06-4813-cr

To Be Argued By:
JAMES R. SMART

==========

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 06-4813-cr

UNITED STATES OF AMERICA,
Appellant,

-vs-

MARINO DELOSSANTOS,
Defendant,

FRANCISCO RODRIGUEZ,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

==========

BRIEF FOR THE UNITED STATES OF AMERICA

==========

KEVIN J. O'CONNOR
United States Attorney
District of Connecticut

JAMES R. SMART
RICHARD J. SCHECHTER
WILLIAM J. NARDINI
*Assistant United States Attorney*s

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

PURSUANT TO "BLUE BOOK" RULE 10.7, THE GOVERNMENT'S CITATION OF CASES DOES NOT INCLUDE "CERTIORARI DENIED" DISPOSITIONS THAT ARE MORE THAN TWO YEARS OLD.

STATUTES

RULES

OTHER AUTHORITIES

STATEMENT OF JURISDICTION

The district court (Janet C. Hall, J.) had subject matter jurisdiction over this federal criminal case under 18 U.S.C. § 3231. On October 4, 2006, the district court entered its ruling granting defendant's motion to suppress. On October 10, 2006, the government filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b)(1)(B), and this Court has jurisdiction over the government's appeal from the district court's order suppressing evidence under 18 U.S.C. § 3731. Consistent with Section 3731, the United States Attorney has filed a certification that this appeal is not taken for purpose of delay and that the suppressed evidence constitutes substantial proof of a fact material to the proceeding.

The Solicitor General of the United States has personally authorized this appeal.

STATEMENT OF THE ISSUES PRESENTED

1. Whether the district court erred when it found that there was no probable cause for defendant Francisco Rodriguez's October 26, 2005 arrest at the scene of a prearranged cocaine and heroin transaction with an undercover officer, and therefore inappropriately suppressed significant quantities of narcotics and other evidence seized when defendant consented to a search of his apartment and car.

2. Whether the district court erred when it examined and evaluated probable cause factors in isolation from one another, and failed to consider all such factors, in contravention of the well-established "totality of the circumstances" test.

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 06-4813-cr

UNITED STATES OF AMERICA,
Appellant,

-vs-

MARINO DELOSSANTOS,
Defendant,

FRANCISCO RODRIGUEZ,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

In this interlocutory appeal the government challenges the district court's granting of defendant Francisco Rodriguez's motion to suppress evidence. The issue before this Court is whether the district court erred when it found that defendant was arrested without probable cause.

Rodriguez was arrested on October 26, 2005, in Fairfield, Connecticut, with co-defendant Marino Delossantos, at a prearranged narcotics transaction between an undercover officer and Delossantos. Based on their training, experience, and information gathered during the investigation, including observation of defendant and Delossantos's conduct during the three hours before the arrests, the investigators concluded that Rodriguez was involved in Delossantos's drug trafficking and arrested the pair. After being properly advised of his Miranda rights, Rodriguez told investigators that he lived in the multi-family residence which the investigators suspected of being the drug storage location. Rodriguez voluntarily executed a written consent agreeing to a search of his apartment. He also agreed to a search of his car. The agents and officers found substantial quantities of cocaine and heroin hidden in a heating vent in the floor of defendant's kitchen, as well as various documents and narcotics trafficking paraphernalia. They seized more documents from his car.

Following indictment in March 2006 by a federal grand jury on heroin and cocaine conspiracy charges, Rodriguez moved to suppress the seized evidence and his post-arrest statements. Defendant claimed that he had been arrested without probable cause, invalidating his consent to the search and tainting the voluntariness of his statements. On October 4, 2006, the district court granted the motion to suppress. The ruling precludes the government from introducing, among other things, the substantial quantities of cocaine and heroin and various paraphernalia discovered in Rodriguez's apartment, which constitute the

heart of the evidence in support of the charge against Rodriguez.

As explained below, defendant's arrest was amply supported by probable cause, and the district court's contrary conclusion is based on a misapplication of the "totality of the circumstances" test. Accordingly, the ruling of the district court granting defendant's motion to suppress evidence should be reversed.

STATEMENT OF THE CASE

On October 26, 2005, defendant-appellee Francisco Rodriguez and co-defendant Marino Delossantos (who is not a party to this appeal) were arrested by agents of the Drug Enforcement Administration ("DEA") and officers of the DEA's High Intensity Drug Trafficking Area Task Force for Bridgeport, Connecticut. Joint Appendix ("JA") 270. They were charged initially with state narcotics violations. JA245.

On March 7, 2006, a federal grand jury sitting in Bridgeport returned an indictment against Rodriguez and Delossantos. JA011-13. Count One charged both defendants with conspiracy to distribute 500 grams or more of cocaine in violation of 21 U.S.C. §§ 846 and 841(b)(1)(B). Count Two charged both defendants with conspiracy to distribute 100 grams or more of heroin, in violation of the same provisions.[1] Defendants were

[1] Counts Three and Four of the Indictment charged (continued...)

arraigned on the Indictment on March 23, 2006. JA003. On July 28, 2006, Delossantos plead guilty to the cocaine and heroin conspiracy charges in Counts One and Two. JA306.

On August 3, 2006, Rodriguez filed a motion for leave to file a late motion to suppress evidence and a motion to suppress statements and seized physical evidence. JA5. On August 15, 2006, the district court granted the motion for leave to file the motion to suppress. JA005.

On August 17, 2006, the grand jury returned a Superseding Indictment as to Rodriguez, adding Counts Three and Four, which charged possession with intent to distribute 500 grams or more of cocaine and 100 grams or more of heroin, respectively, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B). JA015-17. On August 23, 2006, Rodriguez was arraigned on the Superseding Indictment. JA006.

The district court held an evidentiary hearing on the motion to suppress on August 23, 2006. JA019-222. On October 4, 2006, the district court (Hall, J.) granted the motion to suppress evidence. JA265-94.

---

[1] (...continued)
Delossantos with possession with intent to distribute 500 grams or more of cocaine, and 100 grams or more of heroin, respectively, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B). JA012-13.

On October 10, 2006, the government timely filed a notice of interlocutory appeal. JA295. On November 7, 2006, the United States Attorney filed a certification pursuant to 18 U.S.C. § 3731, certifying that this appeal is not taken for purpose of delay and that the suppressed evidence constitutes substantial proof of a fact material to the proceeding. JA295-97.

The trial of Rodriguez has been stayed pending this appeal. Rodriguez is on pretrial release under conditions set by the court. JA008.

STATEMENT OF FACTS

The pertinent facts are undisputed. They are as found by the district court, with the exception of omissions in its findings, as noted below.

On October 25, 2005, an undercover Stamford, Connecticut police officer assigned to a federal DEA task force met with a suspected drug dealer known at that time only by the name "Marino," at a gas station on the corner of Lindley Street and Capitol Avenue in Bridgeport. They discussed a possible, future narcotics transaction. JA162, 164.[2] Marino arrived alone and on foot and entered the undercover officer's car. JA130. He told the undercover

---

[2] The transcript of the August 23, 2006 evidentiary hearing on defendant's motion to suppress appears at pages 19-222 of the Joint Appendix. Pages 85-157 cover the testimony of Special Agent Rodney George. Pages 158-211 cover the testimony of Task Force Officer Felix Martinez.

that he looked familiar and that he suspected that the undercover was a Stamford police officer. JA163. Marino eventually agreed to provide a sample of cocaine, and to meet again a short while later at the Cumberland Farms store and gas station by Exit 24 off Interstate 95. JA164-65.[3] He said that he had to go home to retrieve the sample, walked to a white Dodge Neon, and drove away. *Id.*

Agents followed Marino to a multifamily residential building at 1315 Howard Avenue in Bridgeport, where he went inside. JA089-91. He emerged a few minutes later, drove straight to the Cumberland Farms, about five minutes away, met the undercover officer and provided him with the drug sample. JA092-94. Marino offered the undercover heroin and quoted a price per gram. JA167. The agent told Marino that he would contact him later to confirm his order. *Id*. Marino again asked about the undercover officer's ties to Stamford, specifically asking whether he knew two individuals from Stamford. *Id*. Although the undercover knew them, he denied it. *Id*.

After these meetings, agents checked the license plate of Marino's vehicle and determined that it was registered in the name of Valerie Delossantos. JA093. The agents consulted law enforcement data bases and concluded that Marino's last name was Delossantos and that the vehicle used for the meetings was registered in a family member's name. *Id*.

---

[3] Although ignored by the district court, it is uncontested that Delossantos stated that he could provide any amount of cocaine his prospective customer might want. JA164.

During the evening of October 25, 2005, the undercover officer called Delossantos and asked to buy two ounces of cocaine and five grams of heroin. JA168. They agreed to meet the next day at the same location between noon and 1:00 p.m. JA169. Concerned that Delossantos would learn that the undercover was a police officer, the agents planned to arrest Delossantos at the meeting. JA169.

On the morning of October 26, DEA Special Agent Rodney George surveilled 1315 Howard Avenue where he suspected that Delossantos stored drugs. The agent and his brother officers believed this because Delossantos went there to get the sample on October 25 and drove directly back to the undercover where he distributed the sample. JA095, 97-98, 122-23, 170, 209.

At approximately 10:45 a.m., Agent George saw Delossantos and defendant Francisco Rodriguez walk from the porch of 1315 Howard Avenue to the Neon. JA090, 99-101. Delossantos entered the passenger's seat and Rodriguez the driver's seat. JA099-101. The agent followed the car to Dewey Street, headed in the direction of the on-ramp to Interstate 95, where he lost sight of it. JA102. He returned to surveil 1315 Howard Avenue. *Id*.

At approximately 11:15 a.m., the undercover officer spoke with Delossantos by cellular telephone. JA172. The officer heard "car sounds" and somebody else in the background. JA172-73. Although the court's ruling omits any discussion of the officer's observations and conclusions, the officer inferred that the individual he

heard in the background was Rodriguez, based on Agent George's report that just 30 minutes earlier the two had left 1315 Howard Avenue together, with Rodriguez driving. JA173.[4]

At approximately 12:20 p.m., the undercover officer again called Delossantos and heard another person in the background and road noise or sounds of passing cars. JA175-76, 201-02, 204. Delossantos told him to call when he reached the Cumberland Farms. JA175-76.

At 12:30 p.m., Agent George saw Rodriguez driving the Neon back to the Howard Avenue residence with Delossantos, who exited the passenger side of the car and entered the house. JA106-07. Rodriguez, who was still the driver, walked behind the car, out of sight of the agent. JA106-08. Approximately ten minutes later, Delossantos got back into the passenger side of the Neon. Rodriguez returned to the driver's seat and drove away from the suspected drug storage location. JA107-08. Agent George did not notice Delossantos carrying anything in or out of the house. JA141-42. Rodriguez drove onto I-95 southbound. Agent George followed the pair to the Cumberland Farms where the undercover officer and

[4] Throughout operations on the 26th, the agents maintained communications as to pertinent developments, including communications via radio and cellular telephone. *See, e.g.*, JA099, 102-03, 108, 150, 173, 176-77.

Delossantos had arranged to meet. Other Task Force members were already there. JA108-11.[5]

En route to the Cumberland Farms, and while Rodriguez was driving, Delossantos called the undercover officer. JA179-81. Delossantos instructed the undercover that when he arrived, the undercover should pull behind his car and follow. JA180-82. Although the precise translation is disputed, Delossantos stated, in substance, either that he did not want to do it there; did not want to be there; or wanted to go somewhere else. JA180-81, 198-200. The undercover could hear Delossantos speaking in an aside to another person in Spanish, but the officer could not discern what was said. The only other person in Delossantos's vehicle was Rodriguez. JA180. Delossantos undisputably sounded tense, JA180, and when the agent asked why he wanted to go somewhere else, he indicated that he was not comfortable with the number of people there. JA181. Having listened to Delossantos speak, the officer believed that Rodriguez, the driver, would have understood that Delossantos was saying that he wanted to meet, but wanted the undercover to follow him somewhere else for the meeting. JA182. Based on his training and experience, and mindful that Delossantos suspected that he could be connected to the police, the undercover believed that Delossantos would not have said

---

[5] The undercover and Delossantos spoke again by cellular telephone at approximately 12:50, at which time the undercover confirmed that he was at the Cumberland Farms. Delossantos said he was on his way. JA178-79. The undercover heard no road noise or background voices during this call. *Id.*

that in Rodriguez's company unless Rodriguez were also involved in the narcotics transaction. *Id*.[6]

Rodriguez drove into the parking lot of the prearranged location with Delossantos in the passenger seat. JA183. Rodriguez pulled their vehicle up next to the undercover vehicle, JA185, where Delossantos and Rodriguez were arrested. JA211. After their arrest, drugs were found on Delossantos. JA184.

By the time of his arrest, the agents believed that Rodriguez was involved in Delossantos's illegal narcotics activities. JA157, 182, 185-86. The agents relied on their training and experience, on multiple, interrelated observations, and inferences and deductions therefrom. That the agents' actions were informed by these factors is not disputed. Those factors follow:

- The agents did not believe that Delossantos, who was clearly involved in illegal trafficking, would have let Rodriguez accompany him to a narcotics transaction unless he were involved in Delossantos's trafficking activities. JA187. Based on their training and experience, the agents believed that it would be irrational for Delossantos to allow an uninvolved, innocent party to come along for fear of

---

[6] While undisputed, the facts set forth in the last three sentences of this paragraph are not mentioned in the district court's ruling.

creating a potential witness against himself. JA112-13, 205-06. This was particularly unlikely because Delossantos had proven to be cautious and concerned about detection and was already anxious that his new customer might be connected to the police. JA187, 205-06.

- Based on their training and experience, and considering Delossantos's suspicion that his new customer could be connected to the police, the agents believed that Delossantos would not have spoken over the telephone in the manner that he did and in Rodriguez's company unless Rodriguez were involved. JA113-14, 182. Specifically, they did not believe that Delossantos would have instructed the undercover in Rodriguez's presence to follow him to a new location because of reservations about the prearranged meting location, unless the pair shared criminal knowledge and intent. JA113-14, 180-82.

- Based on their training and experience, and the specific circumstances of this case, the agents also believed that those who drive to transactions are typically involved, and are not "innocent bystanders." JA116, 209 (Q: "Do innocent bystanders based on your training and experience drive to drug deals?" A: "No."), JA105-06. Their

suspicion was heightened by numerous factors: (1) Delossantos had a demonstrated ability to drive; (2) he had access to the same car which he drove the previous day; (3) the car was registered to a family member; and (4) he knew the way to the Cumberland Farms from 1315 Howard Avenue, which was a very short route he had driven the previous day to deliver the sample. Thus, he had no need to recruit someone for the sole purpose of driving him. JA106, 112-14, 186, 208-09.

- The agents believed and concluded that Delossantos would have driven himself to the transaction if Rodriguez were uninvolved. JA208-09. Under these circumstances, Rodriguez's driving indicated his active participation in Delossantos's trafficking activities, particularly since Rodriguez had earlier driven to and from the suspected stash house that morning in apparent preparation for the transaction. JA106, 112-14, 186, 208-09.

- Delossantos's expressed unease concerning the arranged transaction heightened the agents' suspicions. Based on their training and experience, the agents were aware that when a drug dealer is concerned about potential problems at a transaction, he will

often bring someone along to provide assistance, support and protection. JA114-15. The agents knew Delossantos was uneasy about this transaction, because it was his first deal with this customer, he expressed concerns about possible police ties, he sounded nervous in their last telephone conversation, he expressed discomfort with the meeting place, and said that he wanted to change the prearranged meet location at the last minute. JA105-06, 115-17, 162-63, 167, 180, 185-86, 206. Under these circumstances, the agents suspected that Rodriguez was an active, involved participant, possibly to see if he recognized the new customer, to assist Delossantos with driving, acting as a look out, or making a quick getaway, or otherwise protecting or supporting him. JA114-15, 185-86, 206, 207-08.

- Multiple factors caused the agents to believe that the pair were jointly preparing for the prearranged transaction in the hours proceeding it. Based on their training and experience, the agents were aware that drug dealers often scramble shortly before drug deals to obtain the drugs they are expected to sell. JA157, 209-10. Thus, at 11:15 a.m. on the 26th when Delossantos said that he was not yet ready and needed more time, JA172, the agents believed that Delossantos

was then engaged in narcotics-related activity, namely, trying to secure the drugs for the deal. Their belief was further supported by the fact that the conversation took place shortly before the planned meeting time and shortly after Rodriguez drove Delossantos from 1315 Howard Avenue, the suspected drug storage location. Further, background noise over the telephone suggested that Delossantos was on the road. JA103-05, 157, 172-75, 204-05, 209-10. The undercover's hearing another person in the background of the telephone conversation, coupled with surveillance officers observing two people leaving the stash location together, caused them to conclude that the two were acting in concert to deliver the narcotics. JA103-05, 157, 172-75, 209-10. Because Delossantos and Rodriguez returned to the suspected drug storage location at 12:30, shortly before the planned meeting, and then left a few minutes after Delossantos entered, with Rodriguez driving them directly to the planned deal, the agents believed the pair were jointly undertaking preparations for the narcotics transaction. JA104-05, 112, 186.

After he was advised of his rights, Rodriguez said he lived at 1315 Howard Avenue, and voluntarily consented to a search of his apartment and car. JA270-71. The

agents found a substantial cache of cocaine and heroin under a heating vent in the center of defendant's kitchen floor. JA248. Narcotics trafficking paraphernalia and relevant documents were also seized from defendant's kitchen. JA248-49. Additional documents were seized from defendant's car. JA249.

On March 7, 2006, a federal grand jury sitting in Bridgeport returned an indictment against Rodriguez and Delossantos. JA011-13. Count One charged both defendants with conspiracy to distribute 500 grams or more of cocaine in violation of 21 U.S.C. §§ 846 and 841(b)(1)(B). Count Two charged both defendants with conspiracy to distribute 100 grams or more of heroin, in violation of the same provisions. JA012-13.[7] Defendants were arraigned on the Indictment on March 23, 2006. JA003. Delossantos plead guilty to the cocaine and heroin conspiracy charges in Counts One and Two on July 28, 2006. JA306.

On August 17, 2006, the grand jury returned a Superseding Indictment as to Rodriguez, adding Counts Three and Four, which charged possession with intent to distribute 500 grams or more of cocaine and 100 grams or more of heroin, respectively, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B). JA015-17. On August 23,

---

[7] Counts Three and Four of the Indictment charged Delossantos with possession with intent to distribute 500 grams or more of cocaine, and 100 grams or more of heroin, respectively, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B). JA012-13.

2006, Rodriguez was arraigned on the Superseding Indictment. JA006.

On August 3, 2006, Rodriguez filed a motion for leave to file a late motion to suppress evidence. JA005. He also filed a motion to suppress post-arrest statements and the physical evidence seized from his apartment and car. JA265. On August 15, 2006, the district court granted the motion for leave to file the motion to suppress. JA005. An evidentiary hearing on the motion to suppress was held on August 23, 2006. JA019-222. On October 4, 2006, the district court granted the motion to suppress evidence. JA265-94.

On October 10, 2006, the government filed a timely notice of interlocutory appeal. JA295. The United States Attorney filed a certification pursuant to 18 U.S.C. § 3731, certifying that this appeal is not taken for purpose of delay and that the suppressed evidence constitutes substantial proof of a fact material to the proceeding. JA297-99.

SUMMARY OF ARGUMENT

I. The district court erred when it found that Rodriguez was arrested without probable cause. In arresting him, the agents relied on numerous factors, which, considered in light of their training and experience, and viewed in the totality of the circumstances, supported a reasonable probable cause determination. Rodriguez was not merely present at the time of Delossantos's arrest. Viewed under the totality of the circumstances, there was probable cause to believe that Rodriguez was an active participant in

obtaining narcotics, preparing for the delivery and delivering the narcotics. Thus, the district court erred when it relied on *United States v. Di Re*, 332 U.S. 581 (1948), which held that mere presence at a crime scene does not constitute probable cause.

II. The district court misapplied the totality of the circumstances test when it viewed individual pieces of evidence of defendant's participation in isolation, failed to consider all such evidence, and failed to consider the trained experience of the agents and officers under rapidly developing circumstances. When all the factors are considered collectively and in relation to each other as required by *United States v. Arvizu*, 534 U.S. 266, 273-74, 277 (2002), Rodriguez's arrest was supported by probable cause.

ARGUMENT

I. THE DISTRICT COURT ERRED AS A MATTER OF LAW IN CONCLUDING THAT RODRIGUEZ WAS ARRESTED WITHOUT PROBABLE CAUSE

A. Factual and Procedural Background

Defendant moved to suppress physical evidence and inculpatory post-arrest statements based solely upon his claim that his arrest was not supported by probable cause. The facts leading to his arrest, which are not in dispute, are set forth above in the Statement of Facts.

Finding that the police arrested Rodriguez "merely because he was present in the car with Delossantos," the district court granted defendant's motion to suppress. JA279. The court concluded that other than his presence with Delossantos, the agents had no information implicating Rodriguez in Delossantos's drug activity or demonstrating that he knew or could have known about it. *Id.* The court found that Rodriguez's driving Delossantos to the prearranged drug deal added nothing to the probable cause determination because this conduct, standing alone, did not suggest Rodriguez knew he was driving to a drug deal. JA277.

The court placed no significance on the fact that Rodriguez was driving Delossantos's car, concluding that there was nothing *inherently* suspicious about it, because the police knew "nothing" about their relationship. JA276-77. While the court acknowledged that Rodriguez had been seen "in the vicinity of . . . the suspected drug storage location," it found this factor wholly innocent on the grounds that the address was a multifamily residence. JA276. The court also dismissed the significance of the various telephone conversations on the grounds that Delossantos never used explicitly inculpatory language, such as "drugs," "narcotics transaction," or "deal." JA275.

The district court's decision relied on *United States v. Di Re*, 332 U.S. 581 (1948), which holds that an individual's mere proximity to contraband, suspect individuals, or illegal activity does not constitute probable cause to search or arrest that person. JA274. Because the court found that Rodriguez had been illegally arrested, it

concluded that his post-arrest statements and his otherwise voluntary consent to search, must be suppressed as the "fruits" of the arrest. JA279. The court, therefore, suppressed his post-arrest statements, and the significant quantities of cocaine and heroin and the drug trafficking paraphernalia seized from defendant's residence.[8]

B. Governing Law and Standard of Review

The warrantless arrest of an individual in a public place is consistent with the Fourth Amendment if supported by probable cause. *United States v. Watson*, 423 U.S. 411 (1976). Whether probable cause to arrest exists is determined by examining the totality of the circumstances. *See, e.g.*, *Illinois v. Gates*, 462 U.S. 213, 230-31(1983) (whether probable cause to arrest exists is determined by examining the totality of the circumstances). A "practical, common-sense judgment [is] called for in making a probable cause determination." *Id.* at 244. The issue "'must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.'" *Texas v. Brown*, 460 U.S. 730, 742 (1983) (quoting *United States v. Cortez*, 449 U.S. 411, 418 (1981); *see also Maryland v. Pringle*, 540 U.S. 366, 370 (2003) ("[T]he probable-cause standard is a practical, nontechnical conception that deals with the factual and practical considerations of everyday life on

---

[8] The court also ruled that the evidence at issue did not qualify for admission under the "inevitable discovery" doctrine. The government does not appeal this portion of the court's ruling.

which reasonable and prudent men, not legal technicians, act" (internal quotation marks and citations omitted)). Probable cause to arrest "exists where the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949) (internal quotation marks and citation omitted). All circumstances within the officers' knowledge must be considered in relation to each other, and their cumulative import must be weighed. *United States v. Arvizu*, 534 U.S. 266, 273-74, 277 (2002).

"In order to establish probable cause, it is not necessary to make a prima facie showing of criminal activity or to demonstrate that it is more probable than not that a crime has been or is being committed." *United States v. Cruz*, 834 F.2d 47, 50 (2d Cir. 1987) (internal quotation marks and citation omitted). The standard of probable cause "requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." *United States v. Bakhtiari*, 913 F.2d 1053, 1062 (2d Cir. 1990) (quoting *Gates*, 462 U.S. at 244 n.13).

Standing alone, a defendant's mere presence at the scene of a crime is insufficient to establish probable cause. In 1948, the Supreme Court decided *United States v. Di Re*, 332 U.S. at 581, in which an informant had told police he could buy counterfeit gasoline ration coupons from a man named Buttitta at a certain location in Buffalo, New York. The police arrived and saw three men in the car.

The informant, in the back seat, was holding two counterfeit coupons and said he had obtained them from the driver, Buttitta. The police arrested all three men and found additional coupons hidden in an envelope on the person of Di Re, who was sitting in the front passenger's seat. The Court acknowledged that the police had probable cause as to the informant and Buttitta, but not as to Di Re, because "[a]ll they had was his presence." *Id.* at 592.

Fifty-five years later, in *Pringle*, police stopped a car with three passengers, including Pringle, and saw $763 in cash in the glove compartment and five plastic baggies of cocaine behind the back seat armrest. Although all three men denied ownership of the drugs, the Court found it "an entirely reasonable inference from these facts that any or all three of the occupants had knowledge of, and exercised dominion and control over, the cocaine," and that the police therefore had probable cause to arrest Pringle. *Maryland v. Pringle*, 540 U.S. 366, 372 (2003). The Court stated that "drug dealing [is] an enterprise to which a dealer would be unlikely to admit an innocent person with the potential to furnish evidence against him." *Id.* at 373. In that light, the drugs and cash in the vehicle "indicated the likelihood of drug dealing." *Id.* The Court distinguished *Di Re* on the ground that no "singling out" of a suspect had occurred. *Id.* at 374.

In reviewing a ruling granting a motion to suppress involving a probable cause or reasonable suspicion determination, this Court reviews factual findings of the court for clear error. Where, as here, the facts leading to

the defendant's arrest are not in dispute and the issue is the district court's ultimate determination whether the facts justify the detention, this Court applies *de novo* review. *See, e.g.*, *Ornelas v. United States*, 517 U.S. 690, 697 (1996); *United States v. Garcia*, 339 F.3d 116, 118-19 (2d Cir. 2003) (per curiam); *United States v. Patrick*, 899 F.2d 169, 171 (2d Cir. 1990).

C. Discussion

1. The Totality of the Circumstances Afforded Probable Cause for the Arrest of Rodriguez

Under the "practical, common-sense judgment called for in making a probable cause determination," *Gates*, 462 U.S. at 244, the totality of the circumstances afforded probable cause for the arrest of Rodriguez.

Notwithstanding the conclusion of the district court, the arresting officers and agents relied upon far more than Rodriguez's "mere presence" at the deal. They knew that: (1) Rodriguez drove Delossantos directly to the planned transaction from the house identified as the source of the narcotics; (2) moments before the deal while sitting next to Rodriguez, Delossantos uttered suspicious instructions to the undercover to follow the car driven by Rodriguez; (3) Delossantos did not specify where he and Rodriguez were going, but stated he was uncomfortable meeting at the gas station due to the number of people there; (4) Delossantos was nervous about the transaction, suspecting possible police involvement; (5) Delossantos was capable

of driving himself from Howard Avenue – which was only five minutes away – and had actually driven alone the preceding day; and (6) Rodriguez had driven Delossantos from the address where the drugs were stored a few hours before the planned transaction, and then back again, just before driving him directly to the prearranged transaction, during which time (while in Rodriguez's company, evidently) Delossantos said over the telephone that he needed more time to get ready for the meeting. Given this information and viewed in light of their training and experience, the officers and agents reasonably concluded that Delossantos would not bring an innocent party and potential witness to a drug deal or involve such a person in his preparations, *Pringle,* 540 U.S. at 372 ("[D]rug dealing [is] an enterprise to which a dealer would be unlikely to admit an innocent person with the potential to furnish evidence against him."), and that the person he brought along was likely present to provide assistance, support and protection for the deal. JA114-15, 185-86, 206-08.

Assessed in their cumulative totality, *Arvizu*, 534 U.S. 266, 273-74, 277, these circumstances give rise to a "fair probability" or "substantial chance" of the association of the driver, Rodriguez, with the narcotics transaction, which establishes probable cause for an arrest. *Gates,* 462 U.S. at 238, 243-244 n.13, 246. "Perhaps the central teaching of [the Supreme Court's] decisions bearing on the probable cause standard is that it is a practical, nontechnical conception" that deals in "common-sense conclusions about human behavior." *Gates*, 462 U.S. at 231 (internal quotation marks and citations omitted).

Common sense dictates that when a demonstrated drug dealer speaks about a planned transaction in the presence of another person, the other person may be involved in the transaction. This is certainly the case when the drug dealer is already nervous and then changes the location of the prearranged deal for security reasons while sitting next to the other person. Given these circumstances, the driver of the drug dealer – who drove him from the suspected stash house to the drug meet – is likely a criminal participant, rather than a disinterested third party.

Persons traveling together in an automobile are frequently engaged in a common enterprise, including when the circumstances involve crime. When individuals arrange to meet and travel together in a private car, it is fair to assume that their travel is in furtherance of a common objective or design, whether of a lawful or unlawful nature. This is particularly true, where as here, they traveled back and forth from the same location shortly before arriving at the planned meeting location, and one party acted at the apparent direction of the other. Accordingly, an officer who has probable cause to believe the passenger of the car is about to deliver drugs to him, can reasonably infer that his driver, who brought the vehicle from the suspected drug storage house, is also involved. As set forth below, this common-sense proposition is supported by the Supreme Court's decisions.

In *Pringle*, for example, the car stopped by the police had three passengers, including Pringle, a quantity of cash in the glove compartment and cocaine behind the backseat armrest. Although all three occupants denied ownership

of the drugs, the Court concluded that it was "an entirely reasonable inference from these facts that any or all three of the occupants had knowledge of, and exercised dominion and control over, the cocaine," and therefore police had probable cause to arrest Pringle. 540 U.S. at 372. The Court repeated its prior observation that "a car passenger . . . will often be engaged in a common enterprise with the driver, and have the same interest in concealing the fruits or the evidence of their wrongdoing." *Id.* at 373 (quoting *Wyoming v. Houghton*, 526 U.S. 295, 304-05 (1999)).

The propriety of inferring that an individual in the company of persons engaged in crime is a confederate in their unlawful conduct turns on "whether the known criminal activity was contemporaneous with the association and whether the circumstances suggest that the criminal activity could have been carried on without the knowledge of all persons present." *United States v. Martinez-Molina*, 64 F.3d 719, 727 (1st Cir. 1995); *accord United States v. Hillison*, 733 F.2d 692, 697 (9th Cir. 1988). *See generally* 2 Wayne R. LaFave, Search & Seizure § 3.6(c), at 309-310 (3d ed. 1996). The passenger of a car in which narcotics are being transported for a specific sale is present during the illegality, and he is likely to have known about, and thus to be associated with, the crime. With respect to the driver, it is even more probable that he is complicit because he is actively aiding and abetting the passenger by driving him to the crime.

The district court distinguished *Pringle* on the grounds that the contraband there was found in a common area of

the car, and the car's occupants, all of whom were arrested, all denied ownership, whereas here the police supposedly knew that Delossantos was the party they were looking for and had the drugs on his person. JA278. However, as the evidence made clear, by the time they closed in on the Neon, the agents were not looking for Delossantos exclusively, but had formed a belief that Rodriguez was an accomplice in the narcotics activity. In addition, while the police had probable cause to believe that drugs would be somewhere in the car, they could not have known that only Delossantos possessed them. Under such circumstances, the probable cause rationale for Rodriguez is arguably as strong as, if not stronger than, it was for the occupants of the car in *Pringle*.

In certain situations there may be reason to suppose that a particular individual was unaware of the presence of narcotics on the passenger's person – such as if the passenger were a child or a hitchhiker, *see County Court of Ulster County v. Allen*, 442 U.S. 140, 155, 156 n.15 (1979), or if the location of the contraband and other contextual considerations made clear that it belonged exclusively to a specific person. However, as the Supreme Court noted in *Pringle,* in general, "drug dealing [is] an enterprise to which a dealer would be unlikely to admit an innocent person with the potential to furnish evidence against him." 540 U.S. at 373. *See also United States v. Burrell*, 963 F.2d 976, 988 (7th Cir. 1992) (noting unlikelihood that "drug traffickers . . . discuss or deliver large quantities of drugs in the presence of innocent bystanders"); *United States v. Ortiz*, 966 F.2d 707, 712 (1st Cir. 1992) ("a person . . . brought to a neutral site by

a drug trafficker preliminary to the actual consummation of a narcotic transaction" is unlikely to be an "innocent bystander"; "criminals rarely welcome innocent persons as witnesses to serious crimes and rarely seek to perpetrate felonies before larger-than-necessary audiences"); *cf. United States v. Gainey*, 380 U.S. 63, 67-68 (1965) ("folklore teaches" that "strangers to the . . . business" of manufacturing illegal liquor "rarely penetrate the curtain of secrecy").

Here the district court erred when it disregarded the trained officers' inference that the driver, Rodriguez, was an active participant in the developing narcotics transaction rather than an unwitting innocent third party. The agents' common sense inference, which has been recognized by no less than the Supreme Court, *Pringle*, 540 U.S. at 373, was not merely a whim or speculation, and it was supported by more than the driver's mere presence. For example, while Delossantos did not mention anything about narcotics or the deal, he did tell the purchaser that they would not conduct business at the planned meeting place because he was uncomfortable due to the number of people there. He also said that the purchaser should follow his car to another place. All of these statements suggesting secretive and clandestine, and therefore criminal, activity were made in the driver's presence. The officers' inference was further bolstered by the additional circumstances described above.

The district court erred when it found that these facts did not warrant probable cause to arrest Rodriguez. The "Fourth Amendment accepts [the] risk" that "persons

arrested and detained on probable cause to believe they have committed a crime may turn out to be innocent." *Illinois v. Wardlow*, 528 U.S. 119, 126 (2000). That is a necessary cost of ensuring the effective detection and prosecution of crime. As the Supreme Court has explained, "innocent behavior frequently will provide the basis for a showing of probable cause; to require otherwise would be to *sub silentio* impose a drastically more rigorous definition of probable cause than the security of our citizens demands." *Gates*, 462 U.S. at 244 n.13. The probable cause standard balances society's interest in affording law enforcement officers "fair leeway for enforcing the law in the community's protection" against the competing interest in protecting "citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime." *Brinegar*, 338 U.S. at 176. Here the district court struck that balance in a manner that "unduly hamper[s] law enforcement," when it disregarded the trained officers' inferences and found no probable cause to arrest Rodriguez. *Id.*[9]

---

[9] When, as here, there is no doubt that a crime had been committed, the interest in effective enforcement of the law is pronounced, particularly where the crime is likely part of a continuing pattern of criminal conduct. *Cf.* Model Code of Pre-Arraignment Procedure § 120.1 cmt., at 296 (1975) (Model Code) ("it is necessary to distinguish between cases where there is substantial doubt about whether a crime has been committed at all, and cases where the doubt relates to the identity of the offender"). When it is certain that a crime has been committed and the group of legitimate suspects is both small in number and likely to include actual offenders, the probable cause

(continued...)

The district court erred. In light of the totality of the circumstances, properly considered, the officers had probable cause to arrest Rodriguez.

2. The District Court Misconstrued the Holding of *United States v. Di Re*

The district court erroneously concluded that *United States v. Di Re* dictates a finding that defendant was arrested without probable cause. In *Di Re,* the Supreme Court found that Di Re's presence in the car with the informant and the person singled out by the informant as the seller of the counterfeit coupons was insufficient to support a probable cause finding. *Di Re*, 332 U.S. at 583, 593-94. The Court stated, "[t]he argument that one who

---

[9] (...continued)
standard would permit their arrest even absent any inference that more than one was involved – *i.e.*, even if there were a strong likelihood that an innocent person would be arrested. The interest in ensuring the ability to apprehend and prosecute the actual offender would justify multiple arrests in that situation. *Cf.* Model Code 295 (arrest of "two or more persons, not believed to be accomplices," for "the same offense" would be legal where there is a substantial basis to believe that one or the other committed the crime, even where it is suspected that only one of them did so); *see also* Model Code 294 (the purpose of an officer's antecedent decision to arrest "is to take the person into custody so that the determination can be made whether or not to charge the arrested person with crime"). *A fortiori,* where – as here – the totality of the circumstances supports a strong inference that all arrestees are inculpated in the crime, the probable cause standard is satisfied.

'accompanies a criminal to a crime rendezvous' cannot be assumed to be a bystander, forceful enough in some circumstances, [was] farfetched" as to Di Re for three primary reasons. *Id.* at 593. First, "the meeting [wa]s not secretive or in a suspicious hide-out but in broad daylight." *Id.* Second, "the alleged substantive crime is one which does not necessarily involve any act visibly criminal," and even if Di Re "witnessed the passing of papers from hand to hand, it would not follow that he knew they were ration coupons," let alone counterfeit ration coupons. *Id.* Third, the informant had singled out Buttitta, "and Buttitta only," as the guilty party, and "[a]ny inference that everyone on the scene of a crime is a party to it must disappear if the Government informer singles out the guilty person." *Id.* at 594.

Relying on *Di Re*, the district court observed that the meeting took place "in broad daylight" at a gas station and that Delossantos, who had concealed the drugs on his person, had not committed any "visibly criminal" act. JA275. The district court did not consider the fact that in contrast to *Di Re*, there was no informant here to "single[] out the guilty person." 332 U.S. at 594. In fact, by the time the defendants' car arrived at the prearranged meeting, the agents had already formed the belief that Rodriguez was involved in the crime. Moreover, the trained law enforcement officers here relied on more than defendant's "mere presence" to conclude that Rodriguez was a co-conspirator.

First, in contrast to *Di Re*, Rodriguez and a proven drug trafficker – Delossantos – were under surveillance for

several hours preceding their arrests. During that time, Rodriguez drove Delossantos from a drug storage location to a planned drug deal. The agents reasonably believed that one of the units at 1315 Howard Avenue contained a cache of drugs. On October 25, Delossantos said he had to go home to get the sample, drove there, entered and returned to Agent Martinez with cocaine. On October 26, Rodriguez accompanied Delossantos throughout preparations for the sale, waited at 1315 Howard Avenue while Delossantos entered and emerged from the suspected stash house, and then drove Delossantos to the prearranged location. Rodriguez, therefore, was not merely a "bystander," discovered by the agents at the scene of the crime. Rather, he was present at the drug storage location, accompanied Delossantos throughout the morning's preparations, and drove him during the five minute trip to the planned drug deal. His proximity at each stage of the transaction increased the probability that he was a co-conspirator.

Second, to the agents here, Rodriguez appeared to be Delossantos's driver or bodyguard. The agents testified that drug dealers often bring another person for protection during sales. The agents knew that Delossantos had particular reason to bring protection because he (correctly) suspected that the undercover was a police officer. Further, Delossantos openly discussed the meeting location over the telephone with Rodriguez sitting beside him. Based upon the undercover's training and experience, he believed that a drug trafficker would not conduct such a risky discussion, not even in "code," unless the driver was involved in the conspiracy, JA182 – a

reasonable factual inference based on the officer's "own experience and specialized training," which was entitled to "due weight." *Arvizu*, 534 U.S. at 273. There were no comparable circumstances in *Di Re.*

Third, the agents here reasonably rejected the conclusion reached by the district court that Rodriguez was an innocent dupe. As the Court noted in *Pringle,* drug dealing is "an enterprise to which a dealer would be unlikely to admit an innocent person with the potential to furnish evidence against him." 540 U.S. at 373. Delossantos had driven himself to the same gas station the day before. Presumably, he could have done so again if he wished to keep his drug trafficking secret. However, Rodriguez appeared precisely when the stakes of the criminal activity escalated, when the amount of narcotics and cash involved increased. Thus, a trained law enforcement officer applying his common sense could reasonably conclude that Rodriguez had an interest in the successful sale of the narcotics and was present to protect that interest. *See Houghton*, 526 U.S. at 304-305 ("[A] car passenger . . . will often be engaged in a common enterprise with the driver, and have the same interest in concealing the fruits or the evidence of their wrongdoing.").

Di Re is inapposite and the district court erred when it based its decision on that case.[10]

---

[10] The district court also relied upon *United States v. Bazinet*, 462 F.2d 982 (8th Cir. 1972), which is likewise (continued...)

3. That Rodriguez Was Arrested with Probable Cause Is Further Supported by Additional Case Law

Additional case law further supports the conclusion that Rodriguez was arrested with probable cause. For example, in *United States v. Almanzar*, 749 F. Supp. 538 (S.D.N.Y. 1990), the defendant, Nestor Rodriguez, was in a car near an afternoon drug transaction in which two known dealers were planning to buy drugs from confidential informers on a Manhattan street. The original targets of the investigation arrived at the prearranged location in a car, closely followed by a livery cab driven by defendant Nestor Rodriguez. The livery cab parked in front of the car containing the known suspects. Nestor Rodriguez remained in the cab, in that location, while one of the other suspects approached, entered his cab and had a short conversation with Nestor Rodriguez, the content of

---

[10] (...continued)
inapposite. In *Bazinet*, the police lacked probable cause to arrest the driver of a van carrying a person suspected of illegal dynamite trafficking. Here, unlike *Bazinet*, the defendant was under surveillance for several hours preceding the arrest, drove to and from a suspected stash house before he drove Delossantos to a prearranged drug deal, and was known to have been privy to suspicious telephone conversations regarding arrangements for the meeting, among other things. This activity appeared suspicious to the trained agents. The Eighth Circuit subsequently decided *United States v. Clark*, 754 F.2d 789 (8th Cir. 1985), which found probable cause to arrest the passenger of a vehicle under facts analogous to those here, as discussed further below.

which was unknown. The two original targets crossed the street where they briefly negotiated with the informants. They returned to their vehicle, which remained parked behind Nestor's cab, and opened the trunk of their vehicle. The police arrested the two suspects and Nestor Rodriguez who still sat behind the wheel of his cab. "Prior to his arrival on the scene in the livery cab, the DEA agents had not heard of, or seen, Nestor Rodriguez." 749 F. Supp. at 540.

After indictment, Nestor Rodriguez moved to suppress a firearm recovered from his livery cab claiming the officers lacked probable cause to arrest him. Relying on *Di Re*, Nestor Rodriguez claimed the facts established only "mere association." The court rejected this claim. The court found that the agents' observations indicated deliberate coordination. The court further noted that, the "agents participating in the surveillance were aware that it is common practice for persons engaged in a large narcotics transaction to have an individual present for protection. [Nestor] Rodriguez's actions were consistent with the acts of an individual whose role in a drug conspiracy is to provide protection." *Id.* Thus, the court held "there was probable cause [for the agents] to conclude that [Nestor] Rodriguez 'was not just a mere innocent traveling companion but was traveling and acting in concert' with [the known dealers]." *Id.* (quoting *United States v. Patrick*, 899 F.2d 169, 172 (2d Cir. 1990)).[11]

---

[11] In *Patrick*, the defendant and co-defendant, who were traveling together, were stopped crossing the United States (continued...)

In *United States v. Clark*, 754 F.2d 789, 791-92 (8th Cir. 1985), the defendant Rebecca Sue Clark also pursued a "mere presence" challenge, claiming there was no probable cause to arrest her. An undercover agent had negotiated with defendant's husband to buy three ounces of cocaine and arranged to meet on a street in Des Moines. The target showed up at the rendezvous point with his wife and child in the car with him. When the undercover agent arrived, the husband exited his car and conducted the transaction inside the agent's car. The husband then returned to his car, drove it to a nearby parking lot where he entered a third vehicle and stayed there for about ten minutes. Shortly after the husband re-entered his car, with his wife still in the passenger seat, the agents arrested the husband, and then the wife. The record contains no indication that Mrs. Clark was known to the agents in any

---

[11] (...continued)
border from Canada. DEA agents discovered drugs on the co-defendant and arrested both individuals, believing that the defendant knew about the drugs in his co-defendant's bag. While a district judge determined that the agents did not have probable cause to arrest the defendant, this Court reversed. The Court held that the agents "knew something more about [the defendant] than just his 'propinquity' to [the co-defendant]." *Patrick*, 899 F.2d at 171. Most significantly, the agents knew that they were traveling together and both separately told an unusual story about accidentally crossing the border. The *Patrick* Court determined that based on the totality of the circumstances, it was reasonable to believe that the defendant "was not just a mere innocent traveling companion, but was traveling *and* acting in concert with [the co-defendant] in transporting the cocaine." *Id*. at 172.

respect prior to the meeting. The court affirmed the denial of the wife's suppression motion (seeking to suppress the gun found in her purse at her arrest[12]). The court held that the agent "could have reasonably assumed that Mrs. Clark was present in order to act as a look-out while her husband conducted the deal, or that she might be armed to provide support for her husband in the event that violence erupted," and "could have reasonably concluded that, as a witness to her husband's suspicious behavior, Mrs. Clark was aware of the criminal nature of the transaction being conducted." *Id.* at 792-93.

In *United States v. Munoz*, 738 F. Supp. 800 (S.D.N.Y. 1990), the court considered and rejected a similar probable cause challenge brought by a defendant who was "observed doing nothing but sitting as a passenger in [a] Jeep," *id.* at 802, parked across the street from a meeting in a restaurant between a suspected kidnapper, Rodolfo Rodriguez, and the brother of the victim. The defendant, Tabar-Laro, was unknown to the FBI prior to the meeting. Immediately following the meeting, Rodolfo Rodriguez left the restaurant and spoke to the driver of the Jeep in which defendant Tabar-Laro was sitting. The content of

---

[12] Although it is unclear whether the gun was found through a search incident to an arrest, or as part of a protective sweep before her arrest, the Court of Appeals upheld the district court's conclusion that there was probable cause for the arrest without reference to the gun, based on the agents' surveillance of the deal and the agent's inference that she was present to serve as a lookout or to provide protection. *Clark*, 754 F.2d at 791-92.

the conversation was unknown to the agents. Rodolfo, the suspected kidnapper, and the driver then went to a pay telephone and calls were made, including one call to the victim's family. The driver of the Jeep returned to it, where defendant Tabar-Laro remained. Rodolfo Rodriguez returned to his car with the victim's brother. Both cars drove away. The agents believed that the suspects would bring accomplices to provide support and security where there was a risk of violence. The FBI stopped the vehicles and arrested, among others, Tabar-Laro.

The court found probable cause to arrest Tabar-Laro. It relied upon both the agents' observations at the scene of the meeting, and their inferences, based upon their training and experience, that Tabar-Laro was brought to provide support and security during the meeting. *Id.* at 802. The court held that defendant's claim "that he was in the car only because he had asked Munoz for a ride is a question for the jury to decide." *Id.*

In *United States v. Lima,* 819 F.2d 687, 689-90 (7th Cir. 1987), the defendant, previously unknown to agents, merely sat in a separate car during a night-time drug transaction, having arrived on the scene shortly after the other participants, parked behind the car of one of the original targets, and engaged in a brief conversation of some undetermined sort with one of the original targets, who had walked over to his car. The court upheld a finding that he had been arrested with probable cause, noting these facts and that any "innocent interpretation" of the defendant's presence was "undermined by the fact that

neither [of the original targets] called off or postponed the delivery of the drugs despite [the defendant's] presence." *Id.* at 690.

In *United States v. Fox*, 788 F.2d 905, 907-08 (2d Cir. 1986), this Court upheld a finding that DEA agents had probable cause to arrest the driver of a truck, which had earlier been seen at a house under surveillance for drug trafficking.[13]

In *Bailey v. United States*, 389 F.2d 305 (D.C. Cir. 1967), the court found that there was probable cause to arrest all four occupants of a car matching the description of car in which three witnessed robbers had left the scene of a robbery. The court reasoned that "[t]he police could reasonably suppose that a fourth man, serving as a lookout, had waited in the car while the other three perpetrated the robbery itself." *Id.* at 309.

The government's position is also supported by decisions finding that narcotics convictions were

---

[13] The district court here attempted to distinguish *Fox* on the ground that the suspected drug storage location in this case, 1315 Howard Avenue, was a multifamily structure, whereas the residence under surveillance in *Fox* was presumably a single family dwelling. Considering the ample additional information establishing Rodriguez's connection to the known drug dealer, Delossantos, in relation to that address (*e.g.*, he was seen driving Delossantos to and from the building on multiple occasions, including his driving of Delossantos directly from the building to the prearranged deal), this distinction is of no consequence.

supported by sufficiency of the evidence. In *United States v. Ortiz*, 966 F.2d 707 (1st Cir. 1992), Ortiz's narcotics conviction was upheld, where defendant, who was unknown to investigators before he accompanied the original target to a prearranged deal, sat in the car throughout the deal, while the driver displayed cocaine to the undercover agent and discussed the transaction with him. The court noted that "a person . . . brought to a neutral site by a drug trafficker preliminary to the actual consummation of a narcotic transaction" is unlikely to be an "innocent bystander." *Id.* at 712. *See also United States v. Paone*, 758 F.2d 774 (1st Cir. 1985) (upholding defendant's narcotics conviction where defendant had sat in the backseat of a car when the co-defendant had handed a cocaine sample to an undercover officer, and then later that evening was observed following the co-defendant when he walked to a drug meeting, hovering nearby, and then following him out again).[14]

---

[14] *Cf. United States v. Gordils*, 982 F.2d 64, 71 (2d Cir. 1992) (in context of sufficiency of the evidence claim in a narcotics case, rejecting a "mere presence" claim where "[t]he government's evidence . . . established 'not mere presence, but *presence under a particular set of circumstances that provided a reasonable jury with ample grounds'* to conclude that" the defendant was guilty (emphasis added) (quoting *United States v. Soto*, 959 F.2d 1181, 1185 (2d Cir. 1992))); *United States v. Benitez*, 920 F.2d 1080, 1089 (2d Cir. 1990) ("In most cases including this one . . . the evidence establishes not mere presence but presence under a particular set of circumstances. In such a case, the task of determining the sufficiency of the evidence is not aided by the ritualistic invocation of the 'mere

(continued...)

In short, the facts of this case, applicable case law and common sense support the informed conclusion of the trained arresting officers that there was probable cause to arrest Rodriguez. The district court erred, and its decision should be overturned.

II. THE DISTRICT COURT MISAPPLIED THE TOTALITY OF THE CIRCUMSTANCES TEST BY SEPARATELY EXAMINING INDIVIDUAL PROBABLE CAUSE FACTORS AND FAILING TO CONSIDER CERTAIN FACTORS AT ALL

A. Factual and Procedural Background

As noted, the basis for the ruling below was a finding by the court that the government supposedly lacked the requisite probable cause for a lawful arrest of Rodriguez. The court reasoned that the police had arrested Rodriguez "merely because he was present in the car with Delossantos." JA279. The court concluded that the agents had no information implicating Rodriguez in Delossantos's drug activity or demonstrating that he knew or could have known about Delossantos's drug activity, other than his presence in the Neon with Rodriguez. *Id.*

---

[14] (...continued)
presence' rubric.") (internal quotation marks omitted) (quoting *United States v. Henry*, 849 F.2d 1534, 1537 (5th Cir. 1988) (quoting *United States v. Cruz-Valdez*, 773 F.2d 1541, 1545 (11th Cir. 1985) (en banc)).

In reaching this conclusion, the district court separately considered, and then serially rejected, certain circumstances. First, the district court concluded that Rodriguez's driving of Delossantos to the drug deal provided no support for arresting him because such conduct does not suggest that Rodriguez knew he was driving to a drug deal. JA277. The court dismissed the fact that Rodriguez was driving Delossantos's car, concluding that there was nothing inherently suspicious about it, given that the police knew "nothing" about the nature of their relationship. JA276-77. The court noted that Rodriguez had been seen "in the vicinity of . . . the suspected drug storage location," but found this factor innocent on the grounds that the address was a multifamily residence. JA276. The court dismissed the significance of the various phone conversations on the grounds that Delossantos never used explicitly inculpatory language, like "drugs," "narcotics transaction," or "deal." JA275.

The district court gave no consideration to the agents' trained inference that Rodriguez was probably involved in Delossantos's drug dealing because Delossantos would not have brought to a prearranged drug deal an innocent bystander who could potentially furnish evidence against him. The court paid no attention to the fact that Rodriguez drove Delossantos directly to the planned transaction from the very house identified as the source of the narcotics. It failed to analyze the fact that, moments before the deal while sitting next to Rodriguez, Delossantos had uttered the suspicious instruction to follow the car driven by Rodriguez to some unidentified location because Delossantos was uncomfortable meeting at the prearranged

location due to the number of people there. No consideration was given to the fact that Delossantos had access to his own car, knew the way to the drug meeting location, which was only five minutes away, and had actually driven himself there the preceding day.

The court also gave no consideration to the agents' trained conclusion that when a drug dealer is concerned about potential problems at a transaction, he will often bring someone to provide assistance, support and protection. Nor did the court address the agents' observation that this particular meeting was indeed one that Delossantos was uneasy about, or their related conclusion that Rodriguez was likely brought along to assist Delossantos, with, for example, examining the prospective buyer, serving as a look out, or making a quick getaway.

Moreover, the court gave no consideration to the pattern and timing of Rodriguez's and Delossantos's coming and going at 1315 Howard Avenue, or the deductions of the agents based thereon. As noted, Rodriguez had driven Delossantos away from the address where the drugs were stored a few hours before the planned transaction, and then back again, shortly before getting back in the car and driving him the five minutes directly to the transaction. During this time, Delossantos advised the undercover agent that he needed more time to get ready for the meeting. The agents, based on the foregoing observations, and on their training and experience, concluded that Delossantos, with Rodriguez's

assistance, was engaged in preparations for the narcotics transaction. The court considered none of this.

B. Governing Law And Standard Of Review

As noted, proper application of the "totality of the circumstances" test requires the consideration of all probable cause factors, collectively and in relation to each other. *Arvizu*, 534 U.S. at 273-74, 277. In *Arvizu,* the Supreme Court firmly rejected the approach of examining factors one-by-one, in isolation from the others, in a "divide-and-conquer" methodology, reversing the Ninth Circuit on the grounds that it had engaged in a such an analysis:[15]

> The [Court of Appeals'] evaluation and rejection of seven of the listed factors in isolation from each other does not take into account the "totality of the circumstances," as our cases have understood that phrase. The court appeared to believe that each observation by [the agent] that was by itself readily susceptible to an innocent explanation was entitled to "no weight." [*Terry v. Ohio*, 392 U.S. 1 (1968)],

---

[15] Although *Arvizu* reviewed whether the agent had reasonable suspicion to stop, as opposed to probable cause to arrest, its holding applies equally in the probable cause context, given that both involve the totality of the circumstances test. *See, e.g., United States v. Yusuf*, 461 F.3d 374, 390 n.15 (3rd Cir. 2006); *United States v. Sparks*, 291 F.3d 683, 689 (10th Cir. 2002).

> however, precludes this sort of divide-and-conquer analysis.

Arvizu, 534 U.S. at 274. The Court emphasized that the proper approach involves consideration of all factors, in an aggregate, contextual manner, with "due weight" to the factual inferences of the police based on the cumulative information. *Id.* at 273-74, 277 ("[t]his process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person'" (quoting *Cortez*, 449 U.S. at 418); "reviewing court must give 'due weight' to factual inferences drawn by resident judges and local law enforcement officers," (quoting *Ornelas*, 517 U.S. at 699[16])).

C. Discussion

The district court erred when it concluded that the police arrested Rodriguez based on his mere presence. It erred by engaging in an improper, divide-and-conquer analysis that examined only certain factors, one-by-one, in isolation from the others, with no weight given to the officers' factual deductions and inferences. This approach misapplied the "totality of the circumstances" test, which

---

[16] *See also Brown v. Texas,* 443 U.S. 47, 52 n.2 (1979) (because of their expertise, these officers are "able to perceive and articulate meaning in given conduct which would be wholly innocent to the untrained observer").

demands consideration of all factors, collectively and in relation to each other. *Arvizu*, 534 U.S. at 273-74, 277.

As noted, the district court considered only the bare fact that Rodriguez had been seen "in the vicinity of . . . the suspected drug storage location," JA276, the isolated observation of Rodriguez driving Delossantos to the rendezvous point, the fact that Rodriguez was driving Delossantos's car, without reference to the contextual circumstances, and the disconnected fact that Delossantos in his various telephone conversations did not use explicitly criminal language. In addition, the district court ignored the inferences reached by the agents based upon their training and experience. This alone constitutes improper, reversible analysis under *Arvizu*.

As in *Arvizu,* the district court's focus in the instant case on individual factors, in isolation, "seriously undercut[s] the 'totality of the circumstances' principle." *Id.* at 275. Take, for example, the court's consideration of the fact that Rodriguez had been "seen in the vicinity of . . . the suspected drug storage location." JA276. Standing alone, this fact may be reduced to an innocent explanation. However, in light of all the other information available to the agents – what he was doing before, after and during those sightings, where he was, where he was going, what car he was driving, who he was with and what that person had done, was doing and would do next, all as understood and interpreted by officers with significant experience and specialized training in narcotics law enforcement – their observations and conclusions take on greater, criminal significance.

In short, Rodriguez was not simply "seen in the vicinity of . . . the suspected drug storage location," JA276, as found by the district court. He was seen there on the last occasion driving a known dealer on a five minute trip from the suspected drug storage location directly to a deal about which the known dealer was nervous. Thus, based on the agents' training and experience, they concluded that a nervous drug dealer would not bring an innocent person to a prearranged drug deal. Rather, the agents concluded that the driver of the known drug dealer was acting in concert with Delossantos because Rodriguez was driving Delossantos's own car, Delossantos had driven the route himself the day before, and Delossantos was nervous about his customer being connected to the police. Moreover, Rodriguez was privy to a suspicious conversation in which he would have heard Delossantos communicate over the cell phone that he wanted to meet, but at a new location to which the undercover should follow Rodriguez, because there would be too many people present. Indeed, insofar as Rodriguez was driving Delossantos's car, and considering that the undercover officer overheard Delossantos talking to him, the agents could conclude that Delossantos gave these instructions directly to Rodriguez – all of which bespeaks Rodriguez's knowing involvement in the conspiracy.

Moreover, the earlier sightings of Rodriguez at 1315 Howard Avenue only contributed to the agents' suspicions, when considered against the totality of the circumstances. In the hours before the deal, Rodriguez had driven Delossantos away from the storage location, returned with him (still driving) approximately an hour

and forty-five minutes later, during which time Delossantos had advised the undercover by phone that he was not ready and needed more time. After Delossantos was inside the building for 20 minutes (presumably picking up drugs or preparing for sale the drugs he had just obtained with Rodriguez), Rodriguez drove him again, this time directly to the deal – all of which was consistent with him assisting Delossantos in preparations for the drug meet. These facts reinforced the agents' view, based in part on their training and experience, that Rodriguez was knowingly involved in Delossantos's drug dealing. In light of the cumulative information available to the agents, as interpreted through the lens of their training and experience, the sightings of Rodriguez at 1315 Howard Avenue are indeed significant.[17]

Much the same analysis applies to the court's compartmentalized consideration of the few other factors that it addressed. The court's conclusion that Rodriguez's

---

[17] The court's ruling suggests that the sightings of Rodriguez at 1315 Howard Avenue were innocent because it was a multifamily residence. While true, this observation is beside the point. There was no evidence or suggestion that Rodriguez was associating with 1315 Howard Avenue in connection with residents other than Delossantos or in connection with some apartment other than the one in which Delossantos was accessing narcotics. What mattered was the sighting of Rodriguez driving Delossantos to and from his drug storage spot (regardless of the precise apartment he was using), and in particular his driving of Delossantos from that drug storage spot directly to the deal, under all of the suspicious circumstances noted by the agents.

driving of Delossantos to the drug deal was not suspicious is problematic insofar as it conflicts with the agents' informed view that those who drive known drug dealers to drug deals are typically knowing participants. The court certainly provided no basis for gainsaying the professionals on this point. *See, e.g., Arvizu*, 534 U.S. at 273-74, 277 ("due weight" must be given to the inferences of the police based on the cumulative information before them). Rodriguez's driving of Delossantos to the deal was very meaningful in the context of the rest of the factors that informed the agents' actions.

Rodriguez was not simply driving Delossantos to a drug deal; rather, he was driving a known dealer from the suspected drug storage location directly to a deal about which the known dealer was nervous. Common sense and the agents' training indicate that a known drug dealer would not bring another person to such a deal unless the other person was acting in concert with the drug dealer. On the way to the deal, Delossantos spoke openly in Rodriguez's presence advising the undercover that he was not comfortable meeting at the prearranged location because there would be too many people present. The instruction to the undercover to follow the car – presumably repeated to Rodriguez insofar as he was the driver – reinforced the agents' belief in Rodriguez's knowing involvement in the drug transaction. And, again, Rodriguez's driving of Delossantos in the hours before the deal – away from the storage location, during which time Delossantos had advised the undercover that he was not ready and needed more time, back to the storage location which Delossantos entered for 20 minutes, and before

driving him directly to the deal (all of which is consistent with the often-seen pattern of a drug dealer preparing for a deal by scrambling to get product, stash some of it and take the amount needed for the transaction) – supported the agents' belief that Rodriguez was knowingly involved in Delossantos's drug dealing.[18]

The same problem infects the court's dismissal of Delossantos's telephone conversations. While it is true that Delossantos never used explicit criminal language in a conversation overheard by Rodriguez, what he was willing to say in Rodriguez's company, in light of when he said it, his tone, and what was going on at the time, legitimately contributed to the agents' belief that Rodriguez was a knowing participant in Delossantos's drug dealing. This is particularly true of Delossantos's telephone call on the way to the deal, allowing Rodriguez to overhear him with a nervous tone instructing the person he was going to meet to follow his car to some other, undisclosed location because he was not comfortable meeting at the prearranged location due to the presence of too many people. This conversation was bound to catch Rodriguez's attention insofar as he was the driver of the car that was supposed to lead the undercover to some other location. It would have seemed very strange if Rodriguez had not been aware of what was happening.

---

[18] The same contextual analysis applies to, and overwhelms, the court's compartmentalized conclusion that "[t]here is nothing inherently suspicious about one person driving another person's car when the police know nothing about the nature of their relationship." JA277.

Not only did the court fail to consider the cumulative weight of all the circumstances, it also deviated from the prescribed methodology insofar as it failed to give any deference to the reasonable inferences made by the officers on the basis of their specialized training and experience, as required by the totality of the circumstances test. *Arvizu,* 534 U.S. 273-74, 275-76 (proper evaluation of the totality of the circumstances "allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person" (internal quotation marks and citation omitted); "due weight" must be given to the factual inferences drawn by the law enforcement officers and trial judge); *Brown v. Texas,* 443 U.S. 47, 52 n. 2 (1979) (Because of their expertise, these officers are "able to perceive and articulate meaning in given conduct which would be wholly innocent to the untrained observer"); *Cortez,* 449 U.S. at 418 (experienced officer able to draw "inferences and make [ ] deductions – inferences and deductions that might well elude an untrained person"). The court gave no deference to, and never even directly addressed, the agents' inference that Rodriguez was likely involved because Delossantos would have been unlikely to bring along an outsider for fear of unnecessarily creating a witness who could potentially furnish evidence against him. *Pringle*, 540 U.S. at 371 ("drug dealing [is] an enterprise to which a dealer would be unlikely to admit an innocent person with the potential to furnish evidence against him"). As noted, the court summarily dismissed the agents' view that, based on their training and experience, those who drive dealers to drug deals are

typically involved themselves. It gave absolutely no consideration to the agents' observation that drug dealers going to meetings about which they are concerned will often bring along others to assist with driving, offer protection, serve as lookouts or help and support in other ways, or to their inference that Rodriguez had likely been brought along in such a capacity by Delossantos because of his concerns about this meeting. And it gave no consideration to their inference that, based upon their training, experience and information gathered in this case, from 10:00 am to 12:30 pm, Delossantos, while likely in the company of Rodriguez, was probably engaged in preparations for the drug deal with the undercover. The court gave no reason to disagree with or discredit the agents' conclusions. (For example, there were no adverse credibility findings.) It simply ignored them.

Consideration of the totality of the circumstances, in proper cumulative fashion, with appropriate weight given to the reasonable conclusions of the agents based upon their training and experience, leads to the conclusion that probable cause supported the October 26, 2005 arrest of Rodriguez, as explained above.

CONCLUSION

For the foregoing reasons, the ruling of the district court granting defendant's motion to suppress evidence should be reversed.

Dated: February 7, 2007

Respectfully submitted,

KEVIN J. O'CONNOR
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT

JAMES R. SMART
ASSISTANT U.S. ATTORNEY

RICHARD J. SCHECHTER
ASSISTANT U.S. ATTORNEY

WILLIAM J. NARDINI
Assistant United States Attorney (of counsel)

CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 12,543 words, exclusive of the Table of Contents, Table of Authorities, Addendum of Statutes and Rules, and this Certification.

JAMES SMART
ASSISTANT U.S. ATTORNEY