No. _____

In The
Supreme Court of the United States

JONATHAN RODRIGUEZ,
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

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QUESTION PRESENTED

I. Whether the use of a preponderance of the evidence standard at sentencing violated Rodriguez's Fifth Amendment and Sixth Amendment rights?

II. Whether acquitted conduct should be considered at sentencing?

III. Whether the Confrontation Clause should be applied at sentencing?

IV. Whether a sentencing disparity between powder and crack cocaine is constitutional?

V. Whether Rodriguez's suppression motion should have been granted?

PARTIES TO THE PROCEEDING

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

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PRAYER

Petitioner Jonathan Rodriguez 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 September 8, 2023.

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OPINIONS BELOW

On September 8, 2023, 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.

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JURISDICTION

As noted, the Fifth Circuit entered its judgment on September 8, 2023. 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).

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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.

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STATEMENT OF THE CASE

Jonathan Rodriguez (Rodriguez) was tried for conspiracy to possess/ distribute powder and crack cocaine, and possession of a firearm in furtherance of drug trafficking. Prior to trial, Rodriguez sought to suppress illegally obtained evidence, including drugs and over 1.2 million dollars, which was denied. After trial, Rodriguez was acquitted of the Count 1 Conspiracy to distribute powder cocaine and convicted of the remaining counts. He appealed his conviction and sentence of 25 years.

1009 Bluntzer, a tiny house, and Rodriguez were DEA targets since 2018, but without consistent informants and with only sporadic surveillance. In January of 2019, DEA believed Rodriguez was at 1009 Bluntzer during a recorded crack cocaine controlled buy. Sometime in

early 2019, DEA lost the ability to conduct controlled buys at that location. On May 12, 2019, Mother's Day, at 2AM, a drive-by shooting at 1009 Bluntzer occurred and shots were exchanged. Calls came in reporting shots fired at several locations, with no report of injuries. Within minutes, gang officers arrived at 1009 Bluntzer, and spoke with Jonathan Rodriguez ("*Rodriguez*") and other individuals. Officers canvassed the neighborhood. No victim or suspects were found. DEA Taskforce officers were alerted and arrived in the area in the early morning hours. At 4AM, almost two hours after the report of shots fired, and after exigent circumstances had dissipated because so many patrol officers had been on scene in full uniform for two hours interacting with subjects in front of and coming out of the house, full SWAT conducted a sweep at 1009 Bluntzer observing munitions but finding no persons, narcotics or blood, and during SWAT's secondary sweep of this tiny house, the butt of an AK-47 and a police radio were observed. A robbery/homicide detective then obtained a search warrant lacking probable cause from a Municipal Judge for 1009 Bluntzer confined to police equipment, guns and ammo related to deadly conduct without mentioning the narcotics investigation. DEA task force officers conducted the search at 1009 Bluntzer and soon found the AK-47, a handgun, crack cocaine, munitions and over $13,000 in currency. Without freezing the scene and obtaining a narcotics search warrant, DEA TFO took miscellaneous papers in a stack of mail at 1009 Bluntzer, including a storage unit receipt addressed to Rodriguez's recently deceased mother at her separate residential address, who was not a target. DEA TFO then obtained a second search warrant, this time for narcotics, based on the storage receipt and recent video footage of Rodriguez entering the facility, which was one year off and stale. DEA haphazardly searched the storage unit, crammed with tools and closed non-see-through duffle bags and backpacks containing $1.2 million, powder cocaine, drug ledgers, and 52 firearms. Arrest warrants ensued, and the DEA TFO case-agent suggestively showed one photo of Rodriguez to a co-defendant, Ashley Munoz, advising her

this was the drug leader, and months later, had her identify Rodriguez from a tainted photo line-up. Munoz was the only co-defendant to testify against Rodriguez at trial, displaying bias because her girlfriend had been interested in Rodriguez, which had upset her so much she even mentioned it in her arrest interrogation. Soon after Rodriguez's trial, Munoz received time-served and was reunited with her girlfriend. At trial, the case agent mis-identified Rodriguez instead of his look-alike brother in a surveillance photo outside 1009 Bluntzer. Rodriguez was acquitted on the first conspiracy count for powder cocaine at the storage unit, but convicted on remaining counts, and received an unreasonable 25 years' sentence, even though his alleged cohorts, some of whom did not cooperate, received dismissals and low prison time. While this Honorable Court may decide that standing alone each of these serious errors may not in themselves warrant reversal, when considered cumulatively they clearly demonstrate that Appellant Rodriguez was denied a fair trial.

The Appeal

On August 10, 2022, Mr. Rodriguez filed a timely notice of appeal to the United States Court of Appeals for the Fifth Circuit. Rodriguez raised the following errors in his brief:

> (1) the district court erred by admitting illegally obtained evidence, (2) holding a pretrial hearing to admit evidence prejudiced the defense, (3) the court erred in admitting a drug buy video because it was unreliable and missing audio, (4) the evidence is insufficient to support a conviction for conspiracy to possess crack cocaine, possession with intent to distribute powder cocaine and possessing a firearm in furtherance of a drug trafficking crime, (5) the court excluded critical exculpatory evidence which deprived Rodriguez of his 14th Amendment right to due process and his 6th Amendment right to confrontation, (6) the offense of possessing a firearm in furtherance of a drug trafficking crime is unconstitutional, (7) Rodriguez has been denied a complete record of the proceedings for his appeal, (8) a jury instruction [that] extraneous offenses must be proven beyond a reasonable doubt was not given, (9) the court erred by admitting, over objection, unverifiable and misleading testimony regarding drug distribution methods and theories, (10) the PSR's factual narrative relied upon improper and unreliable facts, (11) preponderance of the evidence standard [is] unconstitutional for sentencing, (12) acquitted conduct should not be considered at sentencing, (13) violation of [the] Confrontation Clause during sentencing, (14) drug quantities were improperly calculated at sentencing, (15) premises enhancement was improper, (16) leadership enhancement was improper,

> (17) the mandatory minimum sentence and suggested guidelines for crack cocaine offenses violate equal protection clause, (18) a 300 month sentence was unreasonable, (19) Rodriguez's return of property request should be granted and his objection to seizure should be sustained.

On September 8, 2023, the Fifth Circuit affirmed the judgment of conviction and sentence. See United States v. JONATHAN RODRIGUEZ, United States Court of Appeals, Fifth Circuit Opinion, 2023 WL 5821787 (5th Cir. 2023) (Appendix).

The 5th Circuit Court held that four of the nineteen issues raised on appeal were directly foreclosed by binding precedent:

> 1) *United States v. Romans*, 823 F.3d 299, 316 (5th Cir. 2016) (foreclosing the challenge to the application of the preponderance standard to his Guidelines range calculation);
>
> 2) *United States v. Bolton*, 908 F.3d 75, 95 (5th Cir. 2018) (foreclosing the challenge to the district court's consideration of acquitted conduct for sentencing purposes);
>
> 3) *United States v. Beydoun*, 469 F.3d 102, 108 (5th Cir. 2006) (foreclosing the attempt to apply the Confrontation Clause to sentencing hearings);
>
> 4) *United States v. Galloway*, 951 F.2d 64, 66 (5th Cir. 1992) (foreclosing the challenge to the sentencing disparity between powder and crack cocaine).

The 5th Circuit affirmed the denial of Rodriguez's suppression hearing for substantially the reasons set out by the district court "in its well-reasoned suppression order."

The 5th Circuit found the District Court did not commit plain error when it entered judgment against Rodriguez for possessing a firearm in furtherance of a drug trafficking crime, (2) instructed the jury that the burden of proof for extraneous offenses is beyond a reasonable doubt, and (3) allowed testimony from a lay witness, based on his extensive knowledge and experience, about trap houses and drug ledgers.

The 5th Circuit found not abuse of discretion as to any of the district court's evidentiary decisions Rodriguez highlights.

The 5th Circuit found there was ample evidence to support that Rodriguez conspired to possess with intent to distribute more than 280 grams of crack cocaine, possessed with intent to distribute the cocaine seized from the storage unit, and possessed a firearm in furtherance of a drug trafficking crime.

Finally, the 5th Circuit held the district court committed no reversible sentencing errors.

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BASIS OF FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

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

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REASONS FOR GRANTING THE PETITION

I. As to the first question presented, this Court should grant certiorari to address whether the use of a preponderance of the evidence standard in deciding whether to enhance Mr. Rodriguez's sentence violated his Fifth Amendment and Sixth Amendment rights.

The Government should be held to a standard of "beyond a reasonable doubt," rather than "preponderance of the evidence" for any allegations and enhancements within the PSR and anything less would be a violation of Mr. Rodriguez's 5th Amendment right that no one shall be deprived of life, liberty or property without due process of law; the Due Process Clause of the Fourteenth Amendment; and the Sixth Amendment right to jury trial.

The preponderance standard for factual determinations at sentencing is suggested by the Guidelines themselves, *see* USSG, § 6A1.3 (Policy Statement) commentary. This Court has held that the application of the preponderance standard at sentencing generally satisfies

due process, *McMillan v. Pennsylvania*, 477 U.S. 79 (1986) and *United States v. Watts*, 519 U.S. 148 (1997).

However, in *United States v. Haymond*, 139 S.Ct. (2019), this Court held that the federal statute governing revocation of supervised release, authorizing a new mandatory minimum sentence based on a judge's fact-finding by a preponderance of the evidence, violated his 5th and 6th Amendment Rights, as applied.

Since then, the Fifth Circuit has held the decision in *Haymond* only addressed the constitutionality of § 3583(k) of the supervised release statute, and the plurality opinion specifically stated that it was not expressing any view on the constitutionality of other subsections of the statute, including and because there currently is no case law from either the Supreme Court or the 5th Circuit court extending *Haymond* to, for example, § 3583(g) revocations, *United States v. Woods*, 793 Fed.Appx. 340 (5th Cir. 2020).

During sentencing, the Court overruled Mr. Rodriguez's objection to the standard of proof, and found under a preponderance of the evidence standard and with sufficient indicia of reliability the amount of drug quantities based in part upon cooperating witnesses. Especially in light of the serious nature of the relevant conduct findings, which significantly increased the guideline range, the judge's fact-finding by a preponderance of the evidence violated Mr. Rodriguez's 5th and 6th Amendment Rights, as applied.

II. As to the second question presented, this Court should grant certiorari to address whether consideration of acquitted conduct for sentencing purposes is unconstitutional.

The Fifth Circuit has held that a jury's acquittal does not prevent the Court at sentencing from considering conduct underlying the acquitted charge, so long as that conduct

has been proved by a preponderance of the evidence, *United States v. Andradi*, 309 F.App'x 891 (5th Cir.2009) (quoting *United States v. Watts*, 519 U.S. 148 (1997)). Although the Government "must prove all elements of a criminal offense beyond a reasonable doubt" at trial, "findings of fact for sentencing purposes need meet only the lower standard of 'preponderance of evidence.' " *United States v. Hull*, 160 F.3d 265 (5th Cir. 1998). (noting that "a finding that [defendant] was not guilty of conspiracy for purposes of conviction is not inconsistent with a finding that [defendant] was a conspirator for purposes of sentencing").

However, the Fifth Circuit's decision conflicts with decisions of other United States Court of Appeals, including the D.C. Circuit, and arguably this Court. Under the particular facts of this case, to consider Mr. Rodriguez's acquitted conduct when calculating the base offense level would result in an improper end-run around his Constitutional rights to due process under the Fifth Amendment and to a trial by an impartial jury under the Sixth Amendment. *See* *United States v. Bell*, 808 F.3d 926 (D.C. Cir. 2015) (Kavanaugh, J., concurring) ("Allowing judges to rely on acquitted or uncharged conduct to impose higher sentences than they otherwise would impose seems a dubious infringement of the rights to due process and to a jury trial."); *United States v. Sabillon-Umana*, 772 F.3d 1328 (10th Cir. 2014) (noting that it is "far from certain whether the Constitution allows" a judge to increase a defendant's sentence "based on facts the judge finds without the aid of a jury or the defendant's consent"). Importantly, "[t]he Sixth Amendment [right to a jury trial], together with the Fifth Amendment's Due Process Clause," requires that each element of a crime be either admitted by the defendant or proved to the jury beyond a reasonable doubt. *Jones v. United States*, 574 U.S. 948 (2014) (Scalia, J., dissenting). "Any fact that increases the penalty to which a defendant is exposed constitutes an element of a crime ... and 'must be found by a jury, not a judge.' " *Id.* (quoting *Cunningham v. California*, 549 U.S. 270 (2007).

III. As to the third question presented, this Court should grant certiorari to address whether the Confrontation clause should be applied at sentencing hearings.

The Rodriguez PSR's factual narrative included alleged out-of-court statements offered for the truth of the matter asserted by a declarant who did not testify at trial in violation of the Confrontation Clause. Such statements: did not fall within a hearsay exception, were testimonial and, if given, were primarily intended to be used in a criminal prosecution. In *Crawford v. Washington*, 541 U.S. 36 (2004), this Court held the Sixth Amendment is violated when testimonial statements are introduced from a witness who did not appear at trial "unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination."

Although this Court has declined to "spell out a comprehensive definition of 'testimonial,' " it has noted that " 'at a minimum' it includes 'prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and ... *police interrogations*.' "although "not all 'interrogations by law enforcement officers[ ]' are subject to the Confrontation Clause," *Michigan v. Bryant*, 131 S.Ct. 1143 (2011)(internal citation omitted). This Court has held that "interrogations solely directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator" fall squarely within the definition of testimonial hearsay, *Davis v. Washington*, 126 S.Ct. 2266 (2006).

The PSR referenced confidential informants, and statements of Consuelo Garcia, who is deceased, and was hospitalized during much of her incarceration; therefore, she and the other declarants were not subject to full and effective cross-examination. As Officer Hernandez testified, informants are "a necessary evil." ROA.1880. The Court's reliance on such hearsay to impose Mr. Rodriguez's sentence rendered the sentencing trial

fundamentally unfair in violation of due process.

The Fifth Circuit has held the Confrontation Clause does not apply at sentencing, *United States v. Beydoun*, 469 F.3d 102 (5th Cir. 2006). However, in light of Mr. Rodriguez's acquittal of the conspiracy charge at the storage unit, and objection to a preponderance standard, the PSR's use of alleged co-defendant's or informant's statements to apply a *role* enhancement, *premises* enhancement and to determine the *applicable drug quantity* violated Mr. Rodriguez's Sixth Amendment right to Confrontation.

Further, assuming arguendo the Confrontation Clause did not apply at sentencing, it does not mean that Mr. Rodriguez lacked all evidentiary protections. Due process requires that sentencing courts rely only on evidence with some minimal level of reliability, as the Guidelines themselves demand that the evidence used have "sufficient indicia of reliability to support its probable accuracy," U.S.S.G. § 6A1.3(a).

The Fifth Circuit has found that Out-of-court declarations by an unidentified informant may be considered where there is good cause for the non-disclosure of the informant's identity and there is sufficient corroboration by other means, *United States v. Rogers*, 1 F.3d 341 (5th Cir. 1993). The evidence here does not comfortably satisfy this standard, and the consideration of such evidence would be a Constitutional flaw, as outlined above. Notably, while contesting standing at the suppression hearing the Government advised the Court:

> "…I don't think that can be accomplished just through the *agents*.[1] I've talked to them. *They don't know a whole lot about who's staying, who's going, what's happening here* … at 1009 Bluntzer." ROA.2304.

[1] Among them, the case agent- DEA TFO Todd Beach.

IV. As to the fourth question presented, this Court should grant certiorari to address the sentencing disparity between powder and crack cocaine.

Applying The mandatory minimum sentence and suggested guidelines for crack offenses the Court applied and considered in sentencing Mr. Rodriguez violated the Equal Protection Clause of the Fifth Amendment, 18 U.S.C. § 3553(a), and the principles set forth in *United States v. Booker*, 543 U.S. 220 (2005). The disparity between powder cocaine to crack cocaine found in the Guidelines, *see* U.S.S.G. § 2D1.1(c) Drug Quantity Table, is derived directly from §841(b)(1) of Title 21, which mandates the same minimum sentence for crimes involving 280 grams or more of crack cocaine as it does for crimes involving 5 kilos or more of powder cocaine.

The crack cocaine / powder cocaine ratio underlying Mr. Rodriguez's mandatory minimum sentence violates the Equal Protection Clause of the Fifth Amendment because the Sentencing Guidelines' differential treatment of crack Cocaine is not rationally related to a legitimate governmental interest of protecting the public against the greater dangers of crack. The Fifth Circuit has held that even the Guidelines' 100 to 1 ratio of powder cocaine to crack cocaine has a rational basis and does not violate equal protection principles, *United States v. Galloway*, 951 F.2d 64 (5th Cir. 1992). Since then, Section 404(b) of the First Step Act of 2018 allows the Court to "impose a reduced sentence as if sections 2 or 3 of the Fair Sentencing Act of 2010 ... were in effect at the time the covered offense was committed." Pub. L. No. 115-391, 132 Stat. 5194. The Fair Sentencing Act reduced the disparity in the treatment of crack-cocaine and powder cocaine offenses. *See* Pub. L. No. 111-220, 124 Stat. 2372. In particular, Congress modified the statutory penalties for "A-Level," "B-Level," and "C-Level" crack-cocaine offenses under 21 U.S.C. § 841(b)(1).

Mr. Rodriguez would still argue even with the crack modifications, the statutory

scheme continues to be unreasonable and violates his Constitutional rights. Further, the crack cocaine statute is unconstitutionally infirm because it does not define the term "cocaine base," and is therefore void for vagueness, an argument that has been in rejected by the 5th Circuit. *See* *U.S. v. Thomas, 932 F.2d 1085, 932 F.2d 1085 (5th Cir, 1991)*.

V. As to the fifth question presented, this Court should grant certiorari to address whether Rodriguez's his suppression motion should have been sustained.

Rodriguez's Fourth Amendment rights were violated when the Government searched 1009 Bluntzer Street, and then a storage unit using an unconstitutional warrantless search and warrants lacking probable cause. ROA. 214, 2958, 2993, 3028, The trial court denied Rodriguez's motion to suppress the illegally obtained evidence. ROA.3147-3166. Searches and seizures inside a home without a warrant are presumptively unreasonable, *Brigham City, Utah v. Stuart*, 547 U.S. 398 (2006).

There were four searches. The first was a warrantless search by a SWAT team, followed by three search warrants obtained by law enforcement for two locations alleged to be under the control of Rodriguez. ROA. 2316, 2921, 2926, 2941. G.E.31- 3056-3064.[2] G.E.32- ROA.3065-3078. G.E. 33 ROA.3079-3095.

On May 12, 2019, officers responded to a "shoot-out" at 1009 Bluntzer, and during a warrantless sweep, found the butt of what looked like an AK-47 in a closet and a police radio, along with munitions outside and inside the home, which formed the basis of the first search warrant. ROA. 3056-3059, 3061-3064.

The second search warrant concerned a storage unit located on Ayers Street. ROA.160, 2926, 3065. The search warrant for the storage unit was based on evidence

collected from the Bluntzer residence, including receipts and keys found in the Bluntzer address. 3065-3078.

The third search warrant was in conjunction with an arrest warrant for Jonathan Rodriguez based upon evidence generated in the first three searches. ROA.3079-3095.

A Suppression Hearing was held on May 26, 2020. ROA.3039, 3172. The Government first challenged Rodriguez's standing stating he "repeatedly and consistently denied…he owned the place and lives at this residence and…is involved in any way. It's presumably owned by his grandparents, but he says that they rent it to somebody…he doesn't know." ROA.2303. The Government advised the Court:

> "…I don't think that can be accomplished just through the *agents*.[3] I've talked to them. *They don't know a whole lot about who's staying, who's going, what's happening here* or who the host is that even invited him in. I think we're going to have to hear from the Defendant regarding whether he's an overnight guest… at 1009 Bluntzer."

ROA.2304. The Court found Rodriguez had Standing. ROA.3147.

WARRANTLESS SEARCH BY SWAT IMPROPER

On May 12, 2019, officers responded to a "shoot-out" at 1009 Bluntzer, and during a warrantless SWAT sweep, found in plain view the butt of an AK-47 in a closet, a police scanner on a mattress without knowing if it was operable, as well as munitions inside and outside the house, and bullet holes. However, because the sweep was almost two hours after *shots-fired* were reported with no further reports of gun fire or other emergency situations, exigent circumstances had dissipated.

The CAD sheets showed shots were first reported at 2:01AM and last reported at 2:08AM with multiple places of interest. At 2:10AM, Gang Officer John Ghezzi testified he arrived on scene and there were several people, three or four, in the front yard at 1009 Bluntzer, including Rodriguez. ROA.2560-2561. Ghezzi testified he asked Rodriguez what he

[3] Including the case agent, who was present at counsel table during the suppression hearing.

was doing there, and Rodriguez said he was just chilling out on the stairs and saw people arguing and then ducked down when he heard the gunshots. ROA.2563-2564. Gang Officer Martin DeLeon, with 28 years' experience, testified he responded around 2AM and also spoke with Rodriguez, who told him he was visiting at 1009 Bluntzer, which was his grandfather's house, but he did not know who was renting it. ROA.2567-2569. Around this same time, at 2:12AM, GangUnit85 responded to the area and reported two groups shooting at each other went Northbound on foot on 24th Street. ROA.3107. Call activity afterwards did not report gunshots.

One officer testified at Rodriguez's jury trial, *and not at the suppression hearing*, that someone reported seeing an individual with a gun inside 1009 Bluntzer. This alleged observation was not reported in the CAD reports, which would have contained any allegation of such a serious crime- an aggravated assault on a peace officer. Such testimony was not made available to the Court or considered when the Court authored an Order denying the Suppression motion. This same officer, per the jury trial testimony, was the subject of an unrelated disciplinary matter with the Corpus Christi Police Department.

SWAT ENTERS NEARLY TWO HOURS LATER

Nearly two hours after the initial call of "shots fired" at 2:01AM, SWAT entered 1009 Bluntzer to check for persons inside at 3:57AM. ROA.3118. The Government argued the exigent-circumstances exception to the Fourth Amendment's warrant requirement validated the entry. There were no persons found inside, no blood, nor any signs of persons injured.

A warrantless entry will survive constitutional scrutiny if exigent circumstances exist to justify the intrusion, *United States v. Rico*, 51 F.3d 495 (5th Cir.1995). A well-recognized exception to the warrant requirement "applies when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment," *Kentucky v. King*, 563 U.S. 452, 460 (2011). Officers may

enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury, but they must objectively reasonably believe someone within is in need of immediate aid, *Brigham City, Utah v. Stuart*, 547 U.S. 398 (2006).

Here, there was no indication any of the calls originated from 1009 Bluntzer; in fact, there were various locations reported; there were no other reported shots since the ones giving rise to the original call at 2:01AM; the gang unit, including DeLeon with 28 years' experience, was at 1009 Bluntzer visiting with individuals beginning at 2:10AM; several fully uniformed officers were present for the duration; there was no evidence presented that officers had knowledge someone inside was in danger or threatened; nor that anyone at 1009 Bluntzer was in duress or in need of immediate police assistance; there was no evidence presented officers saw or heard someone inside nor that they witnessed any signs of struggle indicative of someone in danger or in need of immediate police intervention; nor 911 calls or dropped calls from inside; nor that officers could see any firearms inside; nor anyone fleeing inside or hot pursuit; nor that any of the departing occupants, who were detained by officers, indicated there was anyone in need of help inside; there was no blood visible; there were no reports of victims or injuries; there was no evidence presented of imminent destruction of evidence nor that an attack was to be imminently launched.

Police Supervisor Paulo Hernandez testified at the Jury Trial the May 12th event occurred when a vehicle drove by and shot at 1009 Bluntzer, he was called to the scene, there were no hostages inside of 1009 Bluntzer, he understood no one was inside 1009 Bluntzer, no one was barricaded inside 1009 Bluntzer, "when we arrived, everybody was out" of 1009 Bluntzer, and there were not any victims of this shooting. ROA.1771-1774. After arriving, Hernandez called DEA TFO Beach to notify him of the shooting at 1009 Bluntzer on May 12, 2019 because Hernandez had until recently been assigned to narcotics and knew 1009

Bluntzer was a was a DEA target. ROA.1776.

The facts do not indicate officers were prevented from seeking a warrant nor do the facts indicate that the situation required immediate police action. Even after experienced officers arrived at 2:10AM, they waited an hour to call SWAT at 3:15AM. ROA.2376, 3113. SWAT Officer Murray testified that typically for a call like this, EMS is called and staged, and Medic 3 arrived on scene at 2:58, per the CAD. ROA.2385. No injuries were reported. ROA.2386.

Murray, who was an experienced SWAT member and an ATL (Assistant Team Leader), testified to a rhetorical question, he had never encountered a "gun battle" where residents came out, seeming to mislead the patrol officers, saying "not to worry, everyone was fine inside." ROA.2398, 2406-2407.

SWAT officers began arriving around 3:30AM (ten to fifteen minutes after being called out), but did not go in until 3:57AM. ROA.2377, 3118. Officers had the opportunity to discuss the situation and their observations before deciding to enter 1009 Bluntzer. The facts of this case do not indicate the officers were faced with a situation that necessitated immediate intervention at 3:57AM because numerous patrol and gang officers in full uniform had handled this continually from 2:10AM. Officers had the situation under control and the luxury of choosing when to enter 1009 Bluntzer.

SWAT *RECHECK* OF THE TINY HOUSE AFTER FIRST SWEEP FOUND NOTHING

At 3:57AM, SWAT was authorized to make entry into 1009 Bluntzer, and went *room to room*. ROA.3118. At 4:00AM, SWAT2 advised to check underneath the house. ROA.3118. SWAT officer Manuel Lewis testified this was a full SWAT call out with over 10 officers teaming up and [going] inside 1009 Bluntzer. ROA.2462-3463, 2469. Lewis testified he entered the house through the front door and he primarily entered the bedroom on the left, and there were not people inside. ROA.2465-2466.

At 4:00AM, SWAT did a *recheck* of the house.[4] ROA.3120. SWAT Officer Murray testified he saw the AK-47 without touching it and *continued* "our *secondary* search." ROA.2405.

Murray testified he made entry through the front door of 1009 Bluntzer, which was a "smaller structure," and *cleared* towards the back of the structure, and then did a *recheck* coming to the front of the structure, the main room and a bedroom. ROA.2379-2380, 2402. At the *recheck* at 4:01AM, SWAT reported "we have one of our PD radios here and other equipment inside the house." ROA.3120. At 4:02AM, P1500 reached out for CID *to come out for a warrant*. ROA.3121. At 4:08AM, during the *recheck*, an AK(weapon) was found in the closet.[5] ROA.3122.

SWAT Officer Murray testified he saw the "butt end of the rifle," consistent with an AK-47, which was at an angle among "a lot of things in the closet," but not hidden, during his secondary clearance through the front door; "I continued my search, *came back* and did a *secondary* search, came into this room… and joined Officer Lewis in that room." ROA.2380-2381, 2383, 2402, 2404, 2409. Murray testified he did not touch the AK-47 and had no idea if it was recently shot nor the condition of the weapon.ROA.2384.

1009 Bluntzer was a tiny house with very little furniture, and it took SWAT only three minutes to check the house. See Gov Exh 11. ROA.2390, 3045. Gov.Exh. 15. ROA.2390, 3048. The AK-47 was not noted until the *recheck*. *See* Gov.Exh.12. ROA.3046.

PROBABLE CAUSE LACKING FOR FIRST SEARCH WARRANT

Probable cause requires the existence of facts "'sufficient in themselves to warrant a

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[4] The house at 1009 Bluntzer was tiny- approximately 500 to 700 square feet. ROA.2467. *See* Gov Exh 15 and 16. Photo at ROA.3048-3049.

[5] Each SWAT officer has an earpiece and communicates contemporaneously with the SWAT supervisor, which appears to be ECHO1 at the scene. ROA.2472.

man of reasonable caution in the belief that' an offense has been or is being committed" and the person to be arrested (or searched) committed it. *U.S. v. Gordon*, 580 F.2d 827, 832-33 (5th Cir. 1978). Here, both warrants contained conclusory statements that were unsupported by underlying facts, and could not be used to establish probable cause. *U.S. v. Underwood*, 725 F.3d 1076, 1081 (9th Cir. 2013).

Lorraine Matthews, a CCPD Robbery Homicide Unit officer, authored the first search warrant on May 12, 2019 at 1009 Bluntzer. ROA.2315-2316. Matthews testified she was called into duty around 4 or 4:30AM on May 12, but did not go to the location of the shooting until after the search warrant was written and signed. ROA.2316-2317.

Matthews testified she based her probable cause on particulars given to her by two SWAT officers, Murray and Lewis; and she was looking for any firearm, munitions, a police radio, police ballistic vests, and police and firearm-related items. ROA.2317-2319, 2340-2341, 2345.

Officer Matthews testified it was possible responding patrol officers had already gone inside prior to SWAT entering. ROA.2326. Matthews acknowledged her PC affidavit said officers escorted people out of the house before SWAT arrived, but she understood they were outside. ROA.2326-2327. SWAT Officer Murray testified he did not know if patrol officers had already taken people out of the house when he arrived, he believed the place had not been cleared before, he was not aware of any victims, he was aware narcotics officers arrived but not their role, and he provided information to Matthews for the search warrant. ROA.2408-2410, 2413, 2415, 2417, 2420.

The First Search Warrant did not provide the magistrate[6] with a substantial basis for determining the existence of probable cause, per *Kohler v. Englade*, 470 F.3d 1104 (5th Cir.

[6] A Corpus Christi Municipal Judge. ROA.2329.

2006), as it was based on finding an AK-47, a class C misdemeanor of discharging a firearm within the city, and a police radio. ROA.2330-2331, 2386. Nor is it illegal to possess an AK-47[7]. Matthews did not know if Rodriguez was a convicted felon. ROA.2327, 2504. No narcotics were observed. ROA.2386.

DEA BECOMES INVOLVED ALMOST TWO HOURS PRIOR TO SWAT SEARCH

Matthews testified when she was called to respond to the incident at 4 or 4:30AM, the DEA Task Force was already on scene, and she was not told why, although she normally did not take a DEA Task Force Agent to her search warrants. ROA.2319-2320, 2336-2337.

NEITHER THE SEARCH WARRANT OR ITS ACCOMPANYING AFFIDAVIT MENTIONED THAT THE HOUSE AND RODRIGUEZ WERE TARGETS OF A DEA INVESTIGATION

Matthews testified she did not recall if someone told her there were drugs inside, but it was not included in her search warrant. ROA.2319, 2326. DEA TFO Beach testified he advised Matthews about 5AM he had been conducting a long-term investigation on 1009 Bluntzer with Jonathan Rodriguez as the primary target selling crack cocaine, which is why Beach showed up at the scene. ROA.2482-2483.

AFFIANT KNEW VERY LITTLE ABOUT THE CASE

Matthews' Affidavit stated "*from my own investigative activity*," but Matthews knew very little about this case and received her information from only two officers, Murray and Lewis, who also did not appear to know much about the case, when writing the warrant. ROA.2317-2319, 3057.

MATTHEWS LOSES CONTROL OF HER OWN SEARCH WARRANT

Matthews lost control of her own search warrant when they began searching before

[7] Matthews testified she did not know if it would be illegal to own an AK-47. ROA.2328.

she even arrived, and even upon arrival, she did not search, and mostly stayed outside interviewing witnesses. ROA.2324, 2349, 2357-2360. Although Beach testified he was supposed to be there to "*assist* in the search for ammunition, firearms, ballistic vests, police radio, police equipment," in reality he took over the investigation. ROA.2515-2517. Instead of CID officers, there were three DEA task force officers searching the house. ROA. 2427-2430. Larock testified he turned the miscellaneous papers over to "the investigating officer," "Todd Beach." ROA.2451-2452. In fact, the Affiant/case-agent/lead investigator, Matthews, was not involved in the search, never saw the storage unit receipt, and did not mention it specifically in her Return. ROA.2367.

THERE WAS NO PROBABLE CAUSE FOR DEADLY CONDUCT

The First Search Warrant claimed there had been a violation of Deadly Conduct at 1009 Bluntzer. Section 22.05 of the Texas Penal Code defines Deadly Conduct as:

> "recklessly engaging in conduct that places another in imminent danger of serious bodily injury; *or* intentionally or knowingly discharges a firearm at or in the direction of one or more individuals or a habitation, building or vehicle and is reckless as to whether the habitation, building or vehicle is occupied." TEX. P.CODE 22.05.

SWAT Officer Murray testified he did not touch the AK-47 when he observed it during his *secondary* SWAT sweep, and had no idea if it had been recently shot or even its condition because he saw only the "butt end." ROA.2384, 2404-2405. Matthews did not have a victim when she was writing the search warrant, ROA.2330. No victim or injuries were reported, despite officers speaking with individuals from 1009 Bluntzer since 2:10AM, canvassing the neighborhood, and talking to several neighbors. ROA.2386, 3111-3113, 3115-3116. No blood was observed. ROA.2340, 2384. The warrant did not make clear how persons at 1009 committed a deadly conduct. Patrol officers and supervisors had ample opportunity to question the multiple civilians who had exited the residence; yet, there was no mention that any refused consent to search or refused to answer any questions or claimed they were

victims. ROA.3113, 3116, 3118. Not surprisingly, SWAT entered and found no person inside.

A POLICE RADIO DID NOT SUPPORT PROBABLE CAUSE

In the Affidavit, Matthews based her probable cause in part on a report of a police radio. ROA.3057. Per the CAD report, which was available to Affiant, this call came in at 2:46AM, a full forty-five minutes after the initial shots fired call. ROA.3109. By this time, several uniformed officers with police radios were in the general area of 1009 Bluntzer. The police radio seized from 1009 Bluntzer was not proven functional nor did the initial officer determine if it was a CCPD police radio nor if it was stolen, ROA.2331, 2335, 2467-2468. Police-radios are not illegal and owned by every news station. Even at the time of the suppression hearing, Matthews still had no evidence it was stolen. ROA. 2337.

DISCHARGING A WEAPON IN CORPUS CHRISTI CLASS C MISDEMEANOR

Matthews testified her probable cause for the search warrant was based upon illegally discharging a firearm in the City of Corpus Christi- different munitions were found inside and outside of the house by responding officers and SWAT, "that is why I wrote the search warrant… to find the possible guns that could have fired those munitions that were located…discharged in the City of Corpus Christi." ROA.2333-2334, 2349, 2389, 2392, 2396-2397. Shooting in city limits is a Class C misdemeanor. ROA.2334. The Government presented no evidence Rodriguez was asked for consent to enter the home, even though he was detained outside of 1009 Bluntzer by Officer Ghezzi. ROA.2561-2562.

SEIZURE OF MAIL WAS UNCONSTITIUTIONAL

Matthews testified DEA TFO Beach, and other DEA Agents, assisted in executing the search warrant at 1009 Bluntzer. ROA.2322, 2325, 2367-2368. DEA TFO Martinez testified the search warrant was executed around 7AM, she was one of the officers who entered the home, and "we're looking for any guns, ammunition due to the nature of the call, what the initial call was," looking in small places for ammunition. ROA.2426-2427, 2433-2434.

Martinez testified there was paperwork in a "little area" in the master bedroom behind and near the fridge. ROA.2427-2430. *See* Def.Exh. 6, ROA.2430-2431, 3140. Martinez testified the paperwork was mail, she could not recall if it was opened or unopened mail, she did not collect it, but briefly saw utility bills. ROA.2431-2432. Martinez testified it was important to look at documents to determine who resides at the residence, and if any purchases were made of a handgun or weapon with receipts. ROA. 2432-2434. Martinez testified LaRock found the storage receipt. ROA.2435. LaRock testified he assisted in executing the first search warrant with two other officers- DEA TFO Beach and Martinez, and they were looking for "weapons and ammunition" but *not papers*. ROA.2441-2442, 2448. LaRock found a handgun underneath the mattress in Def. Exh.6., ROA.3140, and a zipper bag with money between the box-spring and the wall. ROA.2442, 2446-2448. LaRock testified he did not know "who this house was," who was the target of the investigation, so he "collected some bills," "I think some electric… and water bills that had some names on them. I don't know the names that were on these bills." "I didn't have a particular name that I was looking for, so I just grabbed everything," "put them in a bag, listed…on the bag where I located those items, and I turned them over to… Beach for his review." ROA.2442-2443, 2451. LaRock testified he found the papers on top of the refrigerator in Def.Exh.6, ROA.3140, and on the dresser behind, although the photograph was not good.[8] ROA.2444. LaRock testified the papers were mail, some were opened bills, he *did not find a storage unit receipt*, and he handed the bunched-together paperwork, which "could have been" *stacked mail* to Beach. ROA.2441-2444. LaRock testified he did not open any mail, and a storage unit piece of mail could have been in the stack. ROA.2444-2445.

DEA TFO Beach testified he took the miscellaneous paperwork "in a stack of mail,"

[8] The Government did not present any photographs of the mail paperwork. LaRock testified Beach did a video and was taking photographs, along with crime scene techs. ROA.2442.

because "whenever I conduct a search warrant and our group kind of does this," referring to narcotics search warrants, indicating he was clearly in a narcotics investigator mode. ROA.2500-2501, 2505. Beach testified paperwork was found for electricity and internet or cable in the name of John Zapata and Jonathan Rodriguez. ROA. 2546. Beach testified having a storage unit is not illegal, the storage unit receipt was *in mail addressed to Brenda Rodriguez,* who was *not the target* of *any* investigation, the receipt was not in the name of anybody in the house and listed a *different* mailing address on Everhart Road . ROA. 2502-2504, 2519, 2547, 3054. Beach testified the Everhart Road address was confirmed to be a residential address for Brenda Rodriguez, and he later learned she was deceased. ROA.2547-2548, 2557-2558, *See* Govt Exh. 22- ROA.3054

The Return of the Search warrant did not list a storage unit receipt, but only said "Miscellaneous papers." ROA.2364. See Def.Exh.4- ROA.2366, 3102. The First Search warrant did not authorize collection of papers but only of firearms, ammunition and police equipment. ROA.3056-3059, 3061-3064.

Beach testified if he had not seized the storage receipt, it was "hard to say" if he would have been able to get the second search warrant on May 23, 2019 because the storage receipt "could have been found later," but was not. ROA.2509. *See* Gov.Exh.34- ROA.3096.

DEA DID NOT FREEZE THE SCENE AND SEEK A NARCOTICS SEARCH WARRANT AFTER FINDING THE DRUGS AT 1009 BLUNTZER

LaRock testified he broke open a safe found in the bathroom with a hammer at 1009 Bluntzer, recovering methamphetamine, pills and currency; and he recovered crack cocaine and money in a metal box near the windowsill of the same bed where the pistol was located. ROA.2449, 2454-2455, 2457-2458. LaRock did not remember if he found any pay/owe sheets. ROA.2455.

Matthews testified once the narcotics were found, it was not necessary to freeze the scene

and obtain a narcotics search warrant, and Beach never asked her if he could write a narcotics search warrant. ROA.2324-2325.

SECOND SEARCH WARRANT OFF BY ONE YEAR

Eleven days later, DEA TFO Beach authored and obtained the second search warrant on May 23, 2019 from a U.S. Magistrate. ROA.2505, 2513, 2545. *See* Govt Exh.32- ROA.3065-3078. Beach's Affidavit discussed the storage unit receipt for Brenda Rodriguez he seized in a stack of mail at 1009 Bluntzer. ROA. 2502-2506.

Beach's Affidavit was off by a year, incorrectly stating the storage receipt was dated April 18, "2018" instead of "2019." ROA.2506, 2544, 3065-3078. Beach testified this was a typographical error he did not catch until after the warrant was signed by the U.S. Magistrate Judge. ROA.2506, 2534. Beach testified he was the one who went to the Judge for signature, and he made no corrections to her when she signed the warrant. ROA.2506-2507. Beach testified the storage receipt was not attached to the affidavit. ROA.2507. Beach testified the affidavit also incorrectly stated security footage showed Jonathan Rodriguez entering the storage facility on May 12, "2018," over a year before, rather than "2019," which he also did not catch until after it was signed by the Judge. ROA.2508, 2536, 2544-2555, 3069. Beach testified he did not go back to the federal judge and tell her what happened. ROA.2509. Beach testified the one-year date mix-up was unintentional, as he understood what stale evidence was. ROA.2534-2536, 2539-2540.

Beach testified he began doing drug buys between March 2018 and February 2019 at 1009 Bluntzer. ROA.2535-2536. Beach testified he had video of Jonathan Rodriguez going inside of the storage facility on the same day as the first May 12, 2019 search warrant. ROA.2536.

ALL THREE SEARCH WARRANTS WERE INVALID

Officers exceeded the scope of the first warrant when they seized a mailed receipt

addressed to a non-suspect, Brenda Rodriguez, as outlined above. The Supreme Court has held "when an officer acting with objective good faith has obtained a search warrant…and acted within its scope… there is no police illegality and thus nothing to deter," *US. v. Leon*, 468 U.S. 897, 921 (1984). Here, the narcotics officers arguably over-reached with *forethought to exceed the scope of the search warrant*.

Here, the information on its face in the search warrants were so clearly lacking in probable cause that it was entirely unreasonable to render an official belief in its existence. In the first warrant, there was no alleged offense shown, as outlined above. In the second, regarding the storage unit, the one year off date was so stale it could not be argued it had probable cause. There was not a good faith exception. It was not practical or common sensical for officers to rely upon the search warrants in this case because of their lack of probable cause on their face.

The second search warrant signed by the United State Magistrate Judge stated the warrant must be executed within 14 days, which seemed to imply any excess days (over 14) would make the warrant stale.ROA.3065-3078.

No reasonable officer would have believed such a search warrant had probable cause and on its face. There was no evidence presented that other evidence was presented to the United States Magistrate to justify probable cause.

CONCLUSION

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

Date: December 5, 2023

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APPENDIX A- United States Court of Appeals, Fifth Circuit Opinion
(September 8, 2023) 2023 WL 5821787 (5th Cir. 2023)

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

UNITED STATES of America, Plaintiff—Appellee,

v.

Jonathan RODRIGUEZ, Defendant—Appellant.

No. 22-40235
|
FILED September 8, 2023

Appeal from the United States District Court for the Southern District of Texas, USDC No. 2:19-CR-656-1

Attorneys and Law Firms

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

Before Dennis, Engelhardt, and Oldham, Circuit Judges.

Opinion

Per Curiam:[*]

***1** Jonathan Rodriguez appeals his conviction for (1) conspiring to possess with intent to distribute cocaine base, *see* 21 U.S.C. §§ 846, 841(a)(1), (b)(1)(A); (2) possessing with intent to distribute cocaine, *see* 21 U.S.C. § 841(a)(1), (b)(1)(B); and (3) possessing a firearm in furtherance of a drug trafficking crime, *see* 18 U.S.C. §§ 924(c)(1)(A)(ii), (c)(2). The district court departed downward and sentenced Rodriguez to a below-Guidelines sentence of 300 months of imprisonment and five years of supervised release. ROA.793–94, 2284, 2869–70.

Rodriguez raises nineteen issues on appeal.[1] Four of the issues are directly foreclosed by binding precedent. *See United States v. Romans*, 823 F.3d 299, 316 (5th Cir. 2016) (foreclosing the challenge to the application of the preponderance standard to his Guidelines range calculation); *United States v. Bolton*, 908 F.3d 75, 95 (5th Cir. 2018) (foreclosing the challenge to the district court's consideration of acquitted conduct for sentencing purposes); *United States v. Beydoun*, 469 F.3d 102, 108 (5th Cir. 2006) (foreclosing the attempt to apply the Confrontation Clause to sentencing hearings); *United States v. Galloway*, 951 F.2d 64, 66 (5th Cir. 1992) (foreclosing the challenge to the sentencing disparity between powder and crack cocaine).

***2** The remaining fifteen issues fall into six different groups.

First, Rodriguez challenges the district court's denial of his suppression motion. We affirm the denial for substantially the reasons set out by the district court in its well-reasoned suppression order. ROA.3147–66.

Second, Rodriguez raises three unpreserved challenges, which we review for plain error. *See Puckett v. United States*, 556 U.S. 129, 131 (2009). We conclude that the district court did not commit plain error when it (1) entered judgment against Rodriguez for possessing a firearm in furtherance of a drug trafficking crime, (2) instructed the jury that the burden of proof for extraneous offenses is beyond a reasonable doubt, and (3) allowed testimony from a lay witness, based on his extensive knowledge and experience, about trap houses and drug ledgers.

Third, Rodriguez argues the district court abused its discretion in choosing to admit and exclude certain pieces of evidence. We see no abuse of discretion as to any of the district court's evidentiary decisions Rodriguez highlights.

Fourth, Rodriguez argues the evidence is insufficient to support his three counts of conviction. Rodriguez preserved his sufficiency challenges, so we review them *de novo*. *United States v. Moparty*, 11 F.4th 280, 296 (5th Cir. 2021). This review is "highly deferential" to the jury's verdict, and we will affirm if a rational jury could find that all elements of the crime were proved beyond a reasonable doubt. *Id.* (citation omitted). After reviewing the record, we find there is ample evidence to support that Rodriguez conspired to possess with intent to distribute more than 280 grams of crack cocaine, possessed with intent to distribute the cocaine seized from the storage unit, and possessed a firearm in furtherance of a drug trafficking crime.

Fifth, Rodriguez argues the district court committed multiple sentencing errors. After careful review, we reject Rodriguez's

arguments and conclude the district court committed no reversible sentencing errors.

Sixth, Rodriguez argues he is entitled to the return of his forfeited property. We find this argument inadequately briefed on appeal and therefore forfeited. *See, e.g., Rollins v. Home Depot USA*, 8 F.4th 393, 397 (5th Cir. 2021).

Accordingly, we AFFIRM the judgment of the district court. IT IS FURTHER ORDERED that Rodriguez's opposed motion to supplement the record on appeal is DENIED.

All Citations

Not Reported in Fed. Rptr., 2023 WL 5821787

Footnotes

* This opinion is not designated for publication. See 5th Cir. R. 47.5.

1 Rodriguez lists the following errors in his brief:

> (1) the district court erred by admitting illegally obtained evidence, (2) holding a pretrial hearing to admit evidence prejudiced the defense, (3) the court erred in admitting a drug buy video because it was unreliable and missing audio, (4) the evidence is insufficient to support a conviction for conspiracy to possess crack cocaine, possession with intent to distribute powder cocaine and possessing a firearm in furtherance of a drug trafficking crime, (5) the court excluded critical exculpatory evidence which deprived Rodriguez of his 14th Amendment right to due process and his 6th Amendment right to confrontation, (6) the offense of possessing a firearm in furtherance of a drug trafficking crime is unconstitutional, (7) Rodriguez has been denied a complete record of the proceedings for his appeal, (8) a jury instruction [that] extraneous offenses must be proven beyond a reasonable doubt was not given, (9) the court erred by admitting, over objection, unverifiable and misleading testimony regarding drug distribution methods and theories, (10) the PSR's factual narrative relied upon improper and unreliable facts, (11) preponderance of the evidence standard [is] unconstitutional for sentencing, (12) acquitted conduct should not be considered at sentencing, (13) violation of [the] Confrontation Clause during sentencing, (14) drug quantities were improperly calculated at sentencing, (15) premises enhancement was improper, (16) leadership enhancement was improper, (17) the mandatory minimum sentence and suggested guidelines for crack cocaine offenses violate equal protection clause, (18) a 300 month sentence was unreasonable, (19) Rodriguez's return of property request should be granted and his objection to seizure should be sustained.
>
> *See* Blue Br. 11–13.