State nor Federal law. The agents were merely surveilling a public storage location where

individuals can enter 24 hours a day. At the time of the arrest and surveillance, there was no information that Concepcion even existed. See *United States v. Gomez Benabe*, 781 F. Supp. 848, 855 n.12 (D.P.R. 1991) ("The facts on the record simply do not provide probable cause to justify the warrantless arrest. When Agent Ruiz and Officer de Leon arrested the defendant, they did so based on the fact that he: (1) was a stranger; (2) was nervous; (3) had neither identification nor money, and (4) gave evasive answers.") At a minimum, the *Gomez* case determined that the officers had *impermissible* grounds, or better said, *they had some grounds*. In comparison, in Concepcion's case, there were no grounds *whatsoever* to justify the detention. The First Circuit erred in its decision.

The proper test for the existence of probable cause as being "whether, at the moment the arrest was made, . . . the facts and circumstances within [the officers'] knowledge and of which they had reasonable trustworthy information were sufficient to warrant a prudent [person] in believing that the [defendant] had committed or was committing an offense." *United States v. Uricoechea-Casallas*, No. 90-1717, 946 F.2d 162 (1991) (citing *United States v. Figueroa*, 818 F.2d 1020, 1023 (1st Cir. 1987) (quoting Beck v. Ohio, 379 U.S. 89, 91, 13 L. Ed. 2d 142, 85 S. Ct.

223 (1964)). See *United States v. Cruz Jimenez,* 894 F.2d 1, 4-5 (1st Cir. 1990); *United States v. Jorge*, 865 F.2d 6, 9 (1st Cir.) *cert. denied,* 490 U.S. 1027, 104 L. Ed. 2d 198, 109 S. Ct. 1762 (1989); *United States v. Gomez Benabe*, 781 F. Supp. 848, 855 n.12 (D.P.R. 1991). The First Circuit's conclusion and application of the law to Concepcion's case conflicted not only with their precedent but with the precedent of the Supreme Court in *Johnson.*

A. No Exigent Circumstances Existed, No Crime had been Committed, and No Justification to Detain Concepcion Existed in this Case

There are circumstances where an exception to the warrant requirement exists. When faced with *special law enforcement needs,* diminished expectations of privacy, minimal intrusions, or the like, the Court has found that certain general, or individual, circumstances *may render* a warrantless search or seizure reasonable. *See, e.g., Pennsylvania v. Labron*, 518 U.S. 938, 940-941, 135 L. Ed. 2d 1031, 116 S. Ct. 2485 (1996) (per curiam) (search of automobile supported by probable cause); *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 455, 110 L. Ed. 2d 412, 110 S. Ct. 2481 (1990) (suspicionless stops at drunk driver checkpoint); *United States v. Place,* 462 U.S. 696, at 706 (1983)

(temporary seizure of luggage based on reasonable suspicion); *Michigan v. Summers*, 452 U.S. 692, 702-705, 69 L. Ed. 2d 340, 101 S. Ct. 2587 (1981) (temporary detention of suspect without arrest warrant to prevent flight and protect officers while executing search warrant); *Terry v. Ohio*, 392 U.S. 1, 27, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968) (temporary stop and limited search for weapons based on reasonable suspicion). "The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances. And in making that assessment the facts must be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate? *Cf. Carroll v. United States*, 267 U.S. 132 (1925); *Beck v. Ohio*, 379 U.S. 89, 96-97 (1964)." *Id.*, at 21-22 (footnotes omitted); *Michigan v. Summers*, 452 U.S. 692, 700 n.11, 101 S. Ct. 2587, 2593 (1981).

None of these enumerated exceptions existed in this matter. At most, the arrest to prevent flight and protect officers while they were executing the search warrant would apply, however, at the time of Concepcion's detainment, the warrant was executed, and completed, and a receipt was left at the scene. All the agents had at the time, was a locker with drugs inside and an individual in the same building. Accepting the government's version as accurate, at most the agents were watching the location, not that Concepcion was involved with the locker. Concepcion was not under investigation, did not rent the locker, nor was known to the agents at the time. As the Court has noted, "the Fourth Amendment protects people, not places." *Katz v. United States*, 389 U.S. 347, 361, 88 S. Ct. 507, 516 (1967). The fact that the storage locker was under surveillance, does not permit, nor allow the agents to seize a random individual, in this case, Carlos Miguel Concepcion-Guliam. The First Circuit's decision was in error and should be reversed.

CONCLUSION

Based on the foregoing, this Court should grant this request for a Writ of Certiorari and remand to the Court of Appeals for the First Circuit.

Done this 22, day of May 2023.

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Appendix A

United States v. Concepcion-Guliam

United States Court of Appeals for the First Circuit

March 10, 2023, Decided

No. 22-1077

Reporter

2023 U.S. App. LEXIS 5830 *; 62 F.4th 26; 2023 WL 2445027

UNITED STATES OF AMERICA, Appellee, v. CARLOS MIGUEL CONCEPCION-GULIAM, Defendant, Appellant.

Prior History: [*1] APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS. Hon. William G. Young, U.S. District Judge.

Case Summary

Overview

HOLDINGS: [1]-Sufficient evidence supported a conviction for attempted possession with intent to distribute a controlled substance under 21 U.S.C.S. §§ 841(a)(1), (b)(1)(A)(vi), 846 because police officers who seized drug paraphernalia and fentanyl from a storage unit and then closed the unit's door observed defendant, whom a witness identified as a drug courier, enter the facility after parking next to the entrance where the unit was located and then immediately flee from the building, and a detective who found the door to the unit open after defendant's arrest testified that no one else had entered the facility; [2]-The district court adequately explained its imposition of sentence under 18 U.S.C.S. § 3553(c) because it discussed defendant's particular circumstances and no sentencing disparity was apparent; moreover, defendant's downwardly variant sentence was substantively reasonable.

Outcome

Conviction and sentence affirmed.

Counsel: Anthony D. Martin on brief for appellant.

Rachael S. Rollins, United States Attorney, and Mark T. Quinlivan, Assistant United States Attorney, on brief for appellee.

Judges: Before Kayatta, Selya, and Montecalvo, Circuit Judges.

Opinion by: SELYA

Opinion

SELYA, Circuit Judge. Defendant-appellant Carlos Miguel Concepcion-Guliam challenges both his conviction and his sentence on various grounds. Although his attack is multi-dimensional, we conclude that all of its several components are without force. Accordingly, we affirm.

I

We rehearse the relevant facts, recounting

them "in the light most hospitable to the verdict, consistent with record support." United States v. Tkhilaishvili, 926 F.3d 1, 8 (1st Cir. 2019); see United States v. Norris, 21 F.4th 188, 191 (1st Cir. 2021); Casillas-Diaz v. Officer Romualdo Palau, 463 F.3d 77, 79 (1st Cir. 2006). We then map the travel of the case.

On June 19, 2019, an employee of the Extra Space Storage facility in Stoughton, Massachusetts, contacted the Stoughton Police Department (SPD) to report suspected narcotics in Unit 171. Rental payments on the unit had lapsed, and management permitted an officer to observe the drugs (which were in plain view inside the unit). SPD officers then obtained and executed a search warrant for Unit 171. Although the [*2] unit had been rented by Janice Bryant, the officers retrieved documents from within the unit bearing the name "Jason Torres." Subsequent inquiry identified "Jason Torres" as a pseudonym for Randy Guerrero. The search also revealed a treasure trove of drug paraphernalia and drugs: blenders, scales, lactose (a cutting agent), sifters, plastic baggies, and around sixty grams of fentanyl and valeryl fentanyl.

The next day, the SPD officers obtained and executed a search warrant with respect to Unit 1435 — a second-floor unit at the storage facility, which had been rented in the name of "Jason Torres." Inside that unit, the officers found an assortment of controlled substances, a blender, a scale, and plastic baggies.[1] Once all the contraband was seized, the officers closed and latched the door to Unit 1435, leaving a copy of the search warrant in plain view atop a storage bin in the middle of the unit. They then set up surveillance.

About three hours later, an SUV entered the storage facility and parked at the entrance leading up to the second floor. The defendant exited the vehicle and entered the facility. Approximately twenty seconds later, he sprinted back to the SUV, jumped into the [*3] driver's seat, and began to reverse. By then, police officers in marked cruisers blocked his path. After momentarily stopping, the defendant accelerated and crashed into one of the cruisers. He was subsequently arrested, and a search incident to his arrest recovered four grams of fentanyl on his person. The packaging of that fentanyl was consistent with the individual packaging of the fentanyl located in Unit 1435.

On July 24, 2019, a federal grand jury sitting in the District of Massachusetts returned an indictment charging the defendant with attempted possession with intent to distribute 400 grams or more of fentanyl. See 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A)(vi), 846. The defendant maintained his innocence, and on February 24, 2020, he moved to suppress, among other things, his arrest, all evidence obtained incident to his arrest, and all evidence seized from the two storage units.

[1] The drug cache found in Unit 1435 was as follows: 1,080 grams of fentanyl, acetyl fentanyl, valeryl fentanyl; 0.2 grams of fentanyl and valeryl fentanyl; 663.1 grams of fentanyl; 17.1 grams of cocaine base; and 970.4 grams of cocaine. The quantities of fentanyl and cocaine were packaged both in individual baggies containing less than two grams each and in larger pressed bricks (packaged in vacuum-sealed bags).

But days before the scheduled hearing on his motion to suppress, the defendant withdrew his motion.[2]

Trial began on June 2, 2021. The government called as witnesses SPD Detective Robert Kuhn, Janice Bryant, SPD Officer Steven Camara, and Drug Enforcement Administration Task Force Officer Brian Simpkins. At the close of the government's case [*4] in chief, the defendant moved for judgment of acquittal. See Fed. R. Crim. P. 29(a). The district court denied his motion. The defense rested without calling any witnesses or presenting any evidence, and the defendant renewed his motion for judgment of acquittal. See id. That motion, too, was denied. The court submitted the case to the jury, which found the defendant guilty.

Following the jury's verdict, the defendant filed four post-trial motions seeking either judgment of acquittal or a new trial. See id. 29(c). In an electronic order, the district court denied all four motions.

The disposition hearing was held on October 27, 2021. The court adopted the presentence investigation report, which delineated a total offense level (TOL) of thirty-four and a criminal history category of I. It then reduced the TOL by two levels and set the guideline sentencing range at 121 to 151 months.

The prosecutor asked the court to impose a bottom-of-the-range sentence: 121 months. Defense counsel submitted "that the appropriate sentence [for the defendant] would be something between the 0 time received by Ms. Bryant [who rented Unit 171] and the 72 months received by Mr. Guerrero [who allegedly owned the drugs in Unit 1435]." [*5] In the end, he asked for a "time served" sentence (roughly twenty-six months).

The district court queried the prosecutor as to why the defendant should receive a longer sentence than Guerrero (the putative owner of the drugs). The prosecutor replied that Guerrero was not charged for the same conduct: Guerrero's "was a separate matter involving different drugs on different occasions that didn't involve this defendant." Following the defendant's allocution, the court imposed a 108-month term of immurement. In explaining its sentence, the court noted, among other things, that the defendant's conduct was not an isolated event but that the evidence showed that he had been selling a significant quantity of drugs for over a year.

This timely appeal ensued.

II

In this venue, the defendant advances several assignments of error. First, he launches a Fourth Amendment challenge to his arrest and to the seizure of evidence from his person. Second, he challenges the admission of what he curiously terms "lay

[2] A few days before trial, the defendant filed a motion in limine, seeking to preclude the government from introducing a golconda of evidentiary items, including "[a]ll items seized when [the defendant] was arrested and taken at gunpoint into custody." The district court denied this motion in an electronic order on June 1, 2021. The parties make no mention of this motion and order in their appellate briefs, and we deem any objection to the electronic order to be waived. See United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990).

opinion testimony." Third, he mounts a sufficiency-of-the-evidence claim. Fourth, and finally, he raises claims of sentencing error. We address these matters sequentially.

A

We begin with the defendant's Fourth Amendment challenge: [*6] his claim that his arrest and the subsequent search of his person were unreasonable. This claim does not get out of the starting gate. When a defendant raises a Fourth Amendment claim before the district court and subsequently withdraws that claim, he has waived the claim and is precluded from resurfacing it on appeal.[3] See United States v. Orsini, 907 F.3d 115, 120 (1st Cir. 2018) (explaining that once waived, a claim of error ordinarily may not be resurrected on appeal); United States v. Rodriguez, 311 F.3d 435, 437 (1st Cir. 2002) (explaining that "[a] party waives a right when he intentionally relinquishes or abandons it"). That is precisely the situation here: "[a] party who identifies an issue, and then explicitly withdraws it, has waived that issue." Rodriguez, 311 F.3d at 437.

B

The defendant next objects to what he styles as Detective Kuhn's "lay opinion testimony." Despite this generic reference, though, the only "testimony" that the defendant singles out is Detective Kuhn's purported state-of-mind testimony and, specifically, "whether [the defendant] attempted to open the door of the storage unit." This claim of error falls only awkwardly — if at all — under the "lay opinion testimony" label, see Fed. R. Evid. 701; United States v. Valbrun, 877 F.3d 440, 443 (1st Cir. 2017), and — more importantly — reflects an effort to reinvent the record. As such, the claim of error founders.

We ordinarily review claims [*7] relating to the admission or exclusion of evidence for abuse of discretion. See United States v. Kilmartin, 944 F.3d 315, 335 (1st Cir. 2019). Here, however, the defendant did not object below to the admission of the evidence that he now challenges.[4] Our review, therefore, is only for plain error. See United States v. Etienne, 772 F.3d 907, 913 (1st Cir. 2014); United States v. Duarte, 246 F.3d 56, 60 (1st Cir. 2001).

Plain error review is "not appellant-friendly." United States v. Rodriguez, 919 F.3d 629, 634 n.1 (1st Cir. 2019). To prevail under plain error review, the defendant must carry the devoir of persuasion as to each of "four showings: (1) that an error occurred (2) which was clear or obvious and which not only (3) affected the defendant's substantial rights, but also (4) seriously

[3] We note that "the waiver rule may 'admit[] of an occasional exception' in extraordinary circumstances." United States v. Orsini, 907 F.3d 115, 120 (1st Cir. 2018) (alteration in original) (quoting Nat'l Ass'n of Soc. Workers v. Harwood, 69 F.3d 622, 627 (1st Cir. 1995)). The defendant does not argue that extraordinary circumstances are present here. And in all events, we discern none.

[4] In the court below, the defendant did object to the admission of lay opinion testimony on other grounds, including as it related to the modus operandi of drug traffickers. He did not object, however, to Detective Kuhn's purported state-of-mind testimony. It is well settled that "an objection to the admission of evidence on one ground does not preserve other grounds for appeal." United States v. Iwuala, 789 F.3d 1, 7 (1st Cir. 2015).

impaired the fairness, integrity, or public reputation of judicial proceedings." Duarte, 246 F.3d at 60; see United States v. Pinkham, 896 F.3d 133, 136-37 (1st Cir. 2018).

We need not tarry. Here, Detective Kuhn did not offer any testimony as to the defendant's state of mind. He only testified as to what he personally had observed: that — while surveilling the storage facility — he saw the defendant arrive in an SUV and enter the only door leading up to the second floor. About twenty seconds later, the defendant sprinted out of the building. After the defendant's arrest, Detective Kuhn went to the second floor and observed that the door to Unit 1435 was open even though the officers had closed it following their execution [*8] of the search warrant three hours earlier. Detective Kuhn added that the facility had been under surveillance, that neither he nor any other officer had opened that door since executing the search warrant, and that no other person had entered that portion of the facility. The inference was virtually inescapable — though not explicitly stated by Detective Kuhn — that the defendant must have opened the door.

Notably absent from Detective Kuhn's testimony is any mention of the defendant's state of mind. Detective Kuhn's testimony focused exclusively on the defendant's actions, as observed by him. The district court did not err — let alone plainly err — in allowing this testimony. See Fed. R. Evid. 602.

C

We turn next to the defendant's challenge to the sufficiency of the evidence. "We review preserved objections to evidentiary sufficiency de novo." United States v. Gobbi, 471 F.3d 302, 308 (1st Cir. 2006); see Kilmartin, 944 F.3d at 325. In conducting this tamisage, we scrutinize all the evidence in the light most hospitable to the jury's verdict, draw all reasonable inferences to the government's behoof, "and ask whether a rational jury could find that the government proved all the elements of the offense beyond a reasonable doubt." United States v. Fuentes-Lopez, 994 F.3d 66, 71 (1st Cir. 2021); see United States v. Rodriguez-Velez, 597 F.3d 32, 38-39 (1st Cir. 2010).

In this instance, the defendant was convicted [*9] of attempted possession with intent to distribute 400 grams or more of fentanyl. "To prove attempt, the government must show that a defendant intended to commit the substantive offense and that he took a substantial step toward its commission." Gobbi, 471 F.3d at 309. Here, the substantive offense was possession of a controlled substance with intent to distribute. See 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A)(vi), 846; see also United States v. Garcia-Carrasquillo, 483 F.3d 124, 130 (1st Cir. 2007). "[P]ossession may be either actual or constructive." Gobbi, 471 F.3d at 309. "Actual possession is 'the state of immediate, hands-on physical possession.'" Id. (quoting United States v. Zavala Maldonado, 23 F.3d 4, 6 (1st Cir. 1994)).

On appeal, the defendant complains that the government failed to prove beyond a

reasonable doubt both that he intended to possess the fentanyl found in Unit 1435 and that he intended to distribute it. We do not agree. As a start, a jury reasonably could conclude — as this jury did — that the defendant intended to possess the fentanyl found in Unit 1435 and that he took a substantial step toward effectuating that possession. Detective Kuhn testified that after seizing the drug paraphernalia and fentanyl from the unit, the officers left a copy of the search warrant on top of a storage bin inside the unit. The warrant was placed in a conspicuous manner so that anyone entering the [*10] storage unit "would see it immediately." The officers then closed the storage unit and commenced surveillance.

Approximately three hours later, Detective Kuhn observed the defendant enter the storage facility and park next to the entrance leading up to the second floor where Unit 1435 was located. The defendant left the vehicle, went through the door, "and less than 20 seconds [later] appeared in a full sprint back towards th[e] black SUV." Following the defendant's arrest, Detective Kuhn returned to Unit 1435 and found the door to the storage unit open. Detective Kuhn testified that neither he nor any other officer had opened the door. He also testified that no one else had entered the facility during the relevant time frame.

Based on this testimony, the jury reasonably could have inferred that the defendant took a substantial step toward possessing the fentanyl inside Unit 1435 and that he intended to possess those drugs. This inference was reinforced by the fact that the defendant carried corner bags that were consistent with those found in Unit 1435 in size, color, and texture.

Similarly, a jury reasonably could infer that the defendant intended to distribute the fentanyl. "An inference [*11] of intent to distribute may be drawn from the circumstances surrounding possession," including the defendant's statements and conduct and whether the drug quantity was "too large for personal use only." United States v. Bobadilla-Pagán, 747 F.3d 26, 33 (1st Cir. 2014); see United States v. Mendoza-Maisonet, 962 F.3d 1, 12 (1st Cir. 2020).

The record in this case makes manifest that the defendant intended to distribute the fentanyl. For one thing, Bryant identified the defendant as a drug courier. Bryant testified that she regularly purchased fentanyl from a man she identified as "Junior." In the beginning, Junior delivered the fentanyl to her himself, but eventually, others started delivering the fentanyl that she purchased from him. Bryant identified the defendant as one of those delivery persons: she stated that she met with the defendant "[a]lmost every day" for "[m]any months" to purchase fentanyl.

For another thing, the quantity and packaging of the fentanyl was consistent with that intended for distribution. Detective Kuhn testified that vacuum-sealed bags are used "[t]o compress the narcotics for transportation purposes" so as to facilitate subsequent sales and that corner bags are used "[f]or distribution purposes." The jury was entitled to credit these statements, see

Mendoza-Maisonet, 962 F.3d at 14, and, at any rate, the jury reasonably [*12] could have inferred that the fentanyl — given the quantity found — was not intended for personal use but, rather, for distribution, see United States v. Ayala-Garcia, 574 F.3d 5, 13 (1st Cir. 2009) ("[A] large amount and individual packaging of drugs is sufficient to demonstrate an intent to distribute for purposes of section 841(a)(1).").

We add, moreover, that these inferences were strengthened by the defendant's on-the-spot conduct. Evidence of flight may form a basis for an inference of consciousness of guilt. See United States v. Benedetti, 433 F.3d 111, 116 (1st Cir. 2005). Here, the defendant's hasty getaway attempt (which included frantically accelerating his vehicle in reverse and crashing it into a police cruiser) was fertile ground for an inference of consciousness of guilt.

In an effort to cushion the clout of this evidence, the defendant argues that Detective Kuhn's testimony is "[d]eficient" because "there [was] no direct evidence to support" the conclusion that the defendant entered the storage facility with the intent to possess and to distribute the fentanyl. Direct evidence, though, is not essential to ground a conviction; circumstantial evidence alone may suffice. See United States v. Ortiz, 966 F.2d 707, 711 (1st Cir. 1992). And the circumstantial evidence here was powerful: it fully supported the jury's determination that the defendant sought to possess the [*13] fentanyl in the unit in order to distribute it.

In a last-ditch effort to tip the scales, the defendant argues that Detective Kuhn's testimony is "[s]peculative." He suggests that "it is plausible to assume" that the defendant was at the storage facility to meet a drug dealer. But this suggestion is plucked from thin air: there is simply no evidence in the record to support it. And, moreover — even if we assume its plausibility — our task is not to choose among plausible though competing inferences but, rather, to "honor the jury's evaluative choice." Rodriguez-Velez, 597 F.3d at 40.

That ends this aspect of the matter. Considering all the evidence presented and the reasonable inferences therefrom in the light most favorable to the jury's verdict, we hold that the evidence was sufficient to support the defendant's conviction for attempted possession with intent to distribute fentanyl.

D

This brings us to the defendant's claims of sentencing error. The defendant contends that his sentence is both procedurally infirm and substantively unreasonable. We examine these contentions separately. See United States v. Clogston, 662 F.3d 588, 590 (1st Cir. 2011).

1

The defendant's claim of procedural error centers on the district court's explanation of the sentence imposed. When — as in this [*14] case — a defendant fails to raise a claim of procedural error in the court

below, our review is only for plain error. See United States v. Rijos-Rivera, 53 F.4th 704, 708 (1st Cir. 2022); Duarte, 246 F.3d at 60. Because we discern no error — plain or otherwise — the defendant's claim fails.

When imposing a sentence, the court is obligated to "state in open court the reasons for its imposition of [a] particular sentence." 18 U.S.C. § 3553(c); see United States v. Vega-Salgado, 769 F.3d 100, 103 (1st Cir. 2014). This obligation does not require that a sentencing court address each of the sentencing factors limned in 18 U.S.C. § 3553(a) but, rather, that it "identify the main factors driving its determination." United States v. Sepúlveda-Hernández, 817 F.3d 30, 33 (1st Cir. 2016).

The court below did just that. After hearing from the government, defense counsel, and the defendant, the district court pronounced its downwardly variant sentence. It then succinctly explained its sentencing determination, noting that the defendant's offense conduct was not a "mistake." Instead — the court elaborated — the evidence showed that the defendant was "selling drugs . . . for well more than a year and this [entailed] a vast quantity of drugs." The court took into account mitigating factors, commenting that the defendant was "a good family man" and that separation from his daughter would be "terrible." Given this focus, we cannot give credence to the defendant's [*15] complaint that the court's pronouncement of sentence was "bereft of any discussion or consideration of [his] particular circumstance[s]."

Relatedly, the defendant assails the sentencing court because it "fail[ed] to address the question of sentencing disparity." This assault misses the mark.

We agree that in imposing sentences, courts are mandated "to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6); see United States v. Rivera-Gonzalez, 626 F.3d 639, 647-48 (1st Cir. 2010). To make out a successful claim of sentencing disparity, though, a defendant "must compare 'apples . . . to apples.'" United States v. Bedini, 861 F.3d 10, 21 (1st Cir. 2017) (alteration in original) (quoting United States v. Mateo-Espejo, 426 F.3d 508, 514 (1st Cir. 2005)). A claim of sentencing disparity "will not succeed if there are 'material differences between [the complaining defendant's] circumstances and those of [his] more leniently punished confederates.'" United States v. García-Sierra, 994 F.3d 17, 40 (1st Cir. 2021) (first alteration in original) (quoting United States v. Galindo-Serrano, 925 F.3d 40, 52 (1st Cir. 2019)).

The court below was sensitive to the possibility that sentencing disparities might arise. The court asked the prosecutor why the defendant "should . . . get more [time] than" Guerrero (who was sentenced to seventy-two months in prison). The prosecutor explained — without contradiction — that "Guerrero was not actually charged [*16] . . . for the same conduct." She elaborated that the defendant was comparing "apples and oranges" because Guerrero's situation "was a separate matter involving different drugs on different

occasions." On this record, we cannot say that the sentencing court erred in determining that there was no sentencing disparity.

Nor does the record suggest any disparity with respect to Bryant. Even though the district court did not specifically inquire as to why the defendant should serve more time in prison than Bryant, there is no indication in the record that Bryant was charged with any crime.[5] Moreover, her history of criminal convictions (if any) is unknown. Given these uncertainties, she is simply not a fair comparator. And because the court adequately explained the sentence it imposed, the defendant's claim of procedural error fails.

2

We review the substantive reasonableness of a sentence for abuse of discretion. See Holguin-Hernandez v. United States, 140 S. Ct. 762, 766-67, 206 L. Ed. 2d 95 (2020). "There is no one reasonable sentence in any given case but, rather, a universe of reasonable sentencing outcomes." Clogston, 662 F.3d at 592. In assaying the reasonableness of a challenged sentence, we ask "whether the sentence falls within this broad universe." United States v. Rivera-Morales, 961 F.3d 1, 21 (1st Cir. 2020). A sentence will find a home within this [*17] broad universe if it rests on "a plausible rationale and . . . represents a defensible result." Id. And when — as in this case — a defendant challenges a downwardly variant sentence, he must carry a particularly heavy burden to show that the length of the sentence imposed is unreasonable. See United States v. deJesús, 6 F.4th 141, 150 (1st Cir. 2021); United States v. Millán-Machuca, 991 F.3d 7, 32 (1st Cir. 2021).

Here, the sentencing court's rationale was plausible. As we already have explained, the court's reasoning stressed the gravity of the offense and the defendant's relevant conduct. So, too, the sentence imposed represented a defensible result. The defendant was charged with attempting to possess with intent to distribute 400 grams or more of fentanyl. Fentanyl is an extremely dangerous drug, widely reputed to be the modern-day equivalent of the Grim Reaper. And to heighten the seriousness of the defendant's conduct, the evidence at trial showed that he had been peddling fentanyl for over a year, in what the district court supportably described as "vast" quantities. Given these facts, we cannot say that the downwardly variant sentence that the district court imposed was beyond the universe of reasonable sentences.

The defendant attempts to do double duty with his claim of sentencing disparity [*18] by recasting it as a claim of substantive unreasonableness. But it is no more convincing the second time around. As we already have pointed out, the defendant does not base this claim on an apples-to-apples

[5] The defendant's plaint that Bryant "was doing exactly what [he] was purportedly doing, but . . . faced no charges" is unavailing. Even assuming that the defendant and Bryant engaged in comparable misconduct, it is entirely "within the government's discretion to charge similarly situated defendants differently. Only when a prosecutor discriminates against defendants based on impermissible criteria such as race or religion is a prosecutor's discretion subject to review and rebuke." United States v. Rodriguez, 162 F.3d 135, 153 (1st Cir. 1998) (footnote omitted). There is no such allegation here.

comparison. And in the absence of any such comparator, the claim shrivels. See United States v. Gonzalez-Barbosa, 920 F.3d 125, 131 (1st Cir. 2019).

No more need be said. We find the defendant's sentence to be substantively reasonable.

III

We need go no further. For the reasons elucidated above, the defendant's conviction and sentence are

Affirmed.

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