No. 09-1426

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JOSE TAPIA,
Defendant-Appellant.

Appeal from the United States District Court
For the Northern District of Illinois, Western Division
Case No. 08 CR 50023
The Honorable Frederick J. Kapala

BRIEF AND REQUIRED SHORT APPENDIX OF DEFENDANT-APPELLANT JOSE TAPIA

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DISCLOSURE STATEMENT

I, the undersigned counsel for the Defendant-Appellant, Jose Tapia, furnish the following list in compliance with Fed. R. App. P. 26.1 and Cir. R. 26.1:

1. The full name of every party or amicus the attorney represents in the case: JOSE TAPIA

2. Said party is not a corporation.

3. The names of all law firms whose partners or associates are expected to appear for the party before this Court: Sarah O'Rourke Schrup (attorney of record), Louis A. Klapp (senior law student), Abigail Pringle (senior law student), and Russell Shankland (senior law student) of the Bluhm Legal Clinic at the Northwestern University School of Law. The names of all law firms whose partners or associates have appeared for the party in the district court and are not expected to appear:

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STATEMENT OF JURISDICTION

The United States District Court for the Northern District of Illinois, Western Division, had jurisdiction over appellant Jose Tapia's federal criminal prosecution pursuant to 18 U.S.C. § 3231, which states that the "district courts of the United States shall have original jurisdiction . . . of all offenses against the laws of the United States." 18 U.S.C. § 3231 (2006). This jurisdiction was based on a single-count indictment charging Tapia with a violation of 18 U.S.C. § 922(g)(1) (2006). (R. 8.)[1]

Tapia was indicted on June 17, 2008, (R. 8), and his two-day jury trial began on October 20, 2008 (R. 38). The jury returned a verdict of guilty. (R. 41.) The district court sentenced Tapia on February 6, 2009 (R. 51), and entered final judgment on the verdict that same day (R. 52).

Tapia filed his timely notice of appeal on February 18, 2009. (R. 53.) This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 (2006), which grants jurisdiction of "all final decisions of the district courts of the United States" to its courts of appeal, and 18 U.S.C. § 3742 (2006), which provides for review of the sentence imposed.

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[1] References to the sequentially paginated trial transcript shall be denoted as (Trial Tr. __), references to the sentencing hearing transcript as (Sentencing Hr'g Tr. __), and references to the pretrial suppression hearing as (Suppression Hr'g. Tr. __). All other references to the Record shall be denoted with the appropriate docket number as (R. __). References to the material in the short appendix shall be denoted as (App. A __) and material in the long appendix as (App. B. __).

STATEMENT OF THE ISSUES

I. Whether a protective sweep of a home incident to an arrest violates the Fourth Amendment when the arresting officers have no articulable factual basis to suspect any individual other than the arrestee was present in the home or could present a threat to officer safety.

II. Whether a district court abuses its discretion when it applies a substantial sentence increase requiring a finding that the defendant committed an uncharged felony but fails to identify the felony or its elements and leaves the record devoid of meaningful explanation for its decision.

III. Whether a district court abuses its discretion and violates a defendant's Fifth Amendment right to due process by basing a sentence on evidence lacking any indicia of reliability, where the remaining evidence is plainly insufficient to support the decision.

STATEMENT OF THE CASE

This is a direct appeal from a criminal case. Jose Tapia was arrested on May 19, 2008, pursuant to an outstanding warrant on a domestic battery offense. (R. 1.) The officers conducted a sweep of the home after arresting Tapia, during which they recovered a firearm above the heating duct on the ceiling of the basement bathroom. (R. 1.) The results of this sweep served as the basis for the one-count indictment filed against Tapia on June 17, 2008, charging him as a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). (R. 8; R. 1.) Tapia was arraigned on June 18, 2008 and entered a plea of not guilty. (R. 11.)

On July 23, 2008, Tapia filed a motion to suppress physical evidence recovered during the sweep. (R. 13.) The court heard the motion on August 26, 2008 (R. 20), and denied it on September 9, 2008 (R. 22). In the weeks preceding trial, Tapia then filed several motions *in limine* to exclude other evidence he believed to be prejudicial, including the testimony of his wife Verta Rodriguez and certain evidence recovered during the search incident to Tapia's arrest. (R. 29; R. 34; R. 36.) The court affirmed in part and denied in part the motion to exclude certain evidence recovered during the search and denied as moot the motion to exclude Rodriguez's testimony. (R. 35; R. 38.)

The jury trial began on October 20, 2008, and concluded the next day. (R. 38; R. 40.) The jury returned a guilty verdict. (R. 41.) At the sentencing hearing on February 6, 2009, the district court sentenced Tapia to the statutory maximum

sentence of 120 months' imprisonment and three years' supervised release. (Sentencing Hr'g Tr. 5:2-10, 85:15-23.) The court entered final judgment the same day. (R. 52.) Tapia filed his timely notice of appeal on February 18, 2009. (R. 53.)

STATEMENT OF FACTS

On May 19, 2008, officers arrived at 129 Ridgeview Avenue in Rockford to execute an arrest warrant for domestic battery against Jose Tapia. (Suppression Hr'g Tr. 8:25-9:7.) The domestic battery complaint involved was fairly typical: a squabble over money between estranged spouses Verta Rodriguez and Tapia turned sour. (R. 32-2.) Rodriguez accused Tapia of philandering and demanded to see the call log on his cellular phone. (R. 32-2.) Rodriguez and Tapia wrestled over the phone; in the scuffle, Tapia allegedly bit her on the upper arm. (R. 32-2.) They exchanged some unpleasant words, and Rodriguez left. (R. 32-2.) A few days later, on May 3, 2008, Rodriguez went to the Rockford Police and filed a battery complaint against Tapia. (R. 32-2.)

Although the complaint was typical, the response was not. After filing the battery complaint, Rodriguez spoke to the gang unit. (R. 32-3.) Gang Unit detective Randall Peraza, who had been investigating Tapia's possible involvement in a series of gang-related shootings, took over the domestic battery case, even though the alleged battery had no connection to gang activity. (R. 32-3.) Rodriguez told him that Tapia and his gang had been involved in a shooting at 809 South Greenview Avenue (the "Greenview shooting"), which was part of an ongoing inter-gang fight. (R. 32-3.) Rodriguez told Peraza that guns, drugs, and other evidence of gang activity could be found in the basement of 129 Ridgeview, where Tapia was living. (R. 32-3.) When he arrived at 129 Ridgeview, ostensibly to arrest Tapia for domestic battery, Peraza brought a team of agents specializing in drugs, gangs, and

guns. (R. 32-3.) These agents searched the home after Tapia was arrested and found a sparsely furnished home containing a single gun and a sprinkling of marijuana crumbs. (Suppression Hr'g Tr. 12:2-4, 52:19-24, 53:22-23.)

The Search of 129 Ridgeview and the Evidence Recovered

The police secured a warrant for Tapia's arrest based on the domestic battery complaint (Suppression Hr'g Tr. 6:12-15), and surveilled his home, 129 Ridgeview, for several days at different times of day before executing the warrant (Suppression Hr'g Tr. 24:17-25:1). The police never saw anyone coming or going from the home during their observations. (Suppression Hr'g Tr. 24:19-25:1.) On the day of the arrest, there was a Lincoln Navigator parked in front of the home. (Suppression Hr'g Tr. 26:5-6.) The ranch-style home at 129 Ridgeview had one above-ground floor, a below-ground basement, and an attached garage. (Trial Tr. 220:12-20; App. B. 201-03.) The basement had no windows. (App. B. 201-03.) A door in the kitchen led to the basement stairwell. (Trial Tr. 220:19-20.) The eight officers surrounded the house and positioned themselves at windows, the front door, and the back door. (Trial Tr. 216:1-23.) They saw that the entire first floor of the home contained no furniture, personal belongings, or signs of occupancy. (Suppression Hr'g Tr. 11:3-9, 52:19-24.) They saw no one and heard nothing. (*See* Suppression Hr'g Tr. 11:3-9, 48:10-49:1, 51:9-52:2.)

Peraza knocked on the front door, and Tapia answered within three to five minutes. (Trial Tr. 213:1-4.) Officers saw Tapia walk into the kitchen from the

basement stairwell, through the living room, and to the front door. (Trial Tr. 213:5-19; Suppression Hr'g Tr. 10:1-5.) After Tapia peacefully opened the door, officers entered through the doorway and handcuffed him without incident. (Trial Tr. 217:16-24.)

Rather than escort the now-handcuffed and in-custody Tapia to the squad car, the officers instead searched the home in the name of a protective sweep: a search for other persons who may pose a danger to the officers. (R. 32-3.) On the first floor, they looked throughout the living room, the bedrooms, the bathroom, the closets, and the kitchen but found no evidence of other people present or any dangerous material. (Trial Tr. 220:19-20, 221:25-222:3, 222:8-10, 222:17-22, 223:1-7, 223:18-19, 224:7-17, 225:2-6, 225:15-16; Suppression Hr'g Tr. 51:21-24.) Detective Nick Cunningham, a gang and narcotics investigator with the Winnebago County Sheriff's Office, entered the basement stairwell. (Suppression Hr'g Tr. 53:8-11; Trial Tr. 220:23-25.) He saw no one. (*See* Suppression Hr'g Tr. 53.) He heard nothing. (*See* Suppression Hr'g Tr. 53.) He did not call down the stairs to see if anyone was down there. (*See* Suppression Hr'g Tr. 53.) Instead, he descended the stairwell and searched the basement and its small bathroom. (Suppression Hr'g Tr. 53:3-7; Trial Tr. 220:23-221:5.)

The main area of the basement consisted of a ten-by-twenty-foot room. (Suppression Hr'g Tr. 57:3-6.) In this room, Cunningham discovered a bed, sheets blankets, pillows, a desk, clothing, fast food wrappers, music CDs, and other personal items. (Suppression Hr'g Tr. 53:5-6; Trial Tr. 226:18-21.) Cunningham

then entered the small bathroom, looked up, and saw the butt of a handgun in the ceiling. (Trial Tr. 227:15-19; Suppression Hr'g Tr. 54:20-23.) The gun was resting on a heating duct suspended about seven-and-a-half feet in the air. (Suppression Hr'g Tr. 54:10-13.) Only a slight bit of the handle extended beyond the edge of the duct, and the gun was covered by electrical wire and PVC pipes. (Trial Tr. 230:2-8.) Although they had not yet obtained a search warrant, the officers removed the gun from the rafters. (Suppression Hr'g Tr. 33:10-34:2.)

The Suppression Hearing

Based on the discovery of the gun, the government charged Tapia with being a felon in possession of a firearm in violation 18 U.S.C. § 922(g)(1). (R. 8.) Tapia moved to suppress the gun. (R. 13.) He argued that the Fourth Amendment prohibited the officers from conducting a protective sweep of the basement and bathroom without a reasonable belief that someone posing a danger to the officers was present. (R. 15.) He also argued that, even if it was permissible for the officers to enter the basement, the gun was not in plain view. (R. 15.) At the hearing, the government argued that the sweep was reasonable. (Suppression Hr'g Tr. 65:5-9.) Several officers testified that Tapia was a suspected member of a gang, that Rodriguez informed them that gang members sometimes congregated at the house, and that there was a Lincoln Navigator parked out front. (Suppression Hr'g Tr. 10:17-20, 23:11-15, 26:5-6, 52:7-12.) However, they reported no direct observations to support their hunch that the house contained anyone other than Tapia at the time of the arrest. (*See* Suppression Hr'g Tr. 11:3-9, 48:10-49:1, 51:9-52:2.) One

officer initially testified that he entered the basement to search "for evidence." (Suppression Hr'g Tr. 51:21-24.) Upon further questioning from the government, the officer stated that he entered the basement to ensure his safety. (Suppression Hr'g Tr. 51:21-24.) The district court denied the motion to suppress, finding that the officers acted reasonably in conducting the sweep of the home. (R. 22.) The district court found it noteworthy that Tapia was a suspected gang member, that his gang had been involved in recent shootings, and that the Navigator could accommodate up to six people. (R. 22.)

The Sentencing Hearing

After a two-day jury trial, Tapia was convicted on the single charged count. (R. 52.) On February 6, 2009, the court held Tapia's sentencing hearing, at which the government argued for a four-level increase in the sentence pursuant to U.S. Sentencing Guidelines Manual § 2K2.1(b)(6). (Sentencing Hr'g Tr. 68:12-13, 83:20-23.) The enhancement was the only contested issue. (Sentencing Hr'g Tr. 5:13-18.) Under section 2K2.1(b)(6), if Tapia used the firearm in connection with another felony offense, he would be subject to an enhanced sentence. (Sentencing Hr'g Tr. 6:4-10.) The government argued that Tapia violated 720 Ill. Comp. Stat. 5/24-1.2(a)(1), "Aggravated discharge of a firearm," by using the gun in the Greenview shooting on April 9, 2008. (Sentencing Hr'g Tr. 83:20-23; Presentence Investigation Report, Government's Attached Letter at 2.)

In an effort to tie Tapia to the Greenview shooting, the government presented evidence that shell casings from the scene of the shooting matched the gun recovered at 129 Ridgeview. (Sentencing Hr'g Tr. 45:8-16.) The government called Peraza to the stand, who testified primarily about statements made by Verta Rodriguez and Clifford Gozdal, a man who was arrested in connection with an unrelated gang shooting. (Sentencing Hr'g Tr. 20:8-23:24, 25:8-32:25.) Gozdal gave a total of three statements to the police: two to Peraza and one to authorities in Winona, Minnesota. (App. B. 204-210.) The first statement to Peraza occurred on May 9, 2008. (App. B. 209.) Peraza did not discuss either the Greenview shooting or Tapia with Gozdal. (Sentencing Hr'g Tr. 23:16-21.) Gozdal's second statement, given on September 27, 2008, was made to the Minnesota police at the request of an ATF agent who had participated in the search of Tapia's home. (App. B. 204.) In that statement, Gozdal said that Tapia had been in Texas and Tapia had not been involved in the shootings that lead to Gozdal's arrest. (App. B. 204-07.) He did say that that a man called "Midget" confessed that he had "shot up" a house in Rockford with an XD45 handgun and that Midget did not say who, if anyone, was with him. (App. B. 204-07.) Gozdal's final statement, made to Peraza, came on the eve of Tapia's trial in October 2008 and contained a very different story. (App. B. 208.) Instead of implicating only Midget, this statement claimed that Midget and Tapia together confessed their involvement in shooting at a Rockford house with an XD45. (App. B. 208.) Although the statement came months after the incident occurred, Gozdal's third statement, which was prepared by Peraza, now contained the specific

date and location of Tapia's "confession" to Gozdal, the number of shots fired, and the source of the handgun. (App. B. 208.)

Peraza also testified at trial about his discussion with Rodriguez. (Sentencing Hr'g Tr. 20:8-22:10.) She told him that she attended a meeting on April 8, 2008, at which Tapia and several others planned the Greenview shooting as retaliation for a shooting at 716 Loomis (the "Loomis shooting"). (Sentencing Hr'g Tr. 20:24-21:18.) According to Rodriguez, Tapia's friend Jacob Larsen brought a box of guns and distributed them to the attendees, who loaded them with ammunition and left the house. (Sentencing Hr'g Tr. 21:15-18.)

After Peraza, the government called Rodriguez to the stand. (Sentencing Hr'g Tr. 33:6-8.) She did not testify at trial because she had consulted an attorney and had indicated that she would invoke marital privilege. (Sentencing Hr'g Tr. 37:9-10.) The government assumed that she would do the same at sentencing. (Sentencing Hr'g Tr. 40:16-19.) The government asked Rodriguez if she remembered where she was on April 8, 2008. (Sentencing Hr'g Tr. 34:25-35:1.) Rodriguez responded, "Not at the moment." (Sentencing Hr'g Tr. 35:2.) The government asked Rodriguez if she remembered being present with Tapia when he met with people to discuss the Loomis shooting. (Sentencing Hr'g Tr. 35:8-10.) Rodriguez responded, "No." (Sentencing Hr'g Tr. 35:11.) Rodriguez did say that she recalled meeting with Peraza. (Sentencing Hr'g Tr. 35:12-13.) Yet when asked what she discussed with Peraza, Rodriguez answered, "I discussed activity that I made up with him and that I have heard other people say, just repeating what I

heard." (Sentencing Hr'g Tr. 35:14-17.) At the government's urging, the district court immediately issued a perjury warning to Rodriguez and arranged for her to consult with an attorney. (Sentencing Hr'g Tr. 35:21-36:8.) After that consultation, Rodriguez invoked the Fifth Amendment and ended her testimony. (Sentencing Hr'g Tr. 36:1-25.)

The defense called Larsen as a witness. (Sentencing Hr'g Tr. 60:25-61:2.) He testified that he did not see Tapia on April 8, 2008, the day of the alleged meeting, and that he never brought a box of guns to Tapia or anybody else. (Sentencing Hr'g Tr. 61:17-62:2, 63:9-11.) He suggested that Rodriguez, who was angry at Tapia for philandering and at Larsen for helping Tapia cover it up, had a motive to lie about his involvement in the Greenview shooting. (Sentencing Hr'g Tr. 63:25-64:3.)

After this testimony, the district court imposed the four-level increase based on its conclusion that Tapia used the gun in connection with the Greenview shooting. (Sentencing Hr'g Tr. 76:14-15.) Although the presentence investigation report indicated the Greenview shooting was a violation of 720 Ill. Comp. Stat. 5/24-1.2(a)(1), "Aggravated discharge of a firearm," the court never mentioned that offense or its elements. (*See* Sentencing Hr'g Tr. 76:4-15.) The district court supported the enhancement with the following three findings: (1) that the shell casings found at the scene of the Greenview shooting matched the gun found in the ceiling at 129 Ridgeview; (2) that the statement Rodriguez gave to Peraza was more credible than her sworn testimony; and (3) that Gozdal's third statement to Peraza was credible. (Sentencing Hr'g Tr. 76:6-13.) The court further commented that the

"[Greenview shooting] was an outrageous and callous act of violence." (Sentencing Hr'g Tr. 82:23-25.) Without the enhancement, the top of the Guidelines range for Tapia would have been 87 months in prison. (Sentencing Hr'g Tr. 76:16-19.) With the increase, the court imposed the statutory maximum sentence of 120 months. (Sentencing Hr'g Tr. 76:16-24, 85:15-17.)

SUMMARY OF ARGUMENT

Jose Tapia was convicted of unlawfully possessing a firearm because of an unconstitutionally-seized gun that should have been suppressed. Furthermore, he received a substantial sentence enhancement as a result of the court's procedural errors and its consideration of evidence that lacked all indicia of reliability. Consequently, this Court should vacate the conviction or, in the alternative, vacate the sentence and remand for resentencing.

The Rockford Police suspected that Tapia was connected with gang activity. They used a warrant for domestic battery to arrest him in his home, and then they (along with county and federal colleagues who specialized in gangs, drugs, and guns) searched his basement in the name of a "protective sweep." The search produced the gun used to convict Tapia of being a felon in possession of a firearm. Police may only conduct protective sweeps when they reasonably believe that a person other than the arrestee is hiding in the home and that he or she poses a danger to the officers.

The specific facts surrounding the search of Tapia's home show that the police had no reasonable basis to conclude that anyone other than Tapia was in his home. When the officers arrested Tapia, they knew only that Tapia's home, like all homes, occasionally hosted visitors and that the car parked in his driveway, like all cars, could accommodate more than one person. This information falls far short of the "specific and articulable facts" demanded in a reasonableness inquiry.

Moreover, even if it was reasonable to believe a third party was present, the police had no basis to believe that he or she posed any danger to the officers. The police officers knew that the first floor of Tapia's one-level home was completely vacant. The basement presented no harm to the officers on the scene because it had no windows and only one stairway to the first floor, which could easily have been secured without any need for officers to enter or search the basement. Because the search was unconstitutional, the gun should have been suppressed and the conviction should be vacated.

Even if the conviction was proper, the sentencing was not. The government suspected that Tapia used the gun in the Greenview shooting but never brought this allegation to a jury. Instead, the government sought to enhance Tapia's sentence by proving this uncharged conduct under the lower preponderance-of-the-evidence standard available at sentencing. In evaluating this evidence, the district court made numerous procedural errors which resulted in a substantive error: Tapia's sentence was enhanced by at least 33 months based upon wholly unreliable evidence.

Procedurally, the district court committed two fundamental errors. First, it failed to explain its findings in a way that would assure meaningful appellate review of the decision. The record is unclear as to why the court chose to credit one contradictory statement over another. Second, in enhancing Tapia's sentence for his involvement in an "other offense" (the Greenview shooting), the court failed to identify the elements of the alleged "other offense" or to explain how the

government's evidence supported those elements. Each of these procedural errors independently requires a remand for resentencing.

These procedural errors also resulted in a serious substantive error: they blinded the court to the government's failure to prove that Tapia committed an "other offense" arising out of the Greenview shooting. The court relied upon the hearsay statements of Verta Rodriguez and Clifford Gozdal to tie Tapia to the shooting. Rodriguez's hearsay statements were uncorroborated and directly contradicted by her in-court testimony and that of Jacob Larsen. Gozdal's statement implicating Tapia was also uncorroborated and was contradicted by his two earlier statements. Because these statements lacked all indicia of reliability, they failed to satisfy the due-process requirements of the Fifth Amendment. Consequently, the court abused its discretion in relying upon the statements. Had these statements been properly disregarded, the government could not have proven by a preponderance of the evidence that Tapia used the weapon in connection with another felony offense. Accordingly, this Court should vacate the sentence and remand for resentencing.

ARGUMENT

I. The search of Tapia's isolated, windowless basement was unconstitutional because the police had no reason to believe that anyone other than Tapia was present or that anyone could threaten the arresting officers

The search of Tapia's basement incident to his domestic-battery arrest, conducted by the police purportedly as a "protective sweep," violated his Fourth Amendment rights. Protective sweeps are only to be used when police reasonably believe, based on specific and articulable facts, that a person other than the arrestee is hiding in the home and that he or she poses a danger to the officers. *Maryland v. Buie*, 494 U.S. 325, 337 (1990). Neither criterion was met here. First, the specific facts surrounding the search of Tapia's home show that the police had no reasonable basis to conclude that anyone other than Tapia was in his home. Moreover, even if it was reasonable to believe a third party was present in the basement, the police had no reason to believe that he or she posed any danger to the officers. Instead, the facts show that the police department suspected Tapia's involvement in gang activity, but did not obtain a search warrant to investigate this hunch. The police exploited the protective sweep incident to the domestic-battery arrest to poke around Tapia's home. The search was unconstitutional; the gun should be suppressed.

In reviewing a district court's decision on the validity of a protective sweep, this Court reviews *de novo* the ultimate conclusion that the police acted reasonably, but reviews for clear error all findings of historical fact and credibility

determinations. *United States v. Johnson*, 170 F.3d 708, 712-13 (7th Cir. 1999) (citing *Ornelas v. United States*, 517 U.S. 690, 699 (1996)).

Homes contain intimate items in precious places. As such, the Fourth Amendment forbids the police from violating the sanctity of homes with unreasonable searches. U.S. Const., amend. IV; *see Payton v. New York*, 445 U.S. 573, 589-90 (1980); s*ee also United States v. United States Dist. Court for Eastern Dist. of Mich.*, 407 U.S. 297, 313 (1972) (noting that "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed").

Searches conducted without the prior approval of a judge "are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Arizona v. Gant*, 129 S.Ct. 1710, 1716 (2009) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)). Two such exceptions are potentially implicated when police search a suspect's home during their court-authorized, in-home arrest of the suspect. Police may search the area immediately adjacent to the suspect, without probable cause or reasonable suspicion, to ensure that the arrestee cannot reach a weapon or destroy evidence, *Chimel v. California*, 395 U.S. 752, 762-63 (1969), and to ensure that any third-parties cannot immediately launch an attack, *Buie*, 494 U.S. at 334 (1990).

Normally, a warrantless search beyond the spaces immediately adjoining the place of arrest would offend the Constitution, *Chimel*, 395 U.S. at 762-63; *Buie*, 494 U.S. at 334, so its fruits would be suppressed, *see Mapp v. Ohio*, 367 U.S. 643, 655-

56 (1966) (excluding evidence found as the result of a Fourth Amendment violation). However, when police have a reasonable suspicion, based on specific and articulable facts, that: (1) someone other than the arrestee is present in the home; and (2) the other person poses an actual danger to the arresting officers, they may conduct a brief, cursory "protective sweep" to make sure that they can effectuate the suspect's arrest without fear of ambush. *Buie*, 494 U.S. at 337. These demands are necessary because homes, by their nature, can always *plausibly* contain third parties. But that alone cannot justify a protective sweep because it would automatically permit such searches in violation of the Fourth Amendment. *See id.* at 336. The search was unconstitutional because the police had no reasonable basis to believe that anyone other than Tapia was in his home or posed any danger to the officers.

A. The facts surrounding Tapia's in-home arrest could not support a reasonable belief that Tapia's vacant home contained hidden persons

The officers justified their search with the unsupported assumption that Tapia's home contained a hidden inhabitant. The police must have "a reasonable belief based on specific and articulable facts" that a home contains individuals other than the arrestee in order to conduct a protective sweep. *Buie*, 494 U.S. at 337. In *Buie*, police holding a valid arrest warrant entered the suspect's home and fanned out over the first and second floors to find him. *Id.* at 328. One officer shouted into the basement, ordering anyone down there to show himself. *Id.* Buie announced that he was in the basement, showed his hands first, entered the basement

stairwell, ascended to the officer, and was arrested. *Id.* Once Buie was in custody, another officer entered the basement in the name of a protective sweep and seized evidence in plain view. *Id.* The Court rejected Maryland's argument that the police should be permitted to conduct a protective sweep whenever they execute an in-home arrest for a violent crime. *Id.* at 330. Instead, the Court held that the second officer's search of Buie's basement could only be justified if there were specific facts indicating a risk of danger to the officers from some hidden individual. *Id.* at 333-34.

Police officers possess such specific and articulable facts when they observe direct evidence that the home contains multiple individuals. *See United States v. Burrows*, 48 F.3d 1011 (7th Cir. 1995); *United States v. Barker*, 27 F.3d 1287 (7th Cir. 1994). In *Burrows*, the police spent well over fifteen minutes trying to gain entry to a home in order to execute arrest warrants for two men. *Burrows*, 48 F.3d at 1013. During this time, one officer saw a curtain move in the upstairs bedroom window. *Id.* Officers at the entrance to the home could hear movement inside. *Id.* When one of the suspects finally opened the door, he was immediately arrested; the other man was quickly found waiting for the police in an open upstairs bathroom. *Id.* The officers, in the name of a protective sweep, then forced open five locked upstairs doors (four bedrooms and a linen closet). *Id.*

Relying on *Buie*, this Court held that it was reasonable for the officers to believe that other individuals were in the locked bedrooms because officers personally observed movement and heard noise. *Id.* at 1017; *see also Barker*, 27

F.3d at 1289, 1291 (upholding a protective sweep because an ATF agent had observed multiple individuals in the home during all four of her prior undercover visits to the suspect's home); *United States v. Martins*, 413 F.3d 139, 144, 147-48 (1st Cir. 2005) (upholding a sweep where, in response to police knocking at the front door, an adult male voice asked the knocker to identify himself, but where ninety seconds later a young boy answered the door and denied that anyone else was at home); *United States v. Hauk*, 412 F.3d 1179, 1192 (10th Cir. 2005) (upholding a sweep where, while police waited to execute an arrest outside the suspect's residence, they saw a man other than the suspect park his car in the suspect's driveway and apparently enter the suspect's house); *United States v. Cavely*, 318 F.3d 987, 995-96 (10th Cir. 2003) (upholding protective sweep where arrestee told officers that his friend was also present at the house). Without such affirmative direct evidence that a third party may be hidden in the home, the police have only a "mere inchoate and unparticularized suspicion or hunch," which is insufficient to justify a warrantless search. *Buie*, 494 U.S. at 332 (quoting *Terry v. Ohio*, 392 U.S. 1, 27 (1968)).

Unlike the *Burrows* police, who saw a bedroom curtain move and heard people moving inside, the Rockford police observed only a vacant home and heard nothing. (Suppression Hr'g Tr. 9:16-10:10, 44:23-47:2, 52:19-24) (officers testifying that Tapia's approach to his front door was the only indication that anyone was present in the vacant home that was undergoing construction). Unlike the *Barker* ATF agent, who witnessed different individuals at the house over four visits, the

Rockford police observed no one coming or going during their surveillance. (Suppression Hr'g Tr. 24:19-25:1) (Officer Peraza "drove by several times and sat back and watched" 129 Ridgeview at different times of day, but saw no one). Not one of the officers surrounding Tapia's house heard or saw anything that would reasonably indicate the presence of someone other than Tapia.

It was unreasonable to assume others were present simply because Tapia's wife indicated that Tapia's alleged associates visited him and sometimes slept at 129 Ridgeview. The police did not need a witness statement to conclude that Tapia, like everyone, sometimes had visitors. The presence of the Lincoln Navigator outside of 129 Ridgeview is an equally inadequate basis on which to justify the search. Just because the Navigator, like all cars, can hold several people, it does not follow that its driver will always be accompanied by a passenger. Such vague information cannot satisfy the Court's requirement of "specific and articulable facts." *Buie*, 494 U.S. at 337. If it did, police could automatically conduct protective sweeps incident to every in-home arrest, which clearly contravenes *Buie*: "The type of search we authorize today . . . is decidedly not automatic. . . ." 494 U.S. at 336 (internal quotation omitted); *see also United States v. Carter*, 360 F.3d 1235, 1242-43 (10th Cir. 2004) ("Of course, there could always be a dangerous person concealed within a structure. But that in itself cannot justify a protective sweep, unless such sweeps are simply to be permitted as a matter of course, a result hardly indicated by the Supreme Court in *Buie*.").

Consequently, the facts and circumstances surrounding Tapia's arrest were insufficient to justify a reasonable belief that individuals other than Tapia were present at 129 Ridgeview.

B. The configuration of Tapia's home foreclosed the reasonable conclusion that a hypothetical hidden person isolated in Tapia's basement could endanger the arresting or departing officers

Even if it was reasonable for the police to believe that another individual was hiding in the basement at 129 Ridgeview, it was not reasonable to believe that he or she posed any danger. A sweep is constitutional when arresting officers reasonably believe it "is necessary to avert an immediate danger posed by others on the premises." *United States v. Arch*, 7 F.3d 1300, 1303 (7th Cir. 1993). To pose an immediate danger, a hidden person must be: (1) prone to violent behavior and (2) able to act on that predisposition, which depends on the particular configuration of the house. *Burrows*, 48 F.3d at 1016 (7th Cir. 1995) (the reasonableness of the officers' assessment depends on "the particular configuration of the dwelling" and "the characteristics of those . . . who might be present.").

This Court thus far has only been called upon to evaluate dangerousness in terms of the first prong of this inquiry, violent character. *E.g., United States v. Richards*, 937 F.2d 1287, 1291 (7th Cir. 1991) (earlier in the day the arrestee had been seen with a murder suspect); *Burrows*, 48 F.3d at 1013, 1017 (the arrestees were connected with a group planning to take control of the local drug trade); *Barker*, 27 F.3d at 1289 (an undercover agent had seen guns being handled by persons other than the arrestee on multiple earlier visits to the arrestee's home).

However, in Tapia's case, the second prong controls. The fear of hidden danger was unreasonable because the layout of 129 Ridgeview prevented any unknown basement dweller—even one with violent inclinations—from endangering the police during their arrest of Tapia or their departure from the premises.

A protective sweep, when appropriate, should be as limited in time and scope as possible to protect officer safety but also to protect individual rights. *Buie*, 494 U.S. at 335-36 (a sweep may last "no longer than is necessary to dispel the reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises."). When the layout of the house allows, officers should not enter an area that is so isolated that the officers can effectively guard against ambush without entering it.

In *Buie*, six or seven officers holding a valid arrest warrant entered the suspect's home and fanned out over the first and second floors to find him. *Id*. at 328. One officer "announced that he would 'freeze' the basement so that no one could come up and surprise the officers." *Id*. With his gun drawn, the officer shouted into the basement and ordered anyone down there to come up. *Id*. Buie announced that he was in the basement, showed himself hands first, entered the basement stairwell, came up the stairs, and was immediately arrested, searched, and handcuffed by the officer. *Id*. At that point, a second officer "entered the

basement 'in case there was someone else' down there." *Id*. There was not, but he seized evidence in plain view. *Id*.[2]

Any person potentially hidden in Buie's basement could not have actually threatened the police. *Id*. at 338 (Stevens, J., concurring). As Justice Stevens explained, "were the officers concerned about safety, one would expect them to do what [the first officer] did before the arrest: guard the basement door to prevent surprise attacks." *Id*. The second (searching) officer could simply have looked into the basement to make sure no one followed the suspect to the stairwell, but instead he actually entered the basement. *Id*. Justice Stevens found these actions not only unreasonable, but evidence of an improper motive: "[The second officer's] strategy is sensible if one wishes to search the basement. It is a surprising choice for an officer, worried about safety, *who need not risk entering the stairwell at all*." *Id*. (emphasis added).

Justice Stevens's analysis of *Buie* is equally appropriate in this case. The police had no need to enter Tapia's basement. The eight officers peering into the home prior to Tapia's arrest knew the first floor to be completely devoid of people. (Suppression Hr'g Tr. 9:14-10:10, 44:23-47:2, 52:19-24.) Tapia's basement was isolated from the rest of the home: there was only one stairwell, which was secured by a door. (Trial Tr. 213:18-19.) After Tapia answered the officers' knocking at his

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[2] The Court did not actually apply the facts to its rule (it remanded the case), *Buie*, 494 U.S. at 337, yet Justice Stevens opined that the state faced "a formidable task on remand." *Id*. at 338 (Stevens, J., concurring). Justice Kennedy disagreed with Justice Stevens's assessment. *Id*. at 339 (Kennedy, J., concurring).

front door and peacefully gave himself up to arrest, several of the officers could simply have opened the basement door, made sure that no one followed Tapia to the stairwell, and secured the stairwell until their colleagues had safely departed with Tapia. Instead, they chose to exploit the protective sweep exception in the hope of discovering evidence of a crime. At the suppression hearing, one of the officers was asked, "After the defendant was taken into custody, Detective Cunningham, what did you do?" (Suppression Hr'g Tr. 51:21-22.) He replied, "Myself and other officers searched the residence, both the first floor and the basement, *for other evidence*." (Suppression Hr'g Tr. 51:23-24) (emphasis added). Upon further questioning from the government, Cunningham recalled that he entered the basement, not to search for evidence, but to ensure his own safety. (Suppression Hr'g Tr. 52:1-2.)

Officers, of course, must eventually depart a home. The layout of some homes might be such that a police guard at the basement door would be insufficient to protect officers *departing* with the arrestee from any third party lurking in the basement. As this Court has recognized, "a bullet fired at an arresting officer standing outside a window is as deadly as one that is projected from one room to another." *Burrows*, 48 F.3d at 1016 (quoting *United States v. Hoyos*, 892 F.2d 1387, 1397 (9th Cir. 1989) (upholding a protective sweep of a home where the suspect had been arrested outside the residence), *overruled on another point of law by United States v. Ruiz*, 257 F.3d 1030 (9th Cir. 2001)). But, this possibility was of no concern at 129 Ridgeview. Just as the layout of the home protected the officers while making the arrest, it also protected them while departing. Tapia's basement

was isolated from the outside world because it had no windows. (App. B. 201-203.) As many as six police officers could have secured the basement stairwell while their colleagues escorted Tapia outside of the home, which lacked basement windows, to the paddy wagon in his driveway. Thus, any potential basement dweller would have been unable to threaten the police.

The police search of Tapia's basement failed to satisfy the constitutional safeguards required by *Buie*. The police had no reasonable basis to conclude that anyone other than Tapia was in his home because they neither heard nor saw anything to the contrary. Further, any hypothetical basement dweller posed no reasonable threat to the officers. Tapia's isolated, windowless basement enabled the officers to safely execute the arrest and depart. Consequently, the search was unconstitutional and the gun should be suppressed.

II. The district court failed to satisfy procedural requirements necessary to ensure the proper exercise of discretion in imposing a substantial sentence increase

At sentencing, the district court increased Tapia's sentence by four levels for his alleged involvement in an "other offense": the Greenview shooting. A court may increase a sentence for a conviction under 18 U.S.C. § 922(g)(1) if the defendant used the weapon in connection with another felony offense. U.S. Sentencing Guidelines Manual § 2K2.1(b)(6)(2009). The district court, however, committed a series of procedural errors in applying this enhancement and, therefore, this Court should vacate his sentence and remand for resentencing. *United States v. Jackson*, 547 F.3d 786, 792 (7th Cir. 2008) (*quoting United States v. Gall*, 552 U.S. 38, 50

(2007)) (noting that an appellate court must ensure that the district court committed no procedural errors before it addresses the substance of a sentence). First, the court, confronted with controverted issues of material fact, failed to properly explain its findings in a way that would allow meaningful appellate review. Second, the court erred in increasing the sentence based on the "other offense" without acknowledging the statutory elements of the offense or explaining how the government's evidence supported those elements. These procedural errors mask how and why the district court found that Tapia committed the "other offense," which substantially enhanced his sentence.

This Court reviews sentencing decisions for "reasonableness" under an abuse-of-discretion standard, considering questions of law *de novo* and reviewing findings of fact for clear error. *Jackson*, 547 F.3d at 792 (quoting *Gall*, 552 U.S. at 50). First, the Court must ensure that no procedural errors occurred. *Id.* Only when satisfied that the sentence is procedurally sound does the reviewing court consider its substantive reasonableness. *Id.*

A. The court failed to explain its resolution of contested issues of fact material to its sentencing decision as required by Federal Rule of Criminal Procedure 32 and *United States v. Gall*

The district court inadequately explained its factual findings at sentencing and thus improperly resolved contested issues of material fact as required by the Federal Rules of Criminal Procedure and the Guidelines. Fed. R. Crim. P. 32(i)(3)(B); U.S. Sentencing Guidelines Manual § 6A1.3 (2009) (the court must

resolve any factor "reasonably in dispute" and "important to the sentencing determination" in accordance with Rule 32(i)); *Gall,* 552 U.S. at 50 (2007).

To properly calculate the Guidelines sentencing range, the district court is required to address and resolve any contested issues of fact that impact the sentence, including those in the presentence investigation report ("PSR"). Fed. R. Crim. P. 32(i)(3)(B); *United States v. Dean*, 414 F.3d 725, 727 (7th Cir. 2005) (citing *United States v. Ameline,* 409 F.3d 1073, 1086 (9th Cir. 2005) (en banc) ("When a defendant contests the factual basis of a PSR, the district court remains obligated to resolve the dispute before exercising its sentencing discretion under *Booker*.")). Accordingly, "*explicit* factfinding is required . . . if contested facts are material to the judge's sentencing decision." *Dean*, 414 F.3d at 730 (emphasis added). The purpose of Rule 32 is to ensure that where a discretionary sentencing decision turns on facts not considered by the jury, the sentence is nonetheless "based on reliable facts found by the court itself after deliberation." *United States v. Vitrano*, 495 F.3d 387, 391 (7th Cir. 2007) (internal citations and quotations omitted).

Rule 32's fact-finding requirements are toothless in the absence of the companion requirement that the court explain its reasoning on the record. *See United States v. Robinson,* 537 F.3d 798, 804 (7th Cir. 2008) (remanding for failure to "formally explain" why the facts supported a sentence enhancement based on other conduct); *United States v. Johnson*, 489 F.3d 794, 798 (7th Cir. 2007) (district court must provide an explanation for crediting one inconsistent statement over another at sentencing); *United States v. Ross*, 502 F.3d 521, 531 (6th Cir. 2007)

(district court violated Rule 32 by failing to resolve contested facts on the record). Even where the court may properly adopt the version of the facts in the PSR, this Court insists that the record adequately assure the reviewing court that the decision be explicit, specific, and by design. *United States v. Heckel*, 570 F.3d 791, 796-97 (7th Cir. 2009) (internal citations and quotations omitted). The district court's statement of reasons provides transparency that promotes public trust in the judiciary, *Rita v. United States*, 551 U.S. 338, 356 (2007), and without such detail, the appellate court lacks the tools to conduct meaningful review, *Gall,* 552 U.S. at 50; *United States v. Bokhari*, 430 F.3d 861, 864 (7th Cir. 2005).

The record below is devoid of explanation and achieves none of these objectives. At sentencing, the government requested a four-level sentence increase for the use of the weapon "in connection with another offense." Specifically, the government attempted to link Tapia to the Greenview shooting, alleging that he violated 720 Ill. Comp. Stat. 5/24-1.2(a)(1) ("Aggravated discharge of a firearm"). (Presentence Investigation Report, Government's Attached Letter at 2.) Tapia triggered the court's obligation to resolve these questions when he contested the factual basis for his involvement in the Greenview shooting and offered several pieces of contradictory evidence.

The district court acknowledged that the facts surrounding the Greenview shooting were in dispute. (Sentencing Hr'g Tr. 5:13-18) (adopting the factual findings and conclusions contained in the PSR and accompanying materials "other than the evidence pertaining to the Greenview shooting"). The government

primarily relied on Rodriguez's May 2008 statements to Detective Peraza to implicate Tapia in the Greenview shooting.[3] Tapia contested these statements when he offered the testimony of Jacob Larsen, which established a motive for Rodriguez to fabricate and corroborated Tapia's defense. Tapia also flagged the surprising lack of corroboration for Rodriguez's story, which should have been easy to obtain given that at least six other named individuals were allegedly present at the meeting when Rodriguez claims this plan discussed. (Sentencing Hr'g Tr. 21:10-22:1, 69:21-70:12.) Most importantly, Rodriguez herself chose to testify at the hearing, where she expressly contradicted her earlier statements to Detective Peraza and stated under oath, "I discussed activity that I made up with him and that I have heard other people say, just repeating what I heard." (Sentencing Hr'g Tr. 35:16-17.)[4] Immediately after that statement the court gave Rodriguez a perjury instruction. (Sentencing Hr'g Tr. 35:18-36:9.) She thereafter invoked her Fifth Amendment right not to testify, denying either party the opportunity to further probe her statements. (Sentencing Hr'g Tr. 67:21-22.)

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[3] The government also relied on the testimony of a forensic expert to establish that the casings founds at the scene of the Greenview shooting matched the gun found at 129 Ridgeview. (Sentencing Hr'g Tr. 42:6-47:8, 48:12-20, 76:6-8.) The testimony of this expert was not contested. (Sentencing Hr'g Tr. 76:6-8.)

[4] Similarly, the government offered the statement that Gozdal signed on the eve of Tapia's trial in which he claimed Tapia confessed his involvement in the Greenview shooting. At sentencing Tapia pointed to earlier contradictory statements in which Gozdal explicitly denied Tapia's involvement (Sentencing Hr'g Tr. 7:17-20, 75:1-14), an account that was corroborated by Larsen's testimony (Sentencing Hr'g Tr. 61:17-62:17, 63:9-11, 63:25-64:8). Yet the district court likewise never resolved these inconsistencies before choosing Gozdal's last statement as the most credible one.

The court's findings on the record did not resolve these inconsistencies. The court's sole "finding" with respect to Rodriguez's testimony was limited to the unexplained assertion that Rodriguez was "more credible" near the time of the Greenview shooting than she was under oath at the sentencing hearing. (Sentencing Hr'g Tr. 76:8-10.) The district court's decision to ignore Rodriguez's contradictory in-court statement simply because it was a surprise to both parties was an abdication of its duty under Rule 32 and clearly prejudicial to the defense. Although the court did ask both parties to provide an opinion as to the admissibility of Rodriguez's testimony, it neither resolved that issue nor declared Rodriguez's testimony irrelevant to the court's decision. (Sentencing Hr'g Tr. 70:13-17, 76:4-15.) Moreover, the court did not acknowledge Larsen's testimony at all, much less explain its decision to reject it. (Sentencing Hr'g Tr. 76:6-11.) Thus, the district court erroneously applied a substantial sentence increase without resolving fundamental conflicts in the evidence. (Sentencing Hr'g Tr. 76:14-15.) The court's concurrent failure to explain its reasoning hinders effective review of the sentence and requires that the sentence be vacated with instructions on remand to make explicit findings of fact to support the decision to credit one version of inconsistent testimony over another. *See Dean,* 414 F.3d at 730; *Robinson*, 547 F.3d at 804; *Johnson*, 489 F.3d at 798.

B. The court did not identify the elements of the "other offense" or explain how the evidence satisfied those elements

Not only did the district court err fail to establish a meaningful record of its sentencing decisions, it also erred by failing to specifically identify the elements of

"Aggravated discharge of a firearm," as defined by 720 Ill. Comp. Stat. 5/24-1/2(a)(1), and to explain how the evidence satisfied those elements. The court used this offense as the basis to apply a four-level sentence increase under section 2K2.1(b)(6), but neither named nor addressed it at any time during the sentencing hearing.

The court is not free to ignore the elements of an offense when it assumes the role of factfinder in a sentencing proceeding.[5] *Robinson*, 537 F.3d at 803-04. The court must name the offense, identify its elements, and explain how the evidence presented establishes each element. *Id.*; *see also United States v. Legros*, 529 F.3d 470, 474 (2d Cir. 2008) ("each element of the underlying offense must be established"). Because the defendant does not benefit from the full range of constitutional protections to which he is entitled at trial, due process concerns demand strict adherence to procedural safeguards to ensure that the evidence upon which the sentence is based is reliable, accurate, and sufficient to support the

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[5] In the majority of cases in which section 2K2.1(b)(6) applies, the "other offense" in which the weapon is used is encompassed by the facts proven at trial. *See, e.g., United States v. Hill*, 563 F.3d 572, 574-75 (7th Cir. 2009) (other offense was the burglary by which defendant obtained possession of the firearms); *United States v. Robinson*, 537 F.3d 798, 800, 803-04 (7th Cir. 2008) (other offense was attempting to shoot the officers while resisting arrest for unlawful possession); *United States v. Lang*, 537 F.3d 718, 719 (7th Cir. 2008) (other offense was defendant's use of his gun as currency in exchange for cocaine, when the exchange precipitated the arrest); *United States v. Legros*, 529 F.3d 470, 472-73 (2d Cir. 2008) (other offense was a shooting from which the defendant was fleeing when he was arrested). Thus, in the usual case, the facts relevant to the sentence increase have been considered by a jury. Here, the government offered no evidence of the Greenview shooting at trial, enhancing the need for strict adherence to procedural safeguards at sentencing to comport with due process.

court's findings. *See, e.g.*, *United States v. Beler*, 20 F.3d 1428, 1432-33 & n.1 (7th Cir. 1994) (acknowledging the "inherent unfairness of sentencing a defendant based on uncharged criminal acts" and noting that the relaxed evidentiary standards and reduced burden of proof at sentencing require rigorous adherence to procedural requirements).

In *Robinson*, for example, a "habitual criminal" with known gang affiliations was convicted under 18 U.S.C. § 922(g)(1) as a felon in unlawful possession of a firearm. 537 F.3d at 800. While resisting arrest, the defendant repeatedly reached for the gun in his pants pocket. *Id.* at 803. The district court, relying on this fact, inferred that Robinson attempted to use the gun in connection with the other crime of attempted aggravated battery, and it applied a four-level increase under section 2K2.1(b)(6). *Id.* This Court vacated Robinson's sentence and directed the district court on remand to make findings and "formally explain" how those findings supported each element of attempted aggravated battery, including the requisite intent.[6] *Id.* at 804; *see also Legros*, 529 F.3d at 474-76 (vacating sentence enhanced

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[6] This requirement is not unique to section 2K2.1(b)(6). This Court consistently requires that lower courts imposing Guideline enhancements based on the commission of crimes other than the charged offense identify the "other crime" and address its elements before increasing the defendant's sentence based on those acts. *See, e.g., United States v. Arnaout*, 431 F.3d 994, 1002 (7th Cir. 2005) (to apply enhancement under section 3A1.4 for promotion of domestic terrorism when defendant was not convicted of an act of terrorism, court must identify the crime defendant's conduct promoted and satisfy the elements of the statutory definition); *United States v. Turner*, 203 F.3d 1010, 1020 (7th Cir. 2000) (court must indicate it independently found all the elements of perjury to apply an obstruction of justice enhancement under section 3C1.1).

under section 2K2.1(b)(6) for lower court's failure to "mention the essential elements of the offense[s] or identify facts in the record that satisfied" the statutory definitions of felony reckless endangerment or attempted assault).

Just as in *Robinson,* where the district court failed to identify the elements of attempted aggravated battery or apply Robinson's conduct to those elements, the court below failed to identify—or even name—the "other offense" or apply the evidence introduced at sentencing. The government claimed, and the court ostensibly assumed, that Tapia violated an Illinois statute criminalizing the aggravated discharge of a firearm. (Presentence Investigation Report, Government's Attached Letter at 2); 720 Ill. Comp. Stat. 5/24-1.2(a)(1) (2006). The elements of this offense required findings that Tapia: (1) knowingly discharged a firearm; (2) in the direction of or into a building; and (3) knew or should have known the building was occupied. *Id.*; Ill. Pattern Jury Instr.–Criminal 18.12. *Robinson's* requirement that the court be explicit in describing the elements applies even more forcefully here, where Tapia's felon-in-possession conviction was supported by facts wholly separate from the facts that would establish his participation in the Greenview shooting.

Neither the government nor the court attempted to explain how the evidence presented met any of the three required elements. No mention of "Aggravated discharge of a firearm" appears anywhere in the sentencing transcript, nor do any of the court's findings address the elements. The court's sole finding regarding the crime committed by the Greenview shooting was that it was an "outrageous and

callous act of violence." (Sentencing Hr'g Tr. 82:24-25.) This normative judgment cannot substitute for the district court's due process obligation to find that: (1) Tapia knowingly discharged the weapon; (2) in the direction of the house at 809 Greenview; and (3) Tapia knew the house was occupied in order to impose the section 2K2.1(b)(6) enhancement. Therefore, this Court should vacate and remand for resentencing.

III. The district court erred by basing Tapia's sentence on the unreliable hearsay statements of Rodriguez and Gozdal, without which the evidence could not establish that Tapia committed the other felony offense

Not only did the district court commit procedural errors in enhancing Tapia's sentence, it likewise committed a substantive error because the evidence failed to prove that Tapia committed the felony of aggravated discharge of a firearm. The district court relied on three pieces of evidence to support the sentencing enhancement: Gozdal's hearsay statement, Rodriguez's hearsay statement, and the testimony of a ballistics expert. The Due Process Clause allows the district court to only consider reliable evidence at sentencing. Because Gozdal's and Rodriguez's statements were contradicted by his or her earlier testimony, were uncorroborated, and lacked any other indicia of reliability, the district court abused its discretion by considering them. Without these unreliable hearsay statements, the ballistics expert alone cannot prove by a preponderance of the evidence that Tapia committed all the elements of the aggravated discharge of a firearm. The section 2K2.1(b)(6) sentencing enhancement was clearly erroneous.

This Court reviews a district court's determination of the reliability of hearsay evidence at sentencing for an abuse of discretion, *United States v. Smith*, 280 F.3d 807, 810 (7th Cir. 2002), and its sentencing determinations for clear error, *United States v. Alwan*, 279 F.3d 431, 440 (7th Cir. 2002).

A. The district court's reliance on out-of-court statements attributed to Rodriguez and Gozdal violated Tapia's Fifth Amendment right to have only reliable evidence presented against him

The hearsay statements of Rodriguez and Gozdal were unreliable. The Due Process Clause of the Fifth Amendment allows the court to only consider reliable evidence against a defendant. *United States v. Campbell*, 985 F.2d 341, 348 (7th Cir. 1993). Hearsay meets this burden only when it has sufficient indicia of reliability to ensure its probable accuracy, a standard which this Court rigorously applies. *United States v. Beler*, 20 F.3d 1428, 1433 (7th Cir. 1994) (citing *United States v. Miele*, 989 F.2d 659, 664 (3d Cir. 1993)).

Contradictory evidence epitomizes "the prototype of unreliable evidence." *United States v. Acosta*, 85 F.3d 275, 283 (7th Cir. 1996). This Court has repeatedly recognized that contradictory evidence provides "an inadequate basis for calculating a defendant's base offense level under the Guidelines." *Id.* When the government offers a hearsay statement that is inconsistent with the declarant's other out-of-court statements or in-court testimony, the district court must conduct a searching inquiry into the offered evidence's reliability before considering it. *United States v. McEntire*, 153 F.3d 424, 436 (7th Cir. 1998); *United States v. Duarte*, 950 F.2d 1255, 1266 (7th Cir. 1991). To survive appellate review, the district court may not simply

pronounce that one statement is more reliable. *Beler*, 20 F.3d at 1430 (rejecting the district court's conclusory finding as to other relevant conduct in the face of inconsistent evidence); *Duarte*, 950 F.2d at 1266 (the district court must "directly address the contradiction and explain why it credits one statement rather than the other.").

If the district court chooses to credit one inconsistent statement of a declarant over another, this Court looks for independent corroboration. *Compare McEntire*, 153 F.3d at 437 (vacating a sentence based on an inconsistent statement which lacked corroboration), *with United States v. Galbraith*, 200 F.3d 1006, 1013 (7th Cir. 2000) (affirming a sentence where the relied-upon statement was corroborated by facts and details not in the other statement). The government bears the burden of presenting consistent facts, details, and explanations to sufficiently corroborate the offered hearsay evidence. *Galbraith*, 200 F.3d at 1012; *Acosta*, 85 F.3d at 283 (stating that the government, when faced with inconsistent hearsay statements, bears the burden to produce evidence which the court may use in making reliable findings). A district court that relies on uncorroborated, inconsistent hearsay commits reversible error. *Acosta*, 85 F.3d at 283 (vacating a defendant's sentence that the court enhanced based on one of two inconsistent statements by the same declarant because corroborating evidence did not establish the reliability of the offered statement).

1. Rodriguez's statement to Peraza is unreliable because she recanted it on the stand during sentencing and because the government did not present evidence corroborating it

Peraza's testimony at sentencing relied heavily on information obtained from Rodriguez. Specifically, he discussed a conversation he had with Rodriguez in May 2008 after she came to the Rockford police to report the domestic battery incident. (Sentencing Hr'g Tr. 20:8-10, 29:19-30:14; R. 32-2.) While Rodriguez was at the station filling out the complaint, she also asked to speak with a detective from the Gang Unit. (R. 32-2.) Peraza later met with her, and Rodriguez supposedly discussed events surrounding the Greenview shooting. (Sentencing Hr'g Tr. 20:11-22:10.) According to Peraza, Rodriguez said that Tapia and others met at her house on April 8, 2008, and that Tapia ordered the Greenview shooting in retaliation for an earlier shooting. (Sentencing Hr'g Tr. 21:10-18.) Rodriguez said that Jacob Larsen brought a box of guns, and those in attendance distributed guns, loaded them with ammunition, and left the residence. (Sentencing Hr'g Tr. 21:10-18. 22:4-6.)

At sentencing, Rodriguez took the stand as a government witness and directly contradicted key elements of her earlier report. (Sentencing Hr'g Tr. 33:22-23.) When asked if she remembered where she was on April 8, 2008, Rodriguez responded, "Not at the moment." (Sentencing Hr'g Tr. 34:25-35:3.) The government then asked if Rodriguez recalled the alleged meeting where Tapia and others planned the Greenview shooting. (Sentencing Hr'g Tr. 35:8-11.) She answered, "No." (Sentencing Hr'g Tr. 35:8-11.) Most importantly, when discussing her

conversation with Peraza, Rodriguez testified, "I discussed activity that I made up with him and that I have heard other people say, just repeating what I heard." (Sentencing Hr'g Tr. 35:12-17.) The district court immediately issued a perjury warning to Rodriguez, apparently assuming that Peraza's account of her earlier testimony was true and that any inconsistencies were necessarily false. (Sentencing Hr'g Tr. 35:18-36:9.) The court also arranged for her to consult with an attorney. (Sentencing Hr'g Tr. 35:18-36:9.) Rodriguez then invoked the Fifth Amendment and ended her testimony before either party had an opportunity for cross examination.[7] (Sentencing Hr'g Tr. 67:19-22.)

Rodriguez's earlier statement to Peraza conflicted materially with her in-court testimony and was precisely the type of inconsistent evidence that should not be used to enhance a sentence unless independently corroborated. *See Acosta*, 85 F.3d at 283; *McEntire*, 153 F.3d at 437. The government, nonetheless, failed to adequately corroborate Rodriguez's statements to Peraza. Rodriguez identified no less than six people who attended the April 8 meeting, yet the government called none of them to establish that the meeting occurred or, more importantly, that Rodriguez attended it. (Sentencing Hr'g Tr. 21:10-22:2.)

Not only did the government fail to corroborate Rodriguez's hearsay statement, but the defense presented evidence that further undercut the

[7] In light of evolving Sixth Amendment jurisprudence, the appellant respectfully seeks to preserve for potential future appellate review the issue of whether the district court's consideration of testimonial out-of-court statements from Rodriquez and Gozdal during sentencing violated Tapia's right to confrontation under the Sixth Amendment because Tapia did not have the prior opportunity to cross-examine either declarant.

statement's reliability. Although Rodriguez told Peraza that Larsen brought the box of guns to the April 8 meeting and distributed them among the attendees, Larsen testified at sentencing that he did not see Tapia on April 8. (Sentencing Hr'g Tr. 61:17-18.) He further testified that he never brought a box of guns to Tapia or anyone else. (Sentencing Hr'g Tr. 63:9-11.) Larsen also testified that Rodriguez harbored a motive to lie about the incident: Larsen had helped Tapia cover up his extra-marital affairs and Rodriguez was angry with both men. (Sentencing Hr'g Tr. 63:25-64:3.)

Notwithstanding Rodriguez's wholly inconsistent testimony, the total lack of corroboration, and the affirmative evidence from the defense that undercut Rodriguez's original story, the district court credited Rodriguez's statement to Peraza made "near the time of the shooting" over her sworn testimony during sentencing. (Sentencing Hr'g Tr. 76:8-10.) This unsupported conclusion runs afoul of Tapia's due process rights and therefore the district court abused its discretion. *See Duarte*, 950 F.2d at 1255; *Beler*, 20 F.3d at 1430.

2. The district court erred in relying on Gozdal's third hearsay statement, which conflicted with his previous statements and was uncorroborated

Gozdal's out-of-court statements also lacked any indicia of reliability. Gozdal was interviewed three times by law enforcement. (Sentencing Hr'g Tr. 25:23-26:12.) On May 9, 2008, Peraza interviewed Gozdal about shootings in Rockford. (Sentencing Hr'g Tr. 25:23-26:12.) Gozdal did not mention Tapia or the Greenview shooting during the interview. (Sentencing Hr'g Tr. 26:23-27:3.) Later, on

September 27, 2008, an investigator with the Winona County Sheriff's Office, at the request of an ATF agent who had participated in the search of Tapia's home, questioned Gozdal about shootings for which he was arrested in Rockford. (App. B. 204-05.) Gozdal stated that Tapia had nothing to do with any of the shootings and was in Texas when they occurred. (App. B. 205-06.) Gozdal then told the investigator that another man known as Midget had taken an XD45 handgun and shot up a house in Rockford, apparently referring to the Greenview shooting. (App. B. 206.) The investigator asked whether Midget had implicated anyone else in the shooting, but Gozdal responded that Midget had not mentioned anyone else. (App. B. 206.) Finally, on October 20, 2008, the day before Tapia's trial, Peraza again interviewed Gozdal. (App. B. 208.) For the first time, Gozdal implicated Tapia in the Greenview shooting by claiming that both Midget and Tapia had confessed to the shooting. (App. B. 208; Sentencing Hr'g Tr. 27:12-19.) Although the statement came months after the incident occurred, Gozdal's third statement, which was prepared by Peraza, now contained the specific date and location of Tapia's "confession" to Gozdal, the number of shots fired, and the source of the handgun. (App. B. 208.)

Gozdal's three statements were clearly contradictory. In the first, he did not mention Tapia. In the second, he explicitly denied Tapia's involvement in the shooting. In the third, given the day before Tapia's trial, he delivered precise information that was directly related to an element of the charged offense. Gozdal

linked Tapia to the gun by fingering him in an incident where shell casings from the gun were found. (App. B. 208.)

The district court erred in crediting Gozdal's third statement because the government failed to corroborate it. Without such corroboration, the district court had no reasoned basis on which to favor Gozdal's third statement over his earlier statements. (Sentencing Hr'g Tr. 76:10-11) (court finding "Clifford Gozdal's [last] statement to Det. Peraza [to be] credible"). The only reason the district court offered to justify its selection of the third statement was that it identified the type of gun that matched the shell casings found at the Greenview shooting. (Sentencing Hr'g Tr. 76:11-13.) This does not sufficiently corroborate the third statement because Gozdal also mentioned the gun in his second statement. (App. B. 204-08.) The purpose of the corroboration requirement is to differentiate the reliability of inconsistent statements. Because the gun is named in both statements, it does not differentiate, and therefore does not corroborate, Gozdal's third statement. Thus, the district court failed to corroborate Gozdal's third statement and incorrectly relied on it.

In fact, a reasonable observer could find that the third statement was the *least* reliable of the three, given that it was elicited the day before Tapia's trial, had a very different tone and language than the earlier two, and was the farthest in time from the alleged incident. The court, therefore, abused its discretion when it relied upon uncorroborated, inconsistent, and unreliable hearsay evidence to enhance Tapia's sentence.

B. Without Rodriguez's and Gozdal's hearsay statements, the evidence presented was clearly insufficient to satisfy all the elements of an "Aggravated discharge of a firearm"

Because the statements of Rodriguez and Gozdal were not reliable and the only other evidence before the court was the testimony of the ballistics expert, the evidence insufficiently supported the four-level enhancement under section 2K2.1(b)(6). Tapia's sentence, therefore, must be overturned. The court enhanced Tapia's sentence based on his commission of an "Aggravated discharge of a firearm." (Presentence Investigation Report, Government's Attached Letter at 2); 720 Ill. Comp. Stat. 5/24-1.2(a)(1) (2006). As noted above, *see supra* Section II(B), the elements of this offense required that Tapia: (1) knowingly or intentionally discharged a firearm; (2) in the direction of or into a building; and (3) he knew or reasonably should have known the building was occupied. 720 Ill. Comp. Stat. 5/24-1.2(a)(1) (2006); Ill. Pattern Jury Instr.–Criminal 18.12.

The court relied on three pieces of evidence in enhancing Tapia's sentence for the aggravated discharge of a firearm during the Greenview shooting: Rodriguez's statement to Peraza, Gozdal's third statement, and the ballistics expert's testimony. (Sentencing Hr'g Tr. 76:6-11.) As a threshold matter, even if all of the evidence was reliable, none of it satisfied the third element of the crime because there was no proof that Tapia knew that the house would be occupied at the time of the shooting. But as discussed above, two of the three pieces of evidence were internally inconsistent and uncorroborated such that the district court could not reasonably rely upon them. The only remaining piece of evidence was the ballistics expert's

testimony that the shell casings found at the Greenview shooting matched the gun recovered from Tapia's ceiling. (Sentencing Hr'g Tr. 45:12-16.) The expert had no independent knowledge of who fired this gun during the Greenview shooting. (Sentencing Hr'g Tr. 46:20-47:2.) The expert's testimony cannot prove even by a preponderance of the evidence that Tapia was present at the Greenview shooting, fired the gun, or possessed the necessary *mens rea* to satisfy the elements of the offense. In light of this insufficient evidence, the district court clearly erred in applying the enhancement and this Court should overturn Tapia's sentence.

CONCLUSION

For the above reasons, Tapia respectfully requests that this Court vacate the conviction or, in the alternative, vacate the sentence and remand for resentencing.

Respectfully Submitted,

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No. 09-1426

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JOSE TAPIA, Defendant-Appellant.	Appeal from the United States District Court for the Northern District of Illinois, Western Division Case No. 08 CR 50023 Hon. Frederick J. Kapala, Presiding Judge.

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(b) because this brief contains 11,212 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in 12 point Century Schoolbook font with footnotes in 11 point Century Schoolbook font.

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CIRCUIT RULE 31(e) CERTIFICATION

I, the undersigned, counsel for the Defendant-Appellant, Jose Tapia, hereby certify that I have filed electronically, pursuant to Circuit Rule 31(e),versions of the brief and all of the Appendix items that are available in non-scanned PDF format.

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CERTIFICATE OF SERVICE

I, the undersigned, counsel for the Defendant-Appellant, Jose Tapia, hereby certify that on November 18, 2009, two copies of the Brief and Required Short Appendix of Appellant, as well as a digital version containing the brief, were sent by United States mail to the following individual:

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ATTACHED REQUIRED SHORT APPENDIX OF DEFENDANT-APPELLANT JOSE TAPIA

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CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 30(d)

I, the undersigned, counsel for the Defendant-Appellant, Jose Tapia, hereby state that all of the materials required by Circuit Rules 30(a), (b) and (d) are included in the Appendix to this brief.

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RULE 30(b) LONG APPENDIX TABLE OF CONTENTS