NO. 10-20132

In the
United States Court of Appeals
for the Fifth Circuit

UNITED STATES OF AMERICA,
Plaintiff–Appellee,

v.

WASHINGTON MONTANYA
Defendant–Appellant.

On Appeal from the United States District Court
for the Southern District of Texas, Houston Division
No. 4:09-CR-368(2), Hon. Sim Lake, Judge Presiding

BRIEF OF APPELLANT WASHINGTON MONTANYA

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CERTIFICATE OF INTERESTED PARTIES

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The undersigned counsel of record certifies the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate their possible recusal or disqualification.

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3. Honorable Sim Lake – United States District Judge for the Southern District of Texas.

Seth H. Kretzer

STATEMENT REGARDING ORAL ARGUMENT

Appellant Montanya requests oral argument. Montanya believes that oral argument would be of material assistance to the Court in evaluating the district court's improper denial of Montanya's Motion to Suppress certain contraband found during a warrantless search of his home.

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STATEMENT OF JURISDICTION

The district court had jurisdiction under 18 U.S.C. § 3231. The district court announced its judgment on February 19, 2010, and entered its final judgment on the same day. RE.4.680.[1] Montanya filed a Notice of Appeal on February 19, 2010. RE.2; FED. R. APP. P. 4(b)(1)(A). This Court has jurisdiction over Montanya's appeal under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

[1] Docket entries 1-138 comprise the "Record on Appeal." Docket entries 142-202 are paginated separately beginning again with USCA5 1. Documents from docket entries 1-138 are designated the "Record on Appeal" and referred to herein as R. [bates number]. Documents from the smaller range of docket entries 142-202 are paginated "Electronic R. [bates number]." Cites to the record excerpts are in the form RE.[tab number].[bates number].

STATEMENT OF ISSUES FOR REVIEW

1. Whether evidence found during a warrantless search of Montanya's home should have been suppressed.

STATEMENT OF THE CASE

On July 1, 2009, Washington Montanya and two co-defendants, Mauricio Torres and Armando Figueroa, were charged by Indictment with drug offenses redounding to bundles of cocaine found in a cardboard box at Montanya's home. RE.3. Count 1 charged conspiracy to possess with intent to distribute a quantity of five kilograms or more of cocaine, and 100 grams or more of heroin, in violation of 21 U.S.C. §§ 846, 841(a)(1), 841(b)(1)(A), and 841(b)(1)(B). *Id*. at 12-13. Count 3 charged possession with intent to distribute a quantity of five kilograms or more of cocaine in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), and 18 U.S.C. § 2. *Id*. at 14. Count 4 charged Montanya alone with possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A)(i).

Montanya filed a motion to suppress evidence seized pursuant to a warrantless search of his home notwithstanding an executed consent form. RE.5. This evidence included 19.8 wrapped kilograms of cocaine, $14,140 in cash, a scale, and vehicles with aftermarket changes. On October 8, 2009, the district court set the motion for hearing. R.476-606. After hearing from the investigating and arresting officers that their real reason for affecting with in the time and manner in which it occurred was to "get Mr. Montayna to cooperate with us", R.524, the district judge explained, "At a minimum,

they had sufficient information to make a *Terry* stop to detain Mr. Montayna for further questioning and to place him in custody until they further investigated the matter." RE.6.602.

Notwithstanding denial of the motion to suppress, the district judge ordered supplemental briefing on two additional consent-type issues triggered by the testimonies of Montayna and his wife, Cindy Williams, at the hearing.[2] R.603-604. Montanya's supplemental brief reiterated his suppression arguments *writ large*. RE.7. To clarify the scope of his reasoning, the district judge issued a written order denying the motions to suppress. RE.8. In the initial oral order, the district court explained, "I don't see that the Government is arguing exigent circumstances here." R.599-600. By contrast, the written order devoted substantial attention to exigency. RE.8.432-433.

Later that same day, Montanya and the prosecution reached a written plea agreement in which Montanya conditionally pled guilty to Count 3, RE.9, expressly reserving the right to appeal the order denying his motion to suppress. R.441. Reciprocally, the government agreed to dismiss Counts 1 and 4 and not to oppose a request for acceptance of responsibility pursuant

[2] The testimonies of Montayna and his wife, Cindy Williams, are not included in the same transcript as the officers' testimony. The couple's testimony is located at R.225-275.

to U.S.S.G. § 3E.1.1(b). *Id*. at 440. Immediately thereafter, the District Court held a re-arraignment in which Montanya pled guilty to the possession count. Electronic R. 42-72.

The Presentence Report for this case was filed on February 12, 2010. (Doc. No. 105). The Base Offense Level of 34 was predicated on 19.8 kilograms of cocaine. *Id*. at ¶31. Because Montanya was arrested with a firearm in his possession, a two-level enhancement was assessed pursuant to U.S.S.G. §2D1.1. *Id*. at ¶32. The PSR urged a three-level reduction for acceptance of responsibility. *Id*. at ¶37. For these reasons, the PSR urged the conclusion that Montanya's Total Offense Level was thirty-three and his Total Criminal History Score was 4 (Category III), corresponding to a guideline range of 168 months to 210 months. *Id*. at ¶ 46. However, because Montanya had previously been convicted of a felony drug offense, the appurtenant sentencing enhancement yielded a statutory minimum of 20 years pursuant to 21 U.S.C. §841(b)(1)(A).

Sentencing was held on February 19, 2010. Electronic R. 128-138. Judgment was entered on February 24, 2010. RE.4. Montanya had earlier filed his Notice of Appeal on February 19, 2010. RE.2. The court-appointed trial counsel moved to withdraw at the sentencing hearing.

Electronic R. 138. Thereafter, new counsel was appointed to prosecute this appeal. Electronic R. 15.

STATEMENT OF THE FACTS

On April 29, 2009, Montanya was arrested by a team of officers, consisting of Houston Police Department officers and DEA agents, for possession with the intent to deliver cocaine. R.492. This arrest stemmed from an investigation into another man, Mauricio Torres, who was the initial target in an ongoing investigation. *Id*. at 482. Torres had been under investigation since 2007, and had been recorded selling cocaine and heroin to informants on at least two prior occasions. *Id*. at 482-89. By April of 2009, the government had tapped Torres' phone and was listening to his conversations. *Id*. at 489.

In a series of phone calls on April 28, Torres arranged for the sale of 20 kilograms of cocaine to take place at 4:00 p.m. the following day. *Id*. On April 29, Torres made his way to a meat market in west Houston, where he was picked up by a red Ford Explorer. *Id*. at 494. Around 3:45 p.m., Torres called the buyer who informed Torres that he was waiting at an AutoZone near the meat market. *Id*. At this point, the red Explorer carrying Torres arrived at the AutoZone and briefly pulled up next to a Toyota Sequoia,

which police would later find out contained Montanya and his co-defendant, Armando Figueroa. *Id*. at 97-98.

After a few minutes, the Explorer and Toyota Sequoia exited the AutoZone parking lot together. *Id*. The vehicles traveled a short distance and arrived at 11615 Sandstone, where they remained from 3:56 to 4:45 p.m. *Id*. at 499-500. While at the Sandstone house, government agents were unable to see if anything was placed in either of the two vehicles. *Id*. At 4:45, the Toyota Sequoia (this time containing only Figueroa) left the residence at 11615 Sandstone and headed to a Home Depot. Figueroa waited alone at this Home Depot for 50 minutes until the red Explorer arrived and parked adjacent thereto. *Id*. at 516.

Montanya exited the Explorer, got into the Toyota Sequoia, and departed along with Figueroa for Montanya's house on Windfern Trace Rd. Windfern Trace is in a gated community; a code is required to enter. *Id*. at 519. At the point in time when the agents arrived at 6:30 p.m, the observing government agents had not seen any money or drugs being exchanged during the 2.5 hours since they first perceived Montanya. To the contrary, their suspicions that a drug deal had transpired rested solely on the previous day's phone calls and the movements they witnessed on April 29. *Id*. at 515-518.

By the time Agent Brad Sowell arrived at Windfern Trace, the Toyota Sequoia had arrived and backed up to the attached two-car garage. From his vantage point, Agent Sowell could only see the driver side of the vehicle. Agent Sowell also saw Figueroa offloading a box from the back of the vehicle into the garage. *Id.* at 555-56. Agent Sowell relayed this information to the case agent, Sidney Veliz. Based on these events "a decision was made to approach the vehicle." *Id.* However, 'approaching the vehicle' was inextricably intertwined with approaching Montayna's residence without a warrant for the simple reason that the car was legally parked in the garage. *Id.* at 567.

According to Agent Veliz, who made the decision to approach Montanya's residence, there was no indication that the surveillance had been discovered by any of the defendants in this case. *Id.* at 520. Nevertheless, the agents moved in "to get control" of an indefinable and nebulous danger. *Id.* at 523. In this vain, the agents volunteered that they "thought maybe something had happened" and they "wanted to investigate that." *Id*. Finally, Agent Veliz admitted that he could have made the decision to wait and get a warrant from a magistrate before approaching the residence, but he decided that "maybe [he could] get Mr. Montanya to cooperate with us" so he gave the orders to approach the house regardless. *Id.* at 524.

The first officers to approach Montanya's residence were Agents Sowell and Terry. *Id.* at 556-57. Both agents approached with their guns drawn. Agent Sowell first came upon Figueroa who was standing in the driveway next to the vehicle and announced his presence telling the co-defendant "raise your hands." *Id.* At the same time, Agent Terry approached Montanya and called out to him in a similar fashion. *Id.* at 65. As Agent Terry approached Montanya, he heard the sound of metal scratching across the garage floor. This metal was later determined to be a hand gun. *Id.* at 543.

Immediately after Montanya and Figueroa were detained, other agents arrived on the scene and both suspects were handed off to the additional officers. *Id.* at 59. At this point, Agents Sowell and Terry entered the residence from an open door in the garage. *Id.* Their stated reason for this entry was to perform a protective sweep. *Id.* As the agents entered the house they came into the kitchen, were they saw the box they believed had been removed from the back of the Toyota Sequoia. *Id.* at 560.

During their sweep of the house the agents came to a set of stairs, at the top of which they found Montanya's wife, Cindy Williams. *Id.* at 561. The agents asked Williams to come downstairs and sit at the kitchen table. Officer Williamson asked if she knew what was in the box; she said no. *Id.*

at 579. This officer asked Williams for consent to search her house, which she gave by signing a consent form. *Id.*

While the initial agents to arrive on scene were conducting the sweep of the residence, Montanya was being detained by Agent Veliz, who had arrived after the initial entry into the garage. *Id.* at 507. Veliz forced Montanya to the ground, hand-cuffed him, and patted him down. After the house was cleared, Agent Veliz moved Montanya to the back of a patrol car. *Id.* at 507. At the patrol car, Agent Veliz explained to the Defendant why they were there and removed his handcuffs. *Id.* It was at this point that Montanya executed a consent form for the search of his house. *Id.* at 508. Inside the box were 'bricks' of substance that field tested positive for cocaine. *Id.* at 513.

SUMMARY OF THE ARGUMENT

Montanya is entitled to having his conviction vacated and his sentence reversed because the district court incorrectly denied Montanya's motion to suppress evidence. It was uncontroverted that there was no search or arrest warrant for Montanya or his home and garage. For this reason, it was the government's burden to show an exception to the warrant requirement.

The district court incorrectly trained its analysis on only one of the five factors impinging on exigent circumstances. Nevertheless, all five factors militated against a finding of exigency. The officers' unambiguous testimony at the suppression hearing established that Montanya had not perceived their surveillance. For this reason they necessarily were in no danger from Montanya or anyone else, and there was no testimony that Montanya had any propensity (and certainly no motivation) to destroy the narcotics unlawfully seized.

The district court alternatively ruled that consent forms executed by Montanya and his wife validated the prior impermissible search. However, the consent given by the Montanyas was tainted by the unconstitutional police conduct, decidedly not an independent act of free will, and was therefore invalid.

STANDARDS OF REVIEW

Motion to Suppress

"In an appeal of a denial of a motion to suppress evidence, 'we review the district court's factual findings for clear error and its legal conclusions, including its ultimate conclusion as to the constitutionality of the law enforcement action, *de novo*.'" *United States v. Harris*, 566 F.3d 422, 433 (5th Cir. 2009) (quoting *United States v. Chavez*, 281 F.3d 479, 483 (5th Cir. 2002)). "The evidence presented at the suppression hearing must be viewed in the light most favorable to the prevailing party." *Id*.

"Warrantless searches of a person's home are presumptively unreasonable unless the person consents, or unless probable cause and exigent circumstances justify the search." *United States v. Gomez-Moreno*, 479 F.3d 350, 354 (5th Cir. 2007).

ARGUMENT

I. MONTANYA'S ARREST INSIDE HIS HOME VIOLATED THE FOURTH AMENDMENT WHEN NO EXIGENT CIRCUMSTANCES WERE APPURTENANT TO THE PROBABLE CAUSE

A. Fourth Amendment Protection Extends to the Garage in Which Montanya Was Seized

Absent a warrant, an arrest must be predicated on probable cause and exigent circumstances. *Kirk v. Louisiana*, 536 U.S. 635, 638 (2002) ("As *Payton* makes plain, police officers need either a warrant or probable cause plus exigent circumstances in order to make a lawful entry into a home."). Notwithstanding Agent Veliz's testimony that the decision to arrest Montanya in the time and way effectuated was simply to see if "we can get Mr. Montanya to cooperate with us, and he did", R.524, Montanya does not contest that the officers' daylong surveillance elicited probable cause for his arrest. *Atwater v. Lago Vista*, 532 U.S. 318, 354 (2001). For these reasons, it is tautological that Montanya also does not contest that the officers had reasonable suspicion for a *Terry* stop.[3]

But while officers may affect an arrest based on probable cause without a warrant in public, the same is not true when persons are inside their own home. *Payton v. New York*, 445 U.S.573, 576 (1980) ("the

[3] The district court's oral order made reference to *Terry*. RE.6.602. However, *Terry* was not addressed in the subsequent written order. RE.8.

reasons for upholding warrantless arrests in a public place do not apply to warrantless invasions of the privacy of the home."). Montanya was not seized in the house proper, but rather in an attached garage from which a door led directly into the home's interior. However, garages have long been protected by the Fourth Amendment. *Taylor v. United States*, 286 U.S. 1 (1932) (holding that search of garage without a warrant violated the Fourth Amendment); *see also United States v. Oaxaca*, 233 F.3d 1154, 1157 (9th Cir. 2000) ("The Supreme Court has long extended the Fourth Amendment's protection to garages.").

B. The Officers Perceived No Exigent Circumstances From Their Surveillance Position

"[T]he relevant point in determining whether exigent circumstances existed was not at the moment when the officers confronted [the suspect] from the patio, but, rather, before he was aware of their presence." *United States v. Vega*, 221 F.3d 789, 799 (5th Cir. 2000) (reciting the facts which predicated reversal of the denial of suppression in *United States v. Munoz-Guerra*, 788 F.2d 295 (5th Cir. 1986)). This legal principle is particularly salient to Montanya's suppression motion, because according to Agent Veliz (who made the decision to approach the Montanya's residence) there was no indication that the surveillance had been discovered by either Montanya or Figueroa. *Id*. at 520. Despite this key fact, agents moved in "to get control"

of an entirely nonviolent and perfectly subdued situation they were observing from afar. *Id*. at 523. Describing this nebulous 'danger' Agent Veliz explained, [he] "thought maybe *something* had happened. So we wanted to investigate *that*." *Id.* (emphasis added). Finally, Agent Veliz agreed that he could have made the decision to wait and get a warrant from a magistrate before approaching the residence but he decided that "maybe [he could] get Mr. Montanya to cooperate with us" so he gave the orders to approach the house anyway. *Id*. at 524.

The first officers to approach Montanya's residence were Agents Sowell and Terry. *Id*. at 556-57. Both agents approached with their guns drawn. Agent Sowell first came upon Figueroa, who was standing in the driveway next to the vehicle, and announced his presence telling the co-defendant "raise your hands." *Id*. As agent Sowell was detaining Figueroa, Agent Terry, also with gun drawn, approached Montanya and called out to him in a similar fashion. *Id*. It was then that Montanya threw his gun across the garage floor. Until that point in time, none of the agents had any knowledge that Montanya or Figueroa had a weapon. *Id*. at 543.

C. The District Court's Order Trained On Only One of the Five Factors To Be Considered in Establishing Exigency

1. Five Factors

To determine whether exigent circumstances existed, this court has instructed trial judges to look to the following non-exhaustive list of factors:

> 1. the degree of urgency involved and the amount of time necessary to obtain a warrant;
>
> 2. the reasonable belief that narcotics are about to be removed;
>
> 3. the possibility of danger to the police officers guarding the site of contraband while a search warrant is sought;
>
> 4. information indicating that the possessors of the narcotics are aware that the police are on their trail; and
>
> 5. the ready destructibility of the contraband and the knowledge that efforts to dispose of narcotics and to escape are characteristic behavior of persons engaged in the narcotics traffic.

United States v. Timoteo, 353 Fed. Appx. 968, 972 (5th Cir. 2009).

The district judge's oral order at the conclusion of the suppression hearing made no mention of exigent circumstances. RE.6.601-602 (transitioning directly from conclusions regarding probable cause to the issue of consent). Although the subsequent written order did not enunciate this court's well-recognized five-factor test for exigency, *United States v. Gomez-Moreno*, 479 F.3d 350, 354-355 (5th Cir. 2007), the court nonetheless addressed these circumstances in passing:

> [B]ecause the officers had reason to believe that there might be drugs in the house, exigent circumstances existed to support a search of the house for drugs or drug-related evidence that could be disposed of or hidden before the officers could obtain a warrant.

RE.8.433.

As will be explained in Part I.C.e., *infra*, the only exigency factor which the district court specifically addressed was the potential destruction of the contraband. Nevertheless, all five factors inveigh against a finding of exigency, so each will be addressed in turn:

a. Degree of Urgency

The "degree of urgency" militates decisively against a finding of exigent circumstances. Agent Veliz volunteered that he could have easily ascertained a warrant from a magistrate before approaching the residence. *Id.* at 524. "[T]he opportunity to obtain a warrant is one of the factors to be weighed in determining reasonableness." *Vale v. Louisiana*, 399 U.S. 30, 40 (1970) (Black, J., dissenting). Agent Veliz was clear that the decision not to obtain a warrant was made of his own volition.

b. Imminent Removal of the Narcotics

No officer testified that he thought the narcotics would be moved in the short-term. To the contrary, the officers' initial theory of Montanya's purchase from Torres urged that Montanya intended to winnow the narcotics

for further distribution. The time required to measure and change the composure of drugs (much less to arrange for future buyers) countermands any contention of imminent removal.

c. Danger to Police

Montanya's home was in a gated community. Agent Ferner testified that the area was so secure the investigators actually had trouble getting in:

> Like we said, it's a gated community, and it took a while to get some of the – I'm not sure if – I think I had to have -- another vehicle had come out of the gate for me to go in. So, it took a little while to get inside that gate.

R. 551-552.

Moreover, the officers arrived at Montanya's home in the broad daylight of early evening. Unlike a proverbial midnight stakeout in a dark alley, Montanya (and his neighbors) were about and clearly viewable to law enforcement.

d. Awareness of Police Presence

The arresting officers clearly testified that neither Montanya nor Torres had perceived their presence at the time the decision was made to affect the arrest:

> Q. So, they were taking their time moving the vehicles around; am I correct?

A. Yes.

Q. So, there's no indication that you-all -- that surveillance had been detected; am I correct?

A. Yes, sir.

R. 520-521.

Since neither Montanya nor Torres knew of the officers' presence, it would have been impossible for either to pose a risk thereto.

e. Destruction of the Narcotics

The court acknowledged that "disposing of 20k of wrapped cocaine might have taken some time" but nevertheless concluded that "if the officers did search for and seize the gun and the cocaine prior to obtaining Montayna's consent, their actions would have been justified by exigent circumstances." RE.8.443. In other words, the district court's conclusions about exigency rested on the potential destruction of the drugs in Montanya's house, yet acknowledged that 20kg of cocaine could not be disposed of with any great speed. It is extremely curious why any objective observer would assign such a destructive motive to Montanya; to the contrary, the officers' theory of their daylong surveillance posited that Montanya bought these drugs for resale.

D. Any Exigency Specific to the Gun Was Entirely of the Officers' Own Making

This court has long rejected exigency arguments based on circumstances of the agents' own making. *United States v. Thompson*, 700 F.2d 944, 950 (5th Cir. 1983) ("The agents cannot justify their search on the basis of exigent circumstances of their own making."). The district court's exigency determination contravened this legal principle in its application to any danger posed by Montanya.

For example, the district judge declared, "[t]he officers had a strong reason to suspect that a large drug transaction had taken place and that at least one of the participants had possession of a firearm,…". (RE.8.432). "These circumstances also justified seizure of the firearm that the officers located under one of the cars in the garage." *Id*. at 433.

Montanya does not dispute that the agents' daylong surveillance animated the officers' "strong reason to suspect that a large drug transaction had taken place." However, even when viewed in the light most favorable to the government, it does not follow that they also had a strong reason to suspect "that at least one of the participants had possession of a firearm." No officer testified that he saw Montanya or Figueroa with a firearm at any point before Montanya threw his weapon down in the garage after being seized. "A 'mere hunch' will not suffice…", *United States v. Zavala*, 541

F.3d 562, 574 (5th Cir. 2008), and any *a priori* suspicion of Montanya's gun possession on the part of the officers failed to rise above that level of conjecture.

II. THE PLAIN VIEW DOCTRINE FAILED TO JUSTIFY SEARCH OF THE BOX SUBSEQUENTLY FOUND TO CONTAIN COCAINE

A. The Box Was Situated in An Unremarkable and Ordinary Way

In the introductory overview section of its written order, the district court did not utilize the words "plain view."[4] Nor did the district court expressly utilize the term "plain view" in the section of its order expounding on how the officers' reasonable beliefs after their protective sweep obviated the need for a warrant regarding specific contraband, yet the implication was clear:

> In addition, after the protective sweep the officers reasonably concluded that the cardboard box in the kitchen contained cocaine. A warrant was not required to seize an illegal substance such as cocaine.

RE.8.433.

The term "plain view" appears for the first time in a section of the order dedicated to consent. *Id*. at 435. Montanya's arguments concerning consent will be addressed in Part III, *infra*, but the plain view exception must be addressed at present.

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[4] RE.8.427 ("The relevant exceptions for this action are protective sweep, exigent circumstances, and voluntary consent.").

The district court's conclusion concerning the plain view exception rests on an incorrect characterization of the state this box was found in. Agent Ferner explained:

> A. On the box that we recovered that had the cocaine located inside of it, on the outside of the box it had -- was addressed to Washington Montanya or Montanya Washington.
>
> Q. Written on there or how was it?
>
> A. No. It was actually printed on there from a package.
>
> Q. Shipping label?
>
> A. Yes, sir.
>
> Q. Okay. That's the defendant's name -- was on the box?
>
> A. Yes, one of them.
>
> Q. Okay. Was the box -- was anything taken out of the box? Was anything removed from the box?
>
> A. We knew there was 20 packages. It was opened. When I opened it further, when we counted the bundles, there were 20…

R.546.

Agent Ferner's testimony makes clear that this box was an ordinary container bearing a mailing label. Moreover, the packages therein were not visible unless and until the officers plied the box open and removed its contents. Montanya does not dispute the general legal principle that a lawful search is not circumscribed because further acts of opening may be

necessary. *United States v. Ross*, 456 U.S. 798, 820-21 (1982). However, Montanya does dispute that there was an immediately apparent incriminating nature about this box.

B. The Box's Incriminating Character Was Not Immediately Apparent

This court has repeatedly explained that in order for evidence to come within the ambit of the plain view doctrine, its incriminating character must be "immediately apparent." *United States v. Wilson*, 36 F.3d 1298, 1306 (5th Cir. 1994) (reversing denial of suppression when the incriminating nature of stolen checks was not apparent until the point of verification, and furthermore the names on these checks were not visible because of a check cover). Similarly, in *United States v. Coleman*, this court explained that the plain view exception did not justify search of a leather pouch containing a gun as it was not inherently incriminating. 969 F.2d 126, 131 (5th Cir. 1992) (concluding that that the evidence was nevertheless otherwise admissible under *Terry*). *See also United States v. Rutkowski*, 877 F.2d 139, 144 (1st Cir. 1989) (plain view exception did not justify search for stolen platinum as it was not immediately apparent from the outside of the envelope that the platinum was inside).

Montanya's box is highly correlative to *Rutkowski*'s envelope; a labeled cardboard box does not impart an immediately apparent

incriminating nature. *Accord United States v. Portillo-Aguirre*, 311 F.3d 647, 657 (5th Cir. 2002) ("[N]either the bag nor its location suggested that criminal activity was afoot."). For this reason, the plain view doctrine does not justify the warrantless search of the box found in Montanya's home.

III. MONTANYA'S CONSENT WAS INSUFFICIENTLY ATTENUATED TO CLEAVE THE CONSTITUTIONAL VIOLATION FROM THE RESULTING SEIZURE

A. No Independent Act of Free Will

The district court regarded the Montanyas' "consent" as the cynosure of the government's resistance to application of the exclusionary rule. R.600. The admissibility of challenged evidence "turns on a two-pronged inquiry: 1) whether the consent was voluntarily given; and 2) whether the consent was an independent act of free will." *United States v. Hernandez*, 279 F.3d 302, 307 (5th Cir. 2002).

Montanya testified that the police used threats and pointed their weapons at him to gain his consent. R.247-263. Disregarding this testimony, the district court resolved factual contradictions in favor of the officers. R.602-603 (conducting six-part inquiry required by *United States v. Gonzales*, 79 F.3d 413, 421 (5th Cir. 1996)). However, even when the facts are viewed in the light most favorable to the government, Montanya's

consent does not validate the prior impermissible search (see Parts I and II, *supra*) because there was no independent act of free will.

B. Three-Part Test

A three-factor test governs whether consent was an independent act of free will:

1) the temporal proximity of the illegal conduct and the consent;

2) the presence of intervening circumstances; and

3) the purpose and the flagrancy of the initial misconduct.

United States v. Hernandez, 279 F.3d 302, 307 (5th Cir. 2002).

The Supreme Court has emphasized that purpose and flagrancy should be "particularly" addressed. *Taylor v. Alabama*, 457 U.S. 687, 698 (1982); *Dunaway v.New York*, 442 U.S. 200, 218 (1979); *Brown v. Illinois*, 422 U.S. 590, 604 (1975).

1. Temporal Proximity

In reaching its determination that the temporal proximity factor was "not decisive", the district court concluded "[t]he allegedly illegal action and the consent were therefore relatively close in time.", RE.8.434, assigning the points at which the officers made their illegal entry at 6:30 p.m. and Montanya's execution of his form at 6:45. *Id*. When a defendant is arrested and then gives an inculpatory statement within a few hours of arrest, that

temporal proximity weighs against the government. *See, e.g., Brown*, 422 U.S. at 604 (less than two hours not sufficient to purge taint); *Taylor*, 457 U.S. at 691 (six hours not sufficient). Since both Montanya and his wife executed consent forms almost immediately after the illegal entry into their home, the first *Hernandez* factor militates decisively in favor of insufficient attenuation.

2. Intervening Circumstances

To reach its determination that the intervening circumstances factor was "likewise not decisive", the district court observed:

> [t]he significant intervening event was that Montayna signed a consent to search at 6:45 and was then brought inside the house to bring the officers to his bedroom.

RE.8.434.

Montayna did not simply execute the form at 6:45 and return to the house. To the contrary, Montanya was handcuffed, his body searched at gunpoint, and he was removed to a police car where he was presented with a consent form. R.506-508.

This court has repeatedly held that there is no intervening cause where the initial stop led directly to search and discovery of contraband. *United States v. Miller*, 146 F.3d 274, 280 (5th Cir. 1998) (finding no intervening circumstances where initial stop led directly to search and discovery of drugs

in motor home); *United States v. Portillo-Aguirre*, 311 F.3d 647, 659 (5th Cir. 2002) (holding no intervening causes occurred between illegal detention and questioning defendant about luggage). The second *Hernandez* factor militates decisively against a finding of intervening cause.

3. Purpose and Flagrancy

a. The District Court Contradicts Itself With Regards to the Officers' Purpose

The district court concluded that "the alleged violation was not particularly flagrant" because "the purpose of the illegal search and seizure, if it occurred, was both to ensure the safety of the officers and to secure the drugs and drug-related equipment before the suspects could dispose of them." RE.8.435. Each of these conclusions collapses of their own weight. With regards to officer safety, the agents' testimony made clear that they were in no danger prior to the point they affected Montanya's arrest. See Part I, *infra*. Moreover, the district court countermanded its conclusion about impending disposal of the narcotics in a different section of the same written order: "The court recognizes that disposing of 20k of wrapped cocaine might have taken some time…". RE.8.433.

b. Flagrant Misconduct is Demonstrated By The Agents' Decision to Abjure A Warrant So That Montanya Could Be Coerced Into Cooperating

Agent Veliz volunteered that he could have easily ascertained a warrant from a magistrate before approaching the residence. *Id.* at 524. No warrant was sought because the agents wanted Montanya to cooperate, which he did. *Id*. However, they way in which Montanya cooperated were by giving his consent incident to a Constitutional violation.

In *Gomez-Moreno*, this Court explained the concept of flagrancy when the defendant appeal from a denial of her motion to suppress the fruits of a warrantless knock-and-talk investigation that occurred after the defendant had consented to a search:

> When officers demand entry into a home without a warrant, they have gone beyond the reasonable 'knock and talk' strategy of investigation. To have conducted a valid, reasonable 'knock and talk,' the officers could have knocked on the front door . . . and awaited a response; they might have then knocked on the back door . . . . When no one answered, the officers should have ended the 'knock and talk' and changed their strategy by retreating cautiously, seeking a search warrant, or conducting further surveillance.

479 F.3d 350, 355-56 (5th Cir. 2007); see also *United States v. Hernandez,* 2010 U.S. App. LEXIS 18057, *7-10 (5th Cir. 2010) (flagrancy demonstrated by search following failed knock-and-talk investigation).

At its core, this case presents the situation where an agent with 17 years of experience in law enforcement raided a home without a warrant

despite the fact that he believed one could have been obtained easily. It is uncontroverted that surveillance had not been revealed to Montanya or Figueroa. Nor was any agent in danger as they observed Montanya in broad daylight in this gated community. This conduct is far more flagrant than that found to necessitate reversal in *Gomez-Moreno*. For these reasons, the government failed to show the execution of the consent forms were sufficiently attenuated from illegal arrest and should have been suppressed.

CONCLUSION

For the foregoing reasons, Montanya's conviction (based upon a conditional plea) should be vacated and his sentence reversed.

Respectfully submitted,

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1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because this brief contains 6,099 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).
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Date: September 14, 2010

Seth H. Kretzer

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I certify that the Brief of Appellant was filed with the Court by U.S. Mail, and in electronic format through the ECF system, on the 14th day of September, 2010. An electronic copy of the brief was served on counsel of record, as listed below, by electronic mail and through the E.C.F. system, on the same date:

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I certify that one copy of the Brief of Appellant and one copy of the Record Excerpts were served on Washington Montanya, Register No. 99179-179, on the 14th day of September, 2010, at the address listed below, by U.S. Mail:

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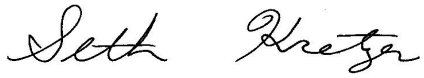

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