

No. 18-6563

IN THE SUPREME COURT OF THE UNITED STATES

JESUS R. GONZALEZ-NEGRON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court committed reversible plain error in finding that a factual basis existed to support petitioner's guilty plea to possession of a firearm in furtherance of a drug-trafficking offense, in violation of 18 U.S.C. 924(c)(1)(A).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is reported at 892 F.3d 485.

JURISDICTION

The judgment of the court of appeals was entered on June 13, 2018. A petition for rehearing was denied on July 30, 2018 (Pet. App. 4a). The petition for a writ of certiorari was filed on October 26, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the District of Puerto Rico, petitioner was convicted on one count of possession with intent to distribute cocaine base, in violation of 21 U.S.C. 841(a)(1), and 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). Judgment 1. He was sentenced to 132 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-3a.

1. On March 3, 2016, law enforcement agents executed a search warrant at petitioner's apartment in the San Martin Public Housing Project in Puerto Rico. Presentence Investigation Report (PSR) ¶ 13. Petitioner was home along with another adult and two minors. Ibid. In the master-bedroom closet, agents found a fully loaded 9mm Glock pistol that had been modified from semi-automatic to fully automatic, making it an illegal machine gun. Ibid. In the kitchen, agents discovered 113 baggies of cocaine, 98 vials of crack cocaine, 50 baggies of marijuana, and two large bags of marijuana, along with empty vials, baggies, a scale, and two pots contaminated with cocaine. PSR ¶ 14. Petitioner was interviewed and admitted that the drugs were his and that he had been dealing drugs in the housing project. PSR ¶¶ 15-16. Petitioner also admitted that he had purchased the modified Glock handgun in the

housing project and knew at the time that it had been modified to fire fully automatic. Ibid.

A grand jury in the District of Puerto Rico charged petitioner with one count of possession with intent to distribute cocaine, in violation of 21 U.S.C. 841(a)(1); one count of possession with intent to distribute marijuana, in violation of 21 U.S.C. 841(a); one count of possession with intent to distribute cocaine base, in violation of 21 U.S.C. 841(a)(1); one count of possession of a machine gun in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. 924(c)(1)(B)(ii) and 2; 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); one count of possession of a firearm by a drug user, in violation of 18 U.S.C. 922(g)(3) and 924(a)(2); and one count of possession of an illegal machine gun, in violation of 18 U.S.C. 922(o). Indictment 1-4.

Petitioner entered a plea agreement whereby he agreed to plead guilty to possession with intent to distribute cocaine base and possession of a firearm in furtherance of a drug-trafficking crime, in exchange for the government's agreement to dismiss the remaining charges. Pet. App. 1a. At petitioner's change-of-plea hearing, he confirmed that he understood the charges, Plea Hrg. Tr. 5-6; acknowledged his desire to plead guilty, id. at 12; and agreed that the proffer that he had "acknowledged * * * that he

possessed the firearm in furtherance of his drug trafficking activities" was accurate, id. at 19-20.

The district court accepted the plea. D. Ct. Doc. 48, at 1 (Jan. 31, 2017). The court subsequently sentenced petitioner to 132 months of imprisonment. Judgment 2.

2. The court of appeals affirmed. Pet. App. 1a-3a.

On appeal, petitioner invoked Federal Rule of Criminal Procedure 11 and argued that his guilty plea was invalid for two reasons: First, because the district court had failed to ascertain whether a sufficient factual basis existed to support his conviction for possession of the firearm in furtherance of his drug-trafficking crime, and second, because the district court had failed to ensure that petitioner understood the legal nature of the possession-in-furtherance element. Pet. App. 1a. The court of appeals concluded that petitioner could raise these claims on appeal notwithstanding the appeal waiver in his plea agreement, but explained that he faced a "high" plain-error review "hurdle" due to his failure to raise his objections to the district court.

Ibid. Relief under the plain-error standard "require[d] [petitioner] to show that the trial court committed error, which was plain, and which affect[ed] [his] substantial rights," and furthermore, that the error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." Id. at 1a-2a (citing United States v. Olano, 507 U.S. 725, 732 (1993)).

The court of appeals determined that petitioner had not met that standard.

On petitioner's first claim, the court of appeals observed that, in reviewing whether petitioner's guilty plea was supported by a factual basis, the government's burden was "fairly modest." Pet. App. 2a (quoting United States v. Ramos-Mejia, 721 F.3d 12, 16 (1st Cir. 2103)). The government need not "'support every element of the charged crime by direct evidence,' or demonstrate that the defendant is guilty beyond a reasonable doubt." Ibid. (citation omitted). Rather, "the government need only show a rational basis in fact for the defendant's guilt" -- that is, "some 'basis for thinking that the defendant is at least arguably guilty.'" Ibid. (citation omitted).

The court of appeals acknowledged that a conviction under 18 U.S.C. 924(c) (1) (A) required that petitioner "possessed the gun 'in furtherance' of his drug dealing," meaning that the possession would "'advance or promote'" that activity. Pet. App. 2a (quoting United States v. Gonsalves, 859 F.3d 95, 111 (1st Cir.), cert. denied, 138 S. Ct. 367 (2017), and 138 S. Ct. 691 (2018)). "In assessing whether a sufficient nexus exists," the court continued, "we consider several factors: whether the firearm was loaded, whether the firearm was easily accessible, the proximity of the firearm to the drugs, and the surrounding circumstances." Ibid.

(quoting United States v. Pena, 586 F.3d 105, 113 (1st Cir. 2009), cert. denied, 559 U.S. 1021 (2010)).

Reviewing the record in this case, the court of appeals found it "far from plain" that any error occurred in establishing a factual basis that petitioner's possession of the gun was in furtherance of his drug trafficking. Pet. App. 2a. The court accepted "a general rule" that "'the mere presence of a firearm where the drug offense occurred is insufficient' to demonstrate possession 'in furtherance.'" Ibid. (quoting United States v. Bobadilla-Pagán, 747 F.3d 26, 35 (1st Cir. 2014)) (brackets and ellipsis omitted). The court explained that, had this been a case where "the drugs and a conventional gun [were] far apart in the same apartment," it would have entertained "a serious argument that there would have been error in accepting the guilty plea without a showing of more specific facts indicating intent to further the underlying drug dealing." Ibid. But light of "the particular facts" of this case, the court found no such error here. Ibid.

The court noted the government's undisputed proffer that petitioner was a drug dealer and the fact that petitioner's firearm had been converted "to fully automatic, that is, to a machine gun." Pet. App. 2a. Because "the law unequivocally precludes any option to keep the [machine] gun for a lawful purpose," the court found that petitioner's possession of it "supports the likelihood that

the actual purpose was * * * furthering [petitioner's] drug crime." Ibid. The court highlighted "the fact that the machine gun was loaded and within the same residence as the drugs." Ibid. The court thus determined that the "facts on record" reflected "at least [an] arguably sufficient * * * factual basis for the 'in furtherance' element," such that "any inadequacy" in the plea "did not amount to error that could be treated as plain." Ibid.

On petitioner's second claim, the court of appeals examined the plea colloquy and found no "plain failure to show on the record that [petitioner] understood the meaning of 'in furtherance' to which he was pleading." Pet. App. 2a. The court noted that "[t]he concept of furtherance is not 'esoteric,'" and "[petitioner's] acknowledgement before the court that the allegations were true is itself good evidence that he understood this element of the charge." Id. at 2a-3a (citations omitted). The court further observed that "[petitioner] point[ed] to nothing in the record to indicate that a more detailed explanation of the 'in furtherance' element would have led him not to plead guilty." Id. at 3a. In particular, the court stated that petitioner's plea allowed him to avoid another charge -- possession of a machine gun in furtherance of a drug-trafficking crime -- that carried a 30-year mandatory minimum sentence. Ibid.

The court of appeals stated that its conclusions made it unnecessary to address the fourth element of plain-error review,

but nevertheless found "no * * * compromise * * * evident on the record" of "the fairness, integrity or public reputation of the judicial process." Pet. App. 3a. On the contrary, the court was "convince[d] * * * that [petitioner] correctly understood the meaning of the statutory elements he was admitting and consequently should be held to his plea entered in open court that he possessed his gun to further his criminal enterprise." Ibid.

ARGUMENT

Petitioner renews his contention (Pet. 7-13) that the factual basis for his guilty plea was insufficient to support his conviction under 18 U.S.C. 924(c)(1)(A).* The court of appeals correctly determined that petitioner did not demonstrate any plain error. See Pet. App. 2a; see also Johnson v. United States, 520 U.S. 461, 466-467 (1997) (describing the four requirements for obtaining relief under the plain-error standard, including the requirement that the error be "plain," which is "synonymous with 'clear' or, equivalently, 'obvious'") (quoting United States v. Olano, 507 U.S. 725, 734 (1993)). The court's case-specific determination does not conflict with any decision of this Court or another court of appeals. Further review is unwarranted.

1. Before accepting a guilty plea, "the court must determine that there is a factual basis for the plea." Fed. R.

* Petitioner does not renew his challenge to the adequacy of the district court's plea colloquy.

Crim. P. 11(b) (3). Here, the record provided an ample factual basis for the district court's determination that petitioner's guilty plea was supported by "a rational basis in fact for [his] guilt." Pet. App. 2a (quoting United States v. Ramos-Mejía, 721 F.3d 12, 16 (1st Cir. 2103)). At a minimum, accepting the plea was not plain error.

a. During the plea colloquy, petitioner admitted that he sold drugs at the housing project and that he had purchased the fully automatic Glock pistol there. Plea Hrg. Tr. at 19. Law enforcement located that firearm in the bedroom of petitioner's apartment, where it was fully loaded with 18 rounds of ammunition. Id. at 18-19. Officers also found large quantities of individually packaged drugs in the kitchen area, along with drug paraphernalia, a scale, decals, empty vials, and baggies -- all indicative of petitioner's drug-dealing activities. Id. at 19. Finally, when the government proffered that petitioner had "acknowledged * * * that he possessed the firearm in furtherance of his drug trafficking activities," ibid., petitioner agreed that statement was accurate, id. at 19-20. The court of appeals correctly determined that these facts were at least "arguably sufficient to satisfy the requirement of demonstrating * * * a factual basis for the 'in furtherance' element [of Section 924(c)(1)(A)] as required under Rule 11." Pet. App. 2a. And that determination

-- which is heavily dependent on the particular facts of this case
-- is unsuited to further review by this Court.

The court of appeals accepted petitioner's contention (Pet. 3) that "mere possession" of a firearm and drugs within a residence would likely not supply a factual basis for a conclusion that the firearm had been possessed "in furtherance" of the drug crime. See Pet. App. 2a. But the court found that the combination of multiple facts provided a factual basis for determining that petitioner's specific firearm possession had been "in furtherance" of his drug trafficking. In particular, petitioner's admissions to drug dealing, the uniquely "destructive capacity" of his machine gun, and its loaded and readily accessible state, all bolstered the preexisting inference from having a gun in the same apartment as drugs. Ibid. As the court explained, those facts "support[] the likelihood that the [gun's] actual purpose was * * * furthering [petitioner's] drug crime." Ibid.

At minimum, no plain, obvious error occurred as would be necessary for petitioner to obtain relief notwithstanding his forfeiture. See Johnson, 520 U.S. at 466-467; see Pet. App. 2a ("If there is thought to be any inadequacy on this point, it did not amount to error that could be treated as plain."). The plain-error posture makes this case particularly unsuited to review in this Court: If petitioner had argued in the district court that additional facts were necessary in order to establish that he

possessed the machinegun in furtherance of his drug-trafficking activities, the government might have supplied more facts for the record. Instead, petitioner acknowledged that he possessed the gun in furtherance of his drug-trafficking. Plea Hrg. Tr. at 19-20.

b. Contrary to petitioner's contention (Pet. 8-14), the decision below does not conflict with the decision of any other court of appeals.

In United States v. Monzon, 429 F.3d 1268 (9th Cir. 2005), the government conceded that the factual basis to support the defendant's guilty plea to possessing a firearm in furtherance of a drug trafficking crime was insufficient and that the error was plain. Id. at 1271. At the plea hearing in Monzon, the defendant stated that he had purchased the gun because it was "cheap" and he "always liked [firearms]," but asserted that he "didn't buy it because of the drugs." Id. at 1270. The plea agreement also made no reference to the reason the defendant possessed the gun; the record noted only that the gun and the drugs were in the bedroom. Id. at 1271. The Ninth Circuit concluded that the error affected the defendant's substantial rights because the record could not support the Section 924(c)(1)(A) charge. Id. at 1272-1274. In United States v. Benson, 63 Fed. Appx. 88 (4th Cir. 2003) (per curiam), the Fourth Circuit, in an unpublished decision, vacated the defendant's guilty plea to a Section 924(c)(1)(A) charge

because "[t]he Government's proffered evidence against Benson * * * demonstrated nothing more than his concurrent possession of narcotics and a firearm." Id. at 89.

In United States v. Maye, 582 F.3d 622 (6th Cir. 2009), the defendant pleaded guilty to a Section 924(c) charge, but expressed confusion at his sentencing hearing in response to mistaken advisements by the district court regarding the nature of the offense. Id. at 629-630. That led the Sixth Circuit to find plain error, concluding that the defendant did not understand the "in furtherance" element of Section 924(c)(1)(A) and would not have pleaded guilty if he had. Id. at 630-631.

Petitioner is not similarly situated to any of these defendants. Unlike the defendants in Monzon and Benson, who either denied or did not admit that the guns they possessed were connected to drug trafficking, petitioner here admitted under oath that he had "acknowledged * * * that he possessed the firearm in furtherance of his drug trafficking activities." Plea Hrg. Tr. 19-20. The government's proffer also detailed the nature of those drug-trafficking activities and that officers had found a fully loaded, illegal machine gun in the same apartment where petitioner carried on those activities. Id. at 18-19. And unlike the defendant in Maye, the court of appeals found "good evidence that [petitioner] understood [the in-furtherance] element of the charge," and rejected his assertion that "a more detailed

explanation of the 'in furtherance' element would have led him not to plead guilty." Pet. App. 3a. Accordingly, the court of appeals' finding that plain error did not occur on the specific facts of this case does not create any circuit disagreement warranting this Court's review.

Petitioner likewise fails to show any conflict of circuit authority through his more general references (Pet. 10, 12-13) to decisions stating that "mere possession of a firearm recognized as one fit for illegal activity * * * does not satisfy the 'in furtherance' requirement" of Section 924(c)(1)(A). United States v. Rios, 449 F.3d 1009, 1014 (9th Cir. 2006); see United States v. Leary, 422 Fed. Appx. 502, 511 (6th Cir. 2011); United States v. Mann, 389 F.3d 869, 880 (9th Cir. 2004), cert. denied, 544 U.S. 955 (2005); United States v. Moore, 919 F.2d 1471, 1475 (10th Cir. 1990). The court of appeals' decision below did not disagree with that proposition. The court did not hold that the mere fact that petitioner's gun was suitable for use in connection with drug trafficking was sufficient to sustain his guilt under Section 924(c); rather, the court found that this case involved "more specific facts indicating intent," relying not only on the nature of the firearm, but also petitioner's admission to drug trafficking and the fact that the unusually destructive gun was found loaded and in "the same residence as the drugs." Pet. App. 2a. None of the decisions on which petitioner relies involved that combination

of circumstances. See Rios, 449 F.3d at 1014 ("The government presented no evidence * * * that the firearm was ever present at * * * the locations of the known drug activities."); Leary, 422 Fed. Appx. at 511 (noting that two firearms were found unloaded, that law enforcement found only a small amount of drugs, and that there was "no evidence that any drug sales took place in [the] apartment, much less in the closet connected to the bedroom [where guns were found], nor was any drug manufacturing equipment found on the premises"); Mann, 389 F.3d at 880 (noting that "guns were not easily accessible in an area where drugs were manufactured and stored"); see also Moore, 919 F.2d at 1475 (affirming conviction because "[t]he evidence established that the machine gun was within relatively close proximity to [the defendant's] supply of cocaine and cash"). Moreover, the cases cited by petitioner involved defendants who maintained their innocence and challenged their convictions under Section 924(c) following a jury trial. See Rios, 449 F.3d at 1010; Leary, 422 Fed. Appx. at 503; Mann, 389 F.3d at 872; Moore, 919 F.2d at 1472. None of those four cases involved a defendant like petitioner who pleaded guilty to violating Section 924(c) and who, in the course of entering the plea, agreed with a factual proffer stating that he had acknowledged possessing a gun in furtherance of drug trafficking.

2. In any event, this case would be an unsuitable vehicle to review the question presented because the court of appeals

alternatively considered "the fourth element of plain error analysis" and found no basis in the record to find that "any error seriously compromised the fairness, integrity or public reputation of the judicial process." Pet. App. 3a. The court determined that "[petitioner] correctly understood the meaning of the statutory elements he was admitting and consequently should be held to his plea entered in open court that he possessed his gun to further his criminal enterprise." Ibid. That factbound determination supplied an independent and discretionary basis for the court of appeals to affirm petitioner's conviction, and it does not warrant this Court's review. See United States v. Johnston, 268 U.S. 220, 227 (1925) ("We do not grant * * * certiorari to review evidence and discuss specific facts.").

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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