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

REPLY BRIEF OF DEFENDANT-APPELLANT JOSE TAPIA

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

The government fails to show that the search of Tapia's basement was reasonable. Protective sweeps are only proper 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). Of the six facts offered by the government to show reasonableness, only two are relevant to the presence of third parties, and they are impermissibly vague to withstand *Buie*'s requirements. Moreover, even if it was reasonable to believe that a third party was in the basement, the government fails to meet its burden of showing that it was reasonable to believe a third party ensconced in Tapia's isolated basement actually posed a threat to the officers.

A. The government's reading of *Buie* and its progeny would validate unconstitutional sweeps based on impermissibly vague information

To justify the officers' sweep of Tapia's basement, the government recounts six rationales supposedly pointing to the presence of dangerous others in Tapia's house. (Gov't Br. 28.) But four of these facts, though specific in nature, are either irrelevant to the *Buie* inquiry or insufficient to uphold the sweep. The remaining two facts are too vague to meet *Buie*'s demand for "specific and articulable facts."

1. Police suspicions about Tapia's potential for aggression are irrelevant to a *Buie* inquiry

Protective sweeps exist to protect officers from the risk posed by dangerous *third parties* in the suspect's home, not from the suspect. *United States v. Arch*, 7 F.3d 1300, 1303 (7th Cir. 1993). Three of the government's rationales for the sweep—Tapia's alleged gang involvement, his prior weapons conviction, and his suspected involvement in the Greenview shooting (Gov't Br. 28) (enumerated facts 1, 2, and 5)—go only to Tapia's character and are irrelevant to the presence or dangerousness of third parties. *United States v. Archibald*, 589 F.3d 289, 298-99 (6th Cir. 2009) ("[Defendant's] prior arrests for violent crimes were an 'irrelevant' factor, which the district court should not have considered.") (internal citation omitted). Any facts relating to Tapia's temperament were irrelevant to the sweep that occurred after Tapia was handcuffed and under police guard.

2. Police suspicions about Tapia's association with potentially aggressive third parties are insufficient in a *Buie* inquiry

To justify a protective sweep, the government must show officers' reasonable suspicion that: (1) third parties were in the home at the time of the arrest; and (2) they posed a danger to officers on the scene. *Buie*, 494 U.S. at 337. Although the fact that Tapia's associates may have recently been involved in a series of shootings may be relevant to the dangerousness requirement of the *Buie* test (Gov't Br. 28) (enumerated fact 4), it is insufficient to justify the search: the government also needed to show that the officers reasonably believed that these individuals were in Tapia's home at the time of his arrest. But, as discussed below, the government

offered only impermissibly vague facts in its attempt to place these persons at 129 Ridgeview.

3. The police had no reasonable indication that Tapia's allegedly violent associates were in the basement of 129 Ridgeview

The government is left with only two facts in its attempt to show the reasonable presence of gang associates in Tapia's basement: (1) statements by Verta Rodriguez that Latin Counts lived in the basement of Tapia's home; and (2) the presence of the Lincoln Navigator in front of 129 Ridgeview. (Gov't Br. 28) (enumerated facts 3 and 6). Neither provided the specific and articulable facts required by *Buie*, so the sweep was unconstitutional.

Rodriguez's statement to Peraza that Tapia's gang associates would occasionally have meetings, hangout, or sleep at Tapia's house were too vague and unsubstantiated to conclude that any of them were actually in 129 Ridgeview when the search took place–at 6:45 am on May 19, 2008. (Suppression Hr'g Tr. 8:25-9:3.) Police possess specific and articulable facts only when they observe direct evidence that the home contains multiple individuals. *See United States v. Burrows*, 48 F.3d 1011, 1017 (7th Cir. 1995) (upholding sweep of locked bedrooms where police saw movement in bedroom from their position outside the house); *United States v. Barker*, 27 F.3d 1287, 1297 (7th Cir. 1994) (upholding a protective sweep because an ATF agent had observed multiple individuals in the home during three of her prior undercover visits to the suspect's home). Unlike these cases, however, the police possessed no facts indicating that other persons were on the premises when they

arrived to arrest Tapia. As a threshold matter, the police surveilled Tapia's home three or four times before executing the warrant and never saw anyone in the home or entering or leaving it. (Suppression Hr'g Tr. 24:17-25:1.) And on the day of the arrest, the Rockford police again observed only a vacant home and heard nothing indicating that multiple persons were in the home. (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).

As for the Navigator parked out front, the police had no specific information that the car was being used by anyone other than Tapia. A single car outside a home is wholly consistent with a single occupant. *See United States v. Stover*, 474 F.3d 904, 910-12 (6th Cir. 2007) (upholding a protective sweep where officers observed two cars parked in the suspect's driveway, with only one registered to the suspect). The officers had the opportunity to verify who owned the Navigator, but failed to do so; therefore the police lacked the specific and articulable fact that might have justified the search. As Peraza testified at the suppression hearing, no one confirmed the car's ownership before entering the house:

> Q. . . . And so, the confidential informant told you about a Lincoln Navigator, correct?
>
> A. Correct.
>
> Q. And they told you that that Lincoln Navigator belonged to a Tony Milene; is that right?
>
> A. Correct.

* * *

Q. Okay. And when you arrived to the residence, you saw the Lincoln Navigator, correct?

A. Correct.

Q. And you ran the license plate, correct?

A. It had a temporary license plate.

Q. Temporary license plate?

A. Somebody else ran the plate. I don't recall running it myself.

Q. Okay. But you know that that vehicle doesn't belong to Tony Milene, correct?

A. If it belongs to him?

Q. Right.

A. I'm not aware of if it belongs to him or not. I know somebody ran the plate.

(Suppression Hr'g Tr. 25:3-8, 26:5-18.)

The searching officers did not know whose Navigator it was; they simply assumed it was being used by someone other than Tapia. Such assumptions do not amount to specific and articulable facts. *See Archibald*, 589 F.3d at 300 ("[A]llowing the police to justify a protective sweep on the ground that they had no information at all is directly contrary to the Supreme Court's explicit command in *Buie* that the police have an articulable basis on which to support their reasonable suspicion of danger from inside the home.")

Thus, because the government offered no specific facts supporting a reasonable belief that Tapia's associates were in 129 Ridgeview on the morning of his arrest, the search was unconstitutional.

B. Officers cannot conduct a sweep when the presumed third party is incapable of endangering the arresting or departing officers

Even if the district court were correct in concluding that other persons might have been in the basement of Tapia's home, the sweep was nevertheless impermissible. Any person in the basement could not have posed a danger to the officers because the home's layout precluded an attack on them as they departed with Tapia. To that end, the basement's isolation was legally relevant under *Buie*. If this Court finds the record insufficiently developed to determine the degree of the basement's isolation, then a remand is appropriate to allow the government to meet its burden of proving the reasonableness of any perceived risk from the basement.

1. The isolation of Tapia's basement is key to a *Buie* inquiry

The government incorrectly claims that the isolation of Tapia's basement is legally irrelevant. (Gov't Br. 34-36.) However, the inability of a presumed basement dweller to threaten the officers at the scene goes directly to the reasonableness of the alleged risk and, thus, the validity of the search.[1]

[1] The government's unsupported suggestion that Tapia forfeited the ability to argue this point (Gov't Br. 33) is without merit. Defendant's trial counsel: (1) specifically challenged the validity of the protective sweep (App. B. 13-15, 16-21); (2) cited and discussed *Buie* (App. B. 18-20), which addresses whether a third-party confined to an isolated basement would be able to threaten police officers, 494 U.S. at 338 (Stevens, J. concurring); and (3) questioned officers on the layout of the house, their positions around the house, and their ability to see through windows. (Suppression Hr'g Tr. 24:6-25:1, 29:14-30:13, 47:16-49:7, 56:23-59:12.) Moreover, *Buie*'s standards explicitly require the *government* to show that the officers harbored a reasonable fear that some third party could threaten

This Court has approvingly cited decisions where the external configuration of the home was a deciding factor in upholding the sweep. *See Burrows*, 48 F.3d at 1016 (*citing United States v. Hoyos*, 892 F.2d 1387 (9th Cir. 1989), *overruled on another point of law by United States v. Ruiz*, 257 F.3d 1030 (9th Cir. 2001)). In *Hoyos*, the Ninth Circuit upheld the sweep of a suspect's home even though he was arrested in his yard. The court reasoned that, although the potential third party was isolated from the scene of the arrest, a detail of the house—that it had windows facing the yard—would have allowed for that third person to threaten the officers from afar. *Hoyos*, 892 F.2d at 1397 ("[A] bullet fired at an arresting officer standing outside a window is as deadly as one that is projected from one room to another."). As in *Hoyos*, the ability of a person in Tapia's basement to threaten the police from afar should be a key question in the protective sweep inquiry. But unlike *Hoyos*, where the yard-facing windows facilitated such a threat, the isolation of Tapia's basement foreclosed such a threat.

The government asserts that "the validity of a protective sweep 'does not turn on the availability of less intrusive investigatory techniques.'" (Gov't Br. 35) (quoting *United States v. Winston*, 444 F.3d 115, 120 (1st Cir. 2006).) But Tapia is not arguing that officers must avoid the sweep when confronted with an option between a valid sweep and a valid alternative to the sweep. Instead, Tapia's

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them. *United States v. Basinski*, 226 F.3d 829, 833 (7th Cir. 2000) ("Where the government obtains evidence in a search conducted pursuant to one of these exceptions [to the warrant requirement], it bears the burden of establishing that the exception applies.") (citing several sources); *see also infra* page 9 (discussing the government's burden in this case). The government's failure to offer evidence showing that the layout of the house supported a finding of reasonable fear of danger does not preclude the defendant from highlighting that the external configuration of the house actually undercuts their position. Thus, no forfeiture occurred.

position is that the sweep in this case was not a valid option because the officers lacked reasonable fear of an attack. Moreover, even the most cautious officers could have adequately protected themselves by guarding the basement door from the kitchen, a measure that would not have abridged Tapia's constitutional rights.

The government also asserts that, as a policy matter, officer safety is the only concern in a protective sweep. (*See* Gov't Br. 35-36.) However, *Buie* resolves the tension between police officers' need to effectuate valid arrest warrants without fear of ambush and the essential Fourth Amendment right to be free from warrantless searches. To stay true to *Buie*, this Court must honor both concerns. The government implies that, if the officers simply arrested Tapia, swept the first floor, and departed, the police officers would be at too great a risk of a third party leaving the basement, ascending the stairs, moving to the front of the house, and attacking the officers as they left. (*See* Gov't Br. 35-36.) Even if this risk existed, it must be balanced against the violation of the sanctity of Tapia's home. *See 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"). A test in which even the smallest risk of officer safety is permitted to trump all else ignores the potential for abuse. Pretextual sweeps (where police lacking probable cause bypass a search warrant) and misbehavior by overzealous officers "engaged in the often competitive enterprise of ferreting out crime," *Johnson v. United States*, 333 U.S. 10, 14 (1948), would no doubt continue and increase under any such reading of *Buie*. The facts of this case,

specifically the basement's isolation, show that the risk to officer safety was quite small relative to the Fourth Amendment concerns and that the proper application of *Buie* requires a reversal.

2. The facts in the record demonstrate no risk to officer safety from Tapia's basement

Contrary to the government's assertion, the record contains ample testimony on the layout of 129 Ridgeview. None of it shows how a potential basement dweller could have threatened the officers on the scene. Should this Court find the record insufficient to ascertain the threat posed by a third party confined to the basement, then the government can attempt to meet its burden by supplementing the record on remand.

The government asserts that the defendant failed to show that the officers knew that there was no threat from the basement due to a lack of windows or doors. (Gov't Br. 34.) This is irrelevant, as the government bears the burden of proving reasonableness. *Buie*, 494 U.S. at 337 (Stevens, J. concurring) ("[I]t is the State's burden to demonstrate that the officers had a reasonable basis for believing. . . that someone in the basement might attack them. . . ."); *Arch*, 7 F.3d at 1302 (7th Cir. 1993) ("[T]he government bears the burden of demonstrating that [the search] fits within an exception to the warrant requirement. . . .") (internal citation removed); *Archibald*, 589 F.3d at 299 ("In order to justify the protective sweep, the government bore the burden of providing sufficient facts . . . ."). Consequently, it is the government's burden to prove that the officers were aware of a threat from basement windows, not the defendant's duty to prove they were not.

For similar reasons, the government's claim that the basement-isolation argument is moot because there were windows or doors connected to the basement cannot suffice to uphold the district court's decision on appeal; the government offers no record support and its assertion appears to be based on facts outside the record on appeal, which is not allowed. (Gov't Br. 34) (stating without record citation that "even if the defendant were correct in stating that the basement had no windows or other doors (and he is not) . . . ."); *see Henn v. Nat'l Geographic Soc'y*, 819 F.2d 824, 831 (7th Cir. 1987) (proscribing references to facts outside the record on appeal). The government bore the burden of proving both that any modes of egress existed *and* that they posed a threat to the officers; the government never asked questions to elicit this information, so it is disingenuous for it to now claim that the record does not support defendant's point. (Gov't Br. 34.) Regardless, the record is sufficiently developed to conclude that the basement posed no reasonable danger to the officers. Even if it were not, the responsibility lies with the government, a deficiency it cannot overcome now by supplying facts unsupported by, and without citation to, the record.

Thus, because the government offered only vague facts in its attempt to show the presence of third parties in Tapia's basement, and because it failed to meet its burden of showing that it was reasonable to believe a basement dweller actually posed a threat to the officers, the search was unconstitutional, and the gun should have been suppressed.

II. The government glosses over the district court's procedural errors by impermissibly supplying its own legally unsupportable post-hoc "findings"

The government attempts to skirt Tapia's challenge to the procedural inadequacies in the district court in three ways. First, the government conflates two of the district court's separate reversible errors into one. Second, the government minimizes the procedural steps required to impose an enhancement based on uncharged criminal conduct. Finally, the government impermissibly supplies backward-looking justifications it presumes the court could have made to justify the enhancement.

A. The government conflates the procedural requirement that the court explain its findings with the substantive issue of reliability and attempts to mask the procedural error by providing post-hoc justifications for the court's decision

Failing to respond to or explain the procedural deficiencies in the district court's sentencing decision, the government instead attempts to cure the court's errors itself and to merge two errors into one. Tapia's objections to the government's evidence, supported by the testimony of Jacob Larsen and the inconsistencies in Clifford Gozdal's two statements to the police (and bolstered by Verta Rodriguez's in-court recantation of her earlier statements to Peraza), triggered the district court's obligation to make explicit findings of fact and to explain those findings on the record. *See United States v. Dean*, 414 F.3d 725, 727, 730 (7th Cir. 2005). A parallel obligation arises where a court chooses to accept one inconsistent statement over another. *United States v. Johnson*, 489 F.3d 794, 798 (7th Cir. 2007); *United States v. Duarte*, 950 F.2d 1255, 1266 (7th Cir. 1991).

Larsen's testimony directly contradicted Rodriguez's version of events leading up to the Greenview shooting: he denied seeing or speaking to Tapia on the day of the shooting, attending a meeting at Rodriguez's house, or supplying guns. (Sentencing Hr'g Tr. 62:6-13, 63:9-11.) Yet nowhere does the district court so much as reference Larsen's testimony in choosing to credit Rodriguez. The court's "findings" were limited to finding Rodriguez's statement "near the time of the shooting" more credible than her repudiation of those statements under oath. (Sentencing Hr'g Tr. 76:8-10.) Even if a passing reference to timing could be considered an explanation, the court failed to explain why it discredited Larsen entirely.

Similarly, the court failed to explain why it chose to credit Gozdal's October statement, typed for him on the eve of Tapia's trial, over his September statement to the Winona police. The statements contradict one another by clear omission. In September 2008 the Winona police interviewed Gozdal at the request of ATF Special Agent John Richardson, the complainant in this case, who was investigating Tapia at the time. (App. B. 204.) The purpose of the interview was to obtain information about Tapia, and the interviewing officer asked Gozdal directly what he knew about Tapia and Tapia's involvement in several shootings. (App. B. 204-06.) Gozdal gave substantial information about Tapia's whereabouts, living arrangement, and activities during this time, yet he never reported that Tapia claimed responsibility for the Greenview shooting; in fact, he never suggested that Tapia was involved at all. (App. B. 205-06.) Gozdal instead "went into detail" about

how a different man—Taylor Hawk, who Gozdal identifies as "Midget"—bragged to him about shooting up a house with an XD45 handgun. (App. B. 206.) When the interviewer asked directly if anyone else participated, Gozdal stated that Midget told him, "*I* shot [the house] up," and did not implicate anyone else in the shooting. (App. B. 206.) Gozdal's failure to mention Tapia could not have been an accident. The night before Tapia's trial, Gozdal signed a statement that added Tapia to the conversation he had with Midget and implicated Tapia in the Greenview shooting. (App. B. 208.)

Despite these internal inconsistencies, the district court summarily stated that it found the October statement credible, in part because it identified the type of gun that matched the casings found at the scene of the shooting. (Sentencing Hr'g Tr. 76:10-13.) Both statements, however, identify the same weapons, so the district court's rationale for choosing the later statement does not distinguish between them and cannot suffice as reasonable explanation for its decision. (App. B. 204-08.)

The government cannot point to any meaningful explanation in the record because the district court did not make it. Instead, the government improperly substitutes its own reasoning on appeal as post-hoc justification for the district court's actions. (Gov't Br. 38-40.) For example, the government makes the unsupported assertion that the district court was free to find Rodriguez's in-court statement incredible, and "by implication, find her earlier statement credible." (Gov't Br. 46.) Yet even if the court determined that Rodriguez lied at sentencing, it could not automatically conclude that she told the truth in her earlier statement to

Peraza. The government attempts to excuse the court from its obligation to indicate why Rodriguez's statement under oath was less reliable than her statement under the stress of domestic abuse. *See United States v. Fennell*, 65 F.3d 812, 813-14 (10th Cir. 1995)(discussed further *infra* Section III).

The government's treatment of Larsen and Gozdal is also flawed. Not a word of the government's lengthy explanation of reasons the district court *could* have rejected Larsen's testimony appears in the record below. (Gov't Br. 38-39.) Similarly, the government's manipulation of Gozdal's two contradictory statements—resulting from its unavailing attempt to claim the statements are consistent (see discussion *supra*)—is yet another retroactive attempt to do the work the district court failed to do. (*See* Gov't Br. 39-40.) This Court has repeatedly rejected similar attempts to engage in such Monday-morning quarterbacking. *See, e.g., United States v. Bokhari*, 430 F.3d 861, 864 (7th Cir. 2005) ("[I]t is the role of the district court—not this court—to make the initial factual findings necessary to support a sentencing calculation."); *United States v. Patel,* 131 F.3d 1195, 1202 (7th Cir. 1997) ("The issue . . . is not whether the government or this panel could identify evidence in the record to support the enhancement, but whether the district court, in choosing to apply it, made the findings necessary to support its decision.").

After trying to explain away the district court's error, the government next conflates the court's procedural error in failing to make and explain its findings with the related but separate substantive error in failing to ensure that the evidence upon which it bases its decision is reliable. (Gov't Br. 37-40); *see infra*

Section III. These requirements, however, serve different objectives and thus are not interchangeable. Because courts are granted expansive discretion in sentencing, they are also tasked with adequately explaining their decisions on the record in order to provide the transparency critical to appellate review and public trust in the judiciary. *See Gall v. United States*, 552 U.S. 38, 50 (2007); *Rita v. United States*, 551 U.S. 338, 356-58 (2007). Thus, the procedural shortcomings alone constitute reversible error.

B. The government misreads this Court's precedent concerning the procedural protections required to impose a sentence enhancement based on crimes neither charged nor proven beyond a reasonable doubt

Tapia also challenges the district court's failure to satisfy a second procedural obligation: to identify and support the elements of a felony offense before imposing a four-level enhancement under section 2K2.1(b)(6). The government acknowledges that the court must take three steps before applying an enhancement based on a uncharged crime: (1) identify the crime (which, under section 2K2.1(b)(6), must be a felony); (2) determine that the elements of that crime are satisfied; and (3) support its conclusions by a preponderance of the evidence. (Gov't Br. 43 (citing *United States v. Arnaout*, 431 F.3d 994, 1002 (7th Cir. 2005)).) The government also recognizes that the latter two steps require the court to make findings. (*See* Gov't Br. 42.) Yet in the same breath, the government erroneously asserts that once it identifies an underlying crime, and that crime is a felony, the court is free to limit its "findings" to a blanket statement that the elements of that felony are satisfied.

(Gov't Br. 41-42.) This Court, which has repeatedly recognized the "self-evident unfairness" inherent in basing sentences on uncharged criminal conduct, *see United States v. Beler*, 20 F.3d 1428, 1431 n.1 (7th Cir. 1994), requires more than such a conclusory declaration. *See, e.g., Arnaout*, 431 F.3d at 1002-03 (finding no error based on district court's detailed findings); *cf. Beler,* 20 F.3d at 1432 (the sentencing court is required to "explicitly state and support" a finding that uncharged conduct is sufficiently related to offense of conviction to impose "aggregation" enhancement).

The government relies on an incomplete and oversimplified interpretation of this Court's decision in *United States v. Robinson*, 537 F.3d 798 (7th Cir. 2008), to support its broad-brush approach. While the error in *Robinson* was the district court's failure to identify the offense underlying its imposition of a section 2K2.1(b)(6) enhancement (*i.e.*, complete step one identified above), this Court was explicit in its instructions to the lower court when it remanded for further factfinding to determine whether the defendant had, in fact, committed a felony (*i.e.,* complete steps two and three). *Robinson*, 537 F.3d at 804. This Court directed that the district court "formally explain" why the evidence supported the elements of the felony rather than a similar misdemeanor offense. *Id.* The explanation had to be sufficient to assure the reviewing court that Robinson "intended to commit a battery and that he took a substantial step toward doing so"—in other words, that the government proved the elements of attempted aggravated battery. *Id.*

The same is true here: the district court was required to make findings and explain how the government's evidence satisfied the elements of "aggravated

discharge of a firearm" (*i.e.*, complete steps two and three) before imposing an enhancement under section 2K2.1(b)(6). Illinois law required the government to prove that Tapia: (1) knowingly discharged a firearm (2) in the direction of 809 S. Greenview and (3) knew that the house was occupied. 720 Ill. Comp. Stat. 5/24-1.2(a)(1)(2006); Ill. Pattern Jury Instr.—Criminal 18.12. None of the evidence relating to the Greenview shooting was presented to the jury, so the district court was the first fact-finder to consider it. Yet the court never mentioned the name of the underlying felony or its elements, much less attempted to show how the evidence satisfied those elements. And, although it adopted the factual findings contained in the PSR, the court explicitly carved out any evidence related to the Greenview shooting. (Sentencing Hr'g Tr. 5:13-18.)

Once again, the government tries to cure the district court's lack of findings by offering evidence on which it claims the district court *could* have relied, (*see* Gov't Br. 42), ignoring the court's own statement that its "findings" were limited to the credibility of Rodriguez and Gozdal (Sentencing Hr'g Tr. 76:6-13). Once again, these post-hoc efforts cannot cure the district court's failure in the first instance. *See Patel,* 131 F.3d at 1202. In any event, the ballistics and other crime-scene evidence cited by the government falls far short of even the lower evidentiary standard because it completely fails to address the first element of the underlying offense: a knowing or willful intent to discharge a firearm. 720 Ill. Comp. Stat. 5/24-1.2(a)(1). Even with the government's improper assistance, the district court

would not be able to support by a preponderance of the evidence the erroneous increase of Tapia's sentence by at least 33 months.

III. Gozdal's and Rodriguez's inconsistent and unreliable statements were an improper basis upon which to enhance Tapia's sentence

Independent of the procedural errors discussed thus far, the district court violated Tapia's due process rights when it enhanced his sentence based on inconsistent and unreliable testimony. Although the government is correct that a court has wide latitude in choosing to credit one witness's plausible statement over another's plausible statement, (Gov't Br. 44) (citing *Anderson v. City of Bessemer*, 470 U.S. 564, 574 (1985)), such a scenario is not at issue in this case. Here, the district court was twice presented with the choice between inconsistent statements from a single witness: first, with Rodriguez, and second, with Gozdal. A court must meet a heightened standard when choosing between inconsistent or contradictory statements of a single witness, and must rigorously scrutinize those statements to determine their reliability. The district court, however, ignored this principle when crediting certain statements by Gozdal and Rodriguez.

Before crediting one inconsistent statement over others from a single witness, the court must conduct a sufficiently searching inquiry based on a totality of all the facts and circumstances surrounding the statements. *See United States v. McEntire*, 153 F.3d 424, 436 (7th Cir. 1998); *see also United States v. Duarte*, 950 F.2d 1255, 1266 (7th Cir. 1991) (although trial courts are ordinarily entitled to deference in their fact-finding, the trial court must do more when relying upon "one of two contradictory statements offered by a single witness"). Specifically, as noted

in Appellant's opening brief, courts look to a variety of sources to corroborate the choice of one inconsistent statement over the other. (Appellant Br. 38.) They consider consistent facts, the amount of detail and explanation that accompanies the statement, circumstances surrounding the statement, and independently corroborative evidence, all of which serve to underscore the reliability of the statement the court ultimately credits. *See United States v. Galbraith*, 200 F.3d 1006, 1012 (7th Cir. 2000) ("[C]onsistent facts, details and explanations suggest the reliability we require before crediting one of several inconsistent statements.")

For example, if the statements vary on a critical point, they are less reliable. *See United States v. Beler*, 20 F.3d 1428, 1434 (7th Cir. 1994) (criticizing the trial court's lack of inquiry into a crucial variance in the statements). Similarly, if the statements are generally inconsistent and lack detail, then they will be deemed less reliable. *See Galbraith*, 200 F.3d at 1013 (finding detailed facts that declarant repeated consistently were reliable despite single inconsistent statement). The circumstances surrounding each statement, including whether the court had the opportunity to hear the statement in court and probe the inconsistencies, also plays a role in determining reliability. *See United States v. Cross*, 430 F.3d 406, 411-12 (7th Cir. 2005) (upholding a reliability determination where the trial court was able to observe the declarant's demeanor and probe inconsistencies). Finally, statements bolstered by competent, reliable and independent corroborative proof are more reliable. *See McEntire*, 153 F.3d at 437 (finding district court error in crediting unreliable statement because it was "uncorroborated and the district court did not

provide a rationale for believing one set of contradictory statements over another."); *compare United States v. Acosta,* 85 F.3d 275, 280 (7th Cir. 1996) (district court's consideration of whether testimony is corroborated by police investigation indicates it "carefully considered" reliability) *with id.* at 282-83 (failure to consider corroborating evidence or provide alternative explanation for choice between inconsistent statements is clear error). Applying these factors to the Gozdal and Rodriguez statements exposes their infirmities and shows that the district court should not have credited them in enhancing Tapia's sentence.

Turning first to Gozdal, had the district court conducted a "sufficiently searching inquiry" into his statements, it would not have been able to credit Gozdal's October statement that implicated Tapia in the Greenview shooting over his September statement that did not connect Tapia to the incident. First, this variance is critical because it goes to the central issue at sentencing: Tapia's involvement in the Greenview shooting. Second, the circumstances surrounding Gozdal's October statements cut against its reliability. The statement was written by Peraza on the eve of Tapia's trial, and the government never called Gozdal as a witness, depriving the court of the opportunity to probe the inconsistency in his statements or to judge his demeanor in delivering the statement. Third, although the government points to "details" contained in Gozdal's October statement as indicia of reliability, (Gov't Br. 39-40, 45-46), the mere addition of detail does not save a materially inconsistent statement—especially where the circumstances call into question the source of the added detail. Finally, the government hangs its hat

on the so-called corroboration between the shell casings and Gozdal's knowledge of the types of guns used in the shooting. (Gov't Br. 45.) Tapia does not dispute that Gozdal knew details about the shooting; his friend Midget told him about it and admitted to being the perpetrator. (App. B. 238.) The relevant fact, and one that remained uncorroborated, was Tapia's participation in the shooting. Therefore, Gozdal's October statement—the one on which the district court inexplicably relied—lacked sufficient indicia of reliability to serve as a basis for the sentencing enhancement.

Rodriguez's statement also suffers from reliability deficiencies, perhaps even more so than Gozdal's given her in-court recantation of her earlier statement. First, because her two statements flatly contradict each other, the "variance" between them is absolute. Such extreme variation clearly undercuts the reliability of the statement on which the district court relied. Second, the recantation makes the level of detail she provided in her earlier statement irrelevant because she admitted to conjuring up those details. Third, although Rodriguez briefly appeared in court, she only answered a few questions before her testimony came to an abrupt end. The court had no opportunity to probe the inconsistencies and evaluate, based on her demeanor and testimony, the reliability of her statement to Peraza. The court and the government point to the timing of her prior statement, its proximity to the Greenview shooting, as evidence of its reliability.[2] (Sentencing Hr'g Tr. 76:8-10; Gov't Br. 44). But the timing of her initial statement is irrelevant when the

[2] In stressing the importance of timing, the government makes an odd argument: the court should rely on the first Rodriguez statement but the last Gozdal statement. (Gov't Br. 44-46.)

question is one of fabrication and recantation, rather than just a fading memory. In fact, the timing of her statement affirmatively weighs against its reliability. The statement came just after a serious domestic dispute and accusations of infidelity, (App. B. 22), circumstances that severely undermine reliability. *See United States v. Fennell,* 65 F.3d 812, 813-14 (10th Cir. 1995) (accusations made by defendant's girlfriend after an altercation, even if partially true, lacked the "minimal indicia of reliability required by the Sentencing Guidelines" and were insufficient to support a finding of felonious intent); *United States v. Comito,* 177 F.3d 1166, 1171 (9th Cir. 1999) (accusatory, out-of-court statements made by defendant's ex-girlfriend soon after their breakup exemplify the "least reliable form of hearsay"). Finally, the government did not substantiate Rodriguez's prior statement with independent corroborative evidence. The government only cites to Gozdal's statement as corroboration for Rodriguez's earlier statements (Gov't Br. 45), but unreliable evidence cannot corroborate unreliable evidence. *United States v. Bell*, 585 F.3d 1045, 1051 (7th Cir. 2009) (impermissible bootstrapping to argue that unreliable reports sufficiently corroborate another questionably credible statement).

Both Gozdal's and Rodriguez's statements lacked the reliability required to support the increase in Tapia's sentence. The district court failed to engage in the requisite sufficiently searching inquiry. It neither directly addressed the contradictions between these statements, nor explained its reasons for crediting certain inconsistent statements over others. Far from the self-evident reliability the government claims, this testimony lacked all indicia of reliability. When these

statements are properly set aside, the evidence is insufficient to prove the elements of the underlying offense, and district court clearly erred in applying the enhancement.

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

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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 5,991 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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Dated: March 12, 2010

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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 March 12, 2010, two copies of the Reply Brief and a digital version of the brief, were sent by United States mail to the following individual:

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