NO. 24-_____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2024

HAROLD MCGHEE

Petitioner,

UNITED STATES OF AMERICA,

Respondent,

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF

APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Bart E. Beals
161 N. Clark, Suite 1700
Chicago, Illinois 60601
(312) 523-2001

QUESTION PRESENTED FOR REVIEW

1. Whether the District Court committed Procedural and substantive error when it denied the Defendant's Franks Motion?

2. Whether the District Court committed Procedural and Substantive error when it failed to hold an evidentiary hearing?

3. Whether the District Court committed Procedural and Substantive error when it failed to address the individual Subsequent GPS Tracker Warrants Affidavits on its face?

4. Whether the District Court committed Procedural and substantive error when it combined a Pre-franks Hearing with a Motion to Suppress Hearing where one was dependent on the other?

5. Whether the Judge committed Abuse of Discretion?

6. Whether a conviction under 18 USC 924 cc) is sustained without the "in furtherance of" prong of a firearm's use in drug trafficking offense?

7. Whether a conviction prior to the age 18 resulting in a sentence of probation may be used to trigger 18 USC 924(e), without being submitted to a jury?

LIST OF PARTIES

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

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **Page**

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2024

HAROLD MCGHEE

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

The Petitioner Harold McGhee respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit which was entered in the above-entitled case on July 10, 2024.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, entitled *United States v. Harold McGhee*, is reported at 98 F.4th 816 (7th Cir. 2024), and is attached hereto in the Appendix A.

JURISDICTION

On April 11, 2024, the United States Court of Appeals for the Seventh Circuit affirmed the sentence of the district court. No petition for rehearing was sought.

Petitioner seeks review of the Seventh Circuit judgment in this Court pursuant to 28 U.S.C. § 1254 (1).

STATUTE INVOLVED

Title 18, United States Code, Section 924(e)(1), provides, in pertinent part:

In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

Title 18, United States Code, Section 922(g)(1), provides, in pertinent part:

(g) It shall be unlawful for any person—

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

STATEMENT OF THE CASE

On February 14, 2022, 731 E. LaSalle Street, Peoria, Illinois was raided by federal law enforcement officers pursuant to a search warrant that had been signed by Magistrate Judge Hawley. The facts given to support the search warrant were the result of information that the federal law enforcement officers had received from local law enforcement officers based on an investigation that started in August of 2021. Local law enforcement officers received a tip from an untested confidential informant naming a "Luhrell McGhee" as a "big time cocaine dealer." Based on that information local law enforcement eventually started investigating Mr. McGhee. A GPS tracking warrant was applied for and granted by a Peoria Judge on September 17, 2021. The GPS tracking warrants were renewed several times but never filed with the state clerk or submitted to the Peoria States Attorney Office. Although, Mr. McGhee's register address was not 731 E. LaSalle and several of the affidavits to support the tracking warrants mention different addresses, eventually the local law enforcement officers conducted a warrantless "trash pull" from Mr. McGhee's private property outside of his fenced in backyard but before the alley.

The physical evidence gleaned from two of the three bags that were seized were part of the basis for the federal search warrant that was executed on February 14, 2022, at 731 E. LaSalle Street, Peoria, Illinois. The search and seizure of evidence along with the statements by Mr. McGhee on February 14, 2022, are what led to the indictment of Mr. McGhee on March 1, 2022. On July 19, 2022, an eight-count superseding indictment was filed against Mr. McGhee. Prior to trial Mr. McGhee filed several motions that include a motion to suppress evidence,

Franks motion, motion to dismiss, as well as motions in limine. The motions to suppress, Franks, and to dismiss were denied. Mr. McGhee was found guilty of all counts on December 1, 2022. In April of 2023, he filed a motion for mistrial, effectively alleging prosecutor misconduct due to questions about some evidence presented during trial.

REASONS FOR GRANTING THE WRIT

THE SEVENTH CIRCUIT COURT OF APPEAL'S DECISION WAS INCORRECT FOR FOUR REASONS

I THE DISTRICT COURT COMMITTED PROCEDURAL AND SUBSTANTIVE ERRORS BY DENYING THE FRANKS MOTION WITHOUT A HEARING

a. Standard of Review

The Appellate Courts "review the district court's denial of the defendant's request for a Franks hearing for clear error." *United States v. McMurtrey*, 704 F.3d 502, 508 (7th Cir. 2013)(*citing United States v. Schultz*, 586 F.3d 526, 531 (7th Cir. 2009)). The clear error inquiry "is factually based and requires that [This Court] give particular deference to the district court, any legal determinations that factor into the court's ruling are reviewed *de novo.*" *Id* (*citing United States v. Harris*, 464 F.3d 733, 737 (7th Cir. 2006)).

b. Analysis

1. The District Court Committed An Abuse of Discretion By Allowing Data Obtained From Tracker Devices That Were Installed Illegally

The issue of whether the federal government has violated the 4th Amendment rights of a citizen is the objectively reasonable expectation of privacy based society's

standards. *O'Connor* v. *Ortega*, 480 U.S. 709, 715, 94 L. Ed. 2d 714, 107 S. Ct. 1492 (1987);*California* v. *Ciraolo*, 476 U.S. 207, 211, 90 L. Ed. 2d 210, 106 S. Ct. 1809 (1986);*Oliver* v. *United States*, 466 U.S. 170, 177, 80 L. Ed. 2d 214, 104 S. Ct. 1735 (1984);*Katz* v. *United States*, 389 U.S. 347, 361, 19 L. Ed. 2d 576, 88 S. Ct. 507 (1967).

" The Amendment establishes a simple baseline, one that for much of our history formed the exclusive basis for its protections: When 'the Government obtains information by physically intruding' on persons, houses, papers, or effects, 'a 'search' within the original meaning of the Fourth Amendment has 'undoubtedly occurred.'" *Florida v. Jardines*, 569 U.S. 1, 5 (2013) (*quoting United States* v. *Jones*, 565 U.S. 400, 406-407, n. 3, 132 S. Ct. 945, 181 L. Ed. 2d 911, 919 (2012)). "Like the automobile exception, the Fourth Amendment's protection of curtilage has long been black letter law. '[W]hen it comes to the Fourth Amendment, the home is first among equals.'" *Collins v. Virginia*, 138 S.Ct. 1663, 1670 (2018) (*quoting Florida* v. *Jardines*, 569 U.S. 1, 6, 133 S. Ct. 1409, 185 L. Ed. 2d 495 (2013)). "The protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened." *California* v. *Ciraolo*, 476 U.S. 207, 212-213, 106 S. Ct. 1809, 90 L. Ed. 2d 210 (1986).

The United States Supreme Court has even ruled that without probable cause, even the disclosure of a person's GPS movement that is disclosed by a third party is still a violation of the Fourth Amendment. *Carpenter v. United States*, 585 U.S. 296 (2018); see also *United States v.*

Jones, 565 U.S. 400 (2012)(where the court suppressed evidence of the defendant's movements that was obtained by a GPS tracker that was illegally installed on the Defendant's vehicle without consent while the vehicle was on public property). In both cases the evidence was suppressed since it was fruit of the poisonous tree.

The search warrant should have been invalidated based on being granted in part based on fruit of the poisonous tree information. One of the reasons for the search warrant was the information obtained through the GPS Trackers. The government violated Mr. McGhee's privacy when law enforcement officers trespassed onto his property at the LaSalle address to install the trackers. Secondly, the length of time the Original State issued GPS Tracker Warrant (45 days) violated the defendant's fourth Amendment rights. The subsequent warrants that were issued under the guise of "extension of the original State issued warrant issued GPS Tracker warrants over a period Spanning from September 2021- February 2022 that failed to follow the state court law of filing a return in a reasonable time outlining what was located. This law is even more specifically in GPS Tracker warrants. The government effectively violated Mr. McGhee's privacy, gathered information illegally, and then used the fruit of the poisonous tree information in an application for a search warrant.

2. Under the Circumstances a Hearing was Required For The Franks Motion

"The defendant must identify specific portions of the warrant affidavit as intentional or reckless misrepresentations, and the claim of falsity should be substantiated by the sworn

statements of witnesses." *Franks*, 438 U.S. at 171. "To obtain a hearing, the defendant must also show that if the deliberately or recklessly false statements were omitted, or if the deliberately or recklessly misleading omissions included, probable cause would have been absent." See *id.* at 171-72.

Mr. McGhee met the standard necessary to have a full Franks hearing. Mr. McGhee, through counsel, showed several concerning facts regarding affidavits that supported the search warrants. The government conceded to the court's assessment of the illegalities in the execution of the GPS Tracker Warrants. Yet, the Court proceeded to give what equated to a full Franks hearing on the federal search warrant for the 731 La Salle Street house. This violated the defendant's Due Process and Confrontation Clause rights.

Mr. McGhee demonstrated that the tracker warrants were not issued in accordance with the state procedure. Mr. McGhee was able to demonstrate through counsel that the affidavits supporting the warrants in state and federal court were confusing and contradictory. Finally, McGhee was able to show that but for the confusing and contradictory natures of the affidavits the remaining information in the search warrants would not have been enough to provide probable cause to grant the search warrant.

"The focus of such a pre-Franks hearing is to determine whether the preliminary showing could be met." *United States v. Sanford*, 35 F.4th 595, 598 (7th Cir. 2022). A "may be problematic if the government is allowed to present new evidence but the defense is not afforded a full opportunity for cross-examination." *Id.* "Allowing the government to bolster the

magistrate's probable cause determination through post-hoc filings does not satisfy the Fourth Amendment concerns addressed in Franks." *United States v. Harris*, 464 F.3d 733, 739 (7th Cir. 2006). "The problem arises, though, when a "*pre-Franks*" hearing becomes a vehicle for the government to present new evidence to explain the discrepancies identified by the defense, yet the defense is not given a full opportunity to challenge or rebut that evidence." *United States v. McMurtrey*, 704 F.3d 502, 509 (7th Cir. 2013).

The pre-Franks went awry in this case when, once the illegality of the State GPS Tracker Warrants was identified by the district court and conceded to by the government. A full Franks hearing on those warrants alone should have followed, or if deemed by the district court to have granted the motion to suppress. The district court committed procedural error by allowing the government to supplement its response through argument to characterize the nature of the defense's evidence and argument without a factual hearing where the defense could have cross-examined the witnesses to determine the reason for the contradictions and discrepancies in the affidavits.

II THE DISTRICT COURT VIOLATED FEDERAL RULES OF EVIDENCE AND MR. MCGHEE'S SIXTH AMENDMENT RIGHTS BY ALLOWING OFFICER LOGAN TO TESTIFY REGARDING AN UNDERCOVER BUY

A. Legal Standard

A question of law is reviewed *de novo. United States v. Mendoza,* 510 F.3d 749, 754 (7th Cir.2007).

B. Analysis

1. Violation of the Confrontation Clause

"The Confrontation Clause of the Sixth Amendment guarantees the right of an accused to 'be confronted with the witnesses against him.'" *United States v. Sasson*, 62 F.3d 874, 882 (7th Cir. 1995). "In order to establish a violation of the Confrontation Clause, the defendant is not required to show prejudice with respect to the trial as a whole, but rather, the focus is on individual witnesses." *Id.* The purpose of the Confrontation Clause of the Sixth Amendment is to provide a procedural guarantee to ensure the reliability of the testimonial evidence by subjecting the witness and thus the testimony to cross examination. *Crawford v. Washington*, 541 U.S. 36, 62, 124 S. Ct. 1354, 1370 (2004). "Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with a jury trial because a defendant is obviously guilty. That is not what the Sixth Amendment prescribes." *Crawford v. Washington*, 541 U.S. 36, 62, 124 S. Ct. 1354, 1371 (2004).

The government provided proof to the jury that Mr. McGhee alleged sold drugs on a different occasion through hearsay testimony from an officer regarding conversations between an unnamed confidential informant and Mr. McGhee. The government was then allowed to bolster that hearsay evidence with additional hearsay evidence of an unauthenticated video of an alleged drug transaction that purported to involve Mr. McGhee. The government was further able to introduce evidence of alleged drugs that were involved int eh under cover buy without providing the proper chain of custody.

III THE DISTRICT COURT ERRED BY DENYING THE MOTION TO DISMISS 924(C) AND 922(G) COUNTS

1. 924(c)

"[T]he mere presence of a firearm in a home or location where drugs are sold is not itself sufficient to prove the 'in furtherance of' prong of the statute and that there must be some nexus or connection between the firearm and the drug-selling operation." *United States v. Eller*, 670 F.3d 762, 765 (7th Cir. 2012). To sustain a conviction for a violation of *18 USC 924(c)*, "the Government must show the defendant actively employed the firearm during and in relation to the predicate crime." *United States v. Abdul*, 75 F.3d 327, 330 (7th Cir. 1996). "It does not include mere placement of a firearm for protection at or near the site of a drug crime or its proceeds or paraphernalia, or the nearby concealment of a gun to be at the ready for an imminent confrontation." *Id.*

"Given ordinary meaning and the conventions of English, we hold that a person does not "use" a firearm under *§ 924(c)(1)(A)* when he receives it in trade for drugs." *Watson v. United States*, 552 U.S. 74, 83 (2007).

The facts alleged in the discovery could not sustain a conviction for 924(c). The was no nexus between the firearm and furtherance of a drug trafficking crime. According to the indictment and discovery the instant case was based on a search pursuant to a search warrant where drugs and a firearm were found in the home of Mr. McGhee. The firearm was found in a different room than where the drugs were recovered. There was no initial allegation that Mr. McGhee used the firearm to threaten or intimidate people. The only allegation was that Mr. McGhee used a small amount of drugs to purchase the firearm from a drug addict. The evidence presented in discovery and during trial was insufficient to establish a nexus to satisfy the requirements of 924(c)

2. 922(g) is Unconstitutional

It is the position of the defense that *18 U.S.C. §922(g)(1)* is unconstitutional as applied to Mr. McGhee. Since *18 U.S.C. §922(g)(1)* is unconstitutional as applied to Mr. McGhee, he is motion for dismissal should have been granted. The Supreme Court's "text and tradition" approach to the Second Amendment, outlined and explained in *Atkinson v. Garland,* 70 F.4th 1018 (7th Cir. June 20, 2023), *Range v. Att'y Gen. United States of Am.,* 69 F.4th 96, 103 (3d Cir. 2023) (en banc), and *New York State Rifle & Pistol Ass'n v. Bruen,* 142 S. Ct. 2111 (2022), compels the conclusion that *§922(g)(1)* is unconstitutional.

The felony convictions used to sustain the conviction for 922(g)(1) in the instant case are nonviolent drug offenses. As applied to Mr. McGhee those offenses were not contemplated by the founders as a reason to strip a citizen of this country of his/her Second Amendment rights.

IV Mr. McGhee's Conviction For Aggravated Battery Should Have Been Submitted to The Jury For Determination As To Whether It Was A Qualifying Conviction Under The Armed Career Criminal Statute ("ACCA")

Pursuant to *Erlinger v. United States*, that was recently decided by this Court, whether Mr. McGhee's conviction, 91 CF 1069, qualified as a conviction under the ACCA should have been submitted to the jury instead of to the judge in a motion in *limine*.1 "Only the jury may find 'facts that increase the prescribed range of penalties to which a criminal defendant is exposed.'" *Erlinger v. United States*, 209 L.Ed.2d 451, 463 (2024)(*quoting Apprendi v. New*

1 This issue was not raised during the motion for new trial, sentencing hearing, or during the appeal. It is being raised strictly based on the *Erlinger v. United States* ruling.

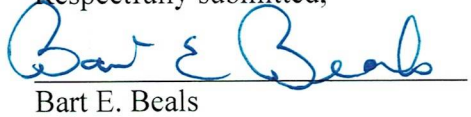
Jersey, 530 U.S. 466, 490 (2000)). "Any fact that, by law, increases the penalty for a crime is an "element" that must be submitted to the jury and found beyond a reasonable doubt." *Alleyne v. United States*, 570 U.S. 99, 103 (2013).

Mr. McGhee was not sentenced to a term of imprisonment based on his 91 CF 1069 conviction. 4A1.2(a)(1) that states "[t]he term "prior sentence" means any sentence previously imposed upon adjudication of guilt, whether by guilty plea, trial, or plea of *nolo contendere*, for conduct not part of the instant offense." There is a factual question as to whether Mr. McGhee's term of probation qualifies under section 4A1.2(a)(1).

CONCLUSION

WHEREFORE, for the reasons stated above, Petitioner Harold McGhee respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States of Appeals for the Seventh Circuit entered on April 11, 2024.

Respectfully submitted,



Bart E. Beals
Petitioner for Harold McGhee

Bart E. Beals
161 N. Clark, Suite 1700
Chicago, Illinois 60601
(312) 324-4892
bealslaw@gmail.com

No. 24- _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM,

HAROLD MCGHEE

Petitioner,

vs.

UNITED STATES OF AMERICA

Respondents.

PROOF OF SERVICE

I, Bart E. Beals, do swear or declare that on this date, July 10, 2024 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 name and addresses of those served are as follows:

Clerk
Supreme Court of the United States
Washington, D.C. 20543

Solicitor General of the United States
Room 5614
10th and Constitution Avenue
Washington, D.C. 20530

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

Executed on July 10, 2024

Bart E Beals

(Signature)

APPENDICE

Opinion Below

United States v. McGhee

United States Court of Appeals for the Seventh Circuit

February 21, 2024, Argued; April 11, 2024, Decided

No. 23-1615

Reporter
98 F.4th 816 *; 2024 U.S. App. LEXIS 8716 **; 2024 WL 1563865

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. HAROLD U. MCGHEE, Defendant-Appellant.

Prior History: [**1] Appeal from the United States District Court for the Central District of Illinois. No. 1:22-cr-10007-001 — Michael M. Mihm, Judge.

Case Summary

Overview

HOLDINGS: [1]-The district court properly denied a Franks hearing because defendant did not make the required preliminary showing that the warrant affidavit contained intentional or reckless falsities; [2]-The trash pull was constitutional because defendant had no privacy interest in trash left outside the curtilage of his home; [3]-The court held that playing the video of the controlled buy with the confidential source's voice did not violate defendant's confrontation right because the confidential informant's statements provided context for defendant's own admissions, not for their truth; [4]-The court further held the within-guidelines sentence was reasonable based on the district court's consideration of the *18 U.S.C.S. § 3553(a)* factors.

Outcome

Judgment affirmed.

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Standards of Review > Clearly Erroneous Review > Findings of Fact

***HN1*[↓] Clearly Erroneous Review, Findings of Fact**

The appellate court reviews a district court's decision denying a hearing for clear error. The district court's factual findings receive deference, and its legal determinations are reviewed de novo.

Criminal Law & Procedure > ... > Search Warrants > Affirmations & Oaths > Sufficiency Challenges

***HN2*[↓] Affirmations & Oaths, Sufficiency Challenges**

Under Franks, a defendant must make a substantial preliminary showing that the affidavit supporting a search warrant is problematic. The court may, at its discretion, hold a hearing to determine whether the preliminary showing could be met. In making that showing, a defendant need not disprove reasonable explanations for the omission of the information before the hearing itself. Though the government is entitled to respond to a defendant's motion, the district court must not—should it elect to hold a hearing on that motion—permit the government to bolster the affidavit without giving the defendant a

full opportunity to challenge or rebut that evidence.

Criminal Law & Procedure > Search & Seizure > Search Warrants > Particularity Requirement

Evidence > ... > Procedural Matters > Objections & Offers of Proof > Offers of Proof

HN3[] **Search Warrants, Particularity Requirement**

A defendant must make three substantial preliminary showings to earn such a hearing: (1) the warrant affidavit contained false statements, (2) these false statements were made intentionally or with reckless disregard for the truth, and (3) the false statements were material to the finding of probable cause. The second showing requires an offer of proof.

Criminal Law & Procedure > ... > Standards of Review > Clearly Erroneous Review > Findings of Fact

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > Motions to Suppress

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Suppression of Evidence

Criminal Law & Procedure > ... > Standards of Review > Clearly Erroneous Review > Motions to Suppress

HN4[] **Clearly Erroneous Review, Findings of Fact**

The appellate court reviews a district court's denial of a motion to suppress de novo as to legal conclusions and for clear error as to factual findings.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Abandoned Property

Criminal Law & Procedure > Search & Seizure > Expectation of Privacy

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Open Fields

HN5[] **Search & Seizure, Scope of Protection**

A person does not possess a reasonable expectation of privacy in the inculpatory items that he discarded in plastic garbage bags left on or at the side of a public street. That principle rings truer when the bags are left in this manner for trash pickup. In that case, the person leaves the bags for the express purpose of having strangers take and sort through the items within. As to homes more generally, the lack of a warrant prevents the physical occupation of private property for the purpose of obtaining information. But the shield of the *Fourth Amendment* ends at the boundary of a home's curtilage.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

HN6[] **Search & Seizure, Scope of Protection**

What a person knowingly exposes to the public is not a subject of *Fourth Amendment* protection.

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > Right to Counsel

Evidence > Admissibility > Procedural

Matters > Rulings on Evidence

HN7[] **De Novo Review, Right to Counsel**

The appellate court reviews evidentiary rulings affecting a defendant's *Sixth Amendment* rights de novo.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Right to Confrontation

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Confrontation

Evidence > ... > Exceptions > Residual Exception > Confrontation Clause Requirements

Evidence > Types of Evidence > Demonstrative Evidence > Recordings

HN8[] **Criminal Process, Right to Confrontation**

The *Confrontation Clause*, *U.S. Const. amend. VI*, does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted. Statements providing context for other admissible statements are not offered for their truth. Therefore, the admission of recorded conversations between informants and defendants is permissible where an informant's statements provide context for the defendant's own admissions.

Criminal Law & Procedure > ... > Appeals > Standards of Review > Abuse of Discretion

Criminal Law & Procedure > Sentencing > Appeals > Proportionality & Reasonableness Review

Criminal Law & Procedure > Sentencing > Imposition of Sentence > Factors

Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion

HN9[] **Standards of Review, Abuse of Discretion**

A challenge to the substantive reasonableness of a sentence is reviewed for an abuse of discretion. When a district court imposes a within-U.S. Sentencing Guidelines sentence, the appellate court's deference is at its peak. When challenging such a sentence, the defendant must demonstrate that his sentence is unreasonable when measured against the factors set forth in *18 U.S.C.S. § 3553(a)*. If a district court offers an adequate statement of its reasons, the sentence is reasonable.

Criminal Law & Procedure > Sentencing > Imposition of Sentence > Factors

Criminal Law & Procedure > Trials > Judicial Discretion

HN10[] **Imposition of Sentence, Factors**

District courts enjoy discretion in assigning weights to the *18 U.S.C.S. § 3553(a)* factors and affirming within-U.S. Sentencing Guidelines sentence.

Criminal Law & Procedure > ... > Reviewability > Preservation for Review > Failure to Object

HN11[] **Preservation for Review, Failure to Object**

A defendant can waive arguments in proceedings before the district court. Waiver occurs when a party intentionally relinquishes a known right, and it extinguishes error and precludes appellate

review. The appellate court asks whether the defendant's decision not to object was knowing and intentional, which is often the case where the defendant chose—as a matter of strategy—not to present an argument. Similarly, a defendant can waive an argument by affirmatively disclaiming an objection at trial.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > ... > Sentencing Guidelines > Adjustments & Enhancements > Armed Career Criminals

HN12 **Fundamental Rights, Cruel & Unusual Punishment**

The *Eighth Amendment*, *U.S. Const. amend. VIII*, does not prohibit the use of a juvenile conviction to support application of the Armed Career Criminal Act, 18 U.S.C.S. § 924(e), enhancement.

Criminal Law & Procedure > ... > Reviewability > Preservation for Review > Abandonment

Criminal Law & Procedure > Appeals > Procedural Matters > Briefs

HN13 **Preservation for Review, Abandonment**

Even when arguments are properly preserved, a defendant can waive them on appeal. Perfunctory and undeveloped arguments, and arguments that are unsupported by pertinent authority, are waived even where those arguments raise constitutional issues. It is not this court's responsibility to do the work of researching and constructing legal arguments for parties, particularly those with counsel. Relatedly, under *Fed. R. App. P. 28(a)(8)(A)*, the argument section of an appellant's brief must include citations to the authorities and parts of the record on which he relies. Litigants must bear in mind that the failure to properly argue their contentions may well result in a finding of abandonment.

Criminal Law & Procedure > Postconviction Proceedings > Motions for New Trial

HN14 **Postconviction Proceedings, Motions for New Trial**

A motion for new trial must be filed within fourteen days, unless it alleges new evidence. *Fed. R. Crim. P. 33(b)(1), (2)*.

Criminal Law & Procedure > Appeals > Procedural Matters > Briefs

HN15 **Procedural Matters, Briefs**

The appellant must prepare and file an appendix containing relevant docket entries from the proceeding in the district court. *Fed. R. App. P. 30(a)(1)(A)*. The Seventh Circuit court is more specific: The appellant shall submit, bound with the main brief, an appendix containing the judgment or order under review and any opinion, memorandum of decision, findings of fact and conclusions of law, or oral statement of reasons delivered by the trial court. Cir. R. 30(a). The court also requires the appellant to certify that he has provided those materials. Cir. R. 30(d). There are consequences for failing to comply with Rule 30. Actions courts may take against appellants for noncompliance include sanctions against counsel, summary affirmance, or refusal to address arguments. In criminal cases, the appropriate penalty for noncompliance is a fine imposed on counsel.

Counsel: For UNITED STATES OF AMERICA, Plaintiff - Appellee: Katherine Virginia Boyle,

Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Urbana, IL; W. Scott Simpson, Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Springfield, IL.

For HAROLD U. MCGHEE, Defendant - Appellant, Bart E. Beals, Attorney, BEALS LAW FIRM, Chicago, IL.

Judges: Before EASTERBROOK, BRENNAN, and KIRSCH, Circuit Judges.

Opinion by: BRENNAN

Opinion

[*819] BRENNAN, *Circuit Judge*. Harold McGhee challenges many of the proceedings that led to his convictions and sentence for drug trafficking. His arguments are without merit or waived, so we affirm the district court in full.

I

In August 2021, a confidential source informed law enforcement that a drug dealer was distributing large amounts of cocaine in Peoria, Illinois. The source said the dealer drove a Chevy Malibu and supplied cocaine to a house on West Millman Street. With this information, details from other informants, and a tracking warrant obtained in state court, the police learned that McGhee lived on LaSalle Street, drove a Chevy Malibu, and delivered cocaine. From this, they reasonably **[**2]** suspected that the drug dealer was McGhee.

Law enforcement investigated McGhee further. Between August and December 2021, they conducted three controlled buys. At the third buy, performed near the LaSalle Street house and recorded on video, a confidential source met with McGhee directly and purchased 8.5 grams of cocaine.

Two months later, agents conducted a trash pull at the LaSalle Street house. Two large garbage cans were set out for that day's collection in the alley fifty feet behind the house and outside its fenced-in yard. The garbage and garbage cans were covered in snow. Three kitchen size bags were sitting in the cans on top of the snow. Officers opened the bags and found rubber gloves and baggies with a white powdery residue, which tested positive for cocaine.

Based on all of this evidence, law enforcement obtained a search warrant for the LaSalle Street house, the Chevy Malibu, McGhee's person, and his electronic devices. The affidavit supporting the warrant recounted details of the investigation and included statements by confidential sources, McGhee's history of drug trafficking convictions, and his affiliation with the LaSalle Street house. The affidavit described **[*820]** that **[**3]** house as the "SUBJECT PREMISES" and did not use that phrase for any other building. When the warrant was executed, police discovered nearly a kilogram of various drugs, including methamphetamine, heroin, fentanyl, marijuana, and cocaine (powder and crack). Law enforcement also recovered a handgun and other paraphernalia related to drug trafficking. McGhee was later charged with five drug-related counts and three firearm counts.

McGhee sought to suppress the evidence recovered at the LaSalle Street house and moved for a hearing to challenge the validity of the search warrant under *Franks v. Delaware, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978)*. He argued the affidavit's use of "SUBJECT PREMISES," in reference to both the LaSalle Street house and the Millman Street house, was impermissibly ambiguous. The district court denied the motion. McGhee's appointed counsel then withdrew, and McGhee pursued his defense pro se until this appeal.

McGhee later renewed his motion to suppress, raising only a new argument that the trash pull was constitutionally unreasonable because it was executed without a warrant. To him, this constitutional infirmity poisoned the evidence recovered during execution of the federal search

warrant. Based in part on testimony from **[**4]** law enforcement about the location of the trash bags, the court denied McGhee's motion.

The government sought a number of pretrial rulings. Two are relevant here. First, it asked the district court to prohibit McGhee from challenging the lawfulness of the searches or seizures or asking witnesses to identify the confidential sources. Second, the government requested a pretrial ruling that McGhee had three prior convictions qualifying him for a mandatory minimum sentence of fifteen years under the *Armed Career Criminal Act, 18 U.S.C. § 924(e)*. McGhee objected to the second motion, asserting that one of the underlying convictions—which he committed as a minor—did not qualify as a "violent felony." But, he also acknowledged that the *Eighth Amendment* did not prohibit the use of the juvenile conviction to enhance his sentence. The court granted both motions.

Jury trial commenced. Despite the court's instruction that the controlled buys were off-limits, McGhee repeatedly attempted to establish that he did not engage in them. So, the government requested permission to show the jury a video capturing the third controlled buy. The court granted that request and denied McGhee's request to call the confidential source (heard in the video's audio) to the stand, **[**5]** as the video was played only to show that the buy occurred. The government introduced the video through the testimony of Officer David Logan. McGhee stated, "No objection," when the video was admitted into evidence.

On recross-examination of Logan, McGhee asked why the cocaine from the third controlled buy was not in court with the rest of the evidence. Logan responded it was still being tested.[1] During a sidebar, McGhee asked for the cocaine to be admitted into evidence. The court directed the government to attempt to retrieve it from the drug lab. The next day the government produced the cocaine, and it was received into evidence. After further recross, McGhee again insisted at a sidebar that the confidential source testify and persisted **[*821]** in his attempts to prove that the controlled buy never happened.

On the fifth and final day of trial, the jury found McGhee guilty on all counts.

About three months later, McGhee moved for a new trial, arguing that the cocaine from the third controlled buy was fabricated and that the buy never occurred. McGhee contended that he learned from a call with the laboratory responsible for testing the cocaine that (1) the laboratory only received evidence from **[**6]** 2022, not from 2021 when the controlled buy occurred, and (2) the cocaine would have included a sticker with information pertinent to its testing. He asserted the evidence submitted at trial had no date and no time on it. The cocaine then, he argued, was fabricated. The district court denied McGhee's motion.

The court sentenced McGhee to 420 months' imprisonment. This sentence was within the Guidelines range and included the ACCA enhancement requested by the government. In pronouncing McGhee's sentence, the court discussed the required *18 U.S.C. § 3553(a)* factors and heard McGhee's objections to the presentence report. McGhee did not raise a constitutional objection to the application of the ACCA enhancement.

II

On appeal, McGhee raises ten challenges to the criminal proceedings resulting in his convictions and sentence. We consider some of his arguments on the merits and resolve others on procedural grounds.

[1] McGhee was not charged with anything arising out of that specific buy, so that cocaine was not originally brought to trial.

A

A-6

Four of McGhee's contentions have been properly appealed.

1. Franks *determination.* McGhee asserts the district court erred by permitting the government to respond during a hearing on his *Franks* motion without permitting cross-examination and by denying the motion. ***HN1***[↑] This court reviews a district court's decision **[**7]** denying a *Franks* hearing for clear error. *United States v. McMurtrey, 704 F.3d 502, 508 (7th Cir. 2013)*. The district court's factual findings receive deference, and its legal determinations are reviewed de novo. *United States v. Taylor, 63 F.4th 637, 650 (7th Cir. 2023)*.

HN2[↑] Under *Franks*, a defendant must make a "substantial preliminary showing" that the affidavit supporting a search warrant is problematic. *438 U.S. at 170, 171*. The court may, at its discretion, hold a hearing "to determine whether the preliminary showing could be met." *United States v. Sanford, 35 F.4th 595, 598 (7th Cir. 2022)*. In making that showing, a defendant "need not disprove" "reasonable explanations for the omission of the information ... before the *Franks* hearing itself." *United States v. Glover, 755 F.3d 811, 820 (7th Cir. 2014)*. Though the government is entitled to respond to a defendant's *Franks* motion, the district court must not—should it elect to hold a hearing on that motion—permit the government to bolster the affidavit without giving the defendant "a full opportunity to challenge or rebut that evidence." *McMurtrey, 704 F.3d at 509*.

The district court did not procedurally err by allowing the government to respond to McGhee's *Franks* motion. The government did not introduce new evidence or call witnesses. And the district court restricted its analysis to McGhee's attempted showing and the proof he offered that the affidavit contained false statements, without weighing possible alternatives.

[*822] The court correctly **[**8]** denied McGhee's motion for a *Franks* hearing. ***HN3***[↑] A defendant must make three substantial preliminary showings to earn such a hearing: "(1) the warrant affidavit contained false statements, (2) these false statements were made intentionally or with reckless disregard for the truth, and (3) the false statements were material to the finding of probable cause." *Sanford, 35 F.4th at 597* (quotation marks omitted). The second showing requires "an offer of proof." *Franks, 438 U.S. at 171*.

McGhee asserts he met his burden by showing that the affidavit contained two false statements, both of which were necessary for the probable cause determination. First, he says the state tracker warrants were falsified because they were never filed with the state clerk's office. Second, he says the federal search warrant contradicts the state tracker warrant because it is ambiguous as to whether a November 16, 2021 controlled buy occurred at the Milmann Street or LaSalle Street house.

These assertions are not enough. The fact that the tracker warrants were never filed is not proof that they were falsified. McGhee's conclusory statement does not follow from his offer of proof. *See United States v. Johnson, 580 F.3d 666, 671 (7th Cir. 2009)* (concluding that defendant failed to meet burden to show falsity of warrant where he **[**9]** "provide[d] no evidentiary basis" for that assertion).

McGhee's second assertion fares no better. He alleges the search warrant confused the address the state tracker warrants targeted with the one the affidavit sought to search. The tracker warrants mention only the Millman Street house, whereas the search warrant identified the LaSalle Street House—the "SUBJECT PREMISES"—as the "Property to Be Searched." McGhee argues that two uses of "SUBJECT PREMISES" in the affidavit refer to the Millman Street house, not the LaSalle Street house, and thus constitute a falsehood.

These two uses are not problematic. The best McGhee can say is the federal warrant is ambiguous. But this is a factual determination, to

which we defer to the district court. *Taylor, 63 F.4th at 650*. And as that court put it, ambiguity does not mean falsity. We conclude that the district court did not clearly err in denying McGhee a *Franks* hearing.

2. HN4[↑] Motion to suppress. We review a district court's denial of a motion to suppress de novo as to legal conclusions and for clear error as to factual findings. *United States v. Correa, 908 F.3d 208, 214 (7th Cir. 2018)*.

HN5[↑] A person does not possess a "reasonable expectation of privacy in the inculpatory items that [he] discarded" in "plastic garbage bags left on or at **[**10]** the side of a public street." *California v. Greenwood, 486 U.S. 35, 40, 41, 108 S. Ct. 1625, 100 L. Ed. 2d 30 (1988)*. That principle rings truer when the bags are left in this manner for trash pickup. *Id.* In that case, the person leaves the bags "for the express purpose" of having strangers take and "sort[] through" the items within. *Id. at 40*. As to homes more generally, the lack of a warrant prevents the physical occupation of "private property for the purpose of obtaining information." *United States v. Jones, 565 U.S. 400, 404, 132 S. Ct. 945, 181 L. Ed. 2d 911 (2012)*. But the shield of the *Fourth Amendment* ends at the boundary of a home's curtilage. *See Florida v. Jardines, 569 U.S. 1, 5-6, 133 S. Ct. 1409, 185 L. Ed. 2d 495 (2013)*.

The evidence McGhee seeks to suppress was recovered from garbage bags, found in garbage cans, sitting in an **[*823]** alley outside the curtilage of the LaSalle house, awaiting trash pickup. Therefore, the search occurred outside the reach of McGhee's reasonable expectation of privacy and comported with *Greenwood*. *HN6*[↑] "What a person knowingly exposes to the public ... is not a subject of *Fourth Amendment* protection." *Katz v. United States, 389 U.S. 347, 351, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967)*. The search complied with the *Fourth Amendment*, so McGhee's motion to suppress was properly denied.

3. HN7[↑] Confrontation of confidential source. We review evidentiary rulings affecting a defendant's *Sixth Amendment* rights de novo. *United States v. Foster, 701 F.3d 1142, 1150 (7th Cir. 2012)*. McGhee asserts these rights were violated when the district court denied his request for the confidential source, whose voice is heard during the controlled **[**11]** buy video, to testify at trial.

HN8[↑] The *Confrontation Clause* "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." *Crawford v. Washington, 541 U.S. 36, 59 n.9, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)*. "[S]tatements providing context for other admissible statements ... are not offered for their truth." *United States v. Van Sach, 458 F.3d 694, 701 (7th Cir. 2006)*. Therefore, "[t]he admission of recorded conversations between informants and defendants is permissible where an informant's statements provide context for the defendant's own admissions." *Foster, 701 F.3d at 1150*.

The district court did not violate McGhee's *Confrontation Clause* right. The court permitted the playing of the video only as proof that the controlled buy occurred because McGhee's own questioning had opened the door. Whether the source's statements are true "is ... immaterial." *Id. at 1151*. McGhee had no right to confront the confidential source.

4. McGhee's sentence. McGhee argues his within-Guidelines sentence of 420 months' imprisonment was unreasonable because of three facts he did not raise with the sentencing court: (a) he was convicted of a nonviolent crime; (b) he did not use or threaten to use a firearm; and (c) his age.

HN9[↑] A challenge to the substantive reasonableness of a sentence is reviewed for an abuse of discretion. *United States v. Williams, 85 F.4th 844, 847 (7th Cir. 2023)*. When a district court imposes a within-Guidelines **[**12]** sentence, our "deference is at its peak." *Id.* When challenging such a sentence, the defendant must

"demonstrat[e] that his ... sentence is unreasonable when measured against the factors set forth in § 3553(a)." United States v. Vallar, 635 F.3d 271, 279 (7th Cir. 2011) (cleaned up). If a district court offers an "adequate statement of its reasons," the sentence is reasonable. United States v. Annoreno, 713 F.3d 352, 359 (7th Cir. 2013) (cleaned up).

The district court considered the § 3553(a) factors at the sentencing hearing and in its statement of reasons. The court noted the sheer amount of drugs at issue; McGhee's awareness of the harm those drugs could cause and his decision to sell them; his prior offenses; his parents' absence during childhood and his decision to join a gang; his epilepsy and past drug abuse issues; his desire to receive a GED; and the fact that he was not a good candidate for rehabilitation. These reasons track several of the § 3553(a) factors, including the nature and circumstance of the offense, McGhee's history and characteristics, his educational and vocational training, and his medical care. *See* 18 U.S.C. §§ 3553(a)(1), (a)(2)(D). The record shows that the district court was also cognizant of **[*824]** the need to impose a sentence that "reflects the seriousness of the offense, promotes respect for the law, provides just punishment ... **[**13]** [and] adequate deterrence, and takes note" of the applicable Guidelines. *See id.* §§ 3553(a)(2)(A), (a)(4).

The facts McGhee points to do not persuade us that the district court abused its discretion. His arguments amount to an objection to how the court weighed the § 3553(a) factors. But that does not mean his sentence is unreasonable. McGhee cannot overcome the presumption that his within-Guidelines sentence is reasonable by contesting the district court's weighing decision. *See* United States v. Melendez, 819 F.3d 1006, 1013 (7th Cir. 2016) ***HN10***[↑] (noting that district courts enjoy "discretion in assigning weights to the § 3553(a) factors" and affirming within-Guidelines sentence.) McGhee's within-Guidelines sentence was reasonable.

B

Problems arise for McGhee's six remaining arguments. He waived them, they are moot, he failed to comply with the applicable circuit and procedural rules in briefing them, or some combination of these obstacles dispose of these challenges.

1. McGhee failed to make two arguments in the district court, so he waived them. ***HN11***[↑] A defendant can waive arguments in proceedings before the district court. "Waiver occurs when a party intentionally relinquishes a known right," and it "extinguishes error and precludes appellate review." United States v. Flores, 929 F.3d 443, 447 (7th Cir. 2019).[2] We ask "whether the defendant's decision **[**14]** not to object was knowing and intentional," which is "often" the case "where the defendant chose—as a matter of strategy—not to present" an argument. *Id.* at 448. Similarly, a defendant can waive an argument by affirmatively disclaiming an objection at trial. United States v. Ridley, 826 F.3d 437, 443 n.1 (7th Cir. 2016).

McGhee argues on appeal that the court violated the Eighth Amendment by applying the ACCA enhancement based in part on a juvenile predicate offense. In response to the government's motion in limine in the district court, McGhee expressly acknowledged that his Eighth Amendment argument was foreclosed by caselaw. *See* United States v. Salahuddin, 509 F.3d 858, 864 (7th Cir. 2007) (holding that ***HN12***[↑] the Eighth Amendment does not prohibit the use of a juvenile conviction to support application of the ACCA enhancement). And at sentencing, McGhee lodged six objections to the PSR, but none referenced the Eighth Amendment or Salahuddin.

McGhee also asserts the district court erred by

[2] "Before issuing" Flores, the panel "circulated it to all judges in active service under ***Circuit Rule 40(e)***. No judge voted to hear [the] case *en banc*." 929 F.3d at 450 n.1.

playing the unauthenticated video of the third controlled buy. But before the video was admitted and played, McGhee affirmatively stated "No objection." Each of these knowing and strategic choices constitute waiver. *Flores, 929 F.3d at 447-48*.

2. McGhee failed to develop three more arguments on appeal, so he waived them. ***HN13***[↑] Even when arguments are properly preserved, a defendant can waive them on appeal. "[P]erfunctory and undeveloped **[**15]** arguments, and arguments that are unsupported by pertinent authority, are waived (even where those arguments raise constitutional issues)." *Crespo v. Colvin, 824 F.3d 667, 674 (7th Cir. 2016)*. It is not this court's responsibility to do the work of researching and constructing legal arguments for parties, particularly those with **[*825]** counsel. *Nelson v. Napolitano, 657 F.3d 586, 590 (7th Cir. 2011)*.

Relatedly, under *Federal Rule of Appellate Procedure 28(a)(8)(A)*, the argument section of an appellant's brief must include "citations to the authorities and parts of the record" on which he relies. "Litigants must bear in mind that the failure to properly argue their contentions may well result in a finding of abandonment." 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3974.1 (5th ed. Apr. 2023 update). That result applies in our circuit. *United States v. Hamzeh, 986 F.3d 1048, 1052 n.4 (7th Cir. 2021)*.

McGhee asserts: (1) the *Second Amendment* required the dismissal of his charge under *18 U.S.C. § 922(g)*; (2) the testimony of Logan regarding the controlled buy video was inadmissible hearsay; and (3) his motion for a new trial should have been granted because there was new evidence that some of the cocaine presented at trial was fabricated. On each of these arguments, McGhee cites little or no caselaw, provides only conclusory statements, and gives few or no record citations.[3] They are "perfunctory and undeveloped" **[**16]** and thus waived. *Crespo, 824 F.3d at 674*.

3. McGhee's argument to dismiss the 18 U.S.C. § 924(c) charge is moot. McGhee claims that the charge against him for violating *18 U.S.C. § 924(c)(1)(A)*, which prohibits the use, carrying, or possession of a firearm in relation to a drug trafficking crime, should have been dismissed because he did not "use" the firearm. McGhee was charged and convicted under the possession prong only. And the second superseding—and controlling—indictment dropped any mention of the carry and use prongs. So, this argument is moot.

C

One last matter. Rules govern the appendix accompanying an appellant's brief. ***HN15***[↑] "The appellant must prepare and file an appendix" containing "relevant docket entries" from the proceeding in the district court. *FED. R. APP. P. 30(a)(1)(A)*. Our court is more specific: "The appellant shall submit, bound with the main brief, an appendix containing the judgment or order under review and any opinion, memorandum of decision, findings of fact and conclusions of law, or oral statement of reasons delivered by the trial court." *CIR. R. 30(a)*. We also require the appellant to certify that he has provided those materials. *CIR. R. 30(d)*. There are consequences for failing to comply with *Rule 30*. *See* 16AA WRIGHT & MILLER § 3976.2 (describing actions courts may take against appellants **[**17]** for noncompliance, including sanctions against counsel, summary affirmance, or refusal to address arguments). In criminal cases, the

---

[3] McGhee's new trial argument can also be rejected as untimely. ***HN14***[↑] A motion for new trial must be filed within fourteen days, unless it alleges new evidence. *Fed. R. Crim. P. 33(b)(1), (2)*. McGhee waited more than three months before filing this motion, and neither it nor his appeal contend that he has any new evidence. He submits only that the evidence presented at trial was "fabricated" and trial exhibits contained "irregularities." But he does not share the new evidence he supposedly discovered.

appropriate penalty for noncompliance is a fine imposed on counsel. *United States v. Evans, 131 F.3d 1192, 1194 (7th Cir. 1997)*.

McGhee failed to observe these rules. His appendix contains only his notice of appeal and the district court's judgment. Absent are the relevant docket entries and the district court's rulings and reasons (written or transcribed) necessary to review nearly all of McGhee's appellate arguments. Nevertheless, counsel certified "that all the materials required by **[*826]** *Circuit Rule 30(a)*, *(b)* and *(d)* are contained" in the appendix. We decline to impose a fine here, but we admonish McGhee's counsel, and remind the bar, to adhere to *Federal Rule of Appellate Procedure 30* and *Circuit Rule 30*.

* * *

We AFFIRM the judgment of the district court in all respects.

End of Document