16-2575

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

***Plaintiff-Appellee*,**

v.

JIMMY RENEE CRUZ, JR.,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PRINCIPAL BRIEF FOR DEFENDANT-APPELLANT JIMMY RENEE CRUZ, JR.

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STATEMENT WITH RESPECT TO ORAL ARGUMENT

Mr. Cruz asks this Court to grant oral argument in this case. *See* 6 Cir. R. 28(b)(1)(B). Mr. Cruz's appeal involves suppression issues and issues of police conduct that cast grave lights on the administration of justice. The record in the district court involves numerous filings on the issue of the investigation and apprehension of Mr. Cruz, and these filings enumerate various concerns about the conduct of a command officer who became involved in this case. The gravity of the issues, public perception of the administration of justice, and legal concerns involved militate in favor of developing the theories of the parties. Oral argument provides the best means for ensuring a complete review of the case that includes addressing any questions the reviewing panel may have.

JURISDICTIONAL STATEMENT

In the district court, Mr. Cruz faced criminal charges over which the court had subject matter jurisdiction under 18 U.S.C. § 3231, which grants exclusive original jurisdiction to district courts over offenses against the laws of the United States. The government indicted Mr. Cruz on August 4, 2015, charging him with three counts of heroin and gun-related offenses. RE. 1: Indictment, PageID 1-3. Mr. Cruz entered a conditional guilty plea on two counts of the Indictment on June 15, 2016. RE. 63: Plea Minutes, PageID 335; *see also* RE. 61: Plea Agreement, PageID 326-33. The plea agreement acknowledged Mr. Cruz's preservation of his right to appeal the denial of his motion to suppress evidence. RE. 61: Plea Agreement, PageID 326.

The district court sentenced Mr. Cruz on November 2, 2016. RE. 73: Minutes of Sentencing, PageID 429. The court imposed a sentence of: 123 months of custody, 6 years of supervised release, and a $200 special assessment; the court did not impose a fine. *Id.* The court entered its judgment on November 2, 2016. RE. 74: Judgment, PageID 430. Mr. Cruz filed his timely notice of appeal on November 8, 2016. RE. 76: Notice of Appeal, PageID 440. This Honorable Court has jurisdiction over this appeal under and 28 U.S.C. § 1291, which authorizes review of final judgments of the district courts, and 18 U.S.C. § 3742(a), which authorizes review of sentences.

STATEMENT OF ISSUES

I. Whether the district court erred in denying Mr. Cruz's motion to suppress evidence when the search warrant in the case issued based on an affidavit that relied on an alleged barebones anonymous tip that an officer likely fabricated to wage a personal vendetta against Mr. Cruz; the alleged tip tainted the remainder of the averments in the affidavit, and the investigation as a whole, beyond redemption.

II. Whether Mr. Cruz's sentence of 123 months is substantively unreasonable.

STATEMENT OF THE CASE

Mr. Cruz has made bad choices in the past and has a criminal history, but he really ran askance of the law when he started dating a woman who had had a romantic relationship with a local police officer. This officer, known for jealousy in these matters, used his position to apprehend Mr. Cruz, effectively eliminating his rival. In doing this, the officer and those who acted on the information that the officer provided violated Mr. Cruz's Fourth Amendment rights.

A. Factual Summary.

Mr. Cruz dated Desiree Downing. *See* RE. 55: Order Denying Motion for Reconsideration, PageID 298; *see also* RE. 22-1: First Motion to Suppress Evidence, Attachment 1 Brief in Support, PageID 47. An officer involved with the investigation that led to the instant case, Sgt. Derrick Turner, also dated Ms.

Downing. *See id.* Jealous of Ms. Downing's relationship with another man, Sgt. Turner pursued Mr. Cruz, ultimately causing his arrest and thus incapacitating him as a romantic rival.

Sgt. Turner demanded that Ms. Downey end her relationship with Mr. Cruz. RE. 22-1: First Motion to Suppress Evidence, Attachment 1 Brief in Support, PageID 47. He threatened to take the car he had obtained financing for and had given to her. *Id.* A week before issuance of the March 19, 2015 search warrant, Sgt. Turner arrived at a Red Roof Inn in Kalamazoo, Michigan, where Ms. Downey was spending the night with Mr. Cruz, and drove off in her car. *Id.* at PageID 47-48.

This behavior corroborated Ms. Downey's opinion that Sgt. Turner was obsessed with her. *See* RE. 45: Restricted-Access Document: Motion for Reconsideration, Exhibit A, PageID 197, lines 2-4. Sgt. Turner had met Ms. Downey at the exotic-dance club at which she worked; he spent a lot of money on her, financed the car for her, bought jewelry for her with their names engraved on it, and took her on trips. RE. 45: Restricted-Access Document: Motion for Reconsideration, PageID 173. Sgt. Turner even continued to pursue Ms. Downey after the events of March 19, 2015, that involved the "raid" on room 129 of the Red Roof Inn. *Id.* at PageID 174.

March 19, 2015, involved the authorities arriving at the Red Roof Inn, pursuing Mr. Cruz, and obtaining a search warrant for room 129. On that day,

Kalamazoo Public Safety Officer Justin Wolbrink obtained a search warrant to search room 129 at a Red Roof Inn in Kalamazoo. RE. 55: Order Denying Motion for Reconsideration, PageID 298. The affidavit in support of the warrant stated Sgt. Turner had, within the past week, received a tip from a confidential informant that Jimmy Cruz was staying in room *229* at the Red Roof Inn and that "heavy drug trafficking [was] occurring from the same room." RE. 22-2: First Motion to Suppress, Exhibit #2 Affidavit for Search Warrant, PageID 55. This statement was not correct – Mr. Cruz was not in room 229. It continued with additional points:

- Mr. Cruz had allegedly absconded from parole and had been absconding since August 23, 2013. *Id.* And he had outstanding warrants. *Id.*
- On March 19, 2015, around 6:00 p.m., about one mile from the Red Roof Inn, Sgt. Turner saw Mr. Cruz driving a new, white Nissan Altima with Illinois license plates. *Id.* Sgt. Turner lost sight of Mr. Cruz and did not locate Mr. Cruz or the vehicle again. *Id.*
- At around 8:00 p.m., investigators went to the Red Roof Inn and saw a new, white Nissan Altima parked in front of room 129 at the Red Roof Inn. *Id.*

- Investigators allegedly addressed Red Roof Inn Staff members who said Jimmy Renee Cruz, Jr., had been staying in room 129 since March 13, 2015. *Id.*
- An officer saw Mr. Cruz leave room 129 and get into the Nissan Altima.
- The affiant and another officer exited their police vehicle and, at gunpoint, commanded Mr. Cruz to stop; the officers opened the doors to the Altima and Mr. Cruz accelerated in the vehicle and drove away. *Id.*
- Mr. Cruz fled the scene. *Id.* Officers lost sight of Mr. Cruz; Mr. Cruz evaded other officers in the area, and the authorities ceased to pursue Mr. Cruz because of safety concerns. *Id.* at PageID 56.
- Officers secured room 129 at the Red Roof Inn. *Id.*
- A canine alerted outside the room, indicating the odor of drugs. *Id.*
- Officers averred they could smell marijuana outside the room. *Id.*
- Mr. Cruz had been included in a report system that indicated involvement in drug offenses, including marijuana and heroin offenses. *Id.*
- Mr. Cruz had prior felony convictions, including drug convictions. *Id.*

- The affiant believed a number of things based on training and experience. *See id.* at PageID 56-57.

Sgt. Turner's alleged reception of the tip started the investigation. The affidavit, however, includes no information about the alleged informant. *See* RE. 22: First Motion to Suppress, PageID 43. The affidavit includes no description of reliability of the CI's basis of knowledge. Ms. Downey has attested that Sgt. Turner would "target" men who expressed interest in her. RE. 45: Restricted-Access Document: Motion for Reconsideration, Exhibit A, PageID 199, lines 5-16. Sgt. Turner had participated in an investigation of a man named "Nutty" who had been spending money on Ms. Downey at the exotic-dance club. *Id.* at 199-200, lines 18-25, 1-4. Sgt. Turner set up other men as well. *See* RE. 45: Restricted-Access Document: Motion for Reconsideration, PageID 174. He sent Ms. Downey a mug shot of her child's father (who was not Mr. Cruz); he proposed marriage to Ms. Downey; he told Ms. Downey not to allow felons in her car. *Id.* This arguably obsessive behavior suggests that no informant actually existed and Sgt. Turner fabricated the alleged tip.

After going to the Red Roof Inn on March 19, 2015, and allegedly talking to an employee or employees there, officers encountered Mr. Cruz, as described in the search-warrant affidavit. *See* RE. 22-2: First Motion to Suppress, Exhibit #2 Affidavit for Search Warrant, PageID 55. A canine unit allegedly alerted in front of

room 129. *Id.* at PageID 56. After obtaining and executing the search warrant, also on March 19, 2015, officers found in room 129 controlled substances (heroin and marijuana), a firearm, and cash. RE. 22-1: First Motion to Suppress Evidence, Attachment 1 Brief in Support, PageID 45, 47; RE. 25: Order Denying Motion to Suppress, PageID 75. This evidence provided the basis for the Indictment in this case.

B. Procedural History.

The government indicted Mr. Cruz on August 4, 2015. RE. 1: Indictment, PageID 1-3. Count one of the indictment charged Mr. Cruz with possessing heroin with the intent to distribute it (a violation of 21 U.S.C. § 841(a)(1)); count two charged possession of a firearm in furtherance of a drug-trafficking offense (a violation of 18 U.S.C. § 924(c)(1)(A)); count three charged Mr. Cruz with being a felon in possession of a firearm (a violation of 18 U.S.C. § 922(g)(1)). *Id.* On August 25, 2015, the government filed an information and notice related to a prior drug-related conviction Mr. Cruz had sustained. RE. 12: Information and Notice, PageID 18-19; RE. 13: Amended Information and Notice, PageID 20-21. The government requested application of 21 U.S.C. § 841(b)(1)(C)'s enhanced sentencing provisions, which provided for a thirty-year maximum sentence, in

accordance with 21 U.S.C. § 851. RE. 12: Information and Notice, PageID 19; RE. 13: Amended Information and Notice, PageID 21.

Mr. Cruz first moved to suppress evidence on February 2, 2016. RE. 22: First Motion to Suppress, PageID 42. The district court denied this motion on February 18, 2016. RE. 25: Order Denying Motion to Suppress, PageID 74. Not long after this denial, on February 29, 2016, Mr. Cruz's attorney moved to withdraw from the case. RE. 37: Motion to Withdraw as Counsel, PageID 154. The court granted this motion on March 9, 2016. RE. 41: Minutes, PageID 162. The court appointed present counsel on March 11, 2016.

Under restricted access, Mr. Cruz filed a motion to reconsider the suppression ruling on April 29, 2016. RE. 45: Restricted-Access Document: Motion for Reconsideration, PageID 170-247. He requested a hearing in accordance with *Franks v. Delaware*, 438 U.S. 154 (1978). Following various filings on the matter, the district court denied Mr. Cruz's motion for reconsideration on May 26, 2016. RE. 55: Order Denying Motion for Reconsideration, PageID 297. In accordance with a written plea agreement, Mr. Cruz pleaded guilty on June 15, 2016. RE. 63: Plea Minutes, PageID 335; *see also* RE. 61: Plea Agreement, PageID 326-33. In paragraph one, this plea agreement acknowledged Mr. Cruz's preservation of his right to appeal the rulings on the motion to suppress evidence and the motion to

reconsider the initial denial of the suppression motion. RE. 61: Plea Agreement, PageID 326.

The district court sentenced Mr. Cruz on November 2, 2016. RE. 73: Minutes of Sentencing, PageID 429. The court denied Mr. Cruz's request for a downward variance, and imposed a sentence of: 123 months of custody, 6 years of supervised release, and a $200 special assessment; the court did not impose a fine. RE. 77: Sent. Trans., PageID 453-54, 463-64; RE. 73: Minutes of Sentencing, PageID 429. The court entered its judgment on November 2, 2016. RE. 74: Judgment, PageID 430. Mr. Cruz filed his notice of appeal on November 8, 2016. RE. 76: Notice of Appeal, PageID 440.

SUMMARY OF THE ARGUMENT

Mr. Cruz and a police officer, Sgt. Derrick Turner, dated the same woman, Desiree Downey. It appears that Ms. Downey took advantage of Sgt. Turner for material gain. During the time in which she spent time with Sgt. Turner, Ms. Downey dated other men who she favored, including Mr. Cruz. Jealous and volatile in the relationship, Sgt. Turner pursued Mr. Cruz and used his position as a police officer to investigate Mr. Cruz. Sgt. Turner told other officers that he had received a tip that Mr. Cruz was staying at a Red Rood Inn and drug trafficking was occurring from his room. The tip offered no details and made no strides to demonstrate the alleged tipster's veracity, reliability, or basis of knowledge. In the past, Sgt. Turner

had used his position to investigate and arrest men interested in Ms. Downey. Evidence suggests he did the same with Mr. Cruz, fabricating the tip against him. Without the Turner information, no search would have occurred.

In the district court, Mr. Cruz requested a hearing in accordance with *Franks v. Delaware*, 438 U.S. 154 (1978). The court denied this request. Circumstances, however, strongly suggest Sgt. Turner knowingly falsified the alleged tip. They also suggest that other officers involved in the investigation knew of Sgt. Turner's volatile relationship with Ms. Downey. Sgt. Turner took Ms. Downey on at least one social trip with other officers. The affidavit supporting the search warrant issued for the motel room failed to establish probable cause to issue that warrant because: it relied on the barebones tip, evidence suggested that Sgt. Turner intentionally fabricated that tip, and the remaining averments are the fruit of the "poison" tip. The good-faith exception to the warrant requirement does not apply because of the knowing falsehood and the lack of good faith.

Mr. Cruz's sentence of 123 months is substantively unreasonable. The drug quantity was relatively minimal, Mr. Cruz's criminal history does not involve lengthy prior sentences, and Mr. Cruz will likely serve several additional years in state custody, for the state parole violation, upon release from federal custody.

STANDARD OF REVIEW

Courts reviewing decisions on motions to suppress evidence uphold district-court factual findings unless clearly erroneous. *United States v. Smith*, 182 F.3d 473, 476 (6th Cir. 1999). Such courts review legal conclusions de novo. *Id.* This standard applies to review of *Franks*-hearing issues as well. *United States v. Mastromatteo*, 538 F.3d 535, 545 (6th Cir. 2008).

Regarding Mr. Cruz's challenge to his sentence, appellate courts review sentences for reasonableness. *Rita v. United States*, 551 U.S. 338, 341 (2007). This review involves an abuse-of-discretion standard. *United States v. Studabaker*, 578 F.3d 423, 430 (6th Cir. 2009). Regardless of whether a sentence sits inside or outside the advisory guideline range, "the appellate court must review the sentence under an abuse-of-discretion standard." *Id.* The court "must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range." *Id.* If it determines that "the district court's sentencing decision is procedurally sound, the appellate court should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard." *Id.* When conducting this review, courts take into account the

totality of the circumstances, including the extent of any variance from the advisory guidelines range. *Id.*

ARGUMENT

I. The district court erred in denying Mr. Cruz's motion to suppress evidence because the search warrant in the case issued based on an affidavit that relied on an alleged barebones anonymous tip that an officer likely fabricated to wage a personal vendetta against Mr. Cruz; this alleged tip tainted the remainder of the averments in the affidavit, and the investigation as a whole, beyond redemption.

The Fourth Amendment protects individuals from unreasonable searches and seizures. U.S. Const. amend. IV. To obtain a search warrant, authorities must have probable cause to believe they will find contraband in the place they seek to search. *See id.* Neutral and detached magistrates should make probable-cause determinations; such matters should not fall to officers "'engaged in the often-competitive enterprise of ferreting out federal crime.'" *United States v. Smith*, 182 F.3d 473, 476-77 (6th Cir. 1999) (citation omitted). For a magistrate to perform his or her official functions, an affidavit in support of issuance of a search warrant "must contain adequate supporting facts about the underlying circumstances to show that probable cause exists for the issuance of the warrant." *Id.* at 477.

Probable cause means reasonable grounds to believe authorities will find contraband, and this belief may rest on less than prima facie proof but requires more than mere suspicion. *Id.* The alleged facts in an affidavit in support of issuance of

a search warrant may stand on hearsay information and information supplied by an informant. *Id.* The alleged facts do not have to come from the affiant's direct knowledge and observations. *Id.* When considering the effect of anonymous tips, courts look to the "totality of the circumstances" to determine whether a tip established probable cause. *Id.* Despite evolutions in case law, an informant's veracity, reliability, and basis of knowledge constitute considerations in judging the totality of the circumstances. *Id.*

Defendants should receive hearings to challenge the validity of a search warrant if they make a substantial preliminary showing that the warrant includes a false statement, made knowingly and intentionally, or with reckless disregard for the truth. *United States v. Mastromatteo*, 538 F.3d 535, 545 (6th Cir. 2008). Such hearings spring from the decision in *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978). If, at the hearing, the evidence establishes, by a preponderance of the evidence, perjury or reckless disregard for the truth, "and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided" and the district court should suppress the fruits of the search. *Id.* (citation omitted).

A. Evidence indicates that the barebones anonymous tip in this case sprang from an officer's fabrications to serve as a means for that officer to carry out a personal vendetta against Mr. Cruz.

Mr. Cruz should have received a *Franks* hearing. He made a substantial preliminary showing that the search-warrant affidavit contained information officers knew to be false. Sgt. Turner allegedly received an anonymous tip regarding Mr. Cruz staying at the Red Roof Inn and that heavy drug trafficking occurred from his room. RE. 22-2: First Motion to Suppress, Exhibit #2 Affidavit for Search Warrant, PageID 55. This tip, however, provided no support for a probable-cause finding because it constituted nothing more than a barebones assertion by an unknown alleged informant of unknown veracity and reliability, and because evidence shows that Sgt. Turner likely fabricated the tip as part of a vendetta against Mr. Cruz.

Regarding anonymous tips, a showing that an informant has a verified track record of reliability may suffice to establish the veracity of the informant's hearsay statements. *Smith*, 182 F.3d at 479. Boilerplate language regarding reliability may not suffice. *See id.* Whether the informant has provided reliable information in the past about the same type of criminal activity focused on in the warrant constitutes a key consideration in the analysis. *Id.* Police corroboration may serve to assess the reliability of an anonymous tip. *Id.* Regarding basis of knowledge, when there is no indication of how an informant came by his or her information, the affidavit should include explicit details that allow a magistrate to know the tip involves more

than a casual rumor or such. *Id.* at 481. Essentially, "richness of detail or a heightened level of corroboration may be required where information is provided by an anonymous informant of unknown veracity." *Id.* at 483.

In this case, however, the traditional anonymous-tip analysis does not really apply because the evidence and circumstances in Mr. Cruz's case suggest Sgt. Turner fabricated the tip. As discussed in the factual summary in the statement of the case above, Sgt. Turner had a relationship with a woman who was also dating Mr. Cruz; Sgt. Turner expressed jealousy, and had a history of targeting men for investigation, when they expressed interest in Ms. Downey. He appears to have fabricated the alleged tip in this case as part of a vendetta against Mr. Cruz, his romantic rival, who Ms. Downey favored. Defendant presented evidence indicating that Sgt. Turner took Ms. Downey's car on a different evening when he knew that she was spending the night with Mr. Cruz.

Justice Kennedy has intimated the potential for police fabrication of alleged anonymous tips. In his concurrence in *Florida v. J.L.*, 529 U.S. 266 (2000), Justice Kennedy stated: "even if the officer's testimony about receipt of the tip is found credible, there is a second layer of inquiry respecting the reliability of the informant that cannot be pursued." *J.L.*, 529 U.S. at 275 (Kennedy, J., concurring). His choice of language here underscores the fact that officers do not always testify credibly regarding receiving "anonymous tips." Justice Kennedy also expressed concern that

"[i]f the telephone call is truly anonymous, the informant has not placed his credibility at risk and can lie with impunity." *Id.* A "reviewing court cannot judge the credibility of the informant and the risk of fabrication becomes unacceptable." *Id.*

Courts across jurisdictions recognize the potential for harassment presented by anonymous tips. *See, e.g.*, *United States v. Christmas*, 222 F.3d 141, 144 (4th Cir. 2000); *see also United States v. Tuter*, 240 F.3d 1292, 1297 (10th Cir. 2001) (finding that anonymous tips provide "virtually nothing" regarding veracity and the reliability of information). In Mr. Cruz's case, one can see that potential come to fruition. The search-warrant affidavit in this case does not give any information on the nature of the tip: one cannot tell whether Sgt. Turner, who allegedly received the tip, received the supposed tip through a face-to-face meeting or through a telephone call or through some other means. *Cf. Christmas*, 222 F.3d at 144 (considering that anonymous phone calls allow people to lie with impunity). The affidavit does not even provide the unsubstantiated claim that the informant had first-hand knowledge, as with the tip the court found insufficient in *Tuter*. *See Tuter*, 240 F.3d at 1298. Nothing in the affidavit indicated the alleged informant's veracity or basis of knowledge. *Cf. Christmas*, 222 F.3d at 144. Nothing indicated the alleged tipster's potential accountability for the supposed tip. *Cf. id.* Akin to the circumstances in *J.L.*, the affidavit makes no mention of authorities documenting the alleged tip or

making any efforts to discover the identity of the tipster. *Cf. J.L.*, 529 U.S. at 275 (Kennedy, J., concurring).

As the Tenth Circuit has expressed it, a primary concern related to anonymous tips "relates to the motives of the tipster." *United States v. Johnson*, 364 F.3d 1185, 1190 (10th Cir. 2004). Tipsters who refuse to identify themselves "may simply be making up the story, perhaps trying to use the police to harass another citizen." *Id.* This Honorable Court has concurred with the *Johnson* court's concerns and has cited *Johnson* approvingly. *See, e.g.*, *United States v. Howard*, No. 14-6326, slip op. at 7 (6th Cir. Nov. 24, 2015) (unpublished). The *Johnson* court expressed concern about police officers using "vague tips to violate the Fourth Amendment rights of innocent citizens." *Johnson*, 364 F.3d at 1191. In Mr. Cruz's case, the situation is even worse; rather than having a vague, potentially abusive citizen's tip, evidence points to an officer fabricating a tip to carry out a personal vendetta against someone.

The alleged tipster here did not provide location information or information related to the alleged tipster's relationship with Mr. Cruz such that authorities would be able to infer the alleged tipster's identity. *See United States v. Noel*, No. 15-2260, slip op. at 6 (6th Cir. Aug. 24, 2016) (unpublished). The alleged tipster here did not provide any intimate details about Mr. Cruz that would not be known by a casual "passerby." *See id.* In *Noel*, the tipster called the parole agency twice, increasing his or her risk of identification and the chances of being held accountable for a false

tip. *Id.* at 6-7. In contrast to the circumstances in *Noel*, in which this Court upheld the search, Mr. Cruz presents a case in which "a caller provided barebones information about only the alleged criminal activity that ultimately resulted in police action." *See id.* at 6. The tip here more closely resembles the tip "largely devoid of detail" in *Howard*, a tip which still provided far more information than the Cruz tip, as it discussed the logistics of the alleged drug transactions and provided names and relationships. *Howard*, No. 14-6326, slip op. at 14.

Mr. Cruz is not asking officers to ignore legitimate anonymous tips from concerned citizens. *See Christmas*, 222 F.3d at 145. But this case presents a barebones tip allegedly given to an officer who has a history of using his police power to harass men who express interest in Ms. Downey. All of the concerns about tips expressed above arise here in an extremely magnified way. This case does not present some simple ambiguity, as in *Hart v. Parks*, 450 F.3d 1059 (9th Cir. 2006). In *Hart*, the Ninth Circuit rejected an argument that police had fabricated records of supposedly anonymous tips. *Hart*, 450 F.3d at 1068. The argument rested on an allegation that an ambiguous detective declaration implied reception of three, rather than two, anonymous calls with tips. *Id.* The argument fell apart because the declaration was ambiguous---simply unclear---and evidence otherwise confirmed reception of only two calls. *Id.*

Unlike in *Hart*, Sgt. Turner did more than make an ambiguous statement. With a history of using his position to launch police actions against romantic rivals, he reported a barebones, anonymous tip against Mr. Cruz. An alleged tipster's animus against the subject of a tip can undermine an alleged tip's reliability. *See Bazzi v. City of Dearborn*, 658 F.3d 598, 605 (6th Cir. 2011). This Court has pointed out that it has concluded in the § 1983 context that an officer lacked reasonable suspicion for a *Terry* frisk when the officer knew the informants in question "were of highly questionable veracity and possessed personal animosity" toward the plaintiff. *Id.* at 607 (citation omitted). This Court will consider whether an officer knew a tipster "was not credible and bore a personal grudge." *Id.*; *see also Painter v. Robertson*, 185 F.3d 557, 569 (6th Cir. 1999) (officer knew tipsters "were of highly questionable veracity and possessed personal animosity against" the subject of the tip, so these tipsters' "accusations lacked sufficient indicia of reliability to warrant an objective reasonable suspicion that the plaintiff might be dangerous").

Given the circumstances, Sgt. Turner likely fabricated the tip and is himself the tipster bearing animosity against Mr. Cruz. This Court has recognized the long-established principle that "government actions may not retaliate" against people exercising protected freedoms. *See, e.g.*, *Estate of Dietrich v. Burrows*, 167 F.3d 1007, 1013 (6th Cir. 1999). In *Dietrich*, this Court allowed plaintiffs' claims under 42 U.S.C. § 1983 to survive defense motions for summary judgment when plaintiffs

alleged that police officers had arrested them in retaliation for plaintiffs' efforts to end police courier services for private clients. *See id.* at 1009, 1013-14. Essentially, the plaintiffs had a private-investigations business and wanted to offer courier services for customers looking to move cash safely. *Id.* at 1009. The plaintiffs knew that local police officers already offered such services---both during and after work hours. *Id.* One of the plaintiffs initiated action with the township to alert the township of liability issues arising from having local officers do this work while in uniform and working for personal gain. *Id.* The local prosecutor's office and local newspapers got involved in the debate. *Id.* Ultimately, the police chief issued an order disallowing the use of police vehicles for personal purposes. *Id.*

Less than a month after the police chief issued this order, the plaintiffs took an assignment delivering cash to a local pharmacy. *Id.* Police officers pulled the plaintiffs' vehicle over, questioned the plaintiffs about whether the plaintiffs had with them concealed weapons, and eventually arrested the plaintiffs on weapons charges. *Id.* at 1009-10. The local prosecutor later dropped the charges. *Id.* at 1010. This Court found that the officers had no probable cause to arrest the plaintiffs. *Id.* at 1012. The defendant officers knew at the time they arrested the plaintiffs that the plaintiffs engaged in the business of moving money: "the officers in this case had full knowledge of facts and circumstances that conclusively established, at the time of the [plaintiffs'] arrests, that the plaintiffs were justified---by statute---in carrying

concealed weapons during their work." *Id.* While one can distinguish Mr. Cruz's circumstances from those of the *Dietrich* plaintiffs, the fact remains that police may not abuse their positions to retaliate against those that somehow "encroach" on police interests.

This Court considered a case even more akin to Mr. Cruz's in *Bazzi v. City of Dearborn*. The plaintiff in *Bazzi* brought a suit under § 1983 after the plaintiff's former employer conspired with two police officers to have false police reports filed against the plaintiff, so the plaintiff would have his federal supervised release revoked. *Bazzi*, 658 F.3d at 600-01. One officer entered into a consent judgment with the plaintiff; the former employer stipulated to the entry of summary judgment for the plaintiff; and one officer filed for summary judgment, which the district court granted and the plaintiff appealed. *Id.* at 602. This Court admonished that the former employer's tip to the officer who had received the grant of summary judgment from the district court did not establish reasonable suspicion to stop the plaintiff's car. *Id.* at 605.

Courts, of course, take police misconduct seriously. The *Franks* rule, providing for exclusion of evidence derived from search warrants based on false information, springs from a desire to deter police misconduct. *Franks*, 438 U.S. at 164 (the Warrant Clause "takes the affiant's good faith as its premise"). Eroded police integrity undermines the justice system. Something as simple as abandoning

"a passenger in a high crime area by a state trooper could constitute a substantive due process violation as a violation of a clearly established liberty interest." *Cooper v. Dupnik*, 963 F.2d 1220, 1249 (9th Cir. 1992) (en banc), *overruled on other grounds by Chavez v. Martinez*, 538 U.S. 760, 765 (2003). The common good includes not only fighting crime, but "fairness in police procedures." *Id.* at 1250. Nothing destroys a government "'more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence.'" *Id.* at 1223 (citation omitted). Government agents must not abuse their positions.

This Court followed a trajectory of emphasizing the gravity of police misconduct in *United States v. Lanham*, 617 F.3d 873 (6th Cir. 2010). In *Lanham*, corrections officers took a marked dislike to an eighteen-year-old boy whom police had arrested for a traffic violation. *Lanham*, 617 F.3d at 878-79. They wanted to scare the boy and placed him in a general-population cell with inmates known for their violence. *Id.* at 879. The inmates beat and raped the boy. *Id.* at 880. This Court sentenced two of the corrections officers to 180 and 168 months in prison for conspiring to violate the boy's civil rights. *Id.* at 881-82.

Of course, the circumstances in Mr. Cruz's case do not parallel those in *Lanham*, but the strong need to deter police misconduct persists. Mr. Cruz made the necessary showing to obtain a *Franks* hearing. He has shown that the tip in this case cannot support a probable-cause determination and should be stricken when

considering the search-warrant affidavit. The tip is barebones and fails as an alleged anonymous tip, and actually seems to represent a knowing false statement by an officer. Sgt. Turner likely fabricated the tip to strike out at a romantic rival. This abuse of the justice system for personal ends warrants excising the statements in the search-warrant affidavit related to the alleged tip and the investigatory fruits flowing from this tip.

B. The statements in the affidavit related to a suggestive "photo show" with an employee at the Red Roof Inn did not contribute to the probable-cause inquiry, but they did contribute to the need for a Franks *hearing.*

The affidavit contains another misstatement in its Item G. RE. 22-2: First Motion to Suppress, Exhibit #2 Affidavit for Search Warrant, PageID 55. The affiant misstated the circumstances of motel staff allegedly confirming that Mr. Cruz was staying in room 129. Item G included a statement that investigators contacted motel staff and the staff "advised that Jimmy Renee Cruz Jr. had been staying at Room 129 at that location since 03/13/15." *Id.* The Red Roof Inn staff, however, did not know Mr. Cruz's name and only responded to a highly suggestive showing of a photograph. *See* RE. 45: Restricted-Access Document: Motion for Reconsideration, PageID 179-180.

Officer Steve Seiser filed a "supplemental information" with "supplement notes" for the incident/investigation report related to this case; Mr. Cruz provided a

copy of these notes to the district court with his proposed reply brief. RE. 50-1: Motion for Leave to File, Attachment 1: Proposed Reply Brief, PageID 270; RE. 50-2: Motion for Leave to File, Attachment 2: Exhibit A, Incident Report Supplement Notes, PageID 274. The district court found it did not need to consider Mr. Cruz's proposed reply to effect an analysis; it granted a government motion to strike the reply. RE. 54: Order Addressing Motions, PageID 296. The notes, however, did provide evidence related to the investigation at the Red Roof Inn and they revealed further the affidavit's misstatements.

In his report, Officer Seiser described how he "responded to the office at the Red Roof Inn" after other officers secured room 129. RE. 50-2: Motion to Leave to File, Attachment 2: Exhibit A, Incident Report Supplement Notes, PageID 274. He spoke with an employee named Erica Sedenquist. *Id.* In response to the officer's inquiry, Ms. Sedenquist said room 129 was registered to Tyanna Davison, and that a male was also staying in the room. *Id.* Officer Seiser showed Ms. Sedenquist "a picture of Jimmy Cruz and she positively identified him as the individual that ha[d] been staying in that room." *Id.* The notes said Ms. Sedenquist stated "that Cruz is a regular guest at the motel" and registers under the name Aldwin Nabors. *Id.* It seems that, because Mr. Cruz regularly stayed at the motel, he did not have to show identification to register. *Id.*

The day after the search, on March 20, 2015, Officer Seiser spoke with Ms. Sedenquist again. *Id.* at 271. Ms. Sedenquist told Officer Seiser that the manager had told her that the manager knew Mr. Cruz as "JR." *Id.* The report bears out that the motel staff did *not* know Mr. Cruz by name, at least not the name Cruz. The officer showed only a single picture. *See id.* After the suggestive photo show, Ms. Sedenquist simply indicated she recognized the man in the picture as someone who stayed at the motel under the name Aldwin Nabors. *Id.* This set of facts undercuts the affidavit's statement that "Investigators contacted Red Roof Inn staff and they advised that Jimmy Renee Cruz Jr. had been staying at Room 129 at that location since 03/13/15." *Cf.* RE. 22-2: First Motion to Suppress, Exhibit #2 Affidavit for Search Warrant, PageID 55.

Courts may order *Franks* hearings based on discrepancies in eye-witness testimony and unsuccessful photo lineups. *See, e.g.*, *United States v. Bonds*, 12 F.3d 540, 568 (6th Cir. 1993). In *Bonds*, the district court ordered a *Franks* hearing when an affiant failed to include in the search-warrant affidavit information that (1) a witness said the suspect's car did not resemble the one she saw at the crime scene, (2) witnesses described a shorter and lighter perpetrator, and one of a different race, than the suspect, and (3) a photo lineup ended "unsuccessfully." *Id.* Ultimately, the district court overruled the defense's objections, and the appellate court upheld this

decision. *Id.* at 569. Omission of the identification information from the search-warrant affidavit did, however, warrant further investigation by the court.

In Mr. Cruz's case, the omission of the true nature of the interaction with the clerk warranted additional scrutiny, especially given the aspects of the investigation already discussed. In October 2014, the National Research Council of the National Academies released a report entitled Identifying the Culprit: Assessing Eyewitness Identification. A press release regarding the report is available on the National Academies webpage. *See* The National Academies of Sciences, Engineering, Medicine, http://www8.nationalacademies.org/onpinews/newsitem.aspx?RecordID=18891. The report details problems and issues with eyewitness identification, the need for standardized procedures for eyewitness identifications, and best practices for law enforcement and the courts. *Id.* Certain aspects of eyewitness identifications raise issues warranting reevaluation of the affidavit in Mr. Cruz's case.

The National Research Council report states that further research is needed to determine whether sequential or simultaneous lineups are more effective. Here, there was no lineup at all---only the presentation of a single photograph. With no "filler" photographs (photos of non-suspects), police could not gauge accurately the clerk's ability to identify Mr. Cruz accurately. The Innocence Project recommends that "fillers" resemble a suspect (for example, be of the same race, have facial hair).

See Innocence Project, http://www.innocenceproject.org/causes/eyewitness-misidentification. With no fillers at all here, the "photo show" was extremely suggestive. The National Research Council report also raises the issue of race. Defense counsel has been unsure of the hotel clerk's race. Counsel does emphasize that cross-racial identification apparently produces less accurate identifications.

The "photo show" here was extremely suggestive with the officer inquiring if the man in the photo was the man in the room. The interaction with the clerk carried contamination from the start. The officer presented the photo as the suspect. There was no "double-blinding" --- the officer knew the picture showed the suspect and conveyed that knowledge to the witness. *See* The National Academies of Sciences, Engineering, Medicine, http://www8.nationalacademies.org/onpinews/newsitem.aspx?RecordID=18891. The affidavit contained no discussion of the clerk's level of confidence in making the identification. Such an assessment and conveying of confidence levels is critical to obtaining accurate identifications. *See id.* The Innocence Project suggests that eyewitness misidentification is the number one contributor to wrongful convictions, as proved by DNA testing. *See* Innocence Project, http://www.innocenceproject.org/causes/eyewitness-misidentification.

Misidentification has played a role in more than 70% of convictions overturned by DNA testing throughout the nation. *Id.* To offer such a suggestive "photo show" and then proffer it in a search-warrant affidavit as motel staff advising

"that Jimmy Renee Cruz Jr. had been staying at Room 129" demonstrates either deliberate falsehood or a reckless disregard for the truth. *See Bonds*, 12 F.3d at 568 n.26 (discussing *Franks* standard). Mr. Cruz need only have shown this falsity/recklessness by a preponderance of the evidence. *Id.* The evidence he presented satisfied that standard. The district court erred in denying the *Franks* hearing.

C. The affiant's averments in the remainder of the affidavit cannot save the search warrant in this case; those averments are the fruit of Sgt. Turner's targeting of Mr. Cruz and carry the taint of the original tip.

In *Howard*, this Court addressed the effects of police corroboration of an investigation into a tip. *See Howard*, No. 14-6326, slip op. at 18. The additional statements based on an investigation into the alleged tip, however, cannot save the evidence in this case from suppression. Generally, if probable cause to support a search exists without the challenged false statement, a court will not conduct a *Franks* hearing. *Mastromatteo*, 538 F.3d at 545. In Mr. Cruz's case, the situation is a little different because the averments in the search-warrant affidavit following the false statement regarding the tip constitute fruit of the poisonous tree: they spring from Sgt. Turner's seeming false statement and personal vendetta against Mr. Cruz.

The exclusionary rule provides for suppression of all evidence obtained in violation of the Constitution. *United States v. Pearce*, 531 F.3d 374, 381 (6th Cir. 2008). And the doctrine of the "fruit of the poisonous tree" bars admission of

evidence "police derivatively obtain from an unconstitutional search or seizure." *Id.* The key question in analyzing a poison-fruit situation is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Id.* (citation omitted). In the circumstances at hand, Sgt. Turner targeted Mr. Cruz for personal revenge, fabricated a tip against him, and led an investigation that culminated in the search at the Red Roof Inn. All of the evidence flowing from Sgt. Turner's illicit targeting of Mr. Cruz qualifies as fruit of the poisonous tree and warrants suppression.

As discussed above, police misconduct is a major concern, and the corrupt actions of police officers may afford defendants extreme or less-common remedies. *See, e.g.*, *United States v. Bland*, No. 09-2504, slip op. at 2-3 (6th Cir. Sept. 26, 2011) (not for publication). In weighing the competing concerns presented by an exclusionary rule, the *Franks* Court did not disregard the burden of such a rule on society. *See Franks*, 438 U.S. at 166-67. But "[t]he requirement that a warrant not issue 'but upon probable cause, supported by Oath or affirmation,' would be reduced to a nullity if a police officer was able to use deliberately falsified allegations to demonstrate probable cause, and, having misled the magistrate, then was able to remain confident that the ploy was worthwhile." *Id.* at 168. The Court underscored deliberate misstatements as presenting special concerns. *See id.* at 170 (limiting

exclusion to deliberate misstatements and those made with reckless disregard for the truth).

This country's concept of "[l]iberty presumes an autonomy of self that includes freedom of . . . certain intimate conduct." *Lawrence v. Texas*, 539 U.S. 558, 562 (2003). An individual's rights under the Fifth Amendment's Due Process Clause include the right to engage in a wide range of sexual conduct without government interference. *Id.* at 578. The Constitution promises a sexual realm of personal liberty free of government intrusion. *Id.* Similarly, due process ensures the right to marry: marriage is a basic civil right fundamental to existence and survival. *Loving v. Virginia*, 388 U.S. 1, 12 (1967). The "[p]rivate, consensual sexual intimacy between two adult persons" is subject to constitutional protections and "may not be punished by the State." *United States v. Windsor*, No. 12-307, slip op. at 23 (U.S. June 26, 2013). This intimacy "can form 'but one element in a personal bond that is more enduring.'" *Id.* (quoting Lawrence, 539 U.S. at 567). Essentially, "moral and sexual choices" are constitutionally protected. *Id.* at 27.

Here, however, these choices led to a sort of conflict between Sgt. Turner and Mr. Cruz and, ultimately, to the investigation that led to charges against Mr. Cruz. Other officers' involvement in the investigation does not mitigate the taint of Sgt. Turner's actions. Officer Justin Wolbrink filed the affidavit in support of the search warrant. RE. 22-2: First Motion to Suppress, Exhibit #2 Affidavit for Search

Warrant, PageID 54. Officer Wolbrink cited in his affidavit Sgt. Turner's allegation of a confidential informant's tip. RE. 22-2: First Motion to Suppress, Exhibit #2 Affidavit for Search Warrant, PageID 55. In the district court, Mr. Cruz presented evidence that Sgt. Turner's co-workers knew of the relationship between Sgt. Turner and Ms. Downey and the complications with other men. RE. 45: Restricted-Access Document: Motion for Reconsideration, PageID 177; RE. 55: Order Denying Motion for Reconsideration, PageID 298. Ms. Downey confirmed that she visited Cedar Point with Sgt. Turner and his co-workers. RE. 45: Restricted-Access Document: Motion for Reconsideration, PageID 177. She affirmed that Sgt. Turner's "job didn't want him having anything to do with me, but, obviously, he still like pursued that anyways." *Id.*

Ms. Downey spent time with some of Sgt. Turner's friends and associates; she explained that officers besides Sgt. Turner appear to have been involved in other men's arrests (such as the arrest of Nutty; these men included other would-be romantic rivals). *Id.* at PageID 177-178. Sgt. Turner bought a car with Ms. Downey and later yelled at her because he had been "fired" or "suspended" over Ms. Downey allowing a felon in the car. *Id.* at PageID 178. These incidents demonstrate other officers' and the police department's likely awareness of Sgt. Turner's tumultuous relationship with Ms. Downey. Sgt. Turner expressed rage over his department's reaction to his relationship with Ms. Downey and it seems his co-workers knew of

the relationship and did not approve. *Id.* at PageID 178. Sgt. Turner followed Mr. Cruz, and even sat outside a barber shop when Mr. Cruz tried to get a haircut; Sgt. Turner drank and discharged his firearm on streets in Kalamazoo. *See id.* at PageID 178-179. Sgt. Turner did not act surreptitiously in using his police authority to pursue personal ends. Reason would suggest other officers noticed his very public actions.

Sgt. Turner used his position of authority to harass Mr. Cruz (and Ms. Downey) and intrude into their relationship. His co-workers and department seem to have known about the relationship and some of the relationship's volatility. While Mr. Cruz's rights related to intimacy did not give him a further right to break the law, they should have protected him from police interference with the relationship and fabricating evidence---an alleged tip---against him, especially as part of some lover's vendetta. The other supposed bases for a probable-cause determination in the search-warrant affidavit all flow from the fabricated "tip." These bases are "fruit of the poisonous tree."

This Court has been reluctant to expand the fruit-of-the-poisonous-tree doctrine. *See United States v. Warshak*, 631 F.3d 266, 294 (6th Cir. 2010) (expressing a sense "that it is unwise to extend the fruit-of-the-poisonous-tree doctrine beyond the context of constitutional violations"). Mr. Cruz's case, however, presents a situation with police overreaching and unconstitutional

meddling in the intimate sexual affairs of Ms. Downey and Mr. Cruz. Sgt. Turner targeted Mr. Cruz because of Mr. Cruz's relationship with Ms. Downey. This targeting led to fabrication of the tip and then to the search. The evidence derived from this illicit targeting should be suppressed as the fruit of the poisonous tree.

D. The good-faith exception to the warrant requirement does not apply to save this evidence from suppression; evidence suggests the other officers knew of Sgt. Turner's romantic involvement with Ms. Downey and this involvement's complications.

The good-faith exception to the exclusionary rule does not apply if: "(1) the supporting affidavit contained knowing or reckless falsity; (2) the issuing magistrate wholly abandoned his or her judicial role; (3) the affidavit is "so lacking in probable cause as to render official belief in its existence entirely unreasonable;" or (4) where the officer's reliance on the warrant was neither in good faith nor objectively reasonable." *United States v. Frazier*, 423 F.3d 526, 533 (6th Cir. 2005). The good-faith exception to the exclusionary rule only saves evidence from suppression under certain circumstances: it is not a perpetual trump. *See Warshak*, 631 F.3d at 282 n.13. The good-faith exception to the exclusionary rule "should not be a perpetual shield against the consequences of constitutional violations." *Id.*

The exclusionary rule aims at deterring police violation of people's Fourth Amendment rights. *Id.* at 289, 290. Here, the supporting affidavit seems to have contained a knowing or reckless falsity, as discussed above, and officer reliance on

the warrant lacked good faith and objective reasonableness. Sgt. Turner's seemingly false "tip" essentially vitiated good faith here. Other officers seem to have been aware of the relationship between Sgt. Turner and Ms. Downey---and that relationship's volatility. They were likely aware of the potential for Sgt. Turner to step out of bounds in the investigation and they should have demanded more regarding the alleged tip.

Sgt. Turner has a history of targeting men with whom Ms. Downey associates. It happened in this case with Mr. Cruz. Other officers have been involved in the arrests this targeting has led to; ultimately, other officers were involved in the arrest of Mr. Cruz. The warrant rested on a falsity, and reliance on the warrant did not come in good faith or with objective reasonableness. The good-faith exception attempts to foster true deterrence of police misconduct; it rests on the idea that the purpose of the exclusionary rule is to deter police misconduct and no deterrent value exists when the police act in good faith. *See Frazier*, 423 F.3d at 533. Sgt. Turner did not act in good faith in pursuing Mr. Cruz, and the other officers involved with Sgt. Turner likely knew of this bad faith. The good-faith exception to the exclusionary rule does not apply to rescue the fruits of the search in this case from suppression.

II. Mr. Cruz's sentence of 123 months constitutes an abuse of discretion and qualifies as substantively unreasonable.

In reviewing sentences, appellate courts consider procedural and substantive reasonableness. A sentence qualifies as procedurally reasonable only if the sentencing court: (1) properly calculated the applicable advisory guidelines range; (2) considered the full set of 18 U.S.C. § 3553(a) factors and the parties' arguments for a sentence outside the guideline range; and (3) adequately articulated its reasoning for imposing the sentence chosen, including the reasons for any rejection of the parties' arguments for an outside-guidelines sentence and any decision to deviate from the advisory guidelines. *United States v. Studabaker*, 578 F.3d 423, 431 (6th Cir. 2009). Substantive reasonableness involves consideration of "the substantive aspect of the sentence (i.e., the relationship between the length of the sentence and the strength of the reasoning under [18] § 3553(a))." *United States v. Cabrera*, 811 F.3d 801, 808-09 (6th Cir. 2016). In the context of substantive reasonableness, a presumption of reasonableness may apply to within-guidelines sentences. *See id.* at 809.

At Mr. Cruz's sentencing, the district court calculated Mr. Cruz's advisory guidelines as: offense level 17, criminal history category VI, range of 51 to 63 months. RE. 77: Sent. Trans., PageID 452. A five-year consecutive sentence applied for the firearm count under 18 U.S.C. § 924(c)(1)(A)(i). *Id.* at PageID 453 (also

clarifying misstatement and confirming that the consecutive sentence was five years, rather than two years). Mr. Cruz also faced state time for a parole violation: his federal sentence would not be the only sentence he would serve for the offense conduct. *See id.* at PageID 455 (anticipating potential four-year sentence).

Outside of the police conduct in the case, Mr. Cruz's offense hardly presents remarkable circumstances. It involves guns and drugs, some twenty-nine grams of heroin. *See id.* at PageID 459; *see also* RE. 71: Defendant's Sentencing Memorandum, PageID 425. This quantity represented a wholesale value of probably less than a thousand dollars. RE. 77: Sent. Trans., PageID 459. While the prosecution argued the quantity represented "a lot" of drugs, this argument does not hold in comparison to many federal cases. *See id.* For his conduct, Mr. Cruz will likely serve more than fourteen years in custody, with the state time. *See* RE. 66: Presentence Report, PageID 374, ¶ 60 (parole-revocation proceedings anticipated upon Mr. Cruz's release from federal custody).

Before this offense, Mr. Cruz's longest sentence came in 2008. RE. 66: Presentence Report, PageID 372, ¶ 52. He received a probation-revocation sentence of just under two years. *Id.* Mr. Cruz has not faced longer and longer sentences and simply ignored the escalating consequences of his choices. He has never received a sentence like the one he now faces. His sentence of one-to-forty years resulted in less than two years of custody. *Id.* A sentence in excess of ten years for twenty-

nine grams of heroin and to account for a criminal history that has resulted in sentences of two year's custody as a maximum is excessive. Such a sentence does not serve the purposes of sentencing articulated in 18 U.S.C. § 3553(a): it is excessive, creating unwarranted sentencing parity with far graver offenses; its disproportion does not promote respect for the law; and it is far more than necessary to deter Mr. Cruz, protect the public, and provide rehabilitation. The sentence is substantively unreasonable.

CONCLUSION

For these reasons, Mr. Jimmy Renee Cruz, Jr., asks this Honorable Court to reverse his conviction and remand for withdrawal of his guilty plea, as contemplated in his conditional plea agreement, and/or vacate his sentence and remand his case for resentencing.

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CERTIFICATE OF COMPLIANCE

In accordance with Federal Rules of Appellate Procedure 28(a)(10), 32(a)(7)(B), and 32(g)(1), and Sixth Circuit Rule 32(a), Mr. Cruz certifies that this brief contains fewer than 13,000 words. For this certification, counsel relies on the word-count tool of his word-processing system. *See* Fed. R. App. P. 32(g)(1). This brief contains 8,675 words.

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CERTIFICATE OF SERVICE

Undersigned counsel certifies that he filed this appellate brief through the Court's CM/ECF electronic system on February 1, 2017. *See* Fed. R. App. P. 25(d)(1)(B); 6 Cir. R. 25(f)(2). Notice of this filing will be sent through the CM/ECF system to all parties indicated on the electronic filing receipt, namely Assistant United States Attorney Mark V. Courtade. Parties may access this filing through the CM/ECF system.

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APPELLANT'S DESIGNATION OF RECORD

In accordance with this Circuit's Rules 28(b)(1)(A)(i) and 30(g)(1), Mr. Cruz includes this designation of relevant documents from the trial court.

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1	Indictment	1-3
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