06-4813-cr

To Be Argued By:
JAMES R. SMART

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 06-4813-cr

UNITED STATES OF AMERICA,
Appellant,

-vs-

MARINO DELOSSANTOS,
Defendant,

FRANCISCO RODRIGUEZ,
Defendant-Appellee.

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

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REPLY BRIEF FOR THE UNITED STATES OF AMERICA

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Defendant's argument is no more compelling than the flawed suppression ruling of the district court. Like the district court, defendant analyzes probable cause factors individually, in isolation from their contextual whole, attempting to reduce each to a possible innocent explanation. Like the district court, defendant addresses probable cause factors selectively, entirely omitting some

and failing to give proper consideration to the trained inferences of the officers and agents. Like the district court, defendant concludes on the basis of this improper, selective "divide-and-conquer" analysis that the agents supposedly arrested him merely because he was "in the car" when Delossantos arrived at the prearranged drug deal. D. Br. at 11-12. He claims that mere proximity to a criminal is an invalid basis for an arrest under *United States v. Di Re*, 332 U.S. 581 (1948), and, thus, he argues, his voluntary consent to search his apartment is supposedly tainted. Therefore, he asserts that the paraphernalia seized from the kitchen cabinets and counter-tops in his own apartment, the drugs seized from his kitchen vent, and the other evidence seized during the search should be suppressed. D. Br. at 11-12. This argument fails.

Insofar as defendant's reasoning is largely coterminous with the rationale of the district court, the government principally relies on its initial brief. The government respectfully submits, however, that consideration of the following seven points highlights the failure of defendant's argument.

I. Defendant Has No Response to the Fact that the District Court Engaged in an Inappropriate, "Divide-and-Conquer" Analysis of the Probable Cause Factors.

Defendant has nothing to say about the district court's inappropriate consideration of individual probable cause factors separately, in a "divide-and-conquer" methodology that misapplied the totality of the circumstances test. *See*

United States v. Arvizu, 534 U.S. 266, 273-74, 277 (2002) (explicitly rejecting a "divide-and-conquer" approach in analyzing the factors making up the totality of the circumstances). The government identified this as the second issue of the appeal and devoted Part II of its argument to this point. Yet defendant has not responded, not even attempting to argue that the district court considered all the probable cause factors collectively and in relation to each other. He essentially concedes – as he must – that the district court engaged in the improper, divide-and-conquer method of analysis proscribed by *Arvizu*.

The district court's one-by-one, isolated analysis of probable cause factors "seriously undercut[s] the 'totality of the circumstances' principle." *Id.* at 275. This failure, alone, constitutes reversible error. *Id.; cf. United States v. Elmore*, 482 F.3d 172, 181, 183 (2d Cir. 2007) (reversing suppression ruling where court focused on a categorical determination regarding an informant's status as anonymous or not, rather than examining the totality of the circumstances in context).

II. Defendant Inaccurately Asserts That the Police "Knew Nothing about Him" Other than His Proximity to Delossantos, When the Totality of the Circumstances Included Much More, Giving Rise to Probable Cause.

Defendant's assertion that at the time of his arrest the agents "knew *nothing* about him," and arrested him merely because he was "in the car" when Delossantos arrived at

the prearranged drug deal, D. Br. at 11-12 (emphasis added), is grossly inaccurate. Even a cursory consideration of the totality of the circumstances, together with the reasonable inferences drawn by the trained law enforcement officers based on this cumulative information, *Arvizu*, 534 U.S. at 273-74, 277; *United States v. Cortez*, 449 U.S. 411, 418 (1981), belies this assertion.

In fact, prior to arresting Rodriguez the agents knew that: (1) he drove Delossantos directly to the planned transaction from the house identified as the source of, or storage area for, the narcotics; (2) moments before the deal, while sitting next to Rodriguez, Delossantos uttered suspicious instructions to the undercover to follow the car driven by Rodriguez; (3) Delossantos did not specify where he and Rodriguez were going, but stated he was uncomfortable meeting at the gas station due to the number of people there; (4) Delossantos was nervous about the transaction, suspecting possible police involvement; (5) Delossantos was capable of driving himself from Howard Avenue – which was only five minutes away – and had actually driven this route alone the preceding day; and (6) Rodriguez had driven Delossantos from the address where the drugs were stored a few hours before the planned transaction, and then got back in the car to drive him directly to the prearranged transaction. Given this information and viewed in light of their training and experience, the officers and agents reasonably concluded that Delossantos would not bring an innocent party and potential witness to a drug deal or involve such a person in his preparations, *Maryland v.*

Pringle, 540 U.S. 366, 373 (2003) ("[D]rug dealing [is] an enterprise to which a dealer would be unlikely to admit an innocent person with the potential to furnish evidence against him."), and that the person he brought along was likely present to provide assistance, support and protection for the deal. JA114-15, 185-86, 206-08.

Defendant's assertion that the arresting officers and agents "knew nothing about him," and arrested him based solely on his presence in Delossantos's car, D. Br. at 11-12, is obviously incorrect. Indeed, as explained in the government's initial brief, assessed in their cumulative totality, *Arvizu*, 534 U.S. 266, 273-74, 277, on the basis of "common-sense conclusions about human behavior," *Illinois v. Gates*, 462 U.S. 213, 231 (1983) (quoting *Cortez*, 449 U.S. at 418), these circumstances give rise to a "fair probability" or "substantial chance" that the driver, Rodriguez, was associated with Delossantos's narcotics transaction. Nothing more is required to establish probable cause for an arrest. *Id.* at 238, 243-44 n.13, 246.

Defendant, like the district court, never engages in the cumulative, contextual examination of the totality of the circumstances, as demanded by *Arvizu*. Defendant has no answer to the implications about his criminal involvement that are fairly raised by such an examination.

III. Defendant Has No Answer to the Point that the District Court Failed to Consider Many of the Circumstances that Informed the Agents' Decision to Arrest Him, and His Efforts to Address Those Circumstances Are Unavailing.

As the government pointed out in its initial brief, the district court not only engaged in an improper divide-and-conquer analysis of the circumstances, it also failed to give any consideration at all to many important probable cause factors, further failing to correctly consider "the *totality* of the circumstances." *See, e.g.*, *Gates*, 462 U.S. at 230-31 (emphasis added). G. Br. at 41-43, 50-51.[1] Defendant

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[1] The circumstances left unaddressed by the court include the fact that, moments before the deal, while sitting next to Rodriguez, Delossantos uttered suspicious instructions over the telephone to the undercover to follow the car driven by Rodriguez, to whom he could be overheard speaking in Spanish. JA180-82, 269-70. The court, likewise, failed to address the fact that Delossantos, at this same time, communicated that he was uncomfortable meeting at the prearranged meeting place because of the number of people there. It gave no consideration to the fact that Rodriguez got back in the car to drive Delossantos directly to the planned transaction from the house identified as the source of the narcotics, or that Delossantos had access to his own car, knew the way to the designated drug meeting location, which was only five minutes away, and had driven himself there the previous day. Nor did it address the agents' observation that Delossantos seemed uneasy about the transaction, or their (continued...)

never responds directly to this aspect of the government's argument, implicitly conceding the error in the district court's limited analysis.

To the extent that defendant, in various parts of his argument, addresses some of the circumstances ignored by the district court, his analysis of these points is unavailing. To begin with, defendant, again, addresses each factor in isolation, without looking at the aggregate, in its contextual totality. This approach perpetuates the erroneous methodology employed by the district court, skewing the meaning of the facts and contravening the clear command of the Supreme Court about how to apply the totality of the circumstances test. *Arvizu*, 534 U.S. at 273-74, 277. Moreover, defendant's arguments regarding even the individual factors, in isolation, are unsuccessful.

For example, defendant fails in his treatment of the undisputed fact that, moments before the deal, while sitting next to Rodriguez, Delossantos uttered instructions to the undercover to follow the car driven by Rodriguez to some other, undisclosed location. The district court mentioned this fact, JA269, but failed to consider it in any way in the course of its analysis. As pointed out by the government in its initial brief, defendant's willingness to give this suspicious instruction, which bespeaks clandestine business intentions, while sitting next to

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[1] (...continued)
trained conclusion that when a drug dealer is concerned about potential problems at a transaction, he will often bring someone to provide support and assistance.

Rodriguez, strongly indicates that Rodriguez was involved in Delossantos's illicit activities. At a minimum, the utterance of the instruction negates the inference that Rodriguez believed they were going to buy gas or groceries. It requires the inference that Rodriguez knew the purpose of their trip was to meet someone,[2] and that Delossantos was dissatisfied with the meeting place and wanted the person on the phone to follow him somewhere else. JA182.

Defendant's only response is that Delossantos "could have simply told Rodriguez to stop at the gas station," without communicating anything directly to Rodriguez about another car following them someplace. D. Br. at 26. This argument is speculative, unlikely and illogical, and fundamentally irrelevant in terms of both the facts and the legal standard of *probable* cause.

First, defendant's speculative suggestion does not even purport to respond to the likelihood that Rodriguez, as the driver of the vehicle that was to be followed, would probably have noted Delossantos's instruction over the phone, even without any direct instruction from Delossantos. Second, whether or not Delossantos had yet shared the instruction with Rodriguez, to effect his new plan, Delossantos eventually would have to do so, because

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[2] Moreover, Delossantos, in telephone conversations earlier that morning, while most likely in Rodriguez's company, had already discussed the upcoming meeting at the Cumberland Farms. *See* G. Br. at 7-8; JA172-73, 175-76, 201-02, 204.

Rodriguez was driving. In this light, Delossantos's willingness to change the plan, alone, was strongly corroborative of Rodriguez's being involved in the scheme, whether or not Delossantos had yet directly instructed Rodriguez on the new plan.[3]

Third, even if the possible scenario of Delossantos telling Rodriguez to wait were somehow relevant as a factual matter, that remote speculative possibility is of no consequence under the probable cause standard. Probable cause is established here if there was a "fair probability" or "substantial chance" of Rodriguez's association with Delossantos' pending narcotics transaction, based on "common-sense conclusions about human behavior." *Gates*, 462 U.S. at 238, 243-44 n.13. Common sense dictates that Rodriguez, as the driver of the car, was probably aware of the change in plan announced by his passenger over the phone. A common sense evaluation of this fact, in conjunction with all the other circumstances, dictates that Rodriguez was probably involved in Delossantos's scheme. Probable cause, like reasonable suspicion, "is a question of probabilities, not possibilities," and it is not necessary to rule out all possibility of innocent conduct. *Elmore*, 482 F.3d at 182-83 (dismissing district court's concern that police, before relying on tipster's information to stop defendant's car, had not done everything possible to rule out the possibility that caller

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[3] Moreover, under the circumstances, the uncontroverted fact that Delossantos was speaking to Rodriguez in an aside, JA180, tends to suggest that he was sharing the plan with Rodriguez in real time.

was impersonating the witness she claimed to be); *Gates*, 462 U.S. at 231 ("'In dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'") (quoting *Brinegar v. United States*, 338 U.S. 160, 176 (1949)); *Holeman v. City of New London*, 425 F.3d 184, 191 (2d Cir. 2005) ("Suspicious circumstances may have innocent explanations; but the availability of an innocent explanation does not create an issue of fact as to the reasonableness of the suspicion. *Arvizu*, 534 U.S. at 278."). Accordingly, whether Delossantos "*could have* simply told Rodriguez to stop at the gas station," D. Br. at 27 (emphasis added) – an assertion not supported by the record – is fundamentally beside the point.

Defendant also offers an unpersuasive argument concerning another important fact left unaddressed by the district court – the fact that Delossantos, at this same time, made another suspicious comment over the phone, communicating that he was uncomfortable meeting at the prearranged meeting place because of the number of people there. Defendant advances two claims here. First, he argues that the district court found that no such statement was made, because the court did not credit this portion of the undercover officer's testimony. D. Br. at 6-8, 26 n.7. The main problem with this argument is that it is not based on the record. The district court made no adverse credibility finding, and never found that the statement had not been made. In fact, the officer's unequivocal testimony on this point, JA181, was

uncontested, and unchallenged on cross-examination.[4] The district court simply never addressed the matter, like so many of the circumstances indicative of Rodriguez's involvement in Delossantos's criminal scheme.

Sensing a problem with the argument regarding the fictional credibility determination by the district court, defendant offers an alternative argument: He hypothesizes that "Delossantos *may have* seen that Rodriguez was not paying attention to the conversation, or Delossantos *could have* been prepared to provide an innocent explanation." D. Br. at 26 n.7 (emphasis added). Once again, defendant's scenarios as to what Delossantos "may have" done or "could have been prepared to do" are speculative and unsupported by the record. In any event, this unlikely scenario is irrelevant under the probable cause standard. The bottom line is that there is uncontradicted evidence that Delossantos told the agent minutes before the deal that he was uncomfortable meeting at the gas station due to the number of people there, and his willingness to make such a statement in front of Rodriguez, in conjunction with all the other circumstances, reasonably supported a

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[4] Although defense counsel did cross-examine on the question of whether Delossantos used the word "transaction" or "deal," she never even asked any questions going to the officer's unequivocal direct testimony that "I specifically asked [Delossantos] why do you want to go somewhere else. He said so many people there and he wasn't comfortable with that," JA181; and *see* JA198-99 (defendant's cross-examination); and D. Br. at. 6-7, 26 n.7.

conclusion that Rodriguez was probably involved in Delossantos's narcotics trafficking.

Defendant also attempts to address the fact that Delossantos seemed uneasy about the transaction, and the agents' trained awareness that when a drug dealer is concerned about potential problems at a transaction, he will often bring someone to provide support and assistance. These circumstances, again, were ignored by the district court.

Defendant's efforts to address these circumstances, while creative, are again unsuccessful. Defendant speculates that "Delossantos's suspicion that [the undercover] was a police officer might have motivated him to bring an innocent dupe." D. Br. at 28. Defendant explains that a drug dealer under such circumstances might want an innocent person along so that he will later have somebody to cooperate against, and so that the innocent driver will not be nervous in responding to police questions in the event of a stop. *Id.* These farfetched imaginings are offered without any basis in the record or any citation to authority. Moreover, defendant's speculation directly conflicts with the Supreme Court's statement that "drug dealing [is] an enterprise to which a dealer would be unlikely to admit an innocent person with the potential to furnish evidence against him." *Pringle*, 540 U.S. at 373. The arresting officers cannot be expected to have thought of these remote, counterintuitive

possibilities or to have refrained from a probable cause determination on account of them.[5]

Defendant also attempts to address the fact that Rodriguez was seen driving Delossantos away from, and back to, the drug storage location, shortly before getting back in the car and driving him the five minutes directly to the transaction – at a time when Delossantos advised the undercover agent that he needed more time to get ready for the meeting. The district court did not address this set of circumstances. Nor did the court address the agents' view, based on these circumstances, in conjunction with the totality of the facts and their training and experience, that Rodriguez and Delossantos were probably jointly engaged in obtaining narcotics or other preparations for the upcoming transaction. JA103-05, 112, 186; *see* G. Br. at 13-14, 46-47, 48-49, 51. Defendant responds to these matters by asserting that: (a) the agents had no basis to even conclude that Rodriguez and Delossantos were together during this period; and (b), in any event, by providing a sample to the undercover officer the day before, Delossantos had shown that he did not need to obtain any drugs. D. Br. at 24-25.

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[5] Defendant also challenges the basis of the conclusion that Delossantos sounded tense or nervous in the moments before the transaction. D. Br. at 27 n.8. Officer Martinez's testimony on this point speaks for itself:

Q: From his voice did he seem to be tense?

A: Seemed nervous.

JA180.

Defendant's arguments again fail. The upcoming transaction involved both cocaine and heroin. JA168. Delossantos had provided a sample only of the cocaine, and that was only a very small amount. JA163-65, 167. There is no inconsistency between the fact that Delossantos provided a small sample of cocaine and the agents' view, based on their training and experience, that Rodriguez and Delossantos were jointly engaged in preparations for the transaction, involving heroin and a much larger amount of cocaine, shortly before it was to take place.

Moreover, notwithstanding defendant's claim, there was ample evidence to support a reasonable conclusion that Rodriguez and Delossantos were driving around together that morning. They were observed together at the suspected drug storage location at 10:45 a.m., when Rodriguez drove Delossantos away from 1315 Howard Avenue in Delossantos's car. JA90, 99-101. They were observed returning to that location at 12:30 p.m., with Rodriguez again driving Delossantos. JA106-108. Moreover, in the meantime, just 30 minutes after they were seen leaving together and just ten minutes before they were seen returning together, the undercover officer had telephone conversations with Delossantos. During these calls (a) the officer heard somebody in the background and road noise or sounds of passing cars, and (b) Delossantos stated that he was not yet ready and discussed arrangements for the upcoming meeting. JA172-73, 175-76. While this may not be certain evidence that the two men were together during this period, it is more than enough evidence to support a reasonable

conclusion that they probably were. Moreover, while this evidence, alone, would not support a conclusion that Rodriguez was part of Delossantos's narcotics activities, in conjunction with the overall totality of the circumstances, and the officers' training and experience, as discussed herein and in the government's initial brief, it contributed to a reasonable inference of probable complicity.

Finally, defendant, like the district court, gives no consideration to the fact that Rodriguez drove Delossantos, in Delossantos's own car, to a drug meeting location just five minutes away, directly from the house identified as the source of the narcotics, after Delossantos had shown that he knew the way to the designated drug meeting location by driving there in his car alone the previous day. These circumstances dictate the inference that Delossantos could have gotten himself to the crime scene on his own, had he wished to, making it probable in any trained officer's eyes that Rodriguez was involved in the affair with him. The Supreme Court has instructed that "drug dealing [is] an enterprise to which a dealer would be unlikely to admit an innocent person with the potential to furnish evidence against him," *Pringle*, 540 U.S. at 373, and it was particularly appropriate here, under the circumstances, for that principle to guide their probable cause determination. By his silence on this issue, defendant concedes as much.

IV. Defendant, and the District Court, Have Forgotten the Requirement that Probable Cause Determinations Be Considered Through the Eyes of a Reasonable Officer.

In emphasizing the undisputed notion that neutral judges, and not police officers, make the final determination regarding the existence of probable cause in any given case, D. Br. at 33-34, defendant forgets to mention the Supreme Court's repeated holdings requiring that "due weight" be given to the inferences of the police based on their training and experience, as applied to the cumulative totality of the information. *See, e.g.*, *Arvizu*, 534 U.S. at 273 (requiring consideration of the cumulative totality of the circumstances "allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person'") (quoting *Cortez*, 449 U.S. at 418); *Texas v. Brown*, 460 U.S. 730, 742 (1983) (probable cause "'must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement'") (quoting *Cortez*, 449 U.S. at 418). The court, in other words, makes the final call on probable cause, but must look at the situation through the eyes of trained police officers in doing so.

Defendant's failure to mention this principle mirrors the district court's analysis in this respect: The district court failed to consider the agents' trained inference that Rodriguez was likely associated with Delossantos's drug

dealing because Delossantos would not have brought to an arranged drug deal an innocent party who could become a witness against him; the court gave no consideration to the agents' trained conclusion that Delossantos, who was nervous about the deal, had probably brought Rodriguez along to assist Delossantos by, for example, examining the potential buyer, serving as a look out, or helping to make a quick getaway; and the court gave no consideration to the fact that the agents reached the informed conclusion that Delossantos, with Rodriguez's assistance, was engaged in preparations for the narcotics transaction during the hours before the deal, based on the agents' training, experience and observations of Rodriguez's driving Delossantos away from the drug storage location, and back to it, shortly before driving him the five minutes directly to the transaction, during which time Delossantos advised the undercover agent that he needed more time to prepare for the meeting. The district court offered no reason to believe the officers were wrong in their conclusions; it simply, and improperly, ignored them.

V. The Reliance of Defendant and the District Court on *Di Re* Disregards the Totality of the Circumstances and the Proper Manner of Applying that Test.

Defendant's assertion that the district court properly relied on *Di Re*, 332 U.S. at 594, disregards the totality of the circumstances in this case and the proper manner of

applying that test.[6] *Di Re* stands for the proposition that mere presence at a crime scene, alone, cannot constitute probable cause. *Id.* at 593. That proposition, while very sensible, does not apply to this case. The totality of the circumstances here entailed a far richer basis for suspicion than Rodriguez's mere proximity, as explained throughout the government's initial brief, and elsewhere herein. Defendant, like the district court, can reach the conclusion that *Di Re* applies here only by ignoring certain circumstances, inappropriately examining others in isolation, attempting to reduce them to an innocent explanation – through tortured logic in many instances – in an improper, divide-and-conquer mode of analysis that the Supreme Court has specifically proscribed, *Arvizu*, 534 U.S. at 273-74, 277. In doing so, defendant, like the district court, improperly ignores the reasonable, trained conclusions of the agents and officers. *See, e.g., id.* When all the circumstances are considered together, collectively and in relation to each other, as the Supreme Court has instructed, *id.*, and as set forth herein and in the government's initial brief, it is obvious that *Di Re* has no application to this case.

VI. The Other Cases Relied Upon by Defendant Are Also Unavailing.

The other cases relied upon by defendant are also unavailing. D. Br. at 20-23. For example, *United States v. Rosario*, 543 F.2d 6 (2d Cir. 1976), is fundamentally a

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[6] Other distinguishing features of *Di Re* were discussed in the government's initial brief. *See* G. Br. at 30.

case about mistaken identity, with no application to the instant matter. The police had arrested Rosario and a female who were both in a van with a known drug dealer, based on a description of a woman and a man who were known confederates of the drug dealer at a prior time. The Court rejected the police officer's probable cause determination, because the description of the male confederate was too general, and the description of the female confederate did not match that of the woman arrested while sitting in the van. *Id.* at 8. In the absence of a proper identification of Rosario and the woman as the confederates at the prior deal, the Court briefly considered the probative value of the mere fact that Rosario was sitting in a van on a Brooklyn street, talking to the drug dealer, with no evidence that any deal was pending or about to happen, and 55 days after the last time the dealer had been known to have engaged in a deal. *Id.* at 8-9. Under these circumstances the Court unsurprisingly held that an arrest was unjustified. However, these bare-bones circumstances are not analogous to this case. Indeed, the fact that no deal was known to be happening at the time, alone, distinguishes the case from the facts of this matter, where Delossantos was on his way to a prearranged drug deal. Other facts that distinguish the case include the suspicious phone conversation that Rodriguez was allowed to hear about the undercover following Delossantos and Rodriguez to some different meeting place, and the fact that Rodriguez was seen driving Delossantos, in Delossantos's own car, five minutes from a suspected stash house directly to the drug deal, about which Delossantos was known to be uneasy. None of these facts were present in *Rosario*.

United States v. Bazinet, 462 F.2d 982 (8th Cir. 1972), another case heavily relied upon by defendant, is likewise inapposite. In *Bazinet*, the police lacked probable cause to arrest the driver of a van carrying a person suspected of illegal dynamite trafficking. Again, as in *Rosario*, but unlike the instant case, there was no evidence that police had any knowledge of any illicit deal pending or suspected that the dynamite trafficker was being transported to a crime scene, where the driver would likely become a witness. Moreover, as noted in our initial brief, the case is further distinguished by the fact that the police there had no information about the driver in *Bazinet* being privy to suspicious telephone conversations nor had he done anything analogous to driving the trafficker back and forth from the suspected stash house, while the driver said over the phone he needed more time to get ready, nor been seen engaged for several hours before the arrest in any other suspicious activity with the dynamite trafficker. These factors render *Bazinet* easily distinguishable.

United States v. Everroad, 704 F.2d 403 (8th Cir. 1983), is also distinguishable. Among other things, the defendant there, unlike this case, did not drive the known drug dealer to the deal. Nor was the defendant known to have been privy to any suspicious conversations. Although Everroad had ridden as a passenger in the drug dealer's car while he drove through the parking lot where the deal was later supposed to take place, the drug dealer had dropped Everroad off at a motel *before* going to the transaction. After the arrest of the unaccompanied drug dealer at the transaction, the police went to the motel and

arrested Everroad. The case, thus, bears little resemblance to the matter at hand.

United States v. Butts, 704 F.2d 701 (3rd Cir. 1983), is also inapplicable here. As the Third Circuit later explained, agents arrested Morgan "solely because he was a passenger in the back seat of a car which two co-defendants under investigation [for applying in a photo studio for the kind of photographic identification necessary to cash stolen checks] approached." *United States v. Castro*, 776 F.2d 1118, 1127 (3rd Cir. 1985) (describing *Butts*). The case, thus, has very little in common with this matter, with its multiple bases for finding probable cause. Indeed, in *Castro*, the Third Circuit itself found that there was probable cause, and that *Butts* was inapplicable, with regard to a matter much more analogous to the instant case. *Id.* (probable cause to arrest defendant where he was sitting in a car in a parking lot near drug dealer's car, which held drug buy money, and where defendant had reached beneath the seat when agents approached to arrest him).

The other cases cited by defendant are also easily distinguishable. *United States v. Seay*, 432 F.2d 395 (5th Cir. 1970), and *United States v. Barber*, 557 F.2d 628 (8th Cir. 1977), are both counterfeit cases (like *Di Re*) in which the defendants were arrested merely because they had been present in the vehicles of individuals who had entered stores – without defendants – to make purchases using counterfeit bills. The cases have nothing to do with this narcotics matter, with its much richer basis for finding probable cause. In *United States v. Chadwick*, 532 F.2d

773, 784 (1st Cir. 1976), unlike the instant case, the police, again, had no knowledge of any pending drug deal to which defendants were going (where an innocent third party would likely not be admitted) nor of any of the communications involving the other drug dealers that Chadwick may have been privy to. To the contrary, Chadwick was arrested without any circumstances analogous to those here – for no reason other than meeting suspected drug traffickers at a train station and assisting them with putting a footlocker containing marijuana into the trunk of a car. *Id.* In *United States v. Linnear*, 464 F.2d 355 (9th Cir. 1972), unlike here, defendant had been in a car which a drug dealer entered after conducting an illegal transaction inside a building. A third person then drove the car to a liquor store, where the drug dealer and defendant entered the store and were arrested. The police knew nothing else about defendant's activities before the arrest, in contrast to the many factors that informed the arrest of Rodriguez in this matter.[7]

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[7] The district court cases relied upon by defendant are also readily distinguishable. In *United States v. Gonzalez*, 362 F. Supp. 415 (S.D.N.Y. 1973), although defendant Torres was seen driving around with a suspected drug dealer in a suspicious manner, in sharp contrast with the instant matter, the police had no information indicating that any drug transaction was imminent and knew nothing about any communications of the drug dealer that defendant Torres had been privy to. Moreover, in *Gonzalez*, the court held, "[p]erhaps most significant of all, at the very moment [of Torres' arrest, the police] had been completely ignorant of both his activities and his whereabouts for the past hour and a half," *id.* at 422, (continued...)

VII. Defendant's Efforts to Distinguish Cases Cited by the Government Are Unsuccessful.

Finally, defendant attempts to distinguish certain cases cited by the government on the grounds that in those cases the police arrested the defendant after the crime took place, whereas here the arrest was supposedly made before any suspicious activities. D. Br. at 29-32. This effort fails.

First, the crime here was well underway when the arrests happened, and police already had ample evidence that Rodriguez was involved in it. Delossantos had

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[7] (...continued)
whereas in our case, directly before his arrest the police had, among other things, watched Rodriguez drive Delossantos in Delossantos's own car directly from a drug storage location to the drug meet five minutes away, while Delossantos engaged in telephone conversations about the drug meet arrangement. Likewise, in *United States v. Ocampo*, 492 F. Supp. 1211, 1229-30 (E.D.N.Y. 1980), in contrast to the instant matter, the police had no information about what Ocampo's activities prior to being seen sitting as the passenger (not the driver) of a car while the driver entered a restaurant and met with a suspected dealer, nor had the police any information about any suspicious conversations that Ocampo may have been allowed to overhear. Finally, *United States v. Viera*, 569 F. Supp. 1419 (S.D.N.Y. 1983), is another counterfeiting case, where defendant was merely present when another man made a purchase using counterfeit bills – facts that have no resemblance to the instant matter.

already provided a sample to the undercover agent, at the same location where the transaction was to be completed, having driven himself there from the drug storage location five minutes away the day before. And, on the day that the higher volume, higher-stakes transaction was to take place, Rodriguez had surfaced, driving Delosssantos from that same drug storage location directly to the drug meet, in Delossantos's own car. This was done while Delossantos, who was known to be nervous about the deal, instructed the buyer over the phone to follow Rodriguez and Delossantos to a new, undisclosed location because of Delossantos's discomfort with the number of people at the Cumberland Farms. This observation was particularly compelling, given the agents' awareness, based on their training and experience, that drug dealers will often bring another individual for support and assistance when they are concerned about a given transaction. Moreover, Rodriguez had driven Delossantos away from, and back to the storage location shortly before the meet, while Delossantos instructed over the phone that he needed more time to get ready, raising the fair inference that he was helping Delossantos with the last minute preparations for the deal.

The police, if anything, had more evidence giving rise to suspicion of Rodriguez at the time of his arrest than they had of the defendants in the cases cited in the government's initial brief. *See United States v. Almanzar*, 749 F. Supp. 538, 540 (S.D.N.Y. 1990) ("Prior to his arrival on the scene in the livery cab, the DEA agents had not heard of, or seen, Nestor Rodriguez" yet the agents legitimately arrested him based on their observation of his

arrival and their knowledge that "it is common practice for persons engaged in a large narcotics transaction to have an individual present for protection"); *United States v. Munoz*, 738 F. Supp. 800, 802 (S.D.N.Y. 1990) (there was probable cause to arrest defendant, who was "observed doing nothing but sitting as a passenger in [a] Jeep" parked across the street from a meeting in a restaurant between a suspected kidnapper and the brother of the victim); *United States v. Lima*, 819 F.2d 687, 689-90 (7th Cir. 1987) (defendant, previously unknown to the agents, sat in a separate car during a night-time drug deal, yet probable cause determination was proper on the grounds that his presence had not made the parties known to be involved cancel the transaction); *Bailey v. United States*, 389 F.2d 305, 309 (D.C. Cir. 1967) (even though witnesses had seen only three individuals involved in the crime and entering the get-away car, arrest of all four occupants of a matching car was valid because the "police could reasonably suppose that a fourth man, serving as a lookout, had waited in the car" during the robbery).

In any event, waiting until completion of the transaction was not necessary for formation of probable cause, as defendant suggests. Defendant argues that it was necessary to wait, to see if Delossantos conducted the transaction in his own car, or in the car of the undercover. D. Br. at 27-28. If the transaction happened in the undercover car, defendant asserts, there would be no probable cause for the arrest because Rodriguez would have been able to think they were going to the gas station for the ordinary reasons one goes to a gas station. *Id.* However, as explained above, the agents' probable cause

determination here actually was significantly bolstered through consideration of where the transaction was to take place and Delossantos's candor in front of Rodriguez – because Delossantos, while seated next to Rodriguez, moments before the deal, had uninhibitedly given instructions about the location, changing it to an undetermined location, to which the buyer was supposed to follow the car driven by Rodriguez.

Moreover, the agents could reasonably suppose that Delossantos would have been reluctant even to create a witness to his conducting the transaction in the undercover's car, especially after having Rodriguez drive in a suspicious manner to some more secluded spot, with the buyer following. Indeed, in *United States v. Clark*, 754 F.2d 789, 791-92 (8th Cir. 1985), as the government noted in its initial brief, G. Br. at 36, the court held that the drug dealer-husband's exiting his car and entering other cars would have been suspicious to his wife, who remained in the front passenger seat, and the agents "could have reasonably concluded that, as a witness to her husband's suspicious behavior, Mrs. Clark was aware of the criminal nature of the transaction being conducted." *Id.* Where, as here, the evidence established an even stronger basis to think that Rodriguez was being allowed to witness suspicious conduct by Delossantos, the agents' reliance on the principle, articulated by none other than the Supreme Court, was all the more justified: "[D]rug dealing [is] an enterprise to which a dealer would be unlikely to admit an innocent person with the potential to furnish evidence against him." *Pringle*, 540 U.S. at 373.

Given the facts established through the evidentiary proceedings in this matter, consideration of the totality of the circumstances, in appropriate, aggregate fashion, with proper weight given to the conclusions of the agents based on their training and experience, leads to the conclusion that probable cause supported the arrest of Rodriguez.

CONCLUSION

For the foregoing reasons, the ruling of the district court granting defendant's motion to suppress evidence should be reversed and the matter remanded for trial with the evidence seized from Rodriguez's apartment.

Dated: May 23, 2007

Respectfully submitted,

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

This is to certify that the foregoing reply brief complies with the 7,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 6,480 words, exclusive of the Table of Contents, Table of Authorities, Addendum of Statutes and Rules, and this Certification.

JAMES SMART
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ANTI-VIRUS CERTIFICATION

Case Name: U.S. v. Rodriguez

Docket Number: 06-4813-cr

I, Louis Bracco, hereby certify that the Reply Brief submitted in PDF form as an e-mail attachment to **briefs@ca2.uscourts.gov** in the above referenced case, was scanned using CA Software Anti-Virus Release 8.3.02 (with updated virus definition file as of 5/23/2007) and found to be VIRUS FREE.

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