TABLE OF APPENDICES

APPENDIX A

United States Court of Appeals for the Fifth Circuit

No. 23-50007

United States Court of Appeals
Fifth Circuit
FILED
September 24, 2024
Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

SAMUEL TANEL CRITTENDEN,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 3:17-CR-2039-2

Before DENNIS, WILLETT, and DUNCAN, *Circuit Judges*.

DON R. WILLETT, *Circuit Judge*:

Samuel Crittenden appeals his conviction for possession with intent to distribute 500 grams or more of methamphetamine, claiming that the district court erred by accepting his waiver of conflict-free counsel and by declining to give a lesser-included-offense jury instruction for simple possession. For the reasons that follow, we AFFIRM.

I

Federal agents received a tip that methamphetamine was being stored at a house on Byway Drive in El Paso, Texas, and arranged for an informant

to attempt a controlled buy. The informant called the number associated with the tip and spoke with Crittenden's wife, Carla Dominguez, who confirmed that she had methamphetamine for sale. Dominguez and the informant agreed to meet in a parking lot to exchange ten pounds of crystal methamphetamine for $35,000.

Shortly before the scheduled exchange, agents watched Dominguez and Crittenden leave their family home in separate vehicles. Crittenden drove to the house on Byway Drive and went inside. Dominguez arrived at the same home around forty-five minutes later. Crittenden exited the residence and handed Dominguez a bag through her passenger-side window. Dominguez then left the Byway Drive house and drove in the direction of the parking lot where she had agreed to meet the informant. Police intercepted Dominguez and found a bag with ten bundles of methamphetamine on the passenger floorboard, which weighed roughly ten pounds and was worth approximately $35,000.

Agents spoke with Crittenden that evening outside his residence. He admitted that he had stored items in the attic of the Byway Drive house and had given a bag to Dominguez that day. He asserted they were his "wife's bags" and that he "thought" or "believed" they contained marijuana. Following their interview with Crittenden, agents searched the attic of the residence on Byway Drive. They recovered suitcases filled with three additional bundles of methamphetamine and ninety bundles of marijuana. Crittenden's friend, who lived at the Byway Drive house, recounted that Crittenden asked to store personal items at the house. He agreed, and Crittenden brought suitcases over and placed them in the attic.

Dominguez claimed that an old acquaintance sent the drugs to the home she shared with Crittenden without warning or permission. The delivery arrived as unmarked bundles in a plastic tub. When she informed

Crittenden about the delivery, he expressed concern that drugs were in the family home with their children. Dominguez testified at trial that Crittenden "probably" repackaged the drugs from the original tub into suitcases. From there, Crittenden moved the suitcases to the Byway Drive house because he did not want drugs around his family.

II

Dominguez and Crittenden were charged with three counts: (1) conspiracy to possess with intent to distribute 500 grams or more methamphetamine; (2) possession with intent to distribute 500 grams or more of methamphetamine; and (3) conspiracy to possess with intent to distribute marijuana. Before trial, the Government filed a motion notifying the district court that Crittenden's retained counsel, Leonard Morales, could have a possible conflict of interest. The potential conflict concerned Morales's concurrent representation of Francisco Javier Amaro-Arratia, an individual who by that time pleaded guilty to drug charges in a separate proceeding. Amaro-Arratia apparently was in contact with Dominguez in the days leading up to her arrest, and there was evidence that the two likely had the same source of supply. The Government speculated that "Crittenden's defense could evolve into a situation where there is a potential conflict of interest." Although the Government contended that the conflict was waivable and that, based on its conversation with Morales, "Crittenden's anticipated defense would not evolve into a conflict," the Government still asked the district court to inquire into the potential conflict.

The district court held a *Garcia*[1] hearing on the Government's motion. The court informed Crittenden that he was entitled to a conflict-free

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[1] *United States v. Garcia*, 517 F.2d 272 (5th Cir. 1975), *abrogated on other grounds by Flanagan v. United States*, 465 U.S. 259, 263 & 263 n.2 (1984).

lawyer and told him that conflicts can come in two types: waivable and nonwaivable. The court explained that if the conflict was waivable, Crittenden could "waive it and proceed to trial with . . . Morales." But if the conflict was not waivable, the court explained that Crittenden would need to have an attorney appointed or "retain another attorney to represent [him]." Morales confirmed that he had previously "explained all this" to Crittenden, reviewed with Crittenden "his rights . . . and so forth," and discussed the Government's motion with Crittenden "in detail." According to Morales, Crittenden had no issues with the possible conflict given that Morales's client in the unrelated case had only a "tangential link" to his case. Morales asserted that he understood that the Government did not intend to call Amaro-Arratia as a witness and that Amaro-Arratia did not have information related to Crittenden; any "tenuous" link was between Amaro-Arratia and Dominguez. The district court asked whether Crittenden "underst[ood] all that." Crittenden answered that he did.

The district court concluded that any conflict was potential "at least." The court once again confirmed that Crittenden understood "all that" and asked him whether he desired to proceed with Morales as his counsel. Crittenden responded in the affirmative. The court again reminded Crittenden that he was entitled to conflict-free counsel and told him that the trial would be postponed if he wanted another attorney. Crittenden expressed his understanding and repeated his desire to proceed with Morales as counsel.

After this transpired, the district court asked the Government for its position on the purported conflict. The Government commented that there were "ways that [the] potential conflict could arise." Specifically, there appeared to be a previous transaction between Dominguez and Amaro-Arratia, related phone records, and a recording on which Dominguez talked about "delivering to this other person." The prosecutor spelled out that a

conflict would likely arise if Morales went "down a road saying . . . Crittenden had nothing to do with this, it was all . . . Dominguez, and she got it from [Amaro-Arratia]." At the end of the hearing, the district court asked Morales to file a written waiver of the right to conflict-free counsel signed by Crittenden. Morales did so.

The district court accepted the waiver and the case proceeded to trial.

At the close of evidence at trial, Crittenden filed two motions. First, he moved for judgment of acquittal. Although the district court expressed some concern with the "intent to distribute" element of the charges, it denied the motion. Second, Crittenden filed a proposed jury instruction asking that the jury be instructed on the lesser included offense of simple possession under 21 U.S.C. § 844(a) in connection with any instruction about Count 2 (possession with intent to distribute methamphetamine under 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A)(viii)). The district court denied this motion too. The jury convicted Crittenden on all counts.

Crittenden moved post-verdict for an acquittal or, in the alternative, a new trial. The district court granted a new trial on all counts, concluding that the evidence was insufficient for a finding of knowledge for Count 2. The Government appealed the district court's grant of a new trial. A split panel of this court affirmed the district court's grant of a new trial.[2] Our court granted en banc rehearing, concluded that the district court erred in granting a new trial on the count of possession with intent to distribute methamphetamine, reinstated the verdict as to that count, and remanded for sentencing as to that conviction.[3] On remand, the district court granted the

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[2] *United States v. Crittenden*, 25 F.4th 347, 350 (5th Cir. 2022), *vacated and reh'g en banc granted*, 26 F.4th 1015 (5th Cir. 2022).

[3] *United States v. Crittenden*, 46 F.4th 292, 300 (5th Cir. 2022) (en banc).

Government's motion to dismiss Counts 1 and 3 and, as to Count 2, sentenced Crittenden to seventy months of imprisonment. This appeal followed.

III

Crittenden makes two arguments on appeal. First, he argues that the district court erred by failing to protect Crittenden's right to effective assistance of counsel by accepting a conflict-free waiver when there was a significant actual conflict of interest. Second, he asserts that the district court abused its discretion in not giving Crittenden's requested lesser-included-offense instruction. We review each in turn.

A

We review for "simple error" a district court's acceptance of waiver of the right to conflict-free counsel.[4]

"Under the Sixth Amendment, where there exists a constitutional right to counsel, there exists a correlative right to representation that is free from any conflict of interest."[5] Nevertheless, the right to conflict-free counsel is not absolute and "can be waived if (1) the waiver is made voluntarily, knowingly, and intelligently, and (2) the conflict is not so severe as to undermine the integrity of the judicial system."[6] In a "*Garcia* hearing" on a conflict of interest and the waiver of this right, district courts must

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[4] *United States v. Vaquero*, 997 F.2d 78, 89 (5th Cir. 1993), *cert. denied*, 510 U.S. 1016 (1993).

[5] *United States v. Rico*, 51 F.3d 495, 508 (5th Cir. 1995) (quoting *United States v. Carpenter*, 769 F.2d 258, 262 (5th Cir. 1985)).

[6] *Id.* (first citing *United States v. Garcia*, 517 F.2d at 276–77; then citing *Vaquero*, 997 F.2d at 90–91).

> address each defendant personally and forthrightly advise him of the potential dangers of representation by counsel with a conflict of interest. The defendant must be at liberty to question the district court as to the nature and consequences of his legal representation. Most significantly, the court should seek to elicit a narrative response from each defendant that he has been advised of his right to effective representation, that he understands the details of his attorney's possible conflict of interest and the potential perils of such a conflict, that he has discussed the matter with his attorney or if he wishes with outside counsel, and that he voluntarily waives his Sixth Amendment protections . . . . Mere assent in response to a series of questions from the bench may in some circumstances constitute an adequate waiver, but the court should nonetheless endeavor to have each defendant personally articulate in detail his intent to forego this significant constitutional protection.[7]

We have summarized *Garcia* as requiring the district court "to ensure that the defendant (1) is aware that a conflict of interest exists; (2) realizes the potential hazards to his defense by continuing with such counsel under the onus of a conflict; and (3) is aware of his right to obtain other counsel."[8]

On appeal, Crittenden argues that he did not knowingly and voluntarily waive Morales's conflict of interest while concurrently representing Crittenden and Amaro-Arratia because (1) Morales failed to

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[7] *Garcia*, 517 F.2d at 278 (citations omitted).

[8] *United States v. Greig*, 967 F.2d 1018, 1022 (5th Cir. 1992) (citing *United States v. Casiano*, 929 F.2d 1046, 1052 (5th Cir. 1991)).

sufficiently explain the conflict to him; and (2) the colloquy at the *Garcia* hearing was inadequate.

As to the first point, Crittenden questions Morales's understanding of the conflict, as well as the representations Morales made about the conflict's effect on Crittenden's defense, because Morales allegedly asserted that Amaro-Arratia and Dominguez did not "have any relationship whatsoever."[9] Crittenden maintains that Morales could not have thoroughly discussed the potential conflict with him such that Crittenden understood the potential hazards.

In support of his latter point, Crittenden alleges that the hearing failed to meet *Garcia*'s standards because it included only a brief and vague discussion of the issue and the court did not elicit a "narrative response" from him, but only "mere assent," which *Garcia* discourages.[10] Crittenden argues that it was not until the end of the *Garcia* hearing that the Government explained the possible perils of the conflict. And at that point, Crittenden argues, he was not asked again if he understood. Accordingly, Crittenden argues that the district court erred by accepting his waiver.

We disagree. Even if the potential conflict of interest stemming from Morales's concurrent representation of Amaro-Arratia and Crittenden ripened into an actual conflict during trial, the record reflects that Crittenden voluntarily, knowingly, and intelligently waived his right to conflict-free counsel before trial. Crittenden was present at the *Garcia* hearing when the court and the parties explained the nature of the potential conflict and referred to the possible risks that the conflict could pose to his defense. And

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[9] Upon review of the hearing transcript, it is more likely Morales was referring to the lack of relationship between Amaro-Arratia and Crittenden, not Dominguez.

[10] *Garcia*, 517 F.2d at 278.

even though the court did not address Crittenden again after the Government provided a "real description of the conflict," he voluntarily signed the waiver at the conclusion of the Government's explanation. Crittenden was aware that Morales represented Amaro-Arratia in a tangentially related criminal matter, that there was evidence indicating that Dominguez and Amaro-Arratia engaged in prior drug trafficking activities with each other and shared a common source of supply, and that there was a potential for Morales to be torn between divergent obligations should Crittenden's defense develop in a certain manner. Especially because the conflict was "potential," the court could not anticipate and "detail each and every one of the snares posed by" the conflict, nor was it required to do so.[11]

Further, Crittenden executed a written waiver—the sufficiency of which he does not meaningfully challenge on appeal. That waiver contains an express acknowledgment by Crittenden that he: was advised of his right to effective representation; was notified and understood the details and likely hazards of Morales's potential conflict; discussed the matter with Morales and understood that he could consult and obtain new counsel; and knowingly and voluntarily waived his right to conflict-free counsel. The signed waiver establishes that he waived the right to conflict-free counsel with ample awareness of the relevant circumstances and of the likely risks of proceeding with Morales as his lawyer.[12] So, even if the colloquy at the *Garcia* hearing

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[11] *See Casiano*, 929 F.2d at 1053; *see also United States v. White*, 706 F.2d 506, 509 (5th Cir. 1983) ("[T]his Court does not expect a trial judge to anticipate every possible detriment that might befall a defendant as the result of a conflict in a particular case . . .").

[12] *See Rico*, 51 F.3d at 510–11.

was inadequate, we conclude that the written waiver remediated any deficiency given the record before us.[13]

Crittenden has not meaningfully argued that the conflict was "so severe as to render a trial inherently unfair" or that "the integrity of the judicial system has been undermined"[14] beyond a cursory statement that "the conflict was so significant, his waiver should not have been accepted." Crittenden has not offered facts or record evidence to demonstrate that Morales and the prosecutor were unreasonable in believing that any conflict was waivable, and that Morales's representation of Crittenden would not be negatively affected by the potential conflict.[15]

Accordingly, we find that the district court did not err when it accepted Crittenden's waiver of conflict-free counsel.

B

We turn now to Crittenden's challenge to the district court's denial of a lesser-included-offense instruction for simple possession.

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[13] *Id.* (holding that defendant's written waiver satisfied *Garcia* in the absence of a colloquy); *cf. United States v. Moore*, 37 F.3d 169, 174 (5th Cir. 1994) (finding that "[t]he *Garcia* hearing . . . f[ell] short of" *Garcia*'s ideal narrative response, but nevertheless finding no error because "the record [otherwise] clearly establish[ed] that [the defendants knowingly] waived their right to a conflict-free attorney"). Crittenden also challenges the voluntariness of his waiver by questioning the court's explanation of his right to appointed counsel and his opportunity to consult with outside counsel. Deficiencies such as these, if they exist, are remedied by the written waiver that expressly addressed each of these points.

[14] *See Vaquero*, 997 F.2d at 90.

[15] *See id.* at 90–91 (evaluating if the conflict undermines the integrity of the judicial system by referencing the ABA Model Rules of Professional Conduct, which asks whether "the attorney reasonably believes the new client's representation will not be affected").

"We review de novo the district court's determination of whether a particular offense is a lesser included offense of a charged offense."[16] And "[w]e review for abuse of discretion the lower court's determinations as to 'whether a jury could rationally acquit on the greater offense yet convict on the lesser.'"[17]

"Rule 31(c) of the Federal Rules of Criminal Procedure provides in relevant part that a 'defendant may be found guilty of an offense necessarily included in the offense charged.'"[18] "This rule entitles a defendant to a jury instruction on any lesser included offense whenever two independent prerequisites have been met": Crittenden must have shown that (1) the elements of simple possession were a subset of the elements of possession with intent to distribute, and (2) based on the evidence presented at trial, a rational jury could have found him guilty of simple possession yet acquitted him of possession with intent to distribute.[19] We limit our analysis to the second prong because our circuit precedent holds, and the parties agree, that simple possession is a lesser-included offense of possession with intent to distribute—thus, the district court's contrary conclusion was legal error.[20]

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[16] *United States v. Snarr*, 704 F.3d 368, 389 (5th Cir. 2013) (citing *United States v. Finley*, 477 F.3d 250, 256 (5th Cir. 2007)).

[17] *Id.* (quoting *Finley*, 477 F.3d at 256).

[18] *United States v. Browner*, 889 F.2d 549, 550 (5th Cir. 1989) (quoting FED. R. CRIM. P. 31(c)).

[19] *See id.* at 550–51 (citations omitted).

[20] *See United States v. Mays*, 466 F.3d 335, 342 (5th Cir. 2006) ("Possession of a controlled substance is undeniably a lesser-included offense of possession with intent to distribute.") (citing *United States v. Garcia-Duarte*, 718 F.2d 42, 47 (2d Cir. 1983)). Indeed, the case that the district court is presumed to have relied on for its erroneous conclusion includes a footnote stating the same. *See United States v. Ambriz*, 727 F.3d 378, 381 n.4 (5th Cir. 2013).

As to the second prong, "[w]e normally review for abuse of discretion a district court's determination of this issue."[21] But "[b]ecause the district court in this case erroneously concluded that it could not give [Crittenden's] requested lesser-included-offense instruction" on account of its legal error at the first prong, "it did not make a specific finding as to the second prong of the test."[22] In this circumstance, *United States v. Lucien* directs our inquiry.[23] In *Lucien*, we looked to the record as a whole to determine whether a rational jury could convict a defendant of the lesser offense yet acquit him of the greater. There, the court first looked at the amount of cocaine base involved. Having determined that 16.48 grams was not inconsistent with personal use, the court then turned to other evidence of intent to distribute. The court reasoned that each piece of evidence found in the apartment, including aluminum foil wrappers, around $1200 in cash, and two guns, was not dispositive of intent to distribute or inconsistent with the defendant's personal use. Even with this evidence, a reasonable juror could have found the defendant guilty of simple possession but acquit him of intent to distribute. Thus, the court found that the defendant was entitled to a lesser-included-offense instruction.[24]

Here, while following the *Lucien* court's reasoning, we find the facts distinguishable from those in *Lucien* and the evidence of Crittenden's intent overwhelming. Following *Lucien*'s lead, we first look to the amount of

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[21] *United States v. Lucien*, 61 F.3d 366, 374 (5th Cir. 1995) (citation omitted).

[22] *Id.*

[23] *See also United States v. Jackson*, 27 F.4th 1088, 1091 (5th Cir. 2022) ("Even when the district court has erred, we may affirm if another ground in the record supports its judgement. The district court need not have reached that ground . . . but it must have been advanced below.") (citations and quotations omitted).

[24] *Id.* at 374–77.

methamphetamine Crittenden possessed and whether it is indicative of personal use or distribution.[25] Here, the evidence established that Crittenden retrieved approximately ten pounds (4.2 kilograms) of methamphetamine from the total stock at the Byway Drive house. This is over 250 times the amount in *Lucien* and is worth approximately $35,000. The quantity of methamphetamine Crittenden possessed exceeds the realm of conceivable personal use and, along with its value, is indicative of distribution.[26]

Unlike in *Lucien*, the amount here is, by itself, enough to indicate intent; yet there is "other evidence that . . . indicates possession with intent to distribute."[27] Specifically, when it came time for Dominguez to deliver ten bundles of methamphetamine to the buyer, Crittenden drove to the house where he stored the drugs and retrieved the exact type and amount of drugs from the large stash, all packed in distributable quantities. Though just a small number of the unmarked bundles in the attic contained methamphetamine, Crittenden picked the correct drug. And after Crittenden retrieved the particular drug that Dominguez had agreed to sell, Dominguez

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[25] *Id.* at 374–75 (gathering cases that looked primarily at quantity in its analysis of intent to distribute).

[26] *See United States v. Munoz*, 957 F.2d 171, 174 (5th Cir. 1992) (noting that proof of intent to distribute may be inferred from drug value and quantity); *United States v. Henley*, 502 F.2d 585, 586 (5th Cir. 1974) (holding that evidence that defendant possessed large quantity of drugs justified refusal to instruct jury on lesser-included offense of simple possession); *United States v. Brooks*, 550 F. App'x 197, 198 (5th Cir. 2013) (unpublished) (holding that 3.9 grams of methamphetamine found in proximity to other drugs, drug paraphernalia, and currency supported inference of intent to distribute); *cf. United States v. Skipper*, 74 F.3d 608, 611 (5th Cir. 1996) (holding that 2.89 grams of crack cocaine is "not clearly inconsistent with personal use"); *United States v. Hunt*, 129 F.3d 739, 742 (5th Cir. 1997) (holding that 7.998 grams of crack cocaine was "insufficient as a matter of law to infer intent").

[27] *Lucien*, 61 F.3d at 375; *see also United States v. Harrison*, 55 F.3d 163, 165, 168 (5th Cir. 1995) (considering evidence such as the presence of a loaded weapon and cash in the same drawer as 49 grams of crack cocaine "cookies").

arrived at the house, Crittenden handed the drugs to Dominguez, and Dominguez drove to the location of the sale. We said in *Lucien*, "[i]f the amount of the cocaine base seized at the Manor Road apartment was significantly greater or if there was additional evidence showing distribution, such as (by way of example only) testimony tending to indicate that sales or distributions of some kind were being made . . . the evidence might support the district court's refusal to give the lesser-included instruction of simple possession."[28] That is precisely what we have here. The overwhelming evidence—including the substantial quantity of drugs, the distributable quantities of the drugs, and Crittenden's correct choice of the exact drug and quantity Dominguez agreed to sell—suggests a reasonable jury could not find the evidence insufficient to find an intent to distribute.[29]

Crittenden also argues without citation to authority that the evidence of his intent to distribute may be negated by testimony that Crittenden "just wanted to get the drugs out of his house." This argument does not follow. The drugs were already out of Crittenden's family home when he went to the Byway Drive house on January 17, 2017, and distributed roughly ten pounds of methamphetamine to Dominguez for her further distribution to the buyer-informant. It is the January 17 conduct that forms the basis of Count 2's charge of possession with intent to distribute. That Crittenden "just wanted to get the drugs out of his house" does nothing to explain away the

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[28] *Lucien*, 61 F.3d at 376.

[29] The dissent rightly notes that "[a] recognition that a jury could convict on the greater offense does not negate that a jury could have failed to find Crittenden's intent to distribute." *Post*, at 19. True enough. But in this case, the evidence—and it is overwhelming—compels the conclusion that no reasonable jury could have rationally found Crittenden guilty of simple possession. The evidence showing his intent to distribute does not merely "support the jury's conviction." Simply put, there are no sound concerns about what happened, and no rational jury looking at this overpowering record could have found Crittenden guilty only of the lesser offense. *Id.*

compelling evidence of his intent to distribute on January 17 from the Byway Drive house.

The amount of methamphetamine involved and the circumstances surrounding the transfer precludes a reasonable jury from convicting Crittenden for simple possession while acquitting him for possession with intent to distribute. And accordingly, the district court did not err in denying a lesser-included-offense instruction for simple possession.

V

For the foregoing reasons, we AFFIRM the district court's acceptance of Crittenden's conflict-free-counsel waiver and its refusal to give the lesser-included offense instruction on simple possession, and REMAND for further proceedings not inconsistent with this opinion.

JAMES L. DENNIS, *Circuit Judge*, concurring in part and dissenting in part:

I concur in the panel majority's holding that Samuel Crittenden validly waived his right to conflict-free counsel before his criminal trial. *Ante*, at 7–10 (majority opinion). But I depart from its conclusion that "the district court did not err in denying" Crittenden "a lesser-included-offense instruction for simple possession." *Id.* at 15. Because, from the evidence ignored by the panel majority, a jury could rationally find Crittenden guilty of simple possession of methamphetamine yet acquit him of intending to distribute, Crittenden was entitled to a jury instruction on the lesser offense of simple possession. The district court's failure to give that instruction was reversible error—Crittenden's conviction must be overturned. I respectfully dissent.

* * *

Relevant to this appeal, a jury convicted Crittenden of possession with intent to distribute 500 grams or more of methamphetamine ("Count 2"). Crittenden challenges the district court's denial of a lesser included offense jury instruction for simple possession of methamphetamine. "Rule 31(c) of the Federal Rules of Criminal Procedure provides in relevant part that a 'defendant may be found guilty of an offense necessarily included in the offense charged.'" *United States v. Browner*, 889 F.2d 549, 550 (5th Cir. 1989) (quoting FED. R. CRIM. P. 31(c)). "This rule entitles a defendant to a jury instruction on any lesser included offense" when: "(1) the elements of the lesser offense [are] a subset of the elements of the charged offense; and (2) the evidence at trial [is] such that a jury could rationally find the defendant guilty of the lesser offense, yet acquit him of the greater." *Id.* at 550–51 (citations omitted).

In this case, *Browner*'s precepts obligated Crittenden to first show that the elements of simple possession of methamphetamine under 21 U.S.C. § 844(a) were a subset of the elements of possession with intent to distribute

methamphetamine under 21 U.S.C. § 841(a)(1). *See United States v. Lucien*, 61 F.3d 366, 372–74 (5th Cir. 1995) (applying *Browner* in the context of a § 844(a) simple possession lesser included offense jury instruction); *United States v. Deisch*, 20 F.3d 139, 143 (5th Cir. 1994) (same). Second, he was required to show that, based on the evidence presented at trial, a rational jury could have acquitted him of intending to distribute and convicted him of simple possession. *Lucien*, 61 F.3d at 372, 374; *Deisch*, 20 F.3d at 142. "While a defendant's request for a lesser-included offense charge should be freely granted, there must be a rational basis for the lesser charge and it cannot serve merely as a device for defendant to invoke the mercy-dispensing prerogative of the jury." *United States v. Collins*, 690 F.2d 431, 438 (5th Cir. 1982), *cert. denied*, 460 U.S. 1046 (1983) (internal quotation marks and citation omitted).

Only the second prong is at issue because our circuit precedent holds, and all agree, that simple possession is a lesser included offense of possession with intent to distribute. *See United States v. Mays*, 466 F.3d 335, 342 (5th Cir. 2006) ("Possession of a controlled substance is undeniably a lesser-included offense of possession with intent to distribute." (citing *United States v. Garcia-Duarte*, 718 F.2d 42, 47 (2d Cir. 1983)). Accordingly, the district court committed legal error by ruling that that simple possession was not a lesser included offense of possession with intent to distribute.

Turning to the second prong, "[w]e normally review for abuse of discretion a district court's determination of this issue." *Lucien*, 61 F.3d at 374 (citation omitted). This is not a normal case, however, "[b]ecause the district court in this case erroneously concluded that it could not give [Crittenden's] requested lesser-included offense instruction" on account of its legal error at the first prong, so "it did not make a specific finding as to the second prong of the test." *Id.* "The record, however, reflects that the district court" voiced serious concerns about the intent to distribute element of Count 2 at the close of trial; record evidence that the panel majority blinks.

Id.; ROA.808–09. That the capable district judge—who presided over the trial, heard the testimony, and saw the evidence—harbored doubts about the intent to distribute element compellingly "implies that the district court thought . . . the evidence at trial raised the possibility that a rational jury could" have acquitted Crittenden of Count 2. *Lucien*, 61 F.3d at 374.

What's more, the record bears out that the issue of intent to distribute was "clearly in dispute." *Id.* at 377 n.16; *Collins*, 690 F.2d at 437; *Browner*, 889 F.2d at 554. At trial, Crittenden put on evidence that his involvement with the methamphetamine was limited and that he "did not want anything to do with the drugs [that] his wife[,] [Carla Dominguez,] brought into their home." Crittenden's evidence further supported that he only sought to be rid of the drugs and that he had no interest in, or intent to distribute, them. *See, e.g.*, ROA.665 (testimony from informant that he did not know Crittenden); ROA.756–57; ROA.763–64; ROA.776–77; ROA.795–803 (testimony by Dominguez as to Crittenden's non-involvement); *cf.* Government Br. at 28 (admission by Government that there was evidence that Crittenden moved the drugs to get them away from his family). Indeed, contrary to the majority's assertion, Crittenden has never posited that the methamphetamine he possessed was intended for his personal use; instead, his theory has been all along that he only sought to get the drugs away from his family. *See, e.g.*, ROA.492–94 (opening statement); ROA.841–50 (closing argument); *Ante*, at 13 (inquiring whether the quantity of drugs possessed is "indicative of personal use or distribution"). Crittenden presented evidence that he had no knowledge of his wife's activities and handled the drugs to remove them from his home and, ultimately, to dispose of them by retrieving them for Dominguez. *See, e.g.*, ROA.756–57; ROA.763–64; ROA.776–77; ROA.795–803 (testimony by Dominguez as to Crittenden's role). As our en banc court observed in a prior iteration of this case, Crittenden's wife in fact testified consistent with this theory that he "'had nothing to do with' the

drugs." *United States v. Crittenden*, 46 F.4th 292, 294 (5th Cir. 2022) (en banc). The panel majority's analysis wholesale disregards this evidence. *Ante*, at 12–15.

Instead, the Government and majority emphasize that, post-verdict, the district court found an intent to distribute could be inferred from the quantity and value of methamphetamine possessed on January 17 and the circumstances leading up to Crittenden's arrest. But that does not fully address the jury instruction issue here. *Lucien*, 61 F.3d at 376. Although the evidence is undoubtedly sufficient to convict Crittenden of possession with intent to distribute, the issue is whether a rational jury nonetheless could acquit him of the greater offense and find him guilty of simple possession. *Id.*; *Browner*, 889 F.2d at 551. The majority flips the standard on its head by only searching for evidence to support the jury's conviction. *Ante*, at 14 n.29. A recognition that a jury could convict on the greater offense does not negate that a jury could have failed to find Crittenden's intent to distribute. I agree with Crittenden's defense that, from the evidence outlined above, a jury could rationally find the defendant guilty of the lesser offense yet acquit him of the greater. *Browner*, 889 F.2d at 551; *Garcia-Duarte*, 718 F.2d at 47. In a case like this one, "it is the jury's province to determine whether the evidence demonstrates simple possession or possession with intent to distribute." *Lucien*, 61 F.3d at 376 (citations omitted); *cf. Spiller v. Harris Cnty.*, 113 F.4th 573, 582 (5th Cir. 2024) (WILLETT, J., concurring) (noting that "three appellate judges" should decline to "play[] junior-varsity jury"). Crittenden was therefore entitled to a jury instruction on the lesser included offense of simple possession, and the district court's failure to give that instruction was reversible error. Crittenden's conviction must be overturned.

I respectfully dissent.

APPENDIX B

United States Court of Appeals for the Fifth Circuit

No. 23-50007

United States Court of Appeals
Fifth Circuit
FILED
October 25, 2024
Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

SAMUEL TANEL CRITTENDEN,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 3:17-CR-2039-2

ON PETITION FOR REHEARING EN BANC

Before DENNIS, WILLETT, and DUNCAN, *Circuit Judges*.

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing (5th CIR. R. 35 I.O.P.), the petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

October 25, 2024

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 23-50007 USA v. Crittenden
USDC No. 3:17-CR-2039-2

Enclosed is an order entered in this case.

See FRAP and Local Rules 41 for stay of the mandate.

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
Melissa B. Courseault, Deputy Clerk
504-310-7701

Ms. Elizabeth Berenguer
Mr. Joseph H. Gay Jr.
Ms. Mary Stillinger

APPENDIX C

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
August 18, 2022
Lyle W. Cayce
Clerk

No. 18-50635

UNITED STATES OF AMERICA,

Plaintiff—Appellant,

versus

SAMUEL TANEL CRITTENDEN,

Defendant—Appellee.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 3:17-CR-2039-2

Before RICHMAN, *Chief Judge*, and JONES, SMITH, STEWART, DENNIS, ELROD, SOUTHWICK, HAYNES, GRAVES, HIGGINSON, COSTA, WILLETT, HO, DUNCAN, ENGELHARDT, OLDHAM, and WILSON, *Circuit Judges*.

GREGG COSTA, *Circuit Judge*, joined by RICHMAN, *Chief Judge*, and JONES, SMITH, STEWART, SOUTHWICK, HAYNES, HIGGINSON, WILLETT, HO, DUNCAN, ENGELHARDT, OLDHAM, and WILSON, *Circuit Judges*:

This appeal involves tension between two rules of deference. When trial judges exercise discretion, appellate judges can reverse only for an abuse of that discretion. Ordering a new trial is one such discretionary act. But when a jury renders a verdict, all judges owe deference to the decision of the

constitutionally-designated factfinder. What happens, then, when a trial judge sets aside a verdict and grants a new trial based on the court's different assessment of the evidence? How closely do we review that new trial grant?

I

A

This case began with a tip to federal agents that methamphetamine was being stored at a house in El Paso. The agents instructed an informant to attempt a controlled buy. The informant called the number associated with the tip and spoke with Carla Dominguez. Dominguez confirmed that she had "windows" for sale—a street name for methamphetamine. She in turn asked whether the informant could source "kush," a strong strain of marijuana that customers often "ask [her] husband for." After several days of negotiation, Dominguez and the informant agreed to meet in a parking lot to exchange 10 pounds of "crystal meth" for $35,000.

Shortly before the scheduled meet, agents observed Dominguez and her husband, Samuel Crittenden, depart their home in separate cars. One of the agents followed Crittenden, who drove to another house on Byway Drive and went inside. Dominguez pulled up to the same house 45 minutes later. Crittenden emerged from the residence and handed Dominguez a bag through the passenger-side window. Dominguez then drove towards the parking lot where she was to meet the informant.

Police intercepted Dominguez before she reached the parking lot. On the passenger floorboard of her vehicle, officers found a black leather handbag containing ten bundles (4.2 kilograms) of methamphetamine.

Federal agents spoke with Crittenden later that evening. Crittenden admitted that he had stored several bags in the attic of the Byway house. And he confirmed that he had given one of those bags to Dominguez that

afternoon. He claimed that they were his "wife's bags" and said he "thought" or "believed" they contained marijuana. Crittenden said he knew he was "going to get in trouble" because of these statements. Indeed, Crittenden's interview prompted agents to search the Byway house, where they found three suitcases filled with 3 more bundles (1.65 kilograms) of methamphetamine and 90 bundles (47 kilograms) of marijuana.

B

A grand jury charged Crittenden and Dominguez with three offenses: conspiracy to deal methamphetamine; possession with intent to distribute 500 grams or more of methamphetamine; and conspiracy to deal marijuana. At trial, the government introduced the testimony of the agents and informant involved in the investigation, along with audio and video recordings of the events described above. Crittenden's friend, who lived at the Byway house, also testified. He explained that Crittenden had asked to store some clothes and other personal items at the house. When his friend agreed, Crittenden brought suitcases over and stored them in the attic.

After the government rested, both defendants unsuccessfully sought an acquittal.

In the defense case, Dominguez took the stand. She testified that Crittenden "had nothing to do with" the drugs, which were allegedly sent to their home by an old acquaintance without warning or permission. The delivery arrived as 100 unmarked bundles in a plastic tub. When Dominguez told Crittenden about the mysterious delivery, Crittenden was alarmed that drugs were in the house with his children, so he moved the bundles to the Byway attic. When it came time to deliver the methamphetamine to the informant, Crittenden then retrieved the bundles for Dominguez because he was the only one who knew where they were.

At the close of evidence, Crittenden against moved for an acquittal, this time only on the conspiracy counts. The court again denied the motion.

The jury convicted Crittenden and Dominguez on all counts.

Crittenden filed a motion seeking an acquittal or, in the alternative, a new trial. The district court granted the second request—a new trial—in a one-page order that stated an opinion would follow. The order did not divulge the grounds for the new trial. But shortly after trial, at Dominguez's sentencing, the court said the following:

> [H]is guideline range is 292 to 365 months and he's facing a 20-year mandatory minimum. I can't . . . even go the 20-year mandatory minimum on him and I'm certainly not going to go 292 months. He had a limited role in what his wife was doing and she got him into this. Very limited role.

At the end of the hearing, the court turned to Crittenden and warned what would happen if he continued to refuse a plea deal[1]: "If you go to trial again and you lose, those guidelines are not going to change and I've given you every opportunity."[2]

Almost five months later, the court issued the opinion giving reasons for the new trial. It made no mention of Crittenden's sentence but instead

---

[1] Crittenden faced an enhanced 20-year mandatory minimum sentence due to a prior felony drug conviction. The government had repeatedly offered to drop the recidivist enhancement in exchange for a guilty plea on one of the charges, but Crittenden declined that offer.

[2] Actually, Crittenden's sentencing exposure did end up changing because of the intervening passage of the First Step Act. *See* First Step Act of 2018, Pub. L. No. 115-391, § 401, 132 Stat. 5194, 5220 (limiting the sentencing enhancement for past felony drug convictions). He now faces a ten-year minimum instead of twenty. *See* 21 U.S.C. § 841(b)(1)(A).

held that the verdict went against the great weight of evidence. The court concluded that the jury's verdict on the two conspiracy charges was erroneous because there was no proof that Crittenden had entered into an agreement to sell narcotics. As for the charge of possession with intent to distribute methamphetamine, the court vacated the verdict because "no direct or circumstantial evidence was presented" at trial showing that Crittenden *knew* that the bags in his possession contained a controlled substance. In the court's view, Crittenden's admission that he "believed" the bags contained marijuana was "insufficient to establish knowledge."

The government moved for reconsideration. At a status conference, the court conceded that "if it was up to the Fifth Circuit, I'm going to get reversed." Still, the court reiterated: "Crittenden is facing 292 to 365 months and I think that's the reason I considered . . . granting a new trial because I was very reluctant to issue that type of sentence." The court later denied the motion for reconsideration "for the same reasons" discussed in the opinion.

The government had timely appealed the new trial grant for the possession with intent to distribute methamphetamine count. A divided panel of this court held that the district court did not abuse its discretion in granting a new trial.[3] 25 F.4th 347 (5th Cir. 2022). The appeal is now before the full court.

[3] Because the district court's opinion indicated it had found insufficient evidence to support the conviction, the panel first asked the district court to clarify whether it was granting a new trial or acquitting the defendant. *See* 827 F. App'x 448 (5th Cir. 2020). The district court promptly responded, explaining that despite some language about insufficiency, it believed the evidence could support a guilty verdict. Nonetheless, it was ordering a new trial because it found the verdict was against the great weight of evidence.

II

The jury requirement for criminal cases is one of only two topics addressed in both the original Constitution and the Bill of Rights (the other is the more obscure topic of venue in criminal trials). U.S. CONST. art. III, § 2, cl. 3; *id.* amend. VI; *see also* THE FEDERALIST NO. 83, at 521 (Alexander Hamilton) (observing that if the Founders agreed on "nothing else," they concurred "at least in the value they set upon the trial by jury"). The jury right's reappearance in the Sixth Amendment is no mere encore. The Bill of Rights includes the jury right among many guarantees for criminal defendants, whereas Article III requires juries as a structural protection. This original jury requirement ensures that unelected judges are not the only actors in our judiciary. "Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary." *Blakely v. Washington*, 542 U.S. 296, 306 (2004).

The jury's constitutional role in deciding criminal trials leaves little room for judicial second-guessing. Review of verdicts is thus "quite limited." *See Burks v. United States*, 437 U.S. 1, 16 (1978). A trial or appellate court can acquit a defendant found guilty by a jury only if "no rational juror could have found guilt beyond a reasonable doubt." *United States v. Sanjar*, 876 F.3d 725, 744 (5th Cir. 2017); *see* FED. R. CRIM. P. 29.

Trial courts, however, have a different path for setting aside a verdict: ordering a new trial. *See* FED. R. CRIM. P. 33(a). A court's power to grant a new trial has deep roots in our legal system. As early as the fourteenth century, English courts possessed the authority—in both civil and criminal cases—to award a second trial when it was clear that "justice ha[d] not been done" by the first. *See* 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 387–88 (1772); *Bright v. Eynon* (1757) 97 Eng.

Rep. 365 (KB). This discretionary power was not meant to supplant the jury right but to "perfect" it. 3 BLACKSTONE 390–91 (explaining that the new trial was thought to be an essential means of sustaining public confidence in the jury system). It entitled courts to order a second round of jury consideration when the first jury brought in a verdict that was "contrary to the evidence." *Id.* at 387.

Motions for new trials have been allowed since the beginning of the federal judiciary. Even before the Bill of Rights was ratified, Congress authorized federal courts to grant new trials for the reasons they had "usually been granted in the courts of law." *See* Judiciary Act of 1789, ch. 20, 1 Stat. 73. Just over 150 years later, the Federal Rules of Criminal Procedure permitted courts to "grant a new trial if the interest of justice so requires." FED. R. CRIM. P. 33(a).

Broadly speaking, Rule 33 is exercised in two situations. *See United States v. Hoffman*, 901 F.3d 523, 552 (5th Cir. 2018). One is when error infects the trial—perhaps the erroneous admission or exclusion of evidence, inflammatory comments by a lawyer, or faulty jury instructions. *See id.* at 552–54. The other is when the court believes the evidence weighs "heavily against the verdict." *United States v. Robertson*, 110 F.3d 1113, 1118 (5th Cir. 1997); *see Tibbs v. Florida*, 457 U.S. 31, 38 nn. 11, 12 (1982). The latter situation—the one this case involves—puts the trial judge in the unusual position of "weigh[ing] the evidence" and "assess[ing] the credibility of the witnesses." *Id.* at 1117. Whatever the grounds for the grant of a new trial, appellate courts review them only for an abuse of discretion. *United States v. Arnold*, 416 F.3d 349, 360 (5th Cir. 2005).

This brings us back to the clash of deference mentioned at the outset: The great respect we owe jury verdicts versus the discretion trial judges have when exercising their Rule 33 power. Our caselaw offers the following

guidance.[4] A judge's power to grant a new trial based on a different assessment of the evidence must be "exercised with caution" and "invoked only in exceptional cases." *United States v. Sinclair*, 438 F.2d 50, 51 n.1 (5th Cir. 1971) (Wisdom, J.) (quoting 2 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 553, at 487 (1969)). The judge cannot "entirely usurp the jury's function" and set aside the verdict merely because the court would have ruled the other way. *United States v. Tarango*, 396 F.3d 666, 672 (5th Cir. 2005).

So what are the exceptional occasions when a trial court may order a new trial even though the evidence was sufficient to support a guilty verdict? Although we have not always articulated a uniform standard, two hallmarks of a trial court's authority in this area stand out. The judge's ability to override the jury verdict exists only when the evidence weighs "heavily against the verdict." *Arnold*, 416 F.3d at 360 (quoting *Robertson*, 110 F.3d at 1118). And the authority should be exercised only when the verdict may have resulted in a "miscarriage of justice." *United States v. Herrera,* 559 F.3d 296, 302 (5th Cir. 2009) (quoting *Tarango*, 396 F.3d at 672); *Arnold*, 416 F.3d at 361. The "miscarriage of justice" requirement reflects the common-law roots of the new-trial power as a backstop against unjust verdicts, *see supra* p. 6, and the modern Rule's limitation that new trials should be granted only when the "interest of justice so requires," *see* FED. R. CRIM. P. 33.[5]

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[4] New trial grants were not appealable until 1984, *see* 3 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 592 & n.17 (4th ed. 2022), so the older caselaw involves appeals of refusals to grant new trials.

[5] Other circuits have also long linked the new-trial power to concerns about a miscarriage of justice. *See, e.g., United States v. Archer,* 977 F.3d 181, 188 (2d Cir. 2020); *United States v. Reed*, 875 F.2d 107, 114 (7th Cir. 1989); *Boesing v. Spiess*, 540 F.3d 886, 890 (8th Cir. 2008); *United States v. Alston*, 974 F.2d 1206, 1211–12 (9th Cir. 1992); *United States v. Martinez*, 763 F.2d 1297, 1313 (11th Cir. 1985).

The standard that best calibrates the juries' constitutional role with a district court's discretion to order a new trial comes from a leading treatise: "If the court reaches the conclusion that the verdict is contrary to the weight of the evidence and that a miscarriage of justice may have resulted, the court may set aside the verdict and grant a new trial. . . . The power to grant a new trial on this ground should be invoked only in exceptional cases, where the evidence weighs heavily against the verdict." 3 WRIGHT & MILLER, *supra*, § 582. This standard is consistent with much of our precedent, but to the extent some cases articulate a different standard,[6] this one governs going forward.

III

This is not one of the "exceptional cases" in which a judge had discretion to vacate the jury's verdict by ordering a new trial. Far from being a case in which the evidence weighs heavily against the verdict, the great weight of the evidence *supports* this one. The district court set aside the verdict because, in its view, little evidence showed that Crittenden knowingly possessed an illegal substance.[7] But a trinity of evidence supported the knowledge element: a confession; a codefendant's testimony; and compelling circumstantial evidence. Because the district court either improperly discounted or overlooked this evidence, it abused its discretion in

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[6] On occasion, for example, we have phrased the Rule 33 standard as whether there "would be a miscarriage of justice *or* the weight of evidence preponderates against the verdict." *United States v. Wright*, 634 F.3d 770, 775 (5th Cir. 2011) (emphasis added) (quoting *United States v. Wall*, 398 F.3d 457, 466 (5th Cir. 2004)). As we have explained, however, a district court must conclude both that the verdict weighs heavily against the evidence and that a miscarriage of justice may have resulted. Of course, those two questions are closely related.

[7] Although the relevant charge is possession with intent to distribute methamphetamine, Crittenden needed to know only that he possessed a controlled substance. *See McFadden v. United States*, 576 U.S. 186, 192 (2015).

ordering a new trial.[8] *See United States v. Baytank (Hous.), Inc.*, 934 F.2d 599, 620 (5th Cir. 1991); *see also United States v. Burks*, 974 F.3d 622, 625–28 (6th Cir. 2020); *United States v. Campos*, 306 F.3d 577, 581 (8th Cir. 2002); and *United States v. Sanchez*, 969 F.2d 1409, 1414–16 (2d Cir. 1992) (all reversing grants of new trial because the evidence did not weigh heavily against the verdict).

We begin with the district court's discounting of Crittenden's confession. Four agents testified that Crittenden said he "thought" or "believed" that the bags in the Byway attic contained marijuana. The district court did not question the agents' credibility or identify countervailing evidence. Rather, it concluded that Crittenden's statement was not evidence that he *knew* the bags contained marijuana—just that he *believed* it. This academic parsing of Crittenden's words intruded on a core jury function. *See Cheek v. United States*, 498 U.S. 192, 203 (1991) ("Knowledge and belief are characteristically questions for the fact finder."). The court ignored that people often temper their language by saying "I think" (or "I believe") rather than "I know." Someone seated across from you at dinner might say "I think there is some food on your chin." Of course, your dinner companion knows there is food on your chin—she can see it with her own eyes—but using "I think" softens the statement. Likewise here, the jury, well-versed

[8] To the extent its concern about Crittenden's minimum sentence as a recidivist motivated the new trial grant, that also would be an abuse of discretion. Because a trial focuses only on the question of guilt, "the jury is not allowed to consider a defendant's potential sentence as part of its deliberations." *United States v. Buchner*, 7 F.3d 1149, 1153 (5th Cir. 1993); *see also* FIFTH CIRCUIT PATTERN JURY INSTRUCTIONS (CRIMINAL CASES) § 1.22 (2019) (instructing juries that when deciding guilt "[y]ou should not be concerned with punishment in any way"). It follows, then, that in considering whether the jury's verdict went against the great weight of the evidence, the judge should not be able to consider a factor the jury could not. *Cf. United States v. Merlino*, 592 F.3d 22, 34 (1st Cir. 2010) (explaining that a district court's concern about a defendant's lengthy mandatory sentence undermined its decision to grant a new trial).

in everyday English usage, could easily conclude that Crittenden knew the bags contained drugs and used "I think" to hedge the impact of his confession. *See Sioux City & Pac. R. Co. v. Stout*, 84 U.S. (17 Wall.) 657, 664 (1873) (recognizing that a jury "can draw wiser and safer conclusions from admitted facts . . . than can a single judge"). That the district court would have drawn a different inference does not mean that the evidence weighed heavily against the verdict. *Tarango*, 396 F.3d at 672 (explaining that a court cannot order a new trial just because the verdict "runs counter to [the] result the district court believed was more appropriate").

Moreover, the district court's doubts about Crittenden's admission are allayed by other statements Crittenden made. He told the agents he was "going to get in trouble" because of what he was saying. Why would that be the case if his statements were not admissions? Crittenden also was "pretty concerned" about the agents' learning he had stored the suitcases in his friend's attic because he "just didn't want [his friend] to get in any kind of trouble." Why would the friend get in trouble unless contraband was in the suitcases? The new trial order did not acknowledge any of these statements, which confirm that Crittenden knew drugs were in the suitcases.

Indeed, the biggest problem with the new trial order is not its impugning the confession but its ignoring other evidence of guilt. The order does not mention anything Dominguez said. But she also admitted Crittenden's knowing participation in drug trafficking. The jury heard recordings of her telling the buyer that she was "working with her husband" and mentioning "trafficking marijuana with her husband." This too is direct evidence of knowledge.

There was also powerful circumstantial evidence of Crittenden's guilt. But the order granting a new trial ignored it, too. Dominguez testified that she and Crittenden were worried about having the plastic tub in their

house because they both "assumed that it was drugs." She said that Crittenden wanted the tub out of their house and that he "probably" put its contents into the suitcases because she did not. Crittenden then took the suitcases to his friend's house on Byway Drive. Critically, when Dominguez needed to deliver ten bundles of methamphetamine for the sale, Crittenden went alone to retrieve that exact amount of methamphetamine from the stash that mostly included marijuana. It defies probability that Crittenden did not know what was in the suitcase, yet he happened to pick the exact amount of the right drug for the planned sale. Only 13 of the 103 bundles contained methamphetamine; all 10 that Crittenden grabbed contained that drug the informant wanted. And it does not make sense that Dominguez would have left the selection of the drugs to chance given the danger of the drug trade.

Even if a trial judge could quibble with any of this evidence in isolation, putting the puzzle pieces together reveals a clear picture: Crittenden knew the suitcases contained illegal drugs. One might even conclude the evidence of his guilt is overwhelming. But however strong the evidence supporting the verdict is, the great weight of evidence is not against the verdict.

This case does not resemble the "exceptional circumstances" that have been found to warrant a new trial. The government's case did not depend on farfetched inferences, *see Robertson*, 110 F.3d at 1119, or solely on the testimony of a cooperating codefendant, *see* FIFTH CIRCUIT PATTERN JURY INSTRUCTIONS (CRIMINAL CASES) § 1.15 (2019) (explaining that such testimony "must always be examined and weighed by the jury with greater care and caution" than that of "ordinary witnesses"). The principal witnesses were not obviously incredible. *See United States v. Autuori*, 212 F.3d 105, 120–21 (2d Cir. 2000). Nor was there meaningful exculpatory evidence, *see United States v. Stacks*, 821 F.3d 1038, 1046 (8th Cir. 2016); *United States v. Ferguson*, 246 F.3d 129, 135–36 (2d Cir. 2001); *Autuori*, 212 F.3d at 120, or a significant risk that the verdict turned on

improper factors, *see Tarango*, 396 F.3d at 674; *United States v. Kellington*, 217 F.3d 1084, 1101 (9th Cir. 2000). Crittenden's confession, the recording of his wife, and circumstantial evidence all pointed to guilt. That Crittenden had a much lesser role than his wife in the drug trafficking is a different issue from the strength of the evidence inculpating him.[9]

* * *

It is true that the "district judge, unlike us, was there throughout the trial." Dissenting Op. 14. But some other people sat through the trial: the twelve citizens who performed their civic duty as jurors. Because their verdict was not against the great weight of evidence, it was an abuse of discretion to erase it.

The order granting a new trial is REVERSED as to Count Two and the jury's verdict on that count (possession with intent to distribute methamphetamine) is REINSTATED. The case is REMANDED for sentencing on that conviction.

[9] Weight of the evidence and role in the offense are separate issues. Evidence might be weak against the kingpin of a drug organization, whereas virtually irrefutable evidence (such as a video) might show the involvement of a minor player.

JENNIFER WALKER ELROD, *Circuit Judge*, joined by DENNIS and GRAVES, *Circuit Judges*, dissenting:

Judge Costa's opinion accurately depicts the standard governing Rule 33 motions for new trial. *See ante* at 6–9. But I disagree with the majority opinion's application of that standard to *these* facts for the reasons explained in the prior panel opinions in this case. *United States v. Crittenden*, 25 F.4th 347, 349–50 (5th Cir. 2022), *judgment vacated and reh'g en banc granted*, 26 F.4th 1015 (5th Cir. 2022); *United States v. Crittenden*, 971 F.3d 499, 504–07 (5th Cir. 2020), *withdrawn*, 827 F. App'x 448 (5th Cir. 2020). The district judge did not take his role here lightly. After reviewing all of the evidence, the district judge concluded that "the evidence failed to show that Crittenden had knowledge of the nature of the controlled substance he possessed—as was required to convict him of possessing methamphetamine with the intent to distribute." *Crittenden*, 25 F.4th at 349. Specifically, the district judge found the evidence lacking about whether Crittenden knew what was in the suitcases and whether he was the one who transferred the drugs *into* the suitcases in the first place. *Crittenden*, 971 F.3d at 503.

The district judge, unlike us, was there throughout the trial. He heard the testimony and saw the evidence as it was presented. For that reason, he was in the best position to determine that, yes, there was enough circumstantial evidence to convict, but no, the verdict should not stand. District courts have historically exercised discretion in granting new trials precisely because of the perspective they have that we do not.

Because the very experienced district judge was well within his discretion to order a new trial on these facts, I respectfully dissent.

APPENDIX D

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
February 8, 2022
Lyle W. Cayce
Clerk

No. 18-50635

UNITED STATES OF AMERICA,

Plaintiff—Appellant,

versus

SAMUEL TANEL CRITTENDEN,

Defendant—Appellee.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 3:17-CR-2039-2

Before DENNIS, ELROD, and COSTA, *Circuit Judges*.

JENNIFER WALKER ELROD, *Circuit Judge*:

After a jury convicted Samuel Crittenden of possession with intent to distribute 500 grams or more of methamphetamine, he moved for a new trial under Federal Rule of Criminal Procedure 33(a). Rule 33 "allows a district court to vacate any judgment and grant a new trial if the interest of justice so requires." *Eberhart v. United States*, 546 U.S. 12, 13 (2005) (quoting Fed. R. Crim. P. 33). The district court granted Crittenden's motion and the United States timely appealed.

The panel issued majority and dissenting opinions in August 2020.

United States v. Crittenden, 971 F.3d 499 (5th Cir. 2020), *withdrawn*, 827 F. App'x 448 (5th Cir. 2020). After further reflection, in October 2020, the panel remanded the case for the limited purpose of allowing the district court to clarify whether it had granted a new trial because the evidence was insufficient to support a conviction or that, despite the sufficiency of the evidence, it "preponderated heavily against the guilty verdict."[*] *See Crittenden*, 827 F. App'x at 449 (citing *United States v. Herrera*, 559 F.3d 296, 302 (5th Cir. 2009)).

On remand, the district court made clear that, though the evidence was sufficient to support a conviction, the court had cautiously reweighed the evidence and found that it preponderated heavily against Crittenden's guilt. Specifically, the district court concluded that the evidence failed to show that Crittenden had knowledge of the nature of the controlled substance he possessed—as was required to convict him of possessing methamphetamine with the intent to distribute. Thus, the district court had concluded that it

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[*] There are significant differences between finding that the evidence was insufficient to support the verdict and granting a new trial. "In this Circuit, the generally accepted standard is that a new trial ordinarily should not be granted unless there would be a miscarriage of justice or the weight of evidence preponderates against the verdict." *United States v. Wright*, 634 F.3d 770, 775 (5th Cir. 2011) (quoting *United States v. Wall*, 389 F.3d 457, 465 (5th Cir. 2004)) (quotation marks omitted). Even where "the evidence is sufficient to support a conviction," the district court may grant a new trial if it "cautiously reweighed" the evidence and concluded that it "preponderated heavily against the guilty verdict." *Herrera*, 559 F.3d at 302. We review a district court's decision to grant a new trial for abuse of discretion. *United States v. Hoffman*, 901 F.3d 523, 552 (5th Cir. 2018).

In contrast, there is insufficient evidence only when, taking all inferences in favor of the verdict, "no rational juror could have found guilt beyond a reasonable doubt." *Id.* at 541 (quoting *United States v. Sanjar*, 876 F.3d 725, 744 (5th Cir. 2017)). When a court finds the evidence insufficient, the defendant must be acquitted. *Burks v. United States*, 437 U.S. 1, 10–11 (1978). Acquittal is required even when the defendant moved only for a new trial. *Id.* at 17. We review *de novo* a district court's holding that the evidence was insufficient to support the jury's verdict. *Hoffman*, 901 F.3d at 541.

would be a miscarriage of justice to let the verdict stand and granted Crittenden's motion for a new trial.

We find no error in the district court's decision, which we review for abuse of discretion. *United States v. Hoffman*, 901 F.3d 523, 552 (5th Cir. 2018). Under binding Supreme Court and circuit precedent, a district court is permitted to carefully reweigh evidence, make credibility assessments, and act as a "thirteenth juror" in considering a motion for a new trial. *Tibbs v. Florida*, 457 U.S. 31, 42, 45 n.22 (1982); *see also United States v. Arnold*, 416 F.3d 349, 361 (5th Cir. 2005) (noting that the district "court has the authority to make its own determination regarding the credibility of witnesses" on a Rule 33 motion for a new trial); *United States v. Robertson*, 110 F.3d 1113, 1117 (5th Cir. 1997) (noting that the district court "may weigh the evidence and may assess the credibility of the witnesses during its consideration of the motion for new trial").

Binding circuit precedent permits a district court to grant a new trial even where "the evidence is sufficient to support a conviction" but nevertheless "preponderate[s] heavily against the guilty verdict." *Herrera*, 559 F.3d at 302. Here, the district court "did not simply disregard the jury's verdict in favor of one it felt was more reasonable." *Robertson*, 110 F.3d at 1119. Indeed, the district court cautiously reweighed the evidence, determined that a mistake had been committed, and permissibly granted a new trial to "prevent a miscarriage of justice." *Id.* at 1119–20.

* * *

The judgment of the district court is AFFIRMED.

GREGG COSTA, *Circuit Judge*, dissenting:[1]

The Constitution twice says that juries decide criminal cases. U.S. CONST. art. III, § 2, cl. 3; *id.* amend. VI. The jury right's reappearance in the Sixth Amendment is no mere encore. The Bill of Rights includes the jury right among many guarantees for criminal defendants, whereas Article III requires juries as a structural protection. This original jury requirement ensures that unelected judges are not the only actors in our judiciary. "Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary." *Blakely v. Washington*, 542 U.S. 296, 306 (2004); *see also* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 237 (2005).

Article III's command that all trials "shall be by Jury" is why, for the first century of our Republic, a defendant could not elect to have a judge decide his fate. *See Thompson v. Utah*, 170 U.S. 343, 353–55 (1898); *Home Ins. Co. v. Morse*, 87 U.S. (20 Wall.) 445, 451 (1874) (citing *Cancemi v. People*, 18 N.Y. 128 (1858)); *see also Patton v. United States*, 281 U.S. 276 (1930) (allowing bench trials); Recent Development, *Accused in Multiple Prosecution Held to Have Absolute Right to Waive Jury Trial*, 59 COLUM. L. REV. 813, 814 (1959) ("Until shortly after the turn of the century, the federal courts and most state courts applied the common law rule that a jury trial can not be

[1] I originally issued this dissent when the court affirmed the district court's grant of a new trial in 2020. *See United States v. Crittenden*, 971 F.3d 499 (5th Cir. 2020). The court later withdrew that opinion, noting some confusion about whether the district court's order—which "speaks repeatedly of the insufficiency of the evidence against Crittenden—supported an acquittal for insufficient evidence as opposed to a new trial based on the court's view that the evidence weighed against the verdict. 827 F. App'x 448, 450 (5th Cir. 2020). On remand, the district court confirmed that the assumption in the original panel opinion was correct; the granting a new trial on the ground that the evidence preponderated against the verdict. As I believe the evidence (which of course has not changed since our original ruling) heavily favors the verdict, I maintain this dissent.

waived in a felony case in which the defendant enters a plea of not guilty."). In other words, the jury right is as much about jurors as it is about defendants. *Cf. Powers v. Ohio*, 499 U.S. 400, 409 (1991) (holding that prospective jurors have the right not to be excluded based on race).

The jury's constitutional role in deciding criminal trials leaves little room for judicial second-guessing. Our review of verdicts is therefore quite limited. *See, e.g.*, *Burks v. United States*, 437 U.S. 1, 16–17 (1978). Likewise, the authority to grant a new trial when there is enough evidence to support the verdict, but the judge would weigh the evidence differently, is in some tension with Article III and the Sixth Amendment. As a result, although we review the grant of a new trial only for abuse of discretion, we have repeatedly warned that its discretion is not unbridled. *United States v. Arnold*, 416 F.3d 349, 360 (5th Cir. 2005); *United States v. Robertson*, 110 F.3d 1113, 1118 (5th Cir. 1997). Above all, a district court cannot use the new-trial power to "usurp the jury's function." *United States v. Tarango*, 396 F.3d 666, 672 (5th Cir. 2005); *see also Arnold*, 416 F.3d at 360; *Robertson*, 110 F.3d at 1118. Only "exceptional" circumstances warrant the strong medicine of a "thirteenth juror." *United States v. Sinclair*, 438 F.2d 50, 51 n.1 (5th Cir. 1971) (Wisdom, J.) (quoting 2 CHARLES ALAN WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 553, at 487 (1969)).

To prevent judges from too often taking a seat in the jury box, a district court may grant a new trial only when the evidence weighs so heavily against the verdict "that it would be a miscarriage of justice to let the verdict stand." *Arnold*, 416 F.3d at 360 (citation omitted); *see also* FED. R. CRIM. P. 33(a) (allowing court to grant new trial if "the interest of justice so requires"). Those words bear repeating: a miscarriage of justice. The jury's verdict in this case comes nowhere close to that. Indeed, far from a case in which the evidence "preponderate[s] heavily against the verdict," *Arnold*, 416 F.3d at 360, the great weight of the evidence supports this one.

Beaucoup evidence shows that Crittenden knew he possessed a controlled substance. I'll start with what should end the matter: Crittenden said as much. When agents confronted him about handing the bag to his wife, Carla Dominguez, he told them that he "thought" or "believed" it contained marijuana. The district court reasoned that, "if anything," Crittenden's confession showed merely that he "believed the bags contained marijuana." So apparently the validity of the verdict rendered by twelve citizens turns on whether the defendant said "I believed" instead of "I knew." This belief/knowledge distinction defies real life. People don't use the *mens rea* terms found in the United States Code when confessing. And they often try to hedge their culpability. The jury recognized Crittenden's confession for what it was. It's because of their broader understanding of everyday situations and language that jurors are better positioned to decide the facts than judges trained in the law. As this case shows, we have a proclivity for how-many-angels-can-dance parsing.

Crittenden's wife also admitted Crittenden's knowing participation in drug trafficking. The jury heard recordings of her telling the buyer that she was "working with her husband" and mentioning "trafficking marijuana with her husband."

The statements of Crittenden and his wife are direct evidence of his knowledge. Standing alone they are strong evidence of guilt.

But wait—there's more.

Most drug cases rely on circumstantial evidence to prove state of mind. *See United States v. Cano-Guel*, 167 F.3d 900, 904 (5th Cir. 1999). There was plenty of that here. Yet the district court ignored most of it, focusing only on the confession that the court rationalized away. That failure to grapple with other incriminating evidence alone is an abuse of discretion. *See Hernandez v. Lynch*, 825 F.3d 266, 271–72 (5th Cir. 2016) (holding that

the BIA abused its discretion when it ignored evidence that counseled against its ruling); *United States v. Ouedraogo*, 531 F. App'x 731, 745 (6th Cir. 2013) (unpublished) (reversing grant of new trial because the district court's "rationale . . . overlook[ed], or improperly discount[ed], much of the evidence").

Overlooking the circumstantial evidence is a more glaring problem because it is so compelling. Dominguez testified that she and Crittenden were worried about having the plastic tub in their house because they "assumed that it was drugs." She said that Crittenden wanted the tub out of their house and that he "probably" put its contents into the suitcases because she did not. *See United States v. Ayala-Tapia*, 520 F.3d 66, 69 (1st Cir. 2008) (explaining that defendant's packing heavily wrapped drugs in suitcase could support inference of knowledge because legal substances would not need such heavy wrapping). Crittenden then took the suitcases to his friend's house on Byway. Critically, when Dominguez needed to deliver ten bundles of methamphetamine for the sale, Crittenden went alone to retrieve that exact amount of the drug from the stash—a stash that also included marijuana. The jury understood that it's ridiculous to think that Crittenden randomly picked one of several bags without knowing its contents and happened to select one that contained exactly ten bundles of methamphetamine and no marijuana. Would Crittenden have risked retrieving the wrong drugs or quantity given how dangerous the drug trade is? *Cf. United States v. Araiza-Jacobo*, 917 F.3d 360, 368 (5th Cir. 2019) (explaining that large quantity of drugs—5.1 kilograms of methamphetamine—showed knowledge because "a drug trafficker would not have entrusted the shipment to an untested courier").

The only reasonable inference that can be drawn from this evidence is that Crittenden moved the drugs out of the tub and into the suitcases before he transported them to the Byway residence. Indeed, his wife acknowledged

that was "probably" the case and, other than her, who else in their home would have transferred the drugs from the tub to the suitcases?

Courts in this circuit tell every jury, "The law makes no distinction between the weights to be given either direct or circumstantial evidence." FIFTH CIRCUIT PATTERN JURY INSTRUCTIONS (CRIMINAL CASES) § 1.08 (2019); *see also McFadden v. United States*, 576 U.S. 186, 192 n.1 (2015). Jurors are not the only people in the courthouse to whom that instruction applies. Failure to give any meaningful weight to the substantial circumstantial evidence of Crittenden's knowledge warrants reversal. *See United States v. McCarter*, 250 F.3d 744, 2001 WL 274753, at *3 (5th Cir. Feb. 23, 2001) (unpublished per curiam) (reversing new-trial grant when district court concluded that evidence of knowledge was circumstantial); *see also United States v. Campos*, 306 F.3d 577, 580 (8th Cir. 2002) (reversing new-trial grant because the district court discounted circumstantial evidence of intent to distribute).

Because granting Crittenden a new trial based on the weight of the evidence defies these basic principles, it should not be surprising that the ruling may not have had much—if anything—to do with the evidence of knowledge. The sequence of events is telling. The district court granted the new trial in a one-page order that said an opinion would follow. That order did not mention anything about weak evidence of knowledge. And despite the fact that the evidence presented at trial would have been freshest in the court's mind when it granted the motion, it took five months to give a reason for doing so.

At a status conference after it finally issued the order explaining the new-trial grant, the court added:

> **I think if it was up to the Fifth Circuit I'm going to get reversed, quite frankly**, but I went over the PSR this

> morning. Mr. Crittenden is facing 292 to 365 months and I think that's the reason I considered . . . granting a new trial because I was very reluctant to issue that type of sentence.

The district court doubled down at Dominguez's sentencing:

> Counsel, as I informed you sometime back, maybe last week, I'm going to grant a new trial for Mr. Crittenden.
>
> I am—his guideline range is 292 to 365 months and he's facing a 20-year mandatory minimum. I can't . . . even go the 20-year mandatory minimum on him and I'm certainly not going to go 292 months.
>
> He had a limited role in what his wife was doing and she got him into this. Very limited role.

At the end of the hearing, the district court turned its attention back to Crittenden. It warned: "Mr. Crittenden, you're facing 292 to 365 months. If you go to trial again and you lose, those guidelines are not going to change and I've given you every opportunity."

There is nothing in either of the district court's discourses about believing ≠ knowing—only a repeated concern about the sentence Congress required. The district court's concern was not unfounded; Congress has since agreed with its view and reduced the minimum sentence Crittenden would face. But another standard jury instruction applies to judges as well: When deciding guilt, "[y]ou should not be concerned with punishment in any way."[2] FIFTH CIRCUIT PATTERN JURY INSTRUCTIONS (CRIMINAL

[2] Under the First Step Act, Crittenden faces a ten rather than twenty-year minimum. That new law would apply whether we reinstate the guilty verdict from the first trial or the jury at a new trial returns another one. In either case, the sentencing would

CASES) § 1.22 (2019); *see also United States v. Merlino*, 592 F.3d 22, 34 (1st Cir. 2010) (explaining that a district court's concern about a defendant's lengthy mandatory sentence undermined its decision to grant a new trial).

Much to the district court's surprise, we are allowing it to throw out the jury's verdict. That raises another point. What is going to be different at the next trial? In other words, won't another guilty verdict be just as much of a "miscarriage of justice" as this one? The evidence showing knowledge won't change, so we may be starting a cycle of citizens serving as jurors in this case only to see their work undone. If the court thinks there is actually insufficient evidence to support guilt—a determination that results in an acquittal rather than a new trial—then it should just say so and save future jurors the hassle. Otherwise, it should not require a new trial based on disagreement about state of mind, the quintessential fact issue that juries get to decide. *See Thompson v. Syntroleum Corp.*, 108 F. App'x 900, 902 (5th Cir. 2004) (explaining that summary judgment on "state of mind" questions is "discouraged because intent is a question of fact quintessentially within the province of the factfinder"). Indeed, the majority opinion cites no case affirming a new-trial grant based on a judge's disagreement with how a jury weighed evidence on the inference-laden question of knowledge.

Ultimately, this case pits the deference we owe district judges on discretionary matters against the deference judges owe juries. Both the district judge and the jury saw and heard the evidence. Between the two, the choice is easy given the overwhelming evidence of Crittenden's guilt. I go with the citizens who missed work and had to rearrange family responsibilities because they showed up to do their civic duty. When it comes

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occur after the effective date of the First Step Act. *See United States v. Gomez*, 960 F.3d 173, 177 (5th Cir. 2020).

to commonsense questions like the ones this trial posed, the perspective of a single judge is no match for the collective wisdom that a jury of varied backgrounds and experiences brings to bear.

Yet the district court—now with our court's blessing—concluded that the cross-section of the El Paso community that found Crittenden guilty committed a miscarriage of justice. (I guess I too would have been party to that miscarriage of justice as I think the jury got it right.) This judicial override of the jury's verdict disrespects their service.

APPENDIX E

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
October 1, 2020
Lyle W. Cayce
Clerk

No. 18-50635

UNITED STATES OF AMERICA,

Plaintiff—Appellant,

versus

SAMUEL TANEL CRITTENDEN,

Defendant—Appellee.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 3:17-CR-2039-2

Before DENNIS, ELROD, and COSTA, *Circuit Judges*.

PER CURIAM:*

We WITHDRAW the court's prior majority and dissenting opinions of August 20, 2020, and substitute the following opinion on behalf of the entire panel.

After a jury convicted Samuel Crittenden of possession with intent to

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

distribute 500 grams or more of methamphetamine, he moved for a new trial under Federal Rule of Criminal Procedure 33(a). The district court granted his motion and the United States timely appealed. The panel issued majority and dissenting opinions on August 20, 2020. Upon further reflection, the panel determines that we should remand the case for the limited purpose of clarifying whether the district court held that the evidence was insufficient to support a conviction or that, despite its sufficiency, the evidence "preponderated heavily against the guilty verdict." *United States v. Herrera*, 559 F.3d 296, 302 (5th Cir. 2009).

There are significant differences between finding that the evidence was insufficient to support the verdict and granting a new trial. "In this Circuit, the generally accepted standard is that a new trial ordinarily should not be granted unless there would be a miscarriage of justice or the weight of evidence preponderates against the verdict." *United States v. Wright*, 634 F.3d 770, 775 (5th Cir. 2011) (quoting *United States v. Wall*, 389 F.3d 457, 465 (5th Cir. 2004)) (quotation marks omitted). Even where "the evidence is sufficient to support a conviction," the district court may grant a new trial if it "cautiously reweighed" the evidence and concluded that it "preponderated heavily against the guilty verdict." *Herrera*, 559 F.3d at 302. We review a district court's decision to grant a new trial for abuse of discretion. *United States v. Hoffman*, 901 F.3d 523, 552 (5th Cir. 2018).

In contrast, there is insufficient evidence only when, taking all inferences in favor of the verdict, "no rational juror could have found guilt beyond a reasonable doubt." *Id.* at 541 (quoting *United States v. Sanjar*, 876 F.3d 725, 744 (5th Cir. 2017)). When a court finds the evidence insufficient, the defendant must be acquitted. *Burks v. United States*, 437 U.S. 1, 10–11 (1978). Acquittal is required even when the defendant moved only for a new trial. *Id.* at 17. We review *de novo* a district court's holding that the evidence was insufficient to support the jury's verdict. *Hoffman*, 901 F.3d at 541.

Here, the problem is that the district court's memorandum opinion is ambiguous as to whether it held that the evidence was insufficient to support a conviction or, alternatively, that the evidence preponderated heavily against the guilty verdict despite its sufficiency. The district court's decision to grant a new trial implies that it held that the evidence preponderated heavily against the verdict under *Herrera*, 559 F.3d at 302. Yet, the district court's memorandum opinion speaks repeatedly of the insufficiency of the evidence against Crittenden, which would require acquittal. *See Burks*, 437 U.S. at 10–11. On appeal, neither party addressed this issue.

Because the memorandum opinion is ambiguous, we REMAND for the limited purpose of allowing the district court to state whether it ruled the evidence insufficient or instead ruled that, while the evidence was sufficient, it preponderated heavily against the guilty verdict so as to warrant a new trial. The district court shall enter the appropriate order within twenty-one days of the issuance of this opinion. We retain jurisdiction over this limited remand pending the district court's response, as is customary for limited remands. *See, e.g.*, *United States v. Gomez*, 905 F.3d 347, 356 (5th Cir. 2018). This appeal shall return to the same panel.

* * *

This case is REMANDED FOR LIMITED CONSIDERATION CONSISTENT WITH THIS OPINION.

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED
August 20, 2020

Lyle W. Cayce
Clerk

No. 18-50635

UNITED STATES OF AMERICA,

Plaintiff – Appellant,

v.

SAMUEL TANEL CRITTENDEN,

Defendant – Appellee.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 3:17-CR-2039-2

Before DENNIS, ELROD, and COSTA, Circuit Judges.

JENNIFER WALKER ELROD, Circuit Judge:

A jury convicted Samuel Crittenden and his wife Carla Dominguez of possession with intent to distribute 500 grams or more of methamphetamine. The district court granted Crittenden a new trial because the record does not show that he knew that the bags he removed from his house—and the bag his wife requested that he bring her—contained methamphetamine or any other controlled substance. Because the district court did not abuse its discretion in granting Crittenden a new trial, we AFFIRM.

I.

A.

In 2017, Federal Bureau of Investigation agents received a tip from the Drug Enforcement Agency field office in Juarez, Mexico, that ten pounds of methamphetamine was being stored at a house in El Paso. The FBI agents enlisted a cooperating informant to call Dominguez's phone number, which was associated with the tip, in order to arrange a controlled methamphetamine purchase. In a series of phone calls over the next few days, Dominguez and the informant discussed the informant's ostensible interest in "windows"—a street term for methamphetamine. The informant met Dominguez in person in the parking lot of a JCPenney where they discussed the sale of "crystal," and the informant offered to buy "ten" for $35,000. The two agreed to meet again after Dominguez had verified how much supply she had.

After the meeting, the agents surveilled Dominguez as she returned to the house she shared with Crittenden. Thereafter, the agents observed the two depart the home in separate cars. One of the agents followed Crittenden to another home on Byway Drive in El Paso, where Crittenden exited his vehicle and went inside. The agent broke off the surveillance and rejoined the remaining agents that had continued to surveil Dominguez. Dominguez, however, ultimately led the agents back to the Byway Drive residence. The agents observed a male who was likely Crittenden[1] exit the house and hand Dominguez a black bag through the window of her car.

Dominguez then drove away from the house. When law enforcement intercepted her, they found a black leather handbag containing ten bundles of

[1] The agents testified that it was getting dark and they failed to get a good enough look at the male figure to identify him as Crittenden, but they further stated that Crittenden admitted to handing Dominguez the bag during a subsequent police interview. Dominguez also testified that it was Crittenden that handed her the bag.

methamphetamine collectively weighing 4.2 kilograms. Law enforcement then interviewed Crittenden. According to the agents' later testimony, Crittenden stated that he had moved the bags—which were Dominguez's—to the Byway Drive residence, believing that they contained marijuana. When Dominguez asked him to retrieve one of the bags for her, he did so. A resident of the Byway Drive house would later testify that Crittenden had asked him if he could stay at the Byway Drive house and store some personal effects in the attic because he was having a fight with Dominguez. After receiving consent from the residents of the Byway Drive house to search the attic, law enforcement recovered three roller suitcases filled with 1.65 kilograms of methamphetamine and 47 kilograms of marijuana.

B.

Dominguez and Crittenden were charged in the Western District of Texas with (1) conspiracy to possess with intent to distribute 500 grams or more of methamphetamine in violation of 21 U.S.C. § 841(a)(1), (b)(1)(A)(viii); (2) possession with intent to distribute 500 grams or more of methamphetamine in violation of 21 U.S.C. § 841(a)(1), (b)(1)(A)(viii); and (3) conspiracy to possess with intent to distribute marijuana in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(D), and 846.

At trial, Dominguez took the stand as the sole witness for the defense. She testified that she used to buy marijuana for her and her friends' personal use from an individual named Juan Diaz. Dominguez stated that this relationship ended when, in 2015, she and Crittenden decided to have a fifth child together and resolved "to get closer to God and to take care of [their] family together without having any kind of partying or drug use." She said that she did not hear from Diaz again until he called her in January of 2017 and asked her if she could retrieve his car, which he said had been left on the

U.S. side of the border as a result of a fight he had with his girlfriend, and hold it at her house until his sister could pick it up the following day. Dominguez testified that she agreed and retrieved the car, but when Juan's sister arrived, she took several bags and a large plastic container out of the trunk, gave them to Dominguez, and quickly left before Dominguez could object.

With regard to the series of phone calls, Dominguez testified that she first did not understand what the calls concerned and assumed they were in regard to some broken windows in her house. When the calls continued, Dominguez stated, she began to suspect that the packages contained drugs or other contraband and that her and her family's lives were in danger, so she went along with meeting the individuals who contacted her in order to get rid of the packages. Dominguez stated that when she told Crittenden about what was occurring, Crittenden said that he did not want to have anything to do with the matter and that he did not want the packages to be in the house with their children. According to Dominguez, Crittenden then moved the packages to the Byway Drive residence to get them out of the house.

Dominguez testified that she just instructed Crittenden to "grab a bag" from the Byway Drive house on the day she met with the informant without specifying the contents of the bag. She stated that Crittenden was not involved in any of the transactions and did not know Diaz.

Following the close of evidence, the jury convicted both defendants on all counts.

C.

Crittenden then renewed a properly preserved motion for judgment of acquittal, or, in the alternative, for a new trial. The district court granted the motion for a new trial. In its memorandum opinion, the district court concluded that the Government failed to prove that Crittenden participated in

a conspiracy or that he had the knowledge of the nature of the controlled substance he possessed that was required to convict him of possessing methamphetamine with the intent to distribute. As to the possession count, the court stated,

> [N]o direct or circumstantial evidence was presented during the first trial to show beyond a reasonable doubt that Mr. Crittenden knew the contraband was comprised of any controlled substances listed on the schedules or that he knew the identity of the controlled substances he possessed.
>
> . . . .
>
> The Government argues that the second element was established because Mr. Crittenden had knowledge. To support its argument, the Government specifically points to the moment in which Mr. Crittenden was questioned by authorities and he admitted that he moved what he believed to be marijuana. But, because the Court finds that belief is not enough to establish knowledge, it disagrees with the Government and adheres to the definition laid out by the Supreme Court in *McFadden* [*v. United States*, 576 U.S. 186 (2015)]. In *McFadden*, the Supreme Court determined that knowledge can only be established in two ways: either by knowledge that a controlled substance is listed or by knowledge of the identity of a scheduled controlled substance.
>
> Here, neither of these definitions was established beyond a reasonable doubt by the Government. Any proof—direct or circumstantial—that was introduced during the first trial failed to show that Mr. Crittenden knew the contraband was comprised of any controlled substances listed on the schedules or that he knew the identity of the controlled substances he possessed. Mr. Crittenden never opened the bags to see what was inside. He placed the bags in several suitcases and immediately removed them to the Byway residence, away from his home and family. This testimony, viewed, in the context of all of the evidence offered during the first trial shows, at most, that Mr. Crittenden believed the bags contained something illegal. More specifically, the testimony shows, if anything, that Mr. Crittenden believed the bags contained marijuana. The Court finds this thought or belief insufficient to establish knowledge.

The Government timely appealed the grant of new trial on the possession count.[2] It did not appeal the grant of new trial on the conspiracy counts.

II.

Unlike a judgment of acquittal based on the sufficiency of the evidence, which this court reviews *de novo* while taking the evidence in the light most favorable to the verdict, "the decision on a new trial motion is entrusted to the discretion of the district court so [this court] will reverse it only on an abuse of that leeway." *United States v. Hoffman*, 901 F.3d 523, 552 (5th Cir. 2018). This court thus reviews a district court's grant of a new trial for abuse of discretion, while considering de novo any questions of law that figured into the determination. *United States v. Wall*, 389 F.3d 457, 465 (5th Cir. 2004). "A district court by definition abuses its discretion when it makes an error of law." *Koon v. United States*, 518 U.S. 81, 100 (1996) (considering whether a district court abused its discretion by accounting for improper factors in departing from sentencing guidelines).

A district court may grant a new trial under Federal Rule of Criminal Procedure 33(a) "if the interest of justice so requires." "In this Circuit, the generally accepted standard is that a new trial ordinarily should not be granted 'unless there would be a miscarriage of justice or the weight of evidence preponderates against the verdict.'" *United States v. Wright*, 634 F.3d 770, 775 (5th Cir. 2011) (quoting *Wall*, 389 F.3d at 466).

[2] After filing its notice of appeal, the Government moved in the district court for reconsideration. After the district court initially denied the motion for lack of jurisdiction due to the pending appeal, this court granted a limited remand to allow the district court to reconsider the motion. Thereafter, the district court denied reconsideration for the reasons stated in its memorandum opinion.

III.

On appeal, the Government argues that the district court "erroneously found that the government had failed to prove . . . that Crittenden *knowingly* possessed a controlled substance."[3] The Government contends that it "provided ample evidence of Crittenden's knowledge," namely (1) testimony that Crittenden moved the bags to the Byway Drive house, (2) testimony that Crittenden retrieved a bag containing methamphetamine on Dominguez's request, and (3) some agents' testimony that Crittenden told them he "thought the bags contained marijuana." We conclude that the district court correctly stated the relevant law and permissibly applied it to the facts of this case.

As to the governing legal principles, the district court properly noted that the "knowledge requirement [of § 841(a)] may be met by showing that the defendant knew he possessed a substance listed on the schedules." *McFadden v. United States*, 576 U.S. 186, 192 (2015). The district court also properly concluded that a defendant's mere "belief" that he possessed a controlled substance—divorced from other factors such as deliberate ignorance—"is not enough to establish knowledge." *See United States v. Araiza-Jacobo*, 917 F.3d 360, 366 (5th Cir. 2019) (noting that allowing a jury to convict based on a defendant's "negligent or reckless ignorance . . . would dilute the *mens rea*

[3] The Government alternatively challenges the district court's oral statements indicating disagreement with the mandatory minimum sentence that Crittenden faced. We know of no authority that requires us to consider a court's oral reasons for granting a new trial when they differ from those in a written opinion, and we decline to do so. *Cf. Ellison v. Shell Oil Co.*, 882 F.2d 349, 352 (9th Cir. 1989) (declining to review a district court's oral reasons for granting a directed verdict when they differed from those in its written order). Similarly, although the dissenting opinion makes much of the district court's offhand comment at a status conference that he could "get reversed" by "the Fifth Circuit," such musings do not alter our legal analysis. This district court is far from the first to wonder whether this court will reach a contrary conclusion. *See, e.g.*, *Montanya v. United States*, 2012 WL 2946586, at *5 (S.D. Tex. July 17, 2012) (Lake, J.) ("I'm not always right. Sometimes the higher courts reverse me. . . . That's the way the system works. I don't like to be reversed, but it happens once in a while.).

requirement to a weak '*should* have known' standard, which eviscerates the law's requirement that the defendant acted 'knowingly'"); *Flores-Larrazola v. Lynch*, 840 F.3d 234, 238 (5th Cir. 2016).

In some instances, the knowledge element of a controlled substance offense can be satisfied when a defendant knows there is a high probability that he possesses drugs but deliberately endeavors to avoid confirming those suspicions. *See United States v. Oti*, 872 F.3d 678, 697 (5th Cir. 2017); *United States v. Restrepo-Granda*, 575 F.2d 524, 529 (5th Cir. 1978). However, the Government has never argued deliberate ignorance in this case, and the jury was not instructed on it. We therefore express no opinion regarding whether the evidence demonstrated Crittenden's deliberate ignorance.

The Government fares no better on the facts. There was no evidence that the methamphetamine at issue belonged to Crittenden or that Crittenden was attempting to sell the drugs; rather, federal agents seized the methamphetamine from Dominguez pursuant to a transaction the confidential informant set up with Dominguez. Although the jury originally convicted Crittenden of conspiring with Dominguez to sell the drugs, the evidence supposedly showing Crittenden's involvement in any such conspiracy was so insufficient that the Government did not even appeal when the district court granted a new trial on the conspiracy counts.

In fact, the evidence does not show that Crittenden ever laid eyes on the drugs themselves—not when he moved the bags into the Byway Drive residence, and not when he retrieved a bag on Dominguez's instructions. At oral argument, the Government pointed to Dominguez's testimony that Crittenden "probably" moved the drug packages from their original container to the bags before moving them to the Byway Drive residence. Oral Argument at 7:30. But Dominguez also admitted that she "wasn't there" when the drug

packages were moved into the bags and therefore "wouldn't be able to tell you if it was [Crittenden] or someone else."[4] At any rate, the district court was not required to credit Dominguez's testimony in granting the motion for new trial. *United States v. Robertson*, 110 F.3d 1113, 1117 (5th Cir. 1997) ("The trial judge may weigh the evidence and may assess the credibility of the witnesses during its consideration of the motion for new trial."); *United States v. Arnold*, 416 F.3d 349, 361 (5th Cir. 2005) (noting that the district "court has the authority to make its own determination regarding the credibility of witnesses" on a Rule 33 new trial motion).

Despite the Government's repeated prodding, Dominguez expressly disavowed telling Crittenden that the bag she asked him to retrieve contained any drugs at all, testifying instead that she told Crittenden to "just grab a bag." The evidence shows only that Crittenden complied with Dominguez's request by bringing her a bag. Nothing more.

Some FBI agents testified that Crittenden told them that he "believed"—incorrectly, as it turned out—that "the bags contained marijuana."[5] That is why he "removed them . . . from his home and family" by putting them in the Byway Drive house. But, as previously explained, the district court properly concluded that testimony "show[ing], if anything, that Mr. Crittenden believed

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[4] Moreover, the drugs themselves do not appear to have been visible through the thick packaging. An officer testified that, when he opened the black bag seized from Dominguez, he had to "cut into one of the bundles" to "s[ee] the crystallized product inside."

[5] The Government argues that it would have been an abuse of discretion for the district court to have concluded that mistaken "knowledge" that the bags contained marijuana instead of methamphetamine would be insufficient to satisfy the *mens rea* requirement under *McFadden*. *See* 576 U.S. at 186. However, the district court did not base its new trial grant on any such reasoning. Instead, the district court concluded that "*belief* is not enough to establish *knowledge*" sufficient to satisfy the *mens rea* requirement. Because the evidence did not show "that Mr. Crittenden knew the contraband was comprised of *any* controlled substances listed on the schedules," the district court granted a new trial. The district court was within its discretion to grant a new trial under these circumstances.

the bags contained marijuana" is insufficient to prove knowledge. As a result, it was not an abuse of discretion for the district court to grant Crittenden a new trial on the basis of insufficient evidence of knowledge.

The dissenting opinion grounds its contrary analysis in respect for the role of juries in our system of government—a respect that we wholeheartedly share. *See* Jennifer Walker Elrod, *W(h)ither the Jury? The Diminishing Role of the Jury Trial in our Legal System*, 68 Wash. & Lee L. Rev. 3 (2011). Indeed, as John Adams observed in 1774, juries "are the heart and lungs of liberty." *Id.* at 8 (quoting Thomas J. Methvin, *Alabama the Arbitration State*, 62 Ala. Law. 48, 49 (2001)). Trial courts, on which all three members of this panel have served, generally agree that "juries almost always get it right." Jennifer Walker Elrod, *Is the Jury Still Out?: A Case for the Continued Viability of the American Jury*, 44 Tex. Tech L. Rev. 303, 320 (2012).

It is therefore unsurprising that some states, like Texas, have essentially disallowed judges from re-weighing a jury's determinations on "a witness's credibility, and the weight to be given to their testimony" in criminal cases. *Brooks v. Texas*, 323 S.W.3d 893, 902 (Tex. Crim. App. 2010) (quoting *Lancon v. Texas*, 253 S.W.3d 699, 707 (Tex. Crim. App. 2008)). Yet we are bound by the law of this circuit, which has long afforded district courts "considerable discretion with respect to Rule 33 motions." *United States v. Jordan*, 958 F.3d 331, 338 (5th Cir. 2020) (quoting *United States v. Simmons*, 714 F.2d 29, 31 (5th Cir. 1983)). Indeed, this court has stated that a district court may grant a new trial even where "the evidence is sufficient to support a conviction," if, upon "cautiously reweigh[ing] it," the district court concludes that the evidence "preponderate[s] heavily against the guilty verdict." *United States v. Herrera*, 559 F.3d 296, 302 (5th Cir. 2009).

The advantages or disadvantages of these respective systems are not relevant to the disposition of this appeal, which is governed by the law of this circuit. Nor is it relevant whether, sitting as jurors, members of this panel would have voted to convict. The district court is much better equipped than this court to carry out evidentiary functions, which is why "[i]n our capacity as an appellate court, we must not revisit evidence, reevaluate witness credibility, or attempt to reconcile seemingly contradictory evidence." *United States v. Tarango*, 396 F.3d 666, 672 (5th Cir. 2005). Moreover, as we have explained, our precedent does not permit us to reverse a new trial grant merely because "the evidence is sufficient to support a conviction." *Herrera*, 559 F.3d at 302.

Here, the district "court did not simply disregard the jury's verdict in favor of one it felt was more reasonable." *Robertson*, 110 F.3d at 1119. Instead, "it cautiously reweighed the evidence implicating [Crittenden] and determined that a mistake had been committed. On this basis, having given full respect to the jury's findings, and to prevent a miscarriage of justice, it granted a new trial." *Id.* at 1119–20.

* * *

For the forgoing reasons, the district court's order granting a new trial is AFFIRMED.

GREGG COSTA, Circuit Judge, dissenting:

The Constitution twice says that juries decide criminal cases. U.S. CONST. art. III, § 2, cl. 3; *id.* amend. VI. The jury right's reappearance in the Sixth Amendment is no encore. The Bill of Rights includes the jury right among many guarantees for criminal defendants, whereas Article III requires juries as a structural protection. This original jury requirement ensures that unelected judges are not the only actors in our judiciary. "Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary." *Blakely v. Washington*, 542 U.S. 296, 306 (2004); *see also* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 237 (2005). Article III's command that all trials "shall be by Jury" is why, for the first century of our Republic, a defendant could not elect to have a judge decide his fate. *See Thompson v. Utah*, 170 U.S. 343, 353–55 (1898); *Home Ins. Co. v. Morse*, 87 U.S. (20 Wall.) 445, 451 (1874) (citing *Cancemi v. People*, 18 N.Y. 128 (1858)); *see also Patton v. United States*, 281 U.S. 276 (1930) (allowing bench trials); Recent Development, *Accused in Multiple Prosecution Held to Have Absolute Right to Waive Jury Trial*, 59 COLUM. L. REV. 813, 814 (1959) ("Until shortly after the turn of the century, the federal courts and most state courts applied the common law rule that a jury trial can not be waived in a felony case in which the defendant enters a plea of not guilty."). In other words, the jury right is as much about jurors as it is about defendants. *Cf. Powers v. Ohio*, 499 U.S. 400, 409 (1991) (holding that prospective jurors have the right not to be excluded based on race).

The jury's constitutional role in deciding criminal trials leaves little room for judicial second-guessing. Our review of verdicts is therefore quite limited. *See, e.g.*, *Burks v. United States*, 437 U.S. 1, 16–17 (1978). Likewise, the authority to grant a new trial when there is enough evidence to support the

verdict, but the judge would weigh the evidence differently, is in some tension with Article III and the Sixth Amendment. As a result, although we review the grant of a new trial only for abuse of discretion, we have repeatedly warned that its discretion is not unbridled. *United States v. Arnold*, 416 F.3d 349, 360 (5th Cir. 2005); *United States v. Robertson*, 110 F.3d 1113, 1118 (5th Cir. 1997). Above all, a district court cannot use the new-trial power to "usurp the jury's function." *United States v. Tarango*, 396 F.3d 666, 672 (5th Cir. 2005); *see also Arnold*, 416 F.3d at 360; *Robertson*, 110 F.3d at 1118. Only "exceptional" circumstances warrant the strong medicine of a "thirteenth juror." *United States v. Sinclair*, 438 F.2d 50, 51 n.1 (5th Cir. 1971) (Wisdom, J.) (quoting 2 CHARLES ALAN WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 553, at 487 (1969)).

To prevent judges from too often taking a seat in the jury box, a district court may grant a new trial only when the evidence weighs so heavily against the verdict "that it would be a miscarriage of justice to let the verdict stand." *Arnold*, 416 F.3d at 360 (citation omitted); *see also* FED. R. CRIM. P. 33(a) (allowing court to grant new trial if "the interest of justice so requires"). Those words bear repeating—a miscarriage of justice. The jury's verdict in this case comes nowhere close to that. Indeed, far from a case in which the evidence "preponderate[d] heavily against the verdict," *Arnold*, 416 F.3d at 360, the great weight of the evidence supported this one.[1]

Beaucoup evidence showed that Crittenden knew he possessed a controlled substance. I'll start with what should end the matter: Crittenden

[1] The majority thinks it significant that the government did not appeal the grant of a new trial on the conspiracy count. Maj. Op. 8–9. But there would be no practical benefit from reinstating that verdict as well. The conspiracy count and the substantive count carry the same statutory penalties and Guidelines range. 21 U.S.C. § 846; U.S.S.G. § 1B1.3.

said as much. When agents confronted him about handing the bag to Dominguez, he told them that he "thought" or "believed" it contained marijuana. The district court reasoned that, "if anything," Crittenden's confession showed merely that he "believed the bags contained marijuana." So apparently the validity of the verdict rendered by twelve citizens turns on whether the defendant said "I believed" instead of "I knew." This belief/knowledge distinction defies real life. People don't use the *mens rea* terms found in the United States Code when confessing. And they often try to hedge their culpability. The jury recognized Crittenden's confession for what it was. It's because of their broader understanding of everyday situations and language that jurors are better positioned to decide the facts than judges trained in the law. As this case shows, we have a proclivity for how-many-angels-can-dance parsing.

It gets worse. The confession is direct evidence of knowledge. But most drug cases rely on circumstantial evidence to prove state of mind. *See United States v. Cano-Guel*, 167 F.3d 900, 904 (5th Cir. 1999). There was plenty of that here too. Yet the district court ignored most of it, focusing only on the confession that the court rationalized away. That failure to grapple with other incriminating evidence alone is an abuse of discretion. *See Hernandez v. Lynch*, 825 F.3d 266, 271–72 (5th Cir. 2016) (holding that the BIA abused its discretion when it ignored evidence that counseled against its ruling); *United States v. Ouedraogo*, 531 F. App'x 731, 745 (6th Cir. 2013) (unpublished) (reversing grant of new trial because the district court's "rationale . . . overlook[ed], or improperly discount[ed], much of the evidence").

Overlooking the circumstantial evidence is a more glaring problem because it is so compelling. Dominguez testified that she and Crittenden were worried about having the plastic tub in their house because they "assumed that

it was drugs." She said that Crittenden wanted the tub out of their house and that he "probably" put its contents into the suitcases because she did not. *See United States v. Ayala-Tapia*, 520 F.3d 66, 69 (1st Cir. 2008) (explaining that defendant's packing heavily wrapped drugs in suitcase could support inference of knowledge because legal substances would not need such heavy wrapping). Crittenden then took the suitcases to his friend's house on Byway. Critically, when Dominguez needed to deliver ten bundles of methamphetamine for the sale, Crittenden went alone to retrieve that exact amount of the drug from the stash—a stash that also included marijuana. The jury understood that it's ridiculous to think that Crittenden randomly picked one of several bags without knowing its contents and happened to select one that contained exactly ten bundles of methamphetamine and no marijuana. Would Crittenden have risked retrieving the wrong drugs or quantity given the testimony the defense elicited about how dangerous the drug trade is? *Cf. United States v. Araiza-Jacobo*, 917 F.3d 360, 368 (5th Cir. 2019) (explaining that large quantity of drugs—5.1 kilograms of methamphetamine—showed knowledge because "a drug trafficker would not have entrusted the shipment to an untested courier").

The majority opinion at least acknowledges this circumstantial evidence. But it downplays its strength with diversionary points about Crittenden not owning, selling, or laying his eyes on the drugs. Maj. Op. 8–9. That last point ignores the only reasonable inference that can be drawn from the evidence: Crittenden moved the drugs out of the tub and into the suitcases before he transported them to the Byway residence. His wife—whom the majority otherwise views as an unrivaled truthteller—said that was "probably" the case and, other than her, who else in their home would have transferred the drugs from the tub to the suitcases? The majority also apparently believes that Crittenden and Dominguez left to chance the potentially life-or-death decision

of picking a suitcase that contained the right type and amount of drugs—and then just happened to guess right!

Courts in this circuit tell every jury, "The law makes no distinction between the weights to be given either direct or circumstantial evidence." FIFTH CIRCUIT PATTERN JURY INSTRUCTIONS (CRIMINAL CASES) § 1.08 (2019); *see also McFadden v. United States*, 576 U.S. 186, 192 n.1 (2015). Jurors are not the only people in the courthouse to whom that instruction applies. Failure to give any meaningful weight to the substantial circumstantial evidence of Crittenden's knowledge warrants reversal. *See United States v. McCarter*, 250 F.3d 744, 2001 WL 274753, at *3 (5th Cir. Feb. 23, 2001) (unpublished per curiam) (reversing new-trial grant when district court concluded that evidence of knowledge was circumstantial); *see also United States v. Campos*, 306 F.3d 577, 580 (8th Cir. 2002) (reversing new-trial grant because the district court discounted circumstantial evidence of intent to distribute).

Because granting Crittenden a new trial based on the weight of the evidence defies these basic principles, it should not be surprising that the ruling may not have had much—if anything—to do with the evidence of knowledge. The majority buries in a footnote this elephant in the room: that the grant of a new trial related to concerns about the then-applicable minimum sentence. Maj. Op. 7 n.3. It tersely concludes that it is not required to consider a judge's on-the-record comments when they don't reappear in the written ruling.

But the sequence of events speaks for itself. The district court granted the new-trial motion in a one-page order that said an opinion would follow. That order did not mention anything about weak evidence of knowledge. And despite the fact that the evidence presented at trial would have been freshest

in the court's mind when it granted the motion, it took five months to give a reason for doing so.

At a status conference after it finally issued the order explaining the new-trial grant, the court added:

> **I think if it was up to the Fifth Circuit I'm going to get reversed, quite frankly**, but I went over the PSR this morning. Mr. Crittenden is facing 292 to 365 months and I think that's the reason I considered . . . granting a new trial because I was very reluctant to issue that type of sentence.

The district court doubled down at Dominguez's sentencing:

> Counsel, as I informed you sometime back, maybe last week, I'm going to grant a new trial for Mr. Crittenden.
>
> I am—his guideline range is 292 to 365 months and he's facing a 20-year mandatory minimum. I can't . . . even go the 20-year mandatory minimum on him and I'm certainly not going to go 292 months.
>
> He had a limited role in what his wife was doing and she got him into this. Very limited role.

At the end of the hearing, the district court turned its attention back to Crittenden. It warned: "Mr. Crittenden, you're facing 292 to 365 months. If you go to trial again and you lose, those guidelines are not going to change and I've given you every opportunity."

There is nothing in either of the district court's discourses about believing ≠ knowing—only a repeated concern about the sentence Congress required. The district court's concern was not unfounded; Congress has since agreed with its view and reduced the minimum sentence Crittenden would face. But another standard jury instruction applies to judges as well: When

deciding guilt, "[y]ou should not be concerned with punishment in any way."[2] FIFTH CIRCUIT PATTERN JURY INSTRUCTIONS (CRIMINAL CASES) § 1.22 (2019); *see also United States v. Merlino*, 592 F.3d 22, 34 (1st Cir. 2010) (explaining that a district court's concern about a defendant's lengthy mandatory sentence undermined its decision to grant a new trial).

Much to the district court's surprise, we are allowing it to throw out the jury's verdict. That raises another point. What is going to be different at the next trial? In other words, won't another guilty verdict be just as much of a "miscarriage of justice" as this one? The evidence showing knowledge won't change, so we may be starting a cycle of citizens serving as jurors in this case only to see their work undone. If the court thinks there is actually insufficient evidence to support guilt[3]—a determination that results in an acquittal rather than a new trial—then it should just say so and save future jurors the hassle. Otherwise, it should not require a new trial merely because of disagreement about state of mind, the quintessential fact issue that juries get to decide. *See Thompson v. Syntroleum Corp.*, 108 F. App'x 900, 902 (5th Cir. 2004) (explaining that summary judgment on "state of mind" questions is "discouraged because intent is a question of fact quintessentially within the province of the factfinder"). Indeed, the majority opinion cites no case affirming a new-trial grant based on a judge's disagreement with how a jury weighed evidence on the inference-laden question of knowledge.

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[2] Under the First Step Act, Crittenden faces a ten rather than twenty-year minimum. That new law would apply whether we reinstate the guilty verdict from the first trial or the jury at a new trial returns another one. In either case, the sentencing would occur after the effective date of the First Step Act. *See United States v. Gomez*, 960 F.3d 173, 177 (5th Cir. 2020).

[3] It apparently does, seeing as it states that the district court granted a new trial "because the record does not show that he knew the bags . . . contained methamphetamine or any other controlled substance." Maj. Op. 1.

Ultimately, this case pits the deference we owe district judges on discretionary matters against the deference judges owe juries. Both the district judge and the jury saw and heard the evidence. *See* Maj. Op. 11 (correctly noting the importance of hearing evidence live as opposed to reading a cold record). Between the two, the choice is easy given the overwhelming evidence of Crittenden's guilt. I go with the citizens who missed work and had to rearrange family responsibilities because they showed up to do their civic duty. When it comes to commonsense questions like the ones this trial posed, the perspective of a single judge is no match for the collective wisdom that a jury of varied backgrounds and experiences brings to bear.

Yet the district court—now with our court's blessing—concluded that the cross-section of the El Paso community that found Crittenden guilty committed a miscarriage of justice. (I guess I too would have been party to that miscarriage of justice as I think the jury got it right.) This judicial override of the jury's verdict disrespects their service.