No. 11-50948

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATE OF AMERICA
Plaintiff-Appellee,

v.

MELVIN DAVID TOWNS, JR.
Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas, San Antonio Division
[5:10-CR-00614-XR]

BRIEF FOR APPELLANT

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ORAL ARGUMENT REQUESTED

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that 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 possible disqualification or recusal.

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REQUEST FOR ORAL ARGUMENT

The Defendant-Appellant, Melvin "David" Towns Jr., respectfully requests oral argument pursuant to Fed. R. App. P. 34. This appeal presents a matter of first impression in this Court concerning whether pseudoephedrine transaction logs required to be kept by pharmacies, strictly for law enforcement use, are testimonial and require the testimony of the witness who prepared them to satisfy the requirements of the Sixth Amendment as interpreted in *Crawford v. Washington*, 541 U.S. 36 (2004).

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STATEMENT OF JURISDICTION

This appeal is from the final conviction in *United States v. Melvin David Towns, Jr.*, Cause No. 10-CR-00614 in the United States District Court for the Western District of Texas, San Antonio Division. Therefore, this Court has jurisdiction for this appeal under 28 U.S.C. § 1291. The District Court had jurisdiction of the criminal case under 28 U.S.C. § 3231. The judgment and commitment order was entered by the District Court on October 6, 2011. The Notice of Appeal was filed on October 6, 2011.

STATEMENT OF THE ISSUES

Issue One: The Court denied Towns his constitutional right to confront witnesses against him when admitting testimonial pseudoephedrine transaction logs in evidence without the testimony of the persons who prepared the records.

Issue Two: The Court abused its discretion when it admitted pseudoephedrine logs and summaries of them as business records.

Issue Three: The Court's belief that it could not even consider a safety valve reduction for Towns was erroneous.

STATEMENT OF THE CASE

Towns was convicted by a jury of conspiring to manufacture methamphetamine, in violation of 21 U.S.C. § 846, on June 2, 2011. He was sentenced on October 5, 2011 to 120 months, 5 years SR, and a special assessment of $100. Towns filed a motion for release pending appeal below [Clerk's Record USCA5 240-246] which the court denied on September 13, 2011. On December 16, 2011, this Court granted Mr. Towns bond pending appeal.

STATEMENT OF THE FACTS

On July 21, 2010, Melvin "David" Towns was indicted on one count of conspiracy to manufacture methamphetamine and to possess and distribute pseudoephedrine, knowing it would be used to manufacture methamphetamine. Clerk's Record USCA5 15-18. The indictment noted that federal government regulations limited the quantity of cold medications containing pseudoephedrine that an individual can purchase during a given time. Clerk's Record USCA5 16. On April 6, 2011, the government obtained a superseding indictment which added the quantity of 500 grams or more of methamphetamine to the conspiracy count. The indictment again noted that in order to control the misuse of pseudoephedrine, the federal government regulated the quantity of over-the-counter cold medications that an individual can purchase on one occasion or in a given period. It also explained that commercial vendors who sell the medications must identify

purchasers and maintain records of the sales. Clerk's Record USCA5 96. Under these changed circumstances, the superseding indictment carried a 10 year mandatory minimum sentence based on the quantity of methamphetamine alleged. Clerk's Record USCA5 99.

At trial, the government offered in evidence, as putative business records, logs which the federal government and Texas state laws required to be kept by Walmart, Walgreens, Target and CVS pharmacy purportedly for the purchase of cold medicines containing pseudoephedrine. Clerk's Record USCA5 106-107. The government called no witness who created these log entries.

Towns filed a motion in limine seeking to exclude these records on the grounds that they were not business records under Federal Rule of Evidence 803 (6) since they were calculated for use in court, not in the conduct business functions. The motion cited *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009). Clerk's Record USCA5 115-121. It further noted that the records were required to be kept by Texas law for law enforcement purposes. See Texas Health and Safety Code Annotated § 46.014. Clerk's Record USCA5 116, Volume 4 USCA5 127-128.

> "The Texas Attorney General has specifically held that these records are not collected for business purposes: 'retailers are not, collecting the data for their own use….' Texas Atty. Gen. Op. GA-0564, *available at* 2006 WL 2773877 (September 26, 2006). Rather, the record-keeping statute has a 'law enforcement or governmental purpose'; the 'sole purpose for collecting the information is to make it available to the Department of State Health

> Services of the Department of Public Safety.[1]' *Id.* Indeed, according to the Attorney General, it would be 'a violation of the law' for businesses to collect 'the data for their own use.' *Id.*
>
> Pending Texas legislation makes the law-enforcement purpose behind the record-keeping requirements even more plain. Senate Bill 913, which passed the Senate on April 21, 2011, and is now before the House, will require retailers to transmit the required information to a 'real-time logging system' and makes clear that the records must be disclosed to the United States Drug Enforcement Administration and 'other federal, state, and local law enforcement agencies.' *See* Tex. S. B. No. 913 (April 21, 2011). Because the records are kept for a law-enforcement purpose and not a business purpose, they do not qualify as business records and cannot be admitted on that basis." Clerk's Record USCA5 116-117. [footnote added].

The government agreed that the records were kept under these provisions. Clerk's Record USCA5 138. The motion went on to note that even if the records were admissible as business records, *arguendo* only, the records were further inadmissible under the Confrontation Clause. *Crawford v. Washington*, 541 US 36, 54 (2004). Clerk's Record USCA5 117 & 126.

> "Although [d]ocuments kept in the regular course of business may ordinarily be admitted at trial despite their hearsay status, that is not the case if the regularly conducted business activity is the production of evidence for use at trial." *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 2538 (2009).

"The Supreme Court's observation in *Crawford*, 541 U.S. at 56, that, in general, business records are not testimonial reflects nothing more than the reality that, in general, such records are kept for business, not trial, purposes." *See Melendez-Diaz*, 129 S.Ct. at 2539-40 (whether or not the reports qualify as business records,

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1 The Department of Public Safety is the law enforcement agency for the State of Texas. Volume 3 USCA5 48.

statements prepared for trial were subject to confrontation); *United States v. Jackson*, 636 F. 3d 687, 692 n. 2 (5th Cir. 2001). Clerk's Record USCA5 118. Counsel further noted that the records were kept under circumstances that would lead an "objective witness reasonably to believe that the statement would be available for use later at trial." *Melendez-Diaz,* 129 S.Ct. at 2532. Towns also noted that the records, here, were similar to those kept in *Melendez-Diaz.* Their purpose was to give the information for use at trial just for the sole purpose of providing evidence of the properties of the examined drug were for use at trial. Clerk's Record USCA5 118-119.

> "Those who prepare the records are commanded by state law to do so, and are commanded by state law to turn them over to law-enforcement officials on request. Given the nature and purpose of Texas reporting requirements, an objective witness preparing pseudoephedrine logs would plainly anticipate that they will be used at trial." Clerk's Record USCA5 119.

Towns further pointed out that the records were testimonial because they did precisely what a witness does on direct examination. *See Jackson*, 636 F. 3d at 696; *Melendez-Diaz*, 129 S.Ct. at 2532 (statements were testimonial because they were the statements the witness 'would be expected to provide if called to trial'). Clerk's Record USCA5 119 & 129. On each occasion when the records were offered in evidence, counsel objected on the same basis. Volume 3, USCA5 113 and Volume 4, USCA5 133, 134-136, 139, 141-143, 145-146.

Towns had a right to confront this expected testimony. However, as counsel pointed out on cross-examination of Texas Department of Public Safety investigator Pieprzica[2], no witnesses were available to ask when the sales were made, who the people were that were involved in making purchases, who the clerk was that made the record, and what information was gathered to make it. The government offered no evidence that the clerks who made the records regarding Towns' purchases were unavailable to testify.

> "Q. Yet, despite it is one set of rules, each pharmacy has their own way of keeping records? You discovered that in your investigation?
> A. Yes.
> Q. All right. So, if you don't talk to the person that actually made the sale, the investigation can develop real-really basic things like, did this person actually make this purchase, or is it just what shows up on the records?
> A. This is based on records.
> Q. Right. You never went and got a live witness that said, 'Yeah, I made-I made that sale. This is the person that bought it. I checked the picture ID'? Investigation never developed the facts at that that level?
> A. In some of these cases, I mean, there was-this was a large investigation.
> Q. I understand.
> A There were some pharmacy employees who did tell me that certain individuals were coming in. As a matter fact, they quit selling to them because they were coming too often.
> Q. Exactly. Those are the type of facts, those details that you can develop by directly speaking to witnesses, right?
> A. Yes.
> Q. You can also walk into a pharmacy and see, check out to see if there is surveillance equipment that is being utilized-
> A. Yes.
> Q.-as a security measure? A lot of pharmacies do it?
> A. Yes.
> Q. And they are actually recording the transaction as this takes place?

2 Volume 3, USCA5 48.

A. I can't speak to that for the-
Q. Well, you didn't look deeply enough into that issue, right?
A. I didn't request that.
Q. And so unless you determined whether pharmacy has a surveillance camera that is recorded these transactions, you wouldn't even know to ask for those recordings, right?
A. It just wasn't part of the investigation.
Q. You didn't consider that as part of this investigation to see, well, if a transaction for pseudoephedrine is taking place at 7:10 on August 31, why don't I just see if there is a surveillance recording of this? That could give me additional evidence?
A. No, I didn't." Volume 5, USCA5 266-268.

The court admitted these records and evidence over these objections. Clerk's Record USCA5 205-206 and Volume 2, USCA5 29-39.

Towns, thereafter, filed a motion for new trial (and the motion for reconsideration of the same noting the *Bullcoming*[3] case) on the grounds that these records were improperly admitted as business records and violated Towns' right to confront the witnesses against him; noting the government's burden to prove their admission was harmless. Clerk's Record USCA5 214-221 & 227. *U.S. v. Tirado-Tirado*, 563 F.3d 117, 126 (5th Cir. 2009).

In *Bullcoming,* the Supreme Court confirmed that "[a] document created solely for an 'evidentiary purpose,'… made in aid of a police investigation, ranks as testimonial." *Bullcoming*, at 2717. Noting that the defendant must be permitted to confront the witness who made the observation or performed the analysis recorded, the Supreme Court found that a corporate employee providing a records

3 *Bullcoming v. New Mexico,* 131 S.Ct. 2705 (2011).

affidavit was not an adequate surrogate to satisfy the confrontation clause. *Bullcoming*, at 2708. Clerk's Record USCA5 229.

> "Similarly, Agent James Pieprzica, although also knowledgeable about the law governing the purchase of pseudoephedrine, was not a sufficient replacement for the pharmacy employees. Like the certifying corporate employees, Pieprzica could not convey what the actual sales employees knew or observed while performing each sale, nor could he expose and any lapses or lies on the part of the employees. Additionally, the Government did not assert that Pieprzica had any independent opinions concerning the alleged pseudoephedrine purchase of Towns: he had not seen pharmacy security videos of Towns purchasing pseudoephedrine or of the pharmacy employees checking the driver's licenses of customers making accurate record entries. Allowing Pieprzica to provide surrogate testimony as to the pharmacy records was in error and does not satisfy Towns' rights under the Confrontation Clause." Clerk's Record USCA5 230.

The court denied the motion for new trial and at sentencing opined that the 120 month mandatory minimum sentence was too high a sentence to impose on Towns. Volume 7, USCA5 19. He inquired whether Towns qualified for the safety valve reduction. Volume 7, USCA5 19. Thereafter, Towns met with the Assistant United States Attorney and confirmed that his offense conduct was consistent with that regarding which he testified at trial. A polygraph confirmed that he was telling the truth. Volume 8, USCA5 463. But because Towns continued to assert his innocence, the Court, finding its hands were tied, imposed a 120 month sentence, believing it had no choice in the matter. Volume 8, USAC5 271-277.

> "I agree that you can go to trial, you are found guilty, and then later try to get safety valve. But to do that, you can't during the safety valve hearing plead continued innocence and not say that you know something about the crime that was committed.

> And that's what your client did in the transcript, as I read it. He continues to maintain he is innocent of the charges in this case.
>
> ..I still continue to believe that a guideline sentence of 121 to 151 months is too high for what you did, but I am stuck with the statutory requirement that I sentence you to no less than ten years. And I have tried to help you by giving you the opportunity to do safety valve, but you have not met the requirements of safety valve, as I read the transcript and, accordingly, safety valve is inapplicable here." Volume 8, USCA5 461-462 & 464.

This appeal followed.

SUMMARY OF THE ARGUMENT

Towns' appeal raises and asserts that his Sixth Amendment right to confrontation was violated by the admission (as putative business records) of pseudoephedrine logs, which were prepared for law enforcement use, and the denial of the "safety-valve" provision because of his claim of innocence.

ARGUMENT

ISSUE ONE RESTATED: The Court denied Towns his constitutional right to confront witnesses against him when admitting testimonial pseudoephedrine transaction logs as evidence.

ISSUE TWO RESTATED: The Court abused its discretion when it admitted pseudoephedrine logs and summaries of them as business records.

Issue One and Issue Two are argued together below.

"The Sixth Amendment's Confrontation Clause provides that, '[i]n all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him." *Crawford v. Washington*, 541 U.S. 36, 42, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). "Alleged violations of the Confrontation Clause are

reviewed *de novo*, but are subject to a harmless error analysis." *United States v. Bell*, 367 F.3d 452, 465 (5th Cir. 2004) (citing *United States v. McCormick,* 54 F.3d 214, 219 (5th Cir.1995)). The analysis necessary for this preserved constitutional violation is a "separate and distinct consideration" from evidentiary questions. *See United States v. Jackson*, 636 F.3d 687, 690 (5th Cir. 2011). Therefore, for argument only, if the logs were "business records" for purposes of the Federal Rules of Evidence, their admission can still be a constitutional violation under the Confrontation Clause of the Sixth Amendment. *See Id*. at 696-97 & n.2. Further "the government bears the burden of defeating [Towns'] properly raised Confrontation Clause objection by establishing that its evidence is nontestimonial." *Jackson*, 636 F.3d at 695-696. The government failed to meet its burden and the admission of pseudoephedrine logs constituted testimony against Towns that was not subjected to cross-examination and therefore was a violation of the Confrontation Clause of the Sixth Amendment.

"[T]he Confrontation Clause prohibits (1) testimonial out-of-court statements; (2) made by a person who does not appear at trial; (3) received against the accused; (4) to establish the truth of the matter asserted; (5) unless the declarant is unavailable and the defendant had a prior opportunity to cross examine him." *Jackson*, 636 F.3d at 695 (5th Cir. 2011)(citing *United States v. Gonzales,* 436 F.3d 560, 576 (5th Cir. 2006)). The Government introduced pseudoephedrine logs

against Towns to prove the truth of the matter asserted: that Towns was, in fact, the person purchasing pseudoephedrine at the location at the time listed on the log. The unknown sources of this inculpatory information (the actual store clerks who witnessed and documented the alleged activity) did not appear at trial, were not shown to be unavailable for trial, and were not cross-examined at any time before or during trial. The pseudoephedrine logs, being testimonial in nature, took the place of accusatory in-court testimony of live witnesses. This prompts the constitutional requirement of confrontation under the Sixth Amendment, and under these circumstances Towns should have been afforded the right to utilize cross-examination to confront the testimony used against him. *See Id*. at 695.

Much like the Supreme Court refused to create a "forensic evidence" exception to the demands of the Confrontation Clause in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S. Ct. 2527, 2530, 174 L. Ed. 2d 314 (2009), this Court should refuse to create an exemption for "legally compelled transaction log evidence" for the same reasons: that the logs were "functionally identical" to live in-court testimony, and were created for the primary and sole purpose of documenting past events for investigation and use at trial. This places these records within the "core class of testimonial statements" which are governed by the Confrontation Clause of the Sixth Amendment. *Crawford*, 541 U.S. at 51-52; *Melendez-Diaz*, 557 U.S. at 2531-32; *Jackson*, 636 F.3d at 696-97.

The pseudoephedrine logs served as the "functional equivalent" of "*ex parte* in-court testimony" from numerous pharmacy employees who were excused from testifying and from cross-examination, but whose accusatory statements were admitted against Towns to prove that he was in fact the person who purchased the pseudoephedrine which led to his conviction. *See Melendez-Diaz*, 557 U.S. at 2531 (quoting *Crawford*, 541 U.S. at 51); *See also Jackson*, 636 F.3d at 696. The admission of "*ex parte* in-court testimony" such as this is the exact practice which the Sixth Amendment was designed to prohibit and is explicitly named in *Crawford* as being testimonial. *Crawford*, 541 U.S. at 51-52. The logs were used to accomplish "precisely what a witness does on direct examination." *Davis v. Washington*, 547 U.S. 813, 830, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006). The pseudoephedrine logs took the place of live witness testimony and thus their reliability should have "be assessed in a particular manner: by testing in the crucible of cross-examination." *See Crawford*, 541 U.S. at 61.

The unnamed and unknown pharmacy employees created these logs under circumstances which an objective witness would know was for the sole purpose of law enforcement's use at trial. "A document created solely for an 'evidentiary purpose,' *Melendez–Diaz* clarified, made in aid of a police investigation, ranks as testimonial." *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2717, 180 L. Ed. 2d 610 (2011)(citing *Melendez–Diaz*, 557 U.S. at 2532). *Davis* explains that only the

primary purpose of a statement must be testimonial. *Melendez-Diaz*, 547 U.S. at 822 (statements are testimonial when there is no ongoing emergency and the primary purpose is to "establish or prove past events potentially relevant to later criminal prosecution"). The logs here documented past events and were not just made for the primary evidentiary purpose but were made for the sole purpose of aiding law enforcement in a police investigation, and were statutorily restricted to only be given to law enforcement investigating a violation of controlled substance laws. See 21 U.S.C. § 830(c)(2). Although other deterrent effects might be extrapolated from these statutory requirements, even the non-objective law enforcement witnesses here, admitted that Congress has demanded that pharmacies create these logs for the primary purpose of documenting past events for use in investigation and trial.

To rank as testimonial, statements must have a "primary purpose" of establishing past events "potentially relevant to later criminal prosecution." [quoting *Bullcoming v. New Mexico*, 131 S.Ct. 2705, 2714 n.6 (2001)]. Citing a case pre-*Bullcoming*, *United States v. Mashek*, 606 F.3d 922 (8th Cir. 2010), the government argued below that pseudoephedrine logs were not of the same character as the lab reports in *Melendez-Diaz* but were an objective catalog of unambiguous factual matters. Clerk's Record USCA5 138. It also noted that the Supreme Court had denied certiorari in *Mashek*. Clerk's Record USCA5 224.

Thereafter, *Bullcoming*, 131 S. Ct. 2705 (2011), was decided and clarified that witnesses were not merely observing uncontested objective facts, but were also vouching for the reliability and integrity of the information and the manner in which it was determined. Thus, they could not serve as proper surrogates and satisfy the Confrontation Clause. The bright line rule used in *Mashek* contradicts the United States Supreme Court decision in *Bullcoming* and was decided using plain error review since the error there was not preserved. *United States v. Mashek*, 606 F.3d 922, 930 (8th Cir. 2010) [Mashek did not raise a Confrontation Clause challenge].

> "Most witnesses, after all, testify to their observations of factual conditions or events, e.g. 'the light was green,' 'the hour was noon.' Such witnesses may record, on the spot, what they observed. Suppose a police report recorded an objective fact. Bullcoming's counsel posited the address above the front door of a house or the read-out of a radar gun….Could an officer other than the one who saw the number on the house or gun present the information in Court so long as that officer was equipped to testify about any technology, the observing officer deployed and the police department standard operating procedures? As our precedent makes plain, the answer is emphatically, 'No.'" *Bullcoming* at 2715.

Thus, the facts reflected in the logs kept for law enforcement use by witnesses who were not called to testify observing persons' identities and purchases are not admissible by virtue of the records affidavit of a person who did not observe and record these events.

The Court abused its discretion when it admitted pseudoephedrine logs and summaries of them as business records.

"[W]hen a defendant properly objects to the admission of evidence, the district court's decision to admit such evidence is reviewed for an abuse of discretion." *U.S. v. Dixon*, 132 F.3d 192, 197 (5th Cir. 1997) (citing *United States v. Bermea,* 30 F.3d 1539, 1574 (5th Cir. 1994); *Wilson v. Zapata Off–Shore Co.,* 939 F.2d 260, 272 (5th Cir. 1991)). Towns properly objected to the evidence that the government presented. See Volume 3, USCA5 113; Volume 4, USCA5 133-136; Volume 4, USCA5 139, 141, 143, 145; Volume 5, USCA5 245, 248, 251 & 260. This abuse of discretion review is subject to harmless error review. *United States v. Jimenez Lopez*, 873 F.2d 769, 771 (5th Cir.1989). "A trial court abuses its discretion when its' ruling is based on an erroneous view of the law or a clearly erroneous assessment of the evidence." *United States v. Yanez Sosa*, 513 F.3d 194, 200 (5th Cir.2008) (internal citations omitted).

THE PSEUDOEPHEDRINE LOGS ARE NOT BUSINESS RECORDS

During trial, the government built its case against Towns primarily through the pseudoephedrine logs which allegedly showed multiple purchases of products containing pseudoephedrine from multiple stores by Towns and were entered into trial through the business records exception. Fed.R.Evid. 803(6). These logs are required to be kept by pharmacies under 21 U.S.C. § 830, as was affirmed by the government during trial. See Volume 3, USCA5 32. Texas law also provides for

these logs, specifically Texas Health and Safety Code § 486.014. *Id.* The Texas Health and Safety Code provides greater discretion in the manner in which recording of pseudoephedrine sales are recorded and form of identification can be used by the purchaser. This is especially important as the government never presented any evidence or testimony concerning what the business practices of the pharmacies were, or how the information was recorded. This Court has not decided upon the issue of whether these pseudoephedrine logs are business records, but other cases concerning statutorily created documents persuade that these records are not admissible as business records.

In *Matthews*, the court decided that records regarding the sale of sugar kept pursuant to 26 U.S.C. § 2811 were not business records under the Federal Business Records Act and that prejudicial error occurred when these documents reached the jury. *See Matthews v. United States*, 217 F.2d 409, 411 (5th Cir. 1954). There, the government introduced an IRS form which reported sugar sales which were in turn used to enforce a tax on alcohol. The record had several columns of recorded information labeled as follows: "Date Sold or Shipped," "Quantity," "Kind of Substance (Brand)," "Name and Address of Person or Firm to Whom Sold or Delivered," "Auto Tag No.; R.R. Car No.," "Driver's Name and Address; No. of Permit; Date it Expires." *See Id.* at 412. The records "were required to be made by

certain dealers in sugar, malt, yeast and other articles normally used in the manufacture of alcoholic beverages" per 26 U.S.C. § 2811. *Id.* at 413.

This Court determined that the sugar sale reports were not made in the regular course of business as the seller did not make them "in furtherance of its business in the buying and selling of merchandise." *Id.* at 413. "So long as the accuracy and reliability of records sought to be introduced in evidence have been tested by the fact that a business concern carries on its own affairs from day to day in reliance upon these records, there is no departure from the standards of accuracy and trustworthiness that were basic in the historic rule permitting testimony from the shop book or book of account." *Id.* at 413-14. In applying this standard, the records were found to have none of the "proofs of trustworthiness" as neither the business nor the public looked to these records in conducting business with the seller so the incentive for the business to reliably record the information was lacking. *See Id.* at 414. Additionally, like the logs in the instant case, the records were obtained "at the behest of [a government official] under sanction of Federal statute." *Id*.

Like *Matthews*, the records here require the pharmacy selling a product containing pseudoephedrine to record the name of the product, the quantity sold, the names and addresses of purchasers, and the dates and times of sales. See 21 U.S.C. § 830(e)(1)(A)(iii). The applicable Texas statute, as enacted during the time

of the alleged offense, only required the record of sale to include the name of the person making the purchase, the date of the purchase, and the product and number of grams purchased. *See* TX Health and Safety § 486.014(B)(2). There is no information contained in these logs that a place of business would specifically use for keeping track of sales from its inventory such as inventory codes, bar codes, lot numbers, supplier information, or even price.

Were a store to use this information in many of the ways that a business would, it would violate 21 U.S.C. § 830(c). This section provides that the information obtained in the logs is confidential and "may not be disclosed to any person", except for the Attorney General or an "officer or employee of the United States engaged in carrying out this subchapter, subchapter II of this chapter, or the customs laws … when relevant in any investigation or proceeding for the enforcement of this subchapter, subchapter II of this chapter, or the customs laws … to a State or local official or employee in conjunction with the enforcement of controlled substances laws or chemical control laws". See 21 U.S.C. § 830(c) (generally). As this information cannot be disclosed to any person, except to law enforcement investigating violations of the Controlled Substances Act, the business is prevented from using this record in many of the ways that they would use other, similar, records in the course of their business in buying and selling merchandise. This confidentiality requirement would also keep the public from

relying on these records in their business dealings with the business. As such, these records lack the "proofs of trustworthiness" much like the records in *Matthews*.

Additionally, the reform of the applicable Texas statute in 2011 also shows that the legislative intent behind the creation of these records was not to create a new form of records for businesses to utilize for their profit-making endeavors, but to create evidence for law enforcement investigations. See *2011 Tex. Sess. Law Serv. Ch. 742 (H.B. 1137)*. The law in Texas, TX Health and Safety Code § 486.014, was instituted in 2005. See *2005 Tex. Sess. Law Serv. Ch. 282 (H.B. 164)*. This statute required pharmacies to retain the pseudoephedrine logs for a period of at least two years. See *TX Health and Safety § 486.015*. The 2011 act allowed for the use of and created a real-time electronic database for these records to be entered into. The information in this electronic database may only be disclosed to the United States Drug Enforcement Administration or other federal, state, or local law enforcement and may not be used for any other purpose. See *TX Health and Safety § 486.0146*. Additionally, this act mandated that businesses that have been using the electronic database for over two years shall destroy all paper records. See *TX Health and Safety § 486.015(c)* (as provided for in 2011 Tex. Sess. Law Serv. Ch. 742 (H.B. 1137)). These pseudoephedrine logs cannot be said to be a business record that a business relies on if they are required to destroy these records after they begin to transmit the same information to law enforcement in real-time.

In *Ragano*, the Court determined that certain corporate records did fulfill the requirements of the business records exception. *See United States v. Ragano*, 520 F.2d 1191, 1200 (5th Cir. 1975). There, the government entered into evidence an annual corporate report, a certificate of amendment to the articles of incorporation for the corporation, and an application for a beverage license; which were filed with the state of Florida and purported to list the directors, officers, and shareholders of the corporation. *See Id*. This Court looked to the three factors set out in *Sabatino* in coming to the determination that the records were business records: "(1) the records must be kept pursuant to some routine procedure designed to assure their accuracy, (2) they must be created for motives that would tend to assure accuracy (preparation for litigation, for example, is not such a motive), and (3) they must not themselves be mere cumulations of hearsay or uniformed opinion." *United States v. Ragano*, 520 F.2d at 1200 (citing *Sabatino v. Curtiss National Bank*, 415 F.2d 632, 637 (5th Cir. 1969)).

Here, the pseudoephedrine logs are not documents concerning the inner workings of a company and are not filed with a state entity that could test the accuracy of the information contained within. The logs also fail to satisfy the three factors set forth in *Sabatino*.

As is discussed below, despite the testimony and evidence presented at trial, no information regarding whether the information in the logs was recorded

pursuant to a procedure to assure accuracy was provided. Additionally, there are discrepancies between and within the United States Code and the Texas statute regarding the information recorded in the logs. As such, the pseudoephedrine logs do not fulfill the first factor, that they are kept pursuant to a procedure designed to assure their accuracy. In regards to the second factor set forth in *Sabatino*, the records here are kept for use in investigations of possible violations of the Controlled Substances Act, not for the business related purposes of the pharmacies. See 21 U.S.C. § 830(c).

In *Veytia-Bravo*, this Court determined that ATF form 4473 records, memorializing firearm sales for a specific gun store who had gone out of business by the time of trial, were business records under 803(6). *See United States v. Veytia-Bravo*, 603 F.2d 1187, 1188 (5th Cir. 1979). In that case, the "ATF agent who sponsored [the 4473's] testified that the ATF currently had custody of the [gun store's] records, that the records presented were those prepared by [the gun store], and that [the gun store] had compiled the records pursuant to the ATF regulations. These regulations require a licensed munitions dealer as part of its regular course of business to make a contemporaneous record of every sale of firearms or ammunition." *Id.* at 1192. The Court also found that the ATF regulations required the gun store to record information about every sale it made of firearms or ammunition and that the gun store relied upon these records to conduct

its own business affairs. *See Id.* at 1191. "Where circumstances indicate that the records are trustworthy, the party seeking to introduce them does not have to present the testimony of the party who kept the record or supervised its preparation." *Id.* at 1191-92.

In the instant case, the seller is not required to log all of their sales into the pseudoephedrine log unlike the gun store in *Veytia-Bravo*. A pharmacy is only required to log sales of products containing pseudoephedrine, and then it is not required to log even all of those sales. The requirement that the seller log the sale of a product containing pseudoephedrine "does not apply to any purchase by an individual of a single sales package if that package contains not more than 60 milligrams of pseudoephedrine." 21 U.S.C. § 830(e)(1)(A)(iii). Inasmuch, the records here can hardly be said to be relied upon by the seller in conducting his business activities when the log requires that only specific sales of one product type which makes up only a segment of the total sales the business makes be recorded. On the contrary, it is obvious that the statutorily required records here require the seller to cease his normal activity to log the specific information that he is obligated to do so.

As mentioned above, the records here are purportedly maintained by pharmacies pursuant to 21 U.S.C. § 830 and TX Health and Safety Code § 486.014. At trial, the records were sponsored by Department of Public Safety

Trooper James Pieprzica ("Pieprzica") who testified as to what he had learned from computer generated files said to contain the information found in the logs maintained by each pharmacy. Unlike the ATF agent's attestation of the business practices in *Veytia-Bravo*, Pieprzica stated at trial that he was unable to testify to what happened when records of sales were recorded, other than to say that the pharmacy clerks were required to check a buyer's identification. See Volume 5, USCA5 269. Pieprzica also testified that each pharmacy had its own way of keeping its records. See Volume 5, USCA5 266. Since information regarding the manner or practices used to record the information was not found in the logs or even the trial testimony presented, the testimony of the party who kept the record or supervised its preparation should have been required.

Additionally, the logs themselves make allegations against Towns. The logs purport that Towns purchased a certain product at a certain time at a certain place. The logs also list the amount of pseudoephedrine that Towns allegedly purchased and this information makes the accusation that Towns violated the law. Such blatantly accusatory evidence is testimonial in nature, therefore, the actual person who recorded the information in the logs should have been required to testify so that their statements could undergo the crucible of cross-examination.

THE BUSINESS DID NOTHING TO ASSURE THE TRUSTWORTHINESS AND RELIABILITY OF THE LOGS BECAUSE THEY DO NOT RELY ON THE LOGS

Whether evidence is admissible under Rule 803(6) is "chiefly a matter of trustworthiness." *Mississippi River Grain Elevator, Inc. v. Bartlett & Co., Grain*, 659 F.2d 1314, 1319 (5th Cir. 1981). As explained above, both State and Federal law require and set out requirements for the recording of information in the pseudoephedrine logs. Federal law requires that the seller examine "an identification card that provides a photograph and is issued by a State or the Federal Government." 21 U.S.C. § 830(e)(1)(A)(iv)(I)(aa). The Texas statute, as enacted at the time, only requires the purchaser to "display a driver's license or other form of identification containing the person's photograph and indicating that the person is 16 years of age or older." TX Health and Safety § 486.014(1)(A). As no evidence was provided as to what identification each pharmacy required, it is possible that non-governmental identifications were accepted, allowing the purchaser to masquerade as any individual that they wished. Though only a possibility, Pieprzica's inability to confirm that any employee he encountered could even possibly identify Towns as an individual to whom they sold products containing pseudoephedrine, leaves too much wanting to be able to consider the information in the logs to be reliable or trustworthy.

Additionally, under the Federal statute, either the seller or the purchaser may enter the information into the log, provided the other party confirms the information. See 21 U.S.C. § 830(e)(1)(A)(iv)(III). If the customer was allowed to enter the information into the log and the seller failed to look or it was the regular business practice of the seller to not verify the information, the information within the log would be double hearsay, or hearsay within hearsay, as was the information contained in purported business records in *Ismoila*. *See United States v. Ismoila*, 100 F.3d 380, 392 (5th Cir. 1996). In that case, records in which the original information came directly from the customer were found to not satisfy the requirements of 803(6). "[A]lthough Fed.R.Evid. 803(6) provides an exception for one level of hearsay-that of the business documents themselves created by the employee who recorded the cardholder's statements-the sources of information contained in the records were the cardholders, and their statements must fall within another hearsay exception to be admissible." *Id*.

Here, as mentioned above, Pieprzica was unable to testify as to what happened when the information in the logs was recorded. See Volume 5, USCA5 269. He never testified that there was a single manner with which each pharmacy recorded the information by or gave even the faintest illumination of what those practices were. On the contrary, he testified that each pharmacy had its own way of keeping the records. See Volume 5, USCA5 266. Pieprzico was unable to even

identify the clerks who made each sale, nor did he even visit each pharmacy. See Volume 5, USCA5 265. Pieprzica failed to request the available surveillance videos to ensure that the pharmacy clerks were checking for identification or whether the accused individuals were in fact making the purchases. See Volume 5, USCA5 267. He commented doing so wasn't part of his investigation. See *Id*.

A similar situation was considered by the Court in *Davis*. In that case, the government admitted into evidence a document, pertaining to whether a firearm had entered into interstate commerce, which contained hearsay. *United States v. Davis*, 571 F.2d 1354, 1358 (5th Cir. 1978). In making its determination that the document did not fulfill the requirements of 803(6), the Court looked to the statement of the custodian of records for the firearms manufacturer which purported that the firearm had entered into interstate commerce. *See Id.* at 1358-59. The statement of the custodian of records there was silent as to how the information was recorded, whether it was in the manufacturer's regular practice to make such records, whether the records were kept in the course of a regularly conducted business activity, and whether they were made at or near the time by, or from information transmitted by, a person with knowledge. *See Id.* at 1359. Here, the statements of the custodians of records are also silent as to how the information was recorded or by whom it was recorded or when it was recorded. Neither could Pieprzica, the sponsoring witness, shed any light on what the practice, manner, or

individual purportedly recording the information. The trial court was not given even the most basic of information about whether the records complied with the requirements of 803(6) or whether the "source of information or the method or circumstances of preparation indicate[d] lack of trustworthiness." See Fed. R. Evid. 803(6).

In addition to the above, the proper predicate for 803(6) requires either the custodian of records or a qualified witness to establish the authenticity of the document held for the exception. *See United States v. Iredia*, 866 F.2d 114, 119-20 (5th Cir. 1989) (citing *Coughlin v. Capital Cement Co.*, 571 F.2d 290, 307 (5th Cir. 1978)). "A qualified witness is one who can explain the record keeping system of the organization and vouch that the requirements of Rule 803(6) are met." *United States v. Brown*, 553 F.3d 768, 792 (5th Cir. 2008) (citing *United States v. Iredia*, 866 F.2d at 120). Here, neither the affidavits from the custodians of records nor Pieprzica's testimony explained the record keeping system of the organizations and whether the requirements of 803(6) were met.

The pseudoephedrine logs admitted in the trial court do not meet the requirements of 803(6). The logs are prevented, by the express terms of the aforementioned statutes, from being used for any business purpose; the information contained within is prohibited from being disclosed or being used for any practical purpose other than providing evidence at trial. Since the businesses recording the

information do not rely on them for any reason related to the operation of the business, the logs lack the intrinsic reliability and trustworthiness found in business records. In addition, as the government failed to provide the trial court with the necessary information to determine whether the logs had the reliability which is required of a business record through testimony or evidence, the logs could not be examined and properly considered to fulfill the requirements of 803(6) and the trial court abused its discretion in admitting them. This abuse of discretion prejudiced Towns as these records corroborated the testimony of his alleged coconspirators and was a large portion of the government's case.

WHEN THE PURPOSE OF A RECORD IS THE PRODUCTION OF EVIDENCE AT TRIAL, THEY MAY NOT BE ADMITTED UNDER THE BUSINESS RECORD EXCEPTION

In *Melendez-Diaz*, the Supreme Court stated that "[d]ocuments kept in the regular course of business may ordinarily be admitted at trial despite their hearsay status. But that is not the case if the regularly conducted business activity is the production of evidence for use at trial." *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S.Ct. 2527, 2538, 174 L.Ed.2d 314 (2009).

As described above, under Federal law, the information contained in the logs is confidential and "may not be disclosed to any person", except for the Attorney General or an "officer or employee of the United States engaged in carrying out this subchapter, subchapter II of this chapter, or the customs laws … when relevant

in any investigation or proceeding for the enforcement of this subchapter, subchapter II of this chapter, or the customs laws … to a State or local official or employee in conjunction with the enforcement of controlled substances laws or chemical control laws". See 21 U.S.C. § 830(c) (generally). Under the current Texas statute, the information in this electronic database may only be disclosed to the United States Drug Enforcement Administration or other federal, state, or local law enforcement and may not be used for any other purpose. See TX Health and Safety § 486.0146 (generally).

Even were this Court to determine the logs comply with the requirements of 803(6), arguendo only, it is clear that the only function of requiring this information to be recorded is to produce evidence for use in trial. As such, the logs were inadmissible at trial because their admission violated Towns' confrontation rights and caused him prejudice.

The trial testimony offered by the government in addition to the psuedophedrine records came from Michael Sanders and Joey West. Michael Sanders, a convicted felon and thirty year-long drug addict [Volume 5, USCA5 171] who was awaiting a reduced sentence from twenty years based on his assistance in this case, testified that at some un-named time in the past he had been given pills by Towns and that Towns had assisted him in some manner when Sanders was cooking methamphetamine. Sanders neither recalled when this

occurred over the ten years (a period before that in the indictment) or more in which he cooked methamphetamine, nor could he be certain that it had occurred. Volume 5, USCA5 172-176. He testified that the chemicals in methamphetamine were harmful to his mind. Volume 5, USCA5 204. He could not recall what he had told investigators and what was reflected in their reports. Volume 5, USCA5 207.

> "Did you ever sell methamphetamine to David Towns?
> A. Yes, sir.
> Q. Did he ever sell methamphetamine to you?
> A. Possibly a couple of times, maybe. I am not really--I mean, that has been a long time ago.
> Q. Okay. How long ago?
> A. That's probably been ten years ago or so." Volume 5, USCA5 175.

And, that Towns was sometimes on the land where Sanders made methamphetamine while he was making it, Volume 5, USCA5 181, and drew anhydrous off. Volume 5, USCA5 181. He also testified that Towns would provide psuedophedrine. Volume 5, USCA5 186. Again, all without any time reference.

He also recounted that he would cook it, Towns would watch him do it, but he never actually saw Towns make it. Volume 5, USCA5 175. He further relayed that Towns helped him, without specifying what it was he helped him with. Volume 5, USCA5 176. He could not say that Towns ever manufactured methamphetamine. Volume 5, USCA5 190.

In his first meeting with the government, Sanders denied that Towns was anything other than a friend. Volume 5, USCA5 214. And he did not incriminate him. Volume 5, USCA5 215. Sanders was told that he would not get help from the government with his sentence if he did not implicate Towns. *Id*.

Joey West, the government's other witness, testified that he was assisting the government with his testimony in order to receive a reduced sentence. Volume 5, USCA5 221. He is a poly-drug abuser, having used cocaine, marijuana and methamphetamine. Volume 5, USCA5 223. He learned how to cook methamphetamine from Sanders six years prior to his testimony [Volume 5, USCA5 224], and would cook it at a property in Gonzales, Texas owned by Mr. Towns. Volume 5, USCA5 227. But he never cooked it when Mr. Towns was there. While Mr. Towns was some times at the property when Sanders cooked methamphetamine, he never saw them together. He saw Towns at the property about 20 times but never conducted any methamphetamine business with him. Volume 5, USCA5 228-229. He claimed that Towns brought him some pills in exchange for some drugs, but he never saw Towns cook methamphetamine and did not specify what drugs he traded to Towns on this occasion. Volume 5, USCA5 229-230. He further testified that he never cooked methamphetamine in front of Towns. Volume 5, USCA5 230. When he was on probation and promised that he would not use or possess cocaine, he did not keep that promise and ended

up violating his probation. Volume 5, USCA5 241.

So, while Towns agreed he took "drugs" sold over-the-counter to stay alert, he did not agree he did any methamphetamine manufacturing or assistance with that for Sanders or West. Towns further testified that he did not agree with the log records that he was purchasing so much of these over-the-counter drugs as they listed. Volume 5, USCA5 358.

Towns testified that he sometimes used over-the-counter stimulants including sinus medication to stay awake when he was long distance truck driving. Volume 5, USCA5 343-345. He would keep boxes on hand for this purpose.

During voir dire, Towns' counsel inquired of the jurors if they would require more evidence than just the word of a questionable informant to convict. They replied in the affirmative, that they would need documentary evidence before they relied upon the word of such witnesses. Volume 3, USCA5 73-82. Here, the government's case was comprised of such unreliable evidence. In addition, the government relied upon the inadmissible putative business records which also violated Towns' right to confront the witnesses against him. Clearly, he was prejudiced by this evidence.

ISSUE THREE RESTATED: The Court's belief that it could not even consider a safety valve reduction for Towns was erroneous.

Title 21 U.S.C. § 841 (b)(viii) sets a statutory minimum of ten years in this case.

> "In the case of a violation of subsection (a) of this section involving … 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers … such person shall be sentenced to a term of imprisonment which may not be less than 10 years …."

However, limitations on the applicability of the statutory mandatory minimum sentence exist. One such limitation is contained in 18 U.S.C. § 3553 (f), which provides:

"Notwithstanding any other provision of law, in the case of an offense under section 401, 404 or 406 of the Controlled Substance Act (21 U.S.C. 841, 844, 846) or section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963), **the Court shall impose a sentence** pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 **without regard to any statutory minimum sentence, if the Court finds at sentencing**, after the Government has been afforded the opportunity to make a recommendation, **that –**

(1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;

(2) **the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense**;

(3) **the offense did not result in death or serious bodily injury to any person**;

(4**) the defendant was not an organizer, leader, manager, or supervisor** of others in the offense, as determined under the sentencing guidelines and was not engaged in continuing criminal enterprise, as defined in section 408 of the Controlled substances Act; and

(5**) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense** or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement." (emphasis supplied).

Also, subsection (b)(11) of § 2D1.1 of the Sentencing Guidelines provides for a decrease by two levels in the Sentencing Guideline range, if the defendant meets similar criteria in § 5C1.2 of the Sentencing Guidelines. Section 2D1.1 (b)(11) provides for a reduction of 2 levels if the defendant meets the criteria set forth in § 5C1.2:

NOT MORE THAN 1 CRIMINAL HISTORY POINT. Towns has no prior record. Thus he has no criminal history points.

VIOLENCE OR POSSESSION OF FIREARM. Towns neither possessed a weapon during this offense, nor did he make any threat of violence.

DEATH OR INJURY. Similarly, no death or serious bodily injury occurred in this case.

LEADERSHIP ROLE. Towns was not an organizer, leader, manager or supervisor in the offense. He provided the government all of the information that he knew about the offense. Clerk's Record USCA5 255-262. Since the government threatened Towns with perjury of his debriefing. Towns obtained a polygraph. His polygraph test results are evidence, which this Court should consider in making the evaluation that the information he provided was truthful. See Polygraph test result Clerk's Record USCA5 268-269.

The trial court denied application of the safety valve to Towns because he maintained his innocence and pleaded not guilty. Volume 8, USCA5 464. The sentencing judge felt that he could not sentence Towns to the safety valve because of this. The court specifically found that the ten-year mandatory minimum sentence was excessive for Mr. Towns, but found that it had no other choice absent some sort of post-conviction confession in Towns' debriefing. *Id*. Thus, Towns' argument boils down to whether a person who does not admit guilt, but truthfully debriefs to the government, can qualify for the safety valve. The answer to this

question must be yes to remain consistent with the Towns' right to substantive due process, the right to put the Government to its proof.

None of the Safety Valve provisions require a guilty plea as a prerequisite. See United States Sentencing Guidelines §§ 2D1.1 (b)(11), 5C1.2; 18 USC § 3553(f). A citizen's right to assert his innocence necessitates this result. One can neither find a person untruthful merely because they took the stand and testified at trial, nor consider a defendant guilty simply because he does not speak post arrest. *See generally Doyle v. Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L.Ed.2d 91 (1975)(silence after arrest cannot be used at trial when a defendant testifies). A person, as Towns did here, may testify and put the Government to its proof, while still having met the truthfulness criteria under the Safety Valve with respect to all of the information which he provided to the Government concerning the offense.

In *Garcia-Gil*, this Court acknowledged that, a district court could "believe a defendant's protestations of innocence and find that he has told the prosecution all he knows." *United States v. Garcia-Gil*, 133 Fed. Appx. 102, 110 (5th Cir. 2005)(mem. op.)(citing *United States v. Sherpa*, 110 F.3d 656, 660 – 61 (9th Cir. 1996)). In *United States v. Sherpa*, the Ninth Circuit concluded that a defendant could be found truthful cooperative with the government despite his attestations of innocence contrary to the jury's verdict. *Sherpa*, 110 F.3d at 660-61. Furthermore, "the safety valve may be available to those who put the government

through a trial or wait until the last minute to disclose useful information." *United States v. Hardman*, Case No. 2:05 CR 20044-0, 2007 WL 4144929 *1 (W.D. La. 2007) (citing *United States v. Tournier*, 171 F.3d 645, 647 (8th Cir. 1999)). The safety valve should have been applied, reducing Towns' sentence by two points to a level 30 or lower. Such award of the safety valve would clear the way for variance based on Towns' military service, health problems or other factors.

Thus, the trial court's rejection of the safety valve is legally flawed under a *de novo* standard of review for two reasons. First, it was based on the flawed assumption that Towns was not truthful for the sole reason that he contested his guilt by going to trial. Second, a safety valve finding constitutes an independent determination made by the sentencing judge, not something dictated entirely by the Government's estimation. *United States v. Jeffers*, 329 F.3d 94, 98 (2d Cir. 2003)(proper application of guideline is reviewed *de novo*). Other circuits have acknowledged it is a "misconception" that a safety valve request can be denied solely on the fact that a defendant went to trial. *See United States v. Ramirez*, 2006 Lexis 39724, at *25 (N.D. IA. 2006) (refusing to conduct an evidentiary hearing and denying relief partially because the probation officer and the prosecutor both informed the judge that going to trial cannot form the sole basis for denying the safety valve).

The sentencing judge in this case plainly believed that he had no other choice but to deny the safety valve:

> "The Court: But doesn't this lead to the ironic result that Congress, than [sic] has mandated a 120-month sentence in this case, so under your theory, someone can just continue to plead innocent, not provide any information of safety valve, and bust the minimum mandatory required by the statute?
> Mr. Villarreal: Well, only a person in David's position would be able to do that, Your Honor. He said: Look, I can tell you about my prior drug use, my prior relationship with Michael Sanders, and I have already said what I know about the transactions that are charged in the indictment, but that is it. I have no other relevant or useful information to provide.
> . . .
> The Court: Mr. Towns, I have given you every opportunity for safety valve. I still continue to believe that a guideline sentence of 121 to 151 months is too high for what you did, but ***but I am stuck with a statutory requirement that I sentence you to no less than ten years . . . the safety valve is inapplicable here.***" USCA 5 463 – 64.

This excerpt illustrates the judge's expectation for a confession, an act of contrition, or some semblance of acknowledgement from Towns that he is actually guilty; however, the safety valve provisions impose no such requirement. United States Sentencing Guidelines §§ 2D1.1 (b)(11), 5C1.2; 18 USC § 3553(f). Towns need only debrief honestly, the guidelines do not require a confession of guilt. In this fashion, Towns presents a case markedly different from this Court's dispensation in *United States v. Rikihram*, where district court did not err in denying the safety valve in light of the defendant's contradictory debriefing at every stage of the proceedings against him. *United States v. Rikhiram,* Case No. 10-41233, 2011 WL 6003977 at *1 (5th Cir. December 1, 2011) (*per curiam*) (slip

op.). In contrast, Towns always maintained his innocence. The only basis for the conclusion that he debriefed untruthfully stems the debriefing itself:

> "U.S.A. Charlie Strauss: There's really no sense in pursuing it further, Alfredo. I'm not trying to cut anybody off, but if he says he's not guilty, I mean, the little deal that I read is 'Truthfully provide to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct.' I mean, his trial testimony was that he had no involvement in those offenses.
> Cynthia Orr: Uh-huh.
> Mr. Strauss: - - so I would say that that [sic] concludes it. I'm not trying to being [sic] unfair or - -" See Clerk's Record USCA5 260.

Towns' debriefing illustrates his acceptance of responsibility for conduct taking place outside the times relevant in the indictment; he only asserted his innocence with regard to the conduct alleged in the indictment. Because the law cannot hold an individual culpable for actions a group of conspirators undertakes prior to his entry into the conspiracy, Towns could truthfully assert his innocence at the debriefing, as he did at trial. *Levine v. United States*, 383 U.S. 265, 266 (1966) (per curiam). Because the sentencing judge mischaracterized the entire safety valve inquiry, improperly infringing upon Mr. Towns' decision to assert his innocence, plead not guilty, and go to trial, there is no question that the Trial Court's belief that it could not apply the safety valve was erroneous.

CONCLUSION AND PRAYER

For the foregoing reasons, this Honorable Court should reverse and remand Towns' conviction without the admission of records, which were not business

records and violates his right to confront witnesses against him. It should further reverse and remand his case for a resentencing in which the Court decides whether, in its discretion, it desires to assess the safety valve reduction.

Respectfully Submitted

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CERTIFICATE OF SERVICE

I hereby certify that on this the 28th day of February, 2012 a true and correct copy of the above Brief for Appellant has been served to:

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as registered participant to the CM/ECF filing system and via U.S. Mail, first class, in a postage paid and preaddressed envelope, upon notice from this Court for Appellant to file the paper copies.

By: ___/s/ *Cynthia E. Orr*_____
Cynthia E. Orr

FED. R. APP. P. WITH 5TH CIR. R. & IOP'S

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