

No.

In the
Supreme Court of the United States

JESUS R. GONZALEZ-NEGRON,
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

**On Petition for Writ of Certiorari to the
United States Court of Appeals
For the First Circuit**

PETITION FOR A WRIT OF CERTIORARI

LISA AIDLIN
(Counsel of Record)
P.O. Box 240
Sharon, Massachusetts 02067
(781) 784-1060
laidlin@gmail.com

Counsel for Petitioner

October 26, 2018

QUESTION PRESENTED FOR REVIEW

Is evidence of a loaded machine gun and drugs within a person's residence an adequate factual basis to support a guilty plea to possession of a firearm "in furtherance of" a drug trafficking offense under 18 U.S.C. § 924(c)(1)(A)?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below are contained in the caption of the case.

TABLE OF CONTENTS

QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iii
TABLE OF APPENDICES	iii
TABLE OF AUTHORITIES	iv
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISION AND RULE INVOLVED	1
INTRODUCTION	1
STATEMENT OF THE CASE.....	5
REASONS FOR GRANTING THE WRIT	7
I. Courts Are Divided Over The Question Presented.....	8
II. The Question Presented Is Of Extraordinary Practical Importance And This Case Provides The Perfect Vehicle To Resolve It.....	13
CONCLUSION.....	15

TABLE OF APPENDICES

Appendix A: Opinion, <u>United States v. Gonzalez-Negron</u> , 892 F.3d 485 (1st Cir. 2018).....	Pet. App. 1a-3a
Appendix B: First Circuit's Order Denying Petition for Rehearing.....	Pet. App. 4a

TABLE OF AUTHORITIES

CASES

<u>McCarthy v. United States</u> , 394 U.S. 459 (1969)	7
<u>United States v. Benson</u> , 63 Fed. Appx. 88 (4 th Cir. 2003)	11
<u>United States v. Gonzalez-Negron</u> , 892 F.3d 485 (1st Cir. 2018) (Souther, J.)	1
<u>United States v. Leary</u> , 422 Fed. Appx. 502 (6th Cir. 2011).....	11
<u>United States v. Mann</u> , 389 F.3d 869 (9th Cir. 2004)	2, 9
<u>United States v. Maye</u> , 582 F.3d 622 (6th Cir. 2009).....	10, 11, 12
<u>United States v. Monzon</u> , 429 F.3d 1268 (9th Cir. 2005).....	8, 9
<u>United States v. Moore</u> , 919 F.2d 1471 (10th Cir. 1990).....	12
<u>United States v. Rios</u> , 449 F.3d 1009 (9th Cir. 2006).....	9, 10

CONSTITUTIONAL PROVISIONS AND STATUTES

18 U.S.C. § 924(c).....	8, 10, 11, 12
18 U.S.C. § 924(c)(1)(A)	1, 2, 3, 4, 5, 6, 7, 8, 10, 13
28 U.S.C. § 1254(1)	1

FEDERAL RULES

Fed.R.Crim.P. 11(b)(3)	1, 7, 11
------------------------------	----------

OTHER AUTHORITIES

H.R.Rep. No. 105-344 (1997), 1997 WL 668339	2
---	---

PETITION FOR WRIT OF CERTIORARI

Petitioner Jesus R. Gonzalez-Negron respectfully petitions this Court for a writ of certiorari to review the judgment of the First Circuit.

OPINIONS BELOW

The published opinion of the First Circuit, United States v. Gonzalez-Negron, 892 F.3d 485 (1st Cir. 2018) (Souter, J.)¹, is attached hereto as Appendix A (Pet. App. 1a-3a). The order denying rehearing is attached hereto as Appendix B (Pet. App. 4a) and is unreported.

JURISDICTION

The judgment by the court of appeals was entered on June 13, 2018, and a timely petition for rehearing was denied on July 30, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND RULE INVOLVED

18 U.S.C. § 924(c)(1)(A) provides in relevant part that "any person who, during and in relation to any...drug trafficking crime...who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime...be sentenced to a term of imprisonment of not less than 5 years." Id.

Rule 11 of the Federal Rules of Criminal Procedure requires that the district court, "[b]efore entering judgment on a guilty plea...determine that there is a factual basis for the plea." Fed.R.Crim.P. 11(b)(3).

¹ Hon. David H. Souter, Associate Justice (Ret.) of the Supreme Court of the United States, sitting by designation.

INTRODUCTION

Under 18 U.S.C. § 924(c)(1)(A), a mandatory minimum five-year term of imprisonment is imposed if "any person who, during and in relation to any...drug trafficking crime...in furtherance of any such crime, possesses a firearm." Id. The House Judiciary Committee intended the "in furtherance" language of this statute to be held to "a slightly higher standard" than the "during and relation to" language in Section 924(c)(1)(A): "[t]he government must clearly show that a firearm was possessed to advance or promote the commission of the underlying offense. ***The mere presence of a firearm in an area where a criminal act occurs is not a sufficient basis for imposing this particular mandatory sentence.***" H.R.Rep. No. 105-344 (1997), 1997 WL 668339 at 12 (emphasis supplied). "Rather, the government must illustrate ***through specific facts***, which tie the defendant to the firearm, that the firearm was possessed to advance or promote the criminal activity." Id. (emphasis added). Indeed, "Congress has not made mere possession, when it occurs contemporaneously with drug manufacture, a strict liability crime." United States v. Mann, 389 F.3d 869, 880 (9th Cir. 2004).

The practice of allowing a defendant who is found with a loaded machine gun and drugs inside his residence to plead guilty to possession of a firearm in furtherance of a drug trafficking crime under § 924(c)(1)(A) -- without any admission by the defendant that he possessed the firearm to advance or promote the drug activity -- has not only become a recurring issue, but the federal courts are in conflict as to how

to handle the procedural and substantive issues surrounding the defendant's guilty plea to § 924(c)(1)(A).²

This case presents an important question of federal criminal procedure over which there is a split of authority: does the mere possession of a loaded machine gun and drugs inside a residence provide an adequate factual basis under Rule 11 of the Federal Rules of Criminal Procedure to sustain a guilty plea to § 924(c)(1)(A)? The facts in this case are uncomplicated. During Mr. Gonzalez-Negron's plea hearing, he admitted that he possessed a loaded Glock pistol had been modified to shoot in fully automatic mode (a machine gun) in his bedroom closet of his apartment and that he dealt drugs, which had been stashed in his kitchen cabinet. Pet. App. 2a. Mr. Gonzalez-Negron never admitted that the machine gun advanced or promoted his drug trafficking business.

This case is the perfect vehicle to resolve the circuit split. Mr. Gonzalez-Negron raised his Rule 11 violation on direct appeal. The First Circuit nonetheless ruled "the facts on record, including the particular facts of the loaded machine gun's exceptional destructive capacity and the illegality of its possession, are at least arguably sufficient to satisfy the requirement of demonstrating on the record a factual basis for the 'in furtherance' element as required under Rule 11. If there is thought to be

² Mr. Gonzalez-Negron conceded that there was an adequate factual basis to support the first two elements of possession of a firearm in furtherance of a drug trafficking crime under § 924(c)(1)(A); namely, that he committed a drug trafficking crime and he possessed a firearm.

any inadequacy on this point, it did not amount to error that could be treated as plain.” Pet. App. 2a.

This case warrants the Court's review. There is a conflict among the circuit courts over the question presented. The First Circuit's decision squarely conflicts with the decisions in the three circuit courts, which have found that a guilty plea to § 924(c)(1)(A) requires some evidence that the machine gun promoted or advanced the drug trafficking crime, not merely evidence of possession of a loaded machine gun and drugs within a residence. Only this Court can resolve the open conflict on this fundamental question of federal criminal procedure.

The question presented is of great importance. Federal district courts require guidance as to what procedures should be followed to comply with Rule 11 to ensure an adequate record for a guilty plea to § 924(c)(1)(A). Circuit courts need instruction to maintain uniformity as to whether the “in furtherance” element is satisfied by evidence of the possession of a loaded machine gun and drugs within a residence, or whether there also needs to be evidence that the firearm promoted or advanced the drug trafficking crime to sustain the guilty plea.

This case also presents an excellent vehicle to resolve the question presented. The Rule 11 violation was fully presented in the First Circuit. Mr. Gonzalez-Negron incurred harm by pleading guilty to a crime he did not commit, namely possessing a firearm in furtherance of a drug trafficking offense and receiving an additional 120-month sentence. In short, certiorari should be granted. This case presents a

significant and often-recurring question of federal criminal procedure over which there is a clear conflict of authority.

STATEMENT OF THE CASE

In this case, the police pursuant to a search warrant found a fully loaded Glock pistol containing 16 rounds of 9mm ammunition that had been modified to shoot in fully automatic mode (a machine gun) hidden inside Mr. Gonzalez-Negron's bedroom closet of his apartment and uncovered his stash of drugs in the kitchen cabinet. Pet. App. 2a.

Mr. Gonzalez-Negron, a twenty-six-year old who had no prior criminal record, entered into a plea agreement with the government on December 6, 2016, in which he agreed to certain stipulated facts. He admitted that two days prior to his arrest he purchased the Glock pistol, which had been modified to shoot in fully automatic mode. He further admitted that he had been preparing marijuana, crack cocaine, and cocaine for distribution for the past three months in his housing project. There was no admission or evidence that the machine gun promoted or advance the drug trafficking crime or that the drugs were sold from within his apartment, where he resided with his family. During his interview with his probation officer, Mr. Gonzalez-Negron never specified his reason for purchasing the firearm and disclaimed that it was for safety concerns.

As part of Mr. Gonzalez-Negron's plea deal, the government dismissed a charge to possession of a machine gun in furtherance of a drug trafficking crime, which carried a mandatory 30-year minimum sentence. Pet. App 1a. Under the terms of

the plea agreement, the parties agreed that Mr. Gonzalez-Negron would receive a 12 to 18-month sentence for his drug charge and a consecutive sentence ranging from 96 to 132 months for his firearm possession charge. The plea agreement also contained a waiver of appeal provision.

On the same day he signed his plea agreement, Mr. Gonzalez-Negron attended a plea hearing where he pled guilty to one count of possession with intent to distribute crack cocaine and to one count of possession of a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1)(A)(i). On March 7, 2017, Mr. Gonzalez-Negron received a combined sentence of 132-months incarceration. Pet. App. 1a. In particular, the district court sentenced Mr. Gonzalez-Negron to twelve months incarceration for the drug charge and a consecutive 120 months incarceration for the firearm possession charge.

On direct appeal, Mr. Gonzalez-Negron argued in part that the district court violated Rule 11 of the Federal Rules of Criminal Procedure when it accepted his guilty plea to 18 U.S.C. § 924(c)(1)(A) because the defendant never admitted that he possessed the machine gun to promote or advance his drug trafficking business and the machine gun stored inside the bedroom closet along with the drugs stashed in the kitchen cabinet did not provide an adequate factual basis for his guilty plea.

In a published decision released on June 13, 2018, the First Circuit Court of Appeals rejected Mr. Gonzalez-Negron's arguments and affirmed the appeal. Pet. App. 3a. The First Circuit determined that "[b]ecause possession of a machine gun is criminal per se except for certain very limited exceptions not relevant here...the law

unequivocally precludes any option to keep the gun for a lawful purpose, and supports the likelihood that the actual purpose was unlawful: here, furthering the defendant's drug crime." Pet. App. 2a. The First Circuit then concluded: "In sum, the facts on record, including the particular facts of the loaded machine gun's exceptional destructive capacity and the illegality of its possession, are at least arguably sufficient to satisfy the requirement of demonstrating on the record a factual basis for the 'in furtherance' element as required under Rule 11. If there is thought to be any inadequacy on this point, it did not amount to error the could be treated as plain." Pet. App. 2a (citation omitted).

On July 30, 2018, the First Circuit denied Mr. Gonzalez-Negron's timely petition for rehearing and rehearing en banc. Pet. App. 4a.

REASONS FOR GRANTING THE WRIT

This Court has long recognized that a defendant has due process rights to a fair sentencing procedure by ensuring that the district court "[b]efore entering judgment on a guilty plea...determine(s) that there is a factual basis for the plea." Fed.R.Crim.P. 11(b)(3). A district court must ensure that the defendant's admitted conduct is in fact an offense under the statutory provision for the guilty plea. See McCarthy v. United States, 394 U.S. 459, 467 (1969) ("Requiring this examination of the relation between the law and the acts the defendant admits having committed is designed to protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge").

This case asks the Court to resolve a conflict among the circuit courts as to whether evidence of a loaded machine gun and narcotics within the same residence without any evidence that the defendant possessed the firearm to advance or promote his drug trafficking provides an adequate factual basis for a guilty plea to the “in furtherance” element under § 924(c)(1)(A).

The question presented warrants this Court's review because the First Circuit's decision addresses recurring questions of undoubted importance concerning federal criminal procedure, which impact upon the fairness of the sentencing procedure and call into question due process concerns to plead guilty to the crime committed.

I. Courts Are Divided Over The Question Presented.

The First Circuit's holding on the question presented -- that possession of a loaded machine gun and drugs within a residence provide an adequate factual basis to secure a guilty plea to § 924(c)(1)(A) -- puts the First Circuit, at odds with the holdings of the Fourth, Sixth, and Ninth circuit courts. Specifically, these circuit courts require evidence that the firearm promoted or advance the drug trafficking crime in addition to evidence of the possession of a machine gun and narcotics to sustain a guilty plea to § 924(c)(1)(A). As a result, the outcome of this case would have been different had it arisen in these other jurisdictions.

The Fourth, Sixth, and Ninth Circuits have held, in direct conflict with the First Circuit in this case, that mere possession of a machine gun and narcotics within a person's residence cannot sustain a guilty plea to § 924(c)(1)(A).

For instance, the First Circuit's holding contravenes the Ninth Circuit's decision in United States v. Monzon, 429 F.3d 1268, 1272-74 (9th Cir. 2005), which reversed the defendant's conviction and vacated the defendant's guilty plea to possession of a firearm in furtherance of a drug trafficking crime under § 924(c)(1). Id. The Ninth Circuit found under plain error review that the district court violated Rule 11 when it accepted the defendant's plea without an adequate factual basis as to the defendant's intent because the record only supported that the firearm and drugs were located in a bedroom together and there was no admission by the defendant why he possessed the gun. Monzon, 429 F.3d at 1273-74.

In Monzon, federal agents executed a search warrant and seized a loaded semi-automatic handgun from under the defendant's bedcovers where he had been sleeping, cash from his coat closet, and nearly 250 grams of heroin in a baby formula can wrapped in electrical tape from the closet shelf in the bedroom. Id. at 1269, 1270. During the plea colloquy in Monzon, when asked if he possessed the firearm to protect the drugs, the defendant answered, "No. That's not it. I just had it because somebody sold it to me cheap," and that he liked guns and bought it. Id. at 1270. The government countered that the defendant had the gun in his possession in the bedroom with the drugs, so the defendant admitted that he had a gun and drugs in the bedroom, and the court accepted the guilty plea. Id. at 1270-71.

The Ninth Circuit found the Rule 11 error affected the defendant's substantial rights because the plea agreement contained no statement of the defendant's intent in possessing the gun, and the mere fact he possessed a gun at the scene of a drug

trafficking crime was insufficient to support the "in furtherance" element. Monzon at 1273 (citation omitted).

Indeed, the First Circuit's finding also cannot be squared with the Ninth Circuit's holdings in United States v. Mann, 389 F.3d 869, 880 (9th Cir. 2004) and United States v. Rios, 449 F.3d 1009, 1012 (9th Cir. 2006). In Mann, the Ninth Circuit held that the possession of "inherently dangerous" firearms that are "generally lacking in usefulness except for violent and criminal purposes" does not satisfy the 'in furtherance of' element of § 924(c)(1)(A)). Mann, 389 F.3d at 880. In Rios, 449 F.3d at 1012, the Ninth Circuit reaffirmed this holding and ruled that "mere possession of a firearm recognized as one fit for illegal activity, such as a sawed-off shotgun, does not satisfy the 'in furtherance' requirement." Id. at 1014 (citing Mann, 389 F.3d at 880). The Ninth Circuit in Rios "declined [] to permit reliance solely on the nature of the firearms themselves" for a conviction under § 924(c). Rios, 449 F.3d at 1012, 1016. The Ninth Circuit reversed the defendant's conviction under § 924(c)(1)(A) and refused to find that "[a]ny person involved in a drug conspiracy who happens to have a weapon at home, for whatever purpose, could be convicted under § 924(c)(1)(A)." Rios, 449 F.3d at 1016.

The First Circuit's ruling further contradicts the Sixth Circuit's decision in United States v. Maye, 582 F.3d 622 (6th Cir. 2009), where the Sixth Circuit found under plain error that the government failed to identify evidence that would meet the "in furtherance standard" thereby failing to ensure there was factual basis for the defendant's plea to § 924(c)(1)(A). Id. at 630. In Maye, the defendant sold drugs on

a front porch of a nearby apartment while his gun was inside his apartment. Id. at 624, 630. The police pursuant to a search warrant later seized crack cocaine, digital scales, a revolver and money from the defendant's apartment. Id. at 624. As in this case, the defendant pled guilty to possession of firearm in furtherance of a drug trafficking crime under § 924(c)(1)(A). Maye, 582 F.3d at 626. During the sentencing hearing, the defendant raised concerns about what he did to be charged under § 924(c), and the district court reread the statement of facts, which averred that the defendant possessed with intent to distribute cocaine base and "possess[ed] a firearm in furtherance of a crime of drug trafficking." Maye, 582 F.3d at 629. The Sixth Circuit scrutinized the government's evidence and found there was no factual basis to support the plea to § 924(c), where the firearm was not brandished during the crime, the confidential informant never indicated the gun was loaded or that the defendant threatened him with a weapon, and there was no testimony indicating that the defendant pointed out the gun to the informant or that it was visible during the transaction. Maye, 582 F.3d at 634, 641 n. 3.

The Sixth Circuit in Maye held that the firearm's presence during the vicinity of the crime did not satisfy Rule 11(b)(3) and vacated the guilty plea. Maye, 582 F.3d at 631, 634. The Sixth Circuit explained: "[i]n ruling that mere possession of a firearm on the same premises as a drug transaction is insufficient to support a section 924(c) conviction, we have previously held that the firearm must be strategically located so that it is quickly and easily available for use." Maye, 582 F.3d at 626 (citation and internal quotation marks omitted). Ultimately, the Sixth Circuit ruled:

“[w]ithout any evidence that the firearm found in Maye's residence was possessed to advance or promote the commission of the underlying [drug-trafficking] offense, the district court thus committed plain error in entering judgment on the defendant's section 924(c) guilty plea.” Maye, 582 F.3d at 631 (internal footnote and quotation marks omitted).

The Panel's conclusion further contravenes the Sixth Circuit's holding in United States v. Leary, 422 Fed.Appx. 502, 510-511 (6th Cir. 2011), which ruled that "it cannot be true that any time a gun is found near drugs it is necessarily the result of a strategic decision relating to drug activity." Leary, 422 Fed.Appx. at 511, 513. The Sixth Circuit overturned a jury conviction ruling that the government failed to show that the three firearms including assault rifles found inside the defendant's closet along with a bag of cocaine supported a conviction under § 924(c)(1)(A) for possession of a firearm in furtherance of drug trafficking. Leary, 422 Fed.Appx. at 513. In making this determination, the Sixth Circuit explained, “we have distinguished the ‘in furtherance of’ prong from the ‘during and in relation to’ prong also contained in § 924(c) by holding that the ‘in furtherance of’ prong requires the government to prove a defendant used the firearm with greater participation in the commission of the crime or that the firearm's presence in the vicinity of the crime was something more than mere chance or coincidence.” Leary, 422 Fed. Appx. at 510 (citation omitted).

The First Circuit's decision cannot be reconciled with the Fourth Circuit's holding in United States v. Benson, 63 Fed. Appx. 88, 89-90 (4th Cir. 2003), which

vacated the defendant's guilty plea to § 924(c)(1)(A) for a lack of an adequate factual basis under Rule 11, where the defendant admitted that the firearm and drugs found in his residence belonged to him. Benson, 63 Fed. Appx. at 89-90. The Fourth Circuit held that "[m]ere possession of a firearm is insufficient" to sustain a conviction to possession of firearm in furtherance of a drug trafficking crime. Id. at 89. The Fourth Circuit concluded that "the Government's proffered evidence against Benson, however, demonstrated nothing more than his concurrent possession of narcotics and a firearm. Moreover, in reviewing the remainder of the record before us, we are unable to find any evidence that Benson used, carried, or possessed the firearm in the furtherance of a drug trafficking crime." Id.

The Panel's determination also conflicts with the Tenth Circuit's ruling in United States v. Moore, 919 F.2d 1471, 1475 (10th Cir. 1990), which held that "[m]ere possession of the machine gun cannot support a conviction under section 924(c)." Moore, 919 F.2d at 1475. Ultimately, the Tenth Circuit upheld a jury conviction on a sufficiency of the evidence challenge, where the evidence showed that the machine gun was visible and in close proximity to the drugs in the bedroom where most of the cocaine purchases transpired. Id. The Tenth Circuit concluded that the jury reasonably could have found that the defendant "used' the machine gun as a means of safeguarding and facilitating his possession of cocaine." especially given that witnesses testified the machine was visible during the cocaine purchases. Id. (inferring that the machine gun "emboldened" the defendant "providing him with protection for himself, the cocaine and the cash if the need arose").

Accordingly, at least three circuit courts have directly rejected the legal position taken by the First Circuit in this case. As a result, there is a square split of authority on the question presented that only this Court can resolve.

II. The Question Presented Is Of Extraordinary Practical Importance And This Case Provides The Perfect Vehicle To Resolve It.

This Court should use this case to resolve the split over the question presented. Review by the Court is warranted because this case involves a recurring issue of tremendous practical importance, namely is possession of a loaded machine gun and drugs within a defendant's residence an adequate factual basis to sustain a guilty plea to § 924(c)(1)(A)?

Without this Court's intervention, the federal courts will continue to accept guilty pleas to § 924(c)(1)(A) without an adequate factual basis to support the plea and therefore deny defendants a fair sentencing process and have them to plead to a crime they did not commit. This case presents the perfect vehicle for resolving the question presented. Mr. Gonzalez-Negron thoroughly raised the issue before the First Circuit. This Court should thus grant certiorari to make clear if mere possession of a machine gun and drugs within a residence can sustain a guilty plea to § 924(c)(1)(A).

CONCLUSION

Accordingly, Mr. Gonzalez-Negron's petition for a writ of certiorari should be granted.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Lisa Aidlin", written over a horizontal line.

LISA AIDLIN

P.O. Box 240

Sharon, Massachusetts 02067

(781) 784-1060

Email: laidlin@gmail.com

Counsel for Jesus R. Gonzalez-Negron

October 26, 2018