IN THE SUPREME COURT OF THE UNITED STATES

ADAM N. SANTANA,
PETITIONER,

vs.

UNITED STATES OF AMERICA,
RESPONDENT.

Petition for a Writ of Certiorari from the United States Court of Appeals for the Third Circuit at Appeal Number 22-1601

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Did the Court err when it denied Petitioner's Motion to Suppress the evidence obtained through the execution of the contingency search warrant?

2. Did the Court err when it denied Petitioner's Motion to Suppress the evidence obtained through the execution of a search warrant on a parcel ending in number 6795?

3. Did the Court err when it denied Petitioner's Motion to Dismiss the Indictment?

4. Was the evidence sufficient to establish the charge of Conspiracy?

Was the evidence sufficient to establish the charge of Possession of a Firearm in Furtherance of a Drug Trafficking Crime?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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OPINIONS BELOW

Petitioner respectfully prays for a writ of certiorari to review the judgment of the Court of Appeal for the Third Circuit. The Third Circuit's Non-Precedential Opinion is attached hereto as Appendix A.

JURISDICTION

This litigation began as a criminal prosecution against Adam N. Santana, Petitioner, for violations of laws of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment.

STATEMENT OF THE CASE

On August 28, 2019, the Government charged Petitioner in an Indictment with Conspiracy to Distribute and Possession with Intent to Distribute Five Kilograms or More of Cocaine in violation of 21 U.S.C. § 846; Attempted Possession with Intent to Distribute 500 Grams or More of Cocaine in violation of

21 U.S.C. § 846, and Possession of a Firearm in Furtherance of a Drug Trafficking Crime, in violation of 18 U.S.C. § 924(c). On November 10, 2021, a Jury convicted Petitioner of all charges. On March 22, 2022, the Court sentenced Petitioner to a net sentence of 180 months, five years of Supervised Release, and a $300.00 Special Assessment. The Court did not impose a fine.[1] On April 1, 2022, Petitioner filed the Notice of Appeal. The appeal did not challenge the sentence.

On June 22, 2023, the Third Circuit Affirmed.

Relevant Facts[2]

This case involves the mailing of eight parcels through the U.S. Postal Service from Puerto Rico to 35 Redwood Street, Chambersburg, PA ("35 Redwood Street" or "the property"). On February 12, 2019, a Postal Inspector[3] identified the first parcel. The parcel was addressed to Madeline Diaz at 35 Redwood Street, Chambersburg, PA. The Agent determined that the sender and the recipient of the parcel did not live at the listed addresses. Prior to delivery, the parcel was exposed to a drug detection dog that did not alert for the presence of drugs. This

[1] (Appendix p. 3) The Third Circuit Appendix is attached as Appendix B.

[2] The Relevant Facts will provide a general description of the events. The Arguments will discuss additional facts.

[3] This case involves state and federal law enforcement officials; the Petition will refer to all law enforcement officials as Agents.

notwithstanding, the Agent surveilled the delivery of the parcel, and the Agent saw Petitioner pick up and bring the parcel into 35 Redwood Street. Please note that before February 12, 2019, neither the state nor the federal authorities had evidence that Petitioner was involved in the drug trade or was even aware of his existence.[4]

On or about February 13, 2019, an Agent investigated and identified five other parcels that had been delivered to 35 Redwood Street. These deliveries were found in the U.S. Postal Service's database containing the records of prior deliveries. There is no evidence that Petitioner received the deliveries or that these five parcels had drugs.[5]

On February 22, 2019, the last two parcels were intercepted, i.e., a parcel ending in number 4884 and a parcel ending in number 6795.[6]

The parcel ending in number 4884 was examined by a drug detection dog who alerted for the presence of drugs. Then, an Agent obtained a search warrant, searched the parcel, and found two kilos of cocaine. The parcel was repackaged for delivery to 35 Redwood Street, and the cocaine was replaced with "sham cocaine."

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[4] (Appendix at pp. 315, 3116, 323, 407,408, 409, & 477; NT 11/8/21 pp. 102, 103, & 110; NT 11/9/21 193, 194, 195, 199, & 263)

[5] (Appendix pp. 471, 475, 476; NT 11/9/21 pp. 257, 261, & 262)

[6] The parcel ending in number 6795 was searched on Monday, February 25, 2019, and found to contain two kilos of cocaine. (Appendix pp. 443 & 444; NT 11/9/21 pp. 229 & 230)

An electronic monitoring device was also placed inside the parcel. Then, an Agent obtained a contingency search warrant ("contingency warrant") to search 35 Redwood Street.

The contingency warrant stated: "[t]he execution of this search warrant shall be contingent upon the delivery and acceptance of the parcel and the parcel being taken inside of the residence listed as 35 Redwood St. Chambersburg, PA."[7] In addition, the contingency warrant stated: "[i]n the event the delivery and acceptance of the parcel does not occur, then and in that event, this search warrant will become null and void, will not be executed and will be returned to the issuing authority unserved." *Id*.

The parcel was not delivered to Petitioner or his spouse; neither Petitioner nor his spouse picked up the parcel; and neither Petitioner nor his spouse brought the parcel into the property. The parcel was left by the front door, and a maintenance worker brought it into the home. Petitioner, nor his family, were in the home. Thus, the parcel was not delivered, accepted, and brought into the home, as required by the contingency warrant. Yet the warrant was executed, and the search

[7] (Appendix p. 38)

found the following: a Glock 19 serial number SYK946;[8] several magazines;[9] 18 9mm bullets;[10] an unused digital scale;[11] an unused sealer;[12] five bags similar in size and shape to the multicolored bags where the two sham kilos were packaged;[13] a black iPhone;[14] and a bottle of Polyethylene Glycol. However, no drugs or money were found anywhere on the property.[15]

Yet, while the parcel was not delivered to or accepted by Petitioner, and the parcel was not brought into the property by Petitioner, on August 28, 2019, an Agent testified, under oath, before the Grand Jury that the parcel was delivered, and that Petitioner brought the parcel into the property.[16] This statement also implies

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[8] (Appendix pp. 360, 384, 385, 386, & 387; NT 11/8/21 p. 147; NT 11/9/21 p. 170, 171, 172, & 173)

[9] *Id.*

[10] (Appendix pp. 386, 387, & 388; NT 11/8/21 pp. 172, 173, & 174)

[11](Appendix p. 403; NT 11/9/21 p. 189)

[12](Appendix p. 403 & 404; NT 11/9/21 p. 189 &190)

[13] (Appendix p. 454; NT 11/9/21 p. 240)

[14] The iPhone was searched and no evidence that related to these charges was found on it. (Appendix p. 404; NT 11/9/21 p. 190)

[15] (Appendix p. 405 & 406; NT 11/9/21 p. 191 &192)

[16] (Appendix p. 162; NT 8/28/19 p. 5)

that Petitioner received the parcel. However, fourteen days before, on August 14, 2022, this Agent prepared a report where the correct events were discussed.[17] This Agent was also present when the parcel was left by the front door, and he was aware of what transpired.[18] Thus, the Agent knew that his testimony before the Grand Jury was false. Interestingly, the Agent's Grand Jury testimony describes events that comply with the contingency warrant.

REASONS FOR GRANTING THE PETITION

I. THE COURT ERRED WHEN IT DENIED PETITIONER'S MOTION TO SUPPRESS THE EVIDENCE OBTAINED PURSUANT TO THE CONTINGENCY WARRANT BECAUSE THE GOVERNMENT DID NOT SATISFY THE CONDITIONS OF THE CONTINGENCY WARRANT[19]

The contingency warrant states: "[t]he execution of this search warrant shall be contingent upon the delivery and acceptance of the parcel and the parcel being

[17] (Appendix p. 319; NT 11/8/21 p. 106) The report can be found at page 177 to 186 of the Appendix.

[18] (Appendix p. 322 & 323; NT 11/8/21 p. 109 & 110)

[19] The Motion to Suppress is on page 21of the Appendix, the Government's Response is on page 50 of the Appendix, the Defendant's Reply is on page 69 of the Appendix, and the Court's Memorandum and Order are on page 76 of the Appendix. The motion was based on the documents attached to the motion at pages 35 to 49 of the Appendix. The report of Trooper Steven Nesbit can be found at pages 42 to 45 of the Appendix. The report of Postal Inspector Michael Corricelli can be found at pages 177 to 186 of the Appendix.

taken inside of the residence listed as 35 Redwood St. Chambersburg, PA."[20] This language requires 1) the delivery of the parcel, 2) the acceptance of the parcel, and 3) the taking of the parcel into 35 Redwood Street. Here, the Agents did not deliver the parcel to Petitioner or to his spouse, and Petitioner nor his spouse brought the parcel into their home. Instead, the parcel, by the front door of 35 Redwood Street, and a third party that did not reside in the property brought the parcel into the property.

The Fourth Amendment prohibits unreasonable searches and seizures of a person, their houses, papers, and effects, and it states that warrants to search property require probable cause. U.S. Const. amend. IV. To search a home, absent consent or an exigent circumstance, a warrant is required. In *United States v. Mallory*, 765 F. 3d 373, 383 (3rd Cir. 2014), this Court stated that warrantless searches of the home are presumptively unreasonable.

The triggering events, conditions, or contingencies must be listed in the warrant in an explicit, clear, and narrow manner. *United States v. Bingham*, 270 F. Supp. 2d 665, 670 (W.D. of PA 2003) *citing United States v. Garcia*, 882 F.2d 699, 704 (2d Cir. 1989). The triggering events must also be stated in the warrant, and if not listed in the warrant, they must be in the Affidavit of Probable Cause.

[20] (Appendix p. 38)

The affidavit must be attached to the warrant and incorporated by reference. Also, the officers executing the warrant must carry both documents when executing the warrant. In this case, the triggering events were placed on the Affidavit of Probable Cause.

Anticipatory or contingency search warrants are so named because they require the occurrence of future events before they become effective. *United States v. Loy*, 191 F. 3d 360, 364. (3d Cir. 1999). *See also United States v. Grubbs*, 547 U.S. 90 (2006) (an anticipatory warrant only becomes effective upon the happening of some future event – a "triggering condition" – *which establishes probable cause for the search*). (*Emphasis added*) In other words, there is no probable cause permitting a search if the triggering conditions do not take place. This was a warrantless search because the conditions required for the execution of the contingency warrant did not take place. Therefore, this was a warrantless search.

The warrant's identification of the triggering events is not merely more efficient or preferable; it is indeed the only way to safeguard effectively against unreasonable and unbounded searches. *United States v. Hodal*, 143 F3d 1223, 1227 (9th Cir. 1998). As a general matter, failure to comply with the anticipatory warrant's triggering event "voids" the warrant. *United States v. Perkins*, 887 F.3d 272, 275 (6th Cir. 2018) *citing United States v. Rey*, 923 F.2d 1217, 1221 (6th Cir.

1991) and *United States v. Grubbs*, 547 U.S. 90, 100-101 (2006) (if an officer makes the search before the condition has been met, the search will be held unreasonable). In this case, the contingency warrant also states that "[i]n the event the delivery and acceptance of the aforementioned parcel does not occur, then and in that event, this search warrant will become null and void, will not be executed, and will be returned to the issuing authority unserved." Notice that the emphasis is on the delivery and acceptance of the parcel. This is because delivery and acceptance were necessary to establish a knowing and voluntary exercise of dominion and control over the parcel by an occupant of the property, i.e., Petitioner. Here, the parcel was not delivered to nor accepted by Petitioner. Thus, the warrant was null and void, and the search was warrantless.

In determining whether the triggering events have been satisfied, warrants and their supporting documents are to be read in a commonsense fashion." *United States v. Perkins*, 887 F.3d 272, 275 (6th Cir. 2018) *citing United States v. Miggins*, 302 F.3d 384, 395 (6th Cir. 2002) and *United States v. Gendron*, 18 F.3d 955, 966 (1st Cir. 1994).

On February 22, 2019, armed with the contingency warrant, the Agents went to 35 Redwood Street and placed the parcel by the door. The Agents did not knock on the door or even attempt to deliver the parcel to an adult occupant. The Agents also did not take any measures to make sure that the recipient of the parcel knew

that the parcel was addressed to Carmen Diaz. Neither Petitioner nor his spouse received the parcel, picked up the parcel, or brought the parcel into their home. Instead, an employee of Valley Community Housing, the company that managed 35 Redwood Street, arrived at the property to complete repairs, saw the parcel, picked it up, and brought it inside. At this point, an Agent contacted Valley Community Housing, and after a short conversation, the employee left the apartment to speak to the Agent. The Agent did not direct the employee to place the parcel outside by the front door and to leave the property. The Agents decided, after consultation among themselves, to instruct the employee not to touch the parcel. The consensus among the Agents was that since the parcel was already inside the home, they would leave it there.[21] As such, the employee was explicitly directed not to touch the parcel.[22] This was in direct contravention of the conditions of the contingency warrant that the parcel be delivered, accepted, and brought into the property. This is the equivalent of one of the Agents bringing the parcel into the home.

Because the parcel was addressed to Carmen Diaz and not to one of the adults who lived on the property, the contingency warrant required the parcel to be

[21] (Appendix pp. 322 & 323; NT 11/8/21 pp. 109 & 110)

[22] (Appendix p. 321; NT 11/08/21 p. 109)

delivered to a person who lived on the property and for that person to accept the parcel. Yet, the controlled delivery left the parcel by the front door. Leaving the parcel by the front door was an effort to limit the possibility that the occupants would look at the parcel and reject the parcel because it was not addressed to them. The closer that the parcel was left to the front door, the higher the chances that the parcel would simply be brought into the home without much inspection.

Reading the word delivery in a commonsense fashion, under the circumstances of this case, means the hand delivery of the parcel to an occupant of the home, i.e., Petitioner or his spouse. Reading the word acceptance in a commonsense fashion means that the parcel will be accepted by an adult occupant of the home and, more importantly, that this person knowingly and voluntarily accepted a parcel, knowing that it was addressed to Carmen Diaz. This was the goal of the contingency warrant.

Perhaps most notably, the warrant also requires that the parcel must be taken inside. The common sense meaning of taken inside is that an occupant of the property who knowingly and voluntarily accepted the parcel also took the parcel inside the property. Here, the parcel was taken inside by an employee of Valley Community Housing Corporation.

The Government had the time, the ability, and the resources to make a proper delivery that complied with the contingency warrant, i.e., delivery, acceptance, and

taking it into the property. The Government had Letter Carriers, Postal Inspectors, and State Troopers who could have made the necessary delivery attempts to deliver the parcel to an adult who lived on the property. Also, because this parcel was sent via Express Mail, it would have been normal if the parcel were personally delivered to the occupants of the property. Instead, the Government left the parcel unattended by the front door.

The contingency warrant requirements had to be met to establish probable cause. Without these conditions, the Government only had a parcel found to contain two kilos of cocaine addressed to a person who was not a resident of the property. This does not establish probable cause to search the property. Thus, to search the property, the Government had to comply with the requirements of the contingency warrant. The goal of the contingency warrant was to establish that a resident of the property received, accepted, and then brought the parcel into the property, knowing that it was not addressed to a resident of the property. This would have established that a resident, knowingly and voluntarily, exercised dominion and control over a parcel.

Last, the Government cannot argue that the employee's actions constituted exigent circumstances that permitted the warrantless search of the property because this alleged exigency was caused by the Agent's inappropriate delivery of the parcel. First, the Government cannot create exigencies, intentionally or negligently, and

then rely on them to conduct a warrantless search of a home. Second, the Agents, having the opportunity to direct the worker to take the parcel out of the property, intentionally chose to leave the parcel inside the property.

If the Court agrees with Petitioner, then all evidence found, seized, recorded, heard, and observed during the execution of the contingency warrant must be suppressed.

II. THE COURT ERRED WHEN IT DENIED PETITIONER'S MOTION TO SUPPRESS THE EVIDENCE OBTAINED FROM THE SEARCH FOR THE PARCEL ENDING IN NUMBER 6795

The Fourth Amendment requires a warrant to state with particularity the place and items to be searched and seized. Specifically, the Fourth Amendment states that "... no Warrants shall issue, but upon probable cause, ... and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. Amend. IV; *see also Groh v. Ramirez*, 550 U.S. 551, 557 (2004). In *United States v. Moss*, 936 F.3d 52, 59 (1st Cir. 2019), the First Circuit stated that the manifest purpose of this constitutional rule, known as the particularity requirement, "is to prevent wide-ranging general searches by the police." *See also United States v. Bonner*, 808 F.2d 864, 866 (1st Cir. 1986). "The test for determining the adequacy of the description [in a warrant] of the location to be searched is whether the description is sufficient to enable the executing officer to locate and identify the premises with reasonable effort and whether there is any reasonable probability that

another premise might be mistakenly searched." *Id.* The Fourth Amendment by its terms requires particularity in the warrant, not in the supporting documents." *Id.*

Here, the search warrant listed a different parcel to be searched.[23] Specifically, the warrant was issued for the search of the parcel ending in number 4884 instead of the parcel ending in number 6795. As such, the search warrant did not describe with particularity the place to be searched.

In *United States v. Noyes*, 2010 U.S. Dist. LEXIS 130041, the District Court for the Western District of Pennsylvania confronted a similar issue and stated:

> We also recall that the "particularity requirement" of the Fourth Amendment is designed to achieve three things:
>
> > First, it memorializes precisely what search or seizure the issuing magistrate intended to permit. Second, it confines the discretion of the officers who are executing the warrant. *Marron v. United States*, 275 U.S. 192, 196, 48 S. Ct. 74, 72 L. Ed. 231, Treas. Dec. 42528 (1927). Third, it "inform[s] the subject of the search what can be seized." *Bartholomew [v. Commonwealth of Pa.*], 221 F.3d [425, 429 (3d Cir. 2000)]. For these reasons, although a warrant should be interpreted, it must be sufficiently definite and clear so that the magistrate, police, and search subjects can objectively ascertain its scope. See *Groh [v. Ramirez*], 540 U.S. [551, 556-57], 124 S. Ct. at 1289, 2004 WL 330057.

Noyes, 2010 U.S. Dist. LEXIS 130041, *citing Doe v. Groody*, 361 F.3d 232, 239 (3d Cir. 2004). Here, the mistakes in the search warrant are significant.

[23] The Motion to Suppress is on page 85 of the Appendix; the Government's Response is on page 125 of the Appendix and the Court's Memorandum, and Order are on page 139 of the Appendix.

Because of the mistakes, the warrant does not provide any guidance about the correct parcel to be searched. In fact, it authorizes the search of the wrong parcel. It is impossible to conclude that the Court had authorized the search for a parcel ending in number 6795. The warrant documents did not identify the correct parcel once. The warrant documents discussed two parcels: a parcel ending in number 4884 and a parcel ending in number 8378. The parcel ending in number 6795 is not mentioned at all in the warrant papers. It is only mentioned, after the search, on Form A.O. 93, the return of the warrant form. The warrant memorialized the authority to search the wrong parcel, i.e., the parcel ending in number 4884. The warrant confined the officers' discretion to search the wrong parcel, i.e., a parcel ending in number 4884. Last, the warrant informed the subject of the warrant that it could only search the wrong parcel, i.e., a parcel ending in number 4884. Read practically and in a nontechnical manner, the warrant in question did not authorize the search of the parcel ending in number 6795.

Last, the mistakes contained in the warrant are so significant that a simple reading of the warrant would have revealed the magnitude of the problems. As such, the Government cannot argue good faith reliance on the warrant. An Agent cannot claim good faith reliance when the warrant, the application for the warrant, and the affidavit in support of the application for the warrant describe a different item to be searched, especially when the Agents had searched the parcel ending in

4884 three days before, i.e., February 22, 2019.

If the Court agrees, then the two kilos found inside the parcel ending in number 6795 must be suppressed.

III. THE COURT ERRED WHEN IT DENIED PETITIONER'S MOTION TO DISMISS THE INDICTMENT[24]

On August 28, 2019, an Agent testified before the Grand Jury about the February 22, 2019 delivery, as follows:

> And then one postal inspector puts on a uniform of a letter carrier. We delivered it to that address, 35 Redwood in Chambersburg.
>
> An individual later identified as Adam Santana took the box into the house.

(Appendix p. 162; NT 8/28/19 p. 5)

This Agent was present on February 22, 2022, and was aware of the circumstances surrounding the delivery of the parcel. Also, the Agent prepared a report on August 14, 2019, fourteen days before his testimony before the Grand Jury, where he described the events correctly.[25] However, his testimony was materially different from what took place. The Government placed and left the parcel

[24]The Motion to Dismiss the Indictment is on page 152 of the Appendix; the Government's Response is on page 199 of the Appendix, and the Court's Memorandum and Order are on pages 210 of the Appendix. Please note that this motion was filed a few days before trial because the Grand Jury transcript was provided as part of the Jencks materials also a few days before trial.

[25] (Appendix pp. 177 to 186)

unattended by the front door of the property. Petitioner did not receive the parcel from anyone. Petitioner did not pick up the parcel. Petitioner did not bring the parcel into the property. The parcel was picked up by a maintenance worker who was working at 35 Redwood Street. This worker brought the parcel inside 35 Redwood Street.

Petitioner submits that this was an intentional misstatement to significantly improve the quality of the controlled delivery. It is much more incriminating if Petitioner accepted the parcel and brought it into the home. Again, the testimony that the parcel was delivered to 35 Redwood, picked up by Petitioner and brought into the home by Petitioner is much more persuasive and incriminating than the real events. It established that Petitioner knowingly and voluntarily exercised dominion and control over the parcel and brought it into the property. On the other hand, the real events, i.e., leaving the parcel by the front door unattended and then the parcel being brought into the home by a maintenance worker, are significantly less incriminating and do not establish the knowing and voluntary acceptance.

Petitioner also submits that the Grand Jury testimony prejudiced Petitioner. There is no question that the Agent's Grand Jury version, i.e., that Petitioner grabbed the parcel and brought it into his home, influenced the Grand Jury's decision to indict. The Supreme Court in *Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988) established the standard for dismissing an indictment based on an error in a

Grand Jury proceeding. The Supreme Court stated that a district court is bound by the doctrine of "harmless error" and may not dismiss an indictment because of prosecutorial misconduct before the Grand Jury without making a factual finding that the defendant was prejudiced by the misconduct. *Id*. at 255. The Court went on to state that to find prejudice, the district court must establish one of two prongs: 1) that the violation influenced the Grand Jury's decision to indict, or 2) that there is grave doubt that the decision to indict was free from the substantial influence of the violation. *Id.* at 256. The first part of the test requires the Court to conclude that the violation did influence the Grand Jury. The second part of the test requires the Court to conclude that there is grave doubt that the violation did not influence the Grand Jury. Here, Petitioner argues that both are met.

Petitioner submits the Government knowingly relied on an intentional misstatement of an Agent during his Grand Jury testimony to obtain an indictment. The testimony constituted Perjury, and the Government's use of this testimony constituted prosecutorial misconduct. The definition of Perjury includes making a false material declaration under oath before a Grand Jury. 18 U.S.C. § 1623. To prove that a person has committed Perjury before a grand jury, the Government must prove the following elements: (1) the defendant testified before a grand jury under oath; (2) the defendant knowingly made a false statement; and (3) the false statement was material to the grand jury's investigation. *U.S. v. Dobson*, 380 Fed. Appx 170

(3rd. Cir. 2010) *citing United States v. Friedhaber*, 856 F.2d 640, 642 (4th Cir. 1988). Here, the testimony of the Agent was false, under oath, and the Agent knew it was false. Last, the statement was material because it had the tendency to influence the decision-making of the Grand Jury. *U.S. v. Knight*, 2011 U.S. Dist. LEXIS 16847, fn 16 (2011)("a statement is material if it has a natural tendency to influence, or is capable of influencing, the decision-making body to which it is addressed.")

It gets worse if one considers that the testimony created the implication that the parcel was hand-delivered to Petitioner. The testimony that Petitioner brought the parcel into the home goes to the heart of the matter. To bring the parcel into the home, Petitioner had to have received it, which means that the parcel was delivered and accepted. These are material misrepresentations. Yet, the Agent testified falsely, knowing what had transpired during the delivery.

As such, the false testimony of the Agent was not harmless. The misrepresentations affected the Grand Jury's decision to indict because the Agent's Grand Jury version was much more incriminating than the actual events. Again, if one compares the Grand Jury version with the actual events, it is impossible not to conclude that the Agent's Grand Jury testimony influenced the decision to indict. Imagine if the Grand Jury had been told that the parcel was left by the front door and that a worker, not Petitioner, picked up the parcel outside of the home and brought

the parcel into the home.

It is also respectfully submitted that the Agent's Grand Jury testimony was designed not only to provide a more incriminating version but also to hide the fact that the Government did not comply with the requirements of the contingency warrant.

If the Court agrees with Petitioner, then the indictment must be dismissed.

IV. THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH THE CHARGE OF CONSPIRACY BEYOND A REASONABLE DOUBT

Petitioner submits that the evidence is insufficient to establish the charge of Conspiracy, even when the evidence is viewed in the light most favorable to the Government.

For the Government to prove a conspiracy to distribute a controlled substance, the evidence must establish (1) unity of purpose between the alleged conspirators, (2) an intent to achieve a common goal, and (3) an agreement to work together toward that goal. *United States v. Gibbs,* 190 F. 3d 188, 197 (3d. Cir. 1999). First, the evidence introduced at trial did not establish a unity of purpose beyond the buyer-seller relationship. Second, the evidence introduced at trial did not establish an intent on their part to achieve a common goal beyond the buyer-seller relationship. Third and last, the evidence did not establish an agreement to work towards a goal beyond the buyer-seller relationship.

Here, Petitioner argued at trial that he was not guilty of Conspiracy because he had a buyer-seller relationship with the drug supplier.[26] As such, to be convicted of Conspiracy, the evidence must establish that Petitioner and his supplier had an agreement to commit another crime beyond the crime constituted by their agreement to sell and buy drugs from each other. *Id*. at 197. In other words, there must have been an agreement between the buyer and the seller to sell drugs to others. *United States v. Price*, 13 F.3d 711, 727 (3rd Cir 1994). However, knowledge by the supplier that the buyer will sell the controlled substance to others does not establish a conspiracy unless there is evidence of a separate agreement that the buyer and seller agreed to sell drugs together to others. *United States v. Pressler,* 256 F.3d 144, 153 (3rd Cir. 2001).

To determine whether a conspiracy existed between a seller and a buyer, this Court considers the following factors: (1) the length of affiliation between buyer and seller, (2) whether there is a demonstrated level of mutual trust, (3) whether there is an established method of payment, (4) the extent to which the transactions are standardized, (5) whether the buyer bought large amounts of drugs, and (6) whether the buyer purchased the drugs on credit. *United States v. Badini*, 525 Fed. Appx. 190, 192 (3d Cir. 2013) (non-precedential), *citing* United *States v. Gibbs*, 190 F.3d

[26] The discussion will use the term supplier. However, the evidence available does not establish that there was only one supplier.

188, 197-99 (3d Cir. 1999).

A Review of the Evidence

There is no evidence about the identity of the supplier.[27] There is no evidence that there was only one supplier.[28] There is no evidence of the terms, i.e., price, credit, method of payment, etc., between Petitioner and the supplier.[29] There is no evidence of emails, text messages, or intercepted calls between Petitioner and the supplier.[30] There is no evidence from an informant or a customer of Petitioner that Petitioner and the supplier had an agreement to sell drugs to others beyond their buyer-seller relationship. In fact, there is no evidence at all from an informant or customer about the Petitioner. There is no evidence that Petitioner engaged in a single drug transaction.[31] There is no evidence to whom and where Petitioner delivered the drugs he received from the supplier. As such, there is no evidence that Petitioner and the supplier had an agreement beyond Petitioner buying drugs from the supplier or suppliers. The evidence only establishes that there were eight

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[27] (Appendix pp. 410 & 474; NT 11/9/21 p. 195 & 260)

[28] *Id*.

[29] Appendix pp. 410, 411 & 475; NT 11/9/21 pp. 195, 196 & 261)

[30] (Appendix p. 417; NT 11/9/21 p. 203)

[31] (Appendix pp. 308, 323, 417 & 477; NT 11/8/21 pp. 95 & 110; NT 11/9/21 pp. 203 & 263)

parcels mailed from Puerto Rico to 35 Redwood Street. That Petitioner lived at 35 Redwood Street. Postal records show that seven parcels were delivered to 35 Redwood Street and that only the last two parcels contained cocaine.

The Length of the Affiliation

The evidence shows that the first parcel was delivered to 35 Redwood Street on November 2, 2018, and the last on February 22, 2019. In total, there were seven different deliveries. Please remember that the second parcel received on February 22, 2019, was not delivered. This means the relationship between Petitioner and the supplier, assuming it was the same supplier, was less than four months, not a long relationship. But more importantly, nothing in the length of the relationship establishes that they had more than a buyer-seller relationship.

Whether There is a Demonstrated Mutual Trust

The evidence does not establish whether there was mutual trust between Petitioner and the supplier because there is no evidence other than the parcels addressed to 35 Redwood Street. There is no evidence that would lead one to conclude that there was mutual trust between Petitioner and the supplier.

Whether there is an Established Method of Payment

There is no evidence about the payment method.

The Extent to Which the Transactions Where Standardized

The seven parcels came from Puerto Rico and were addressed to 35 Redwood

Street. This is not enough evidence to conclude that the transactions were standardized.

Whether the Buyer Bought Large Amounts of Drugs

The evidence shows two kilos of cocaine in two parcels. This is a significant amount of cocaine.

Whether the buyer purchased the drugs on credit

The evidence does not establish that the buyer purchased the drugs on credit.

Thus, under the *Gibbs* factors, the evidence does not establish that Petitioner and the unknown supplier or suppliers were co-conspirators. It shows that they had a buyer-seller relationship.

If the Court agrees with Petitioner, then the Conspiracy verdict and sentence must be vacated.

V. THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH THE CHARGE OF POSSESSION OF A FIREARM IN FURTHERANCE OF A DRUG TRAFFICKING CRIME

Petitioner submits that the evidence is insufficient to establish the charge of Possession of a Firearm in Furtherance of a Drug Trafficking Crime, even when the evidence is viewed in the light most favorable to the Government.

On February 22, 2019, upon execution of the contingency warrant, the Agents found a Glock 19, serial number SYK946, in a second-floor bedroom inside a dresser

drawer.[32] The gun did not have a bullet in the chamber.[33] The gun did have a clip with seventeen bullets in it.[34] The evidence established that the Government had not seen Petitioner with a firearm.[35] The evidence also established that Petitioner had been to a firing range[36] and that Petitioner had a permit to carry a firearm. [37] These are lawful activities. The evidence established that no money or drugs were found near the firearm or in the house.[38] Last, Petitioner was not found near the firearm, nor was he attempting to reach for the firearm. [39] When arrested, Petitioner was outside the house, and the firearm was inside a dresser drawer on the second floor.

To establish the charge of Possession of a Firearm in Furtherance of a Drug Trafficking Crime, the Government must prove (1) that Petitioner committed a drug trafficking crime, (2) that Petitioner knowingly possessed a firearm, (3) that

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[32] (Appendix pp. 384, 385, & 402; NT 11/8/21 pp. 146, 147, 170, 171, & 188)

[33] (Appendix p. 402; NT 11/9/21 p. 188)

[34] (Appendix pp. 384, 385, & 402; NT 11/8/21 pp. 146, 147, 188)

[35] (Appendix pp. 323 & 413; NT 11/8/21 p. 110; 11/9/21 p. 199)

[36] (Appendix pp. 554 & 555; NT 11/9/21 p. 330 & 331)

[37] (Appendix p. 383; NT 11/9/21 p. 169)

[38] (Appendix p. 406 & 407; NT 11/9/21 p. 192 & 193)

[39] (Appendix p. 404; NT 11/9/21 p. 190)

Petitioner possessed the firearm to further the drug trafficking crime. *See* Third Circuit Jury Instructions, Section 6.18.924A, "Possession of a Firearm in Furtherance of a Drug Trafficking Crime." In furtherance of means for the purpose of assisting in, promoting, accomplishing, advancing, or achieving the goal of trafficking drugs. *See* Third Circuit Jury Instructions, Section 6.18.924A-1, "In Furtherance Defined."

It is respectfully submitted that here, the evidence only establishes the mere, coincidental presence of the firearm, not possession of a firearm in furtherance of a drug trafficking crime. In *Bailey v. United State*s, 516 U.S. 137, 143 (1995), the Supreme Court construed use narrowly, holding that the term connotes more than mere possession of a firearm by a person who commits a drug offense. The Government must show active employment of the firearm. *Id*. at 144. Similarly, this Circuit, in *United States v. Sparrow*, 371 F.3d 851 (3rd Cir. 2004), developed the following standard to analyze the furtherance of element:

> Under § 924(c), the mere presence of a gun is not enough. What is instead required is evidence more specific to the particular defendant, showing that his or her possession actually furthered the drug trafficking offense. Put another way, the evidence must demonstrate that possession of the firearm advanced or helped forward a drug trafficking crime. In making this determination, the following nonexclusive factors are relevant: [1] the type of drug activity that is being conducted, [2] accessibility to the firearm, [3] the type of weapon, [4] whether the weapon is stolen, [5] the status of the possession (legitimate or illegal), [6] whether the gun is loaded, [7] proximity to drugs or drugs profits, and the time and circumstances under which the gun is found.

Id. at 853. It is respectfully submitted that an application of these factors leads to the conclusion that Petitioner did not possess the firearm in furtherance of a drug trafficking offense.

The Type of Drug Activity that is being Conducted

Parcels were mailed to Petitioner's address via the U.S. Postal Service. Two of those parcels were found to contain cocaine. Receiving parcels via the U.S. Postal Service does not require Petitioner to possess a firearm.

The Accessibility of the Firearm

The firearm was inside a dresser drawer in a bedroom on the second floor. However, Petitioner was outside the house behind the garage, nowhere near the firearm. More importantly, Petitioner did not attempt to reach the firearm. As such, the firearm was not accessible.

The Type of Weapon

The Glock 19 is a standard semi-automatic pistol. Nothing about this type of pistol by itself furthers a drug trafficking crime. Further, nothing surrounding the circumstances of when and where the firearm was found furthers a drug trafficking crime.

Whether the Weapon was Stolen

The evidence established that the firearm was not stolen.

The Status of the Possession (legitimate or illegal)

The firearm was not stolen, and Petitioner had a permit to carry a firearm. Also, in Pennsylvania, a person can have a gun in his home. Thus, the possession was legitimate.

Whether the Gun was Loaded

While the clip of the firearm had seventeen bullets, the gun was not cocked. Thus, it was not ready to be fired.

The Proximity to Drugs or Drug Profits

The firearm was not found near drugs or drug profits. In fact, no drugs, drug profits, or any money were found on the property.

The Time and Circumstances in Which the Gun was Found

The firearm was found during the day hours on a weekday. Nothing about the time and date indicates that the firearm was possessed to further a drug trafficking crime. The circumstances were average. Petitioner arrived at his home and found a parcel inside his home and opened the parcel. He did not need a firearm to open a parcel. If he needed a firearm to open a parcel, the firearm would have been found near the opened parcel in the garage and not in the second-floor bedroom inside a dresser drawer.

If the Court agrees with Petitioner, then the 924(c) verdict and sentence must be vacated.

CONCLUSION

For the foregoing reasons, Petitioner prays that a writ of certiorari be granted, and the United States Supreme Court reviews the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully,

/s/ José Luis Ongay

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Date: September 30, 2023

PROOF OF SERVICE

I, José Luis Ongay, Esquire, do swear or declare that on this date, October 1, 2023, as required by Supreme Court Rule 29, I have served the enclosed MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's Counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid: The names of those served are as follows:

Scott Ford, AUSA, Sylvia H. Rambo United States Courthouse, 1501 North 6th Street, 2nd Floor, P.O. Box 202, Harrisburg, PA 17102

Elizabeth Barchas Prelogar, Solicitor General, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001

Adam N. Santana, 76982-067, F.C.I. Loretto, Federal Correctional Institution, P.O. Box 1000, Cresson, PA 16630

I declare under the penalty of Perjury that the foregoing is true and correct.

/s/ José Luis Ongay

_____

José Luis Ongay, Esquire
600 Germantown Pike, Suite 400
Plymouth Meeting, PA 19462
484 681-1117

Executed on September 30, 2023