

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**

**REPLY IN SUPPORT OF PETITION
FOR A WRIT OF CERTIORARI**

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The Petition raises an important question of federal criminal procedure – does possession of a loaded machine gun by an admitted drug dealer satisfy the factual basis of a guilty plea to “in furtherance” of a drug trafficking offense under 18 U.S.C. § 924(c)(1)(A). This question has divided the circuit courts and resulted in uneven treatment because certain jurisdictions only necessitate a mere concurrent showing of a loaded machine gun and drugs while others require evidence that the machine gun advanced or promoted the drug trade in order to prove the defendant’s intent.

The government cannot muster a single valid reason not resolve the conflict now and in this case. Rather, it incorrectly suggests that the “court of appeals correctly determined that petitioner did not demonstrate any plain error” and that there is no circuit split. Opp. 8.¹ Neither contention is accurate.

The First Circuit in this case held that "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 that could be treated as plain." United States v. Gonzalez-Negron, 892 F.3d 485, 488 (1st Circuit) (Souter, J.). This holding conflicts directly with the holdings in the Fourth, Sixth and Ninth Circuits, which refused under plain error review to find a sufficient factual basis for a guilty plea to the in furtherance element of § 924(c)(1)(A) absent specific evidence

¹ Citations to "Opp. _" are to the government’s Brief in Opposition. Citations to "Pet. _" and "Pet. App. _" are to Mr. Gonzalez-Negron’s petition for a writ of certiorari and its attached appendix.

demonstrating the defendant's intent in possessing the firearm, namely did the firearm advance or promote the drug trade.

Mr. Gonzalez-Negron's concurrent possession of a machine gun and drugs within his residence did not suffice under plain error review to sustain his guilty plea to possession of a firearm in furtherance of a drug trafficking crime. In addition, there is a clear circuit split as to whether a defendant must demonstrate that he possessed the firearm to advance and promote his drug activity to sustain a guilty plea to § 924(c)(1)(A) or whether mere concurrent possession of a machine gun and drugs within a residence suffices for a conviction. This Court should grant the petition and hold that the possession of a loaded machine gun and drugs within a residence is insufficient to sustain a guilty plea to § 924(c)(1)(A) absent some evidence of the defendant's intent to possess the machine gun in furtherance of the drug trafficking.

I. The Question Presented Warrants This Court's Review.

A. The Court of Appeals Misapplied Plain Error Review.

The government erred when it suggested that this case was "unsuited to further review by this Court" because the court of appeals "correctly determined" that there was a factual basis to support petitioner's guilty plea to the "in furtherance" element of § 924(c)(1)(A). Opp. 9-10. The only evidence before the sentencing court concerning Mr. Gonzalez-Negron's guilty plea to possession of a firearm in furtherance of a drug trafficking offense was Mr. Gonzalez-Negron's admission that he sold drugs at his housing project; his admission that he had purchased a fully

automatic machine gun two days prior to arrest; evidence of large quantities of drugs found hidden in Mr. Gonzalez-Negron's kitchen cabinet, and evidence of a fully loaded automatic machine gun stashed in his bedroom closet. See Pet. 5. This evidence simply cannot and does support a guilty plea to § 924(c)(1)(A) as a matter of law.

In drafting the “in furtherance” language of § 924(c)(1)(A), the House Judiciary Committee demanded that “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.” H.R.Rep. No. 105-344 (1997), 1997 WL 668339 at 12 (emphasis supplied). The factual record in this case was devoid of this required showing and the government completely ignored any discussion of this legislative history in its Opposition Brief.

There was no evidence that the machine gun had been brandished during any drug deals, no evidence that the Mr. Gonzalez-Negron dealt drugs from inside his apartment where the drugs and machine gun were stored, and no evidence that the gun promoted or advanced his drug dealing. In fact, Mr. Gonzalez-Negron specifically admitted that he did not possess the machine gun for safety concerns. Pet. 5. In short, there was no evidence to support Mr. Gonzalez-Negron's intent – as required by the “in furtherance element” of Section 924(c)(1)(A) -- as to why he possessed the machine gun.

The government hinges its argument that the court's acceptance of the petitioner's guilty plea to possession of a firearm in furtherance of drug trafficking crime had a sufficient factual basis on the erroneous suggestion that having the

petitioner recite the statutory language during his change of plea hearing that he possessed the firearm in furtherance of his drug trafficking activities somehow supported his guilty plea and his intent as to why he possessed the firearm. Opp. 9. The government cannot bootstrap its deficient evidence by having Mr. Gonzalez-Negron admit to the legal jargon that he possessed a firearm in furtherance of his drug trafficking without *any* record evidence of the defendant's intent. The government failed to proffer *any* evidence that Mr. Gonzalez-Negron intended to possess the firearm to protect the drugs, the drug proceeds, or his drug territory.

Ultimately, the government erroneously argued that that “no plain, obvious error occurred” when the court accepted the petitioner’s guilty plea on the mere fact that petitioner recited the statutory language during his plea colloquy. Opp. 10-11. A conclusory statement without evidence simply cannot support a guilty plea. The government failed to counter the argument that the court of appeals erred when it upheld Mr. Gonzalez-Negron’s guilty plea without any evidence of his intent to possess the machine gun in furtherance of his drug trafficking.

B. There Is a Split of Authority Over the Question Presented.

The government fails to respond meaningfully to the split that exists over the question presented. The government attempts to suggest that there is no conflict or that the decisions are misinterpreted. This approach collapses under even cursory scrutiny.

The government mistakenly claims that “the decision below does not conflict

with the decision of any other court of appeals.” Opp. 11. The conflict as presented in the question presented is whether evidence of a loaded machine gun and drugs within a person’s residence provides 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) without any evidence that the firearm promoted or advanced the drug offense.

There is a conflict among the circuit courts over the question presented. The First Circuit's decision directly conflicts with the decisions in the Fourth, Sixth and Ninth Circuits, which require evidence that the firearm promoted or advanced 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). See Pet. 8-14.

The government attempts to circumvent the circuit conflict by contending that the petitioner “is not similarly situated” to the other defendants “who either denied or did not admit that guns they possessed were connected to drug trafficking.” Opp. 12. The government hinges its entire argument upon Petitioner’s stipulated admission that “he possessed the firearm in furtherance of his drug trafficking activities” to defeat review of the petition. Id. Mr. Gonzalez-Negron's conclusory admission that he possessed the firearm in furtherance of a drug trafficking crime cannot support his conviction because the government was required to provide *some* evidence that the firearm advanced or promoted the drug trafficking business in order to prove the intent element of the crime. The stipulated admission failed to explain why Mr. Gonzalez-Negron possessed the machine gun.

Contrary to the government's contention, there were not "more specific facts indicating intent." Opp. 13. Petitioner admitted to drug trafficking and a machine gun was found inside the same residence as his drug stash. Pet. 5. Mr. Gonzalez-Negron had just purchased the firearm two days earlier and there was no evidence that the firearm stored inside the master bedroom closet had a sufficient nexus to the drug crime, especially where Mr. Gonzalez-Negron never admitted that he bought the gun to protect his drug trade, and there was no evidence that he sold drugs out of his apartment or used the machine gun during any of the drug trafficking.

The facts merely establish that Mr. Gonzalez-Negron possessed a firearm in his bedroom closet and drugs in his kitchen, but mere possession of a firearm near drugs cannot sustain a conviction that the firearm furthered the drug trafficking crime under 18 U.S.C. § 924(c). See Pet. 9-13 (detailing cases). Mr. Gonzalez-Negron specifically stated that he did not know why he purchased the machine gun but added he did not purchase the firearm for safety concerns. PSR at 8. He never provided any other reasoning for his firearm possession.

The government failed to circumvent 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). Monzon, 429 F.3d at 1272-74. The Ninth Circuit found under plain error review that the district court violated Rule 11 of the Federal Rules of Criminal Procedure 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. Similarly, Mr. Gonzalez-Negron never admitted why he possessed his machine gun and there was no evidence to support his intent to possess the machine gun in furtherance of his drug trafficking.

The government ignored the Sixth Circuit's ruling in United States v. Maye, 582 F.3d 622, 631 (6th Cir. 2009), which held: "[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 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 identical facts are present in Mr. Gonzalez-Negron's case and should have resulted in the same outcome.

The government made no effort to distinguish 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 government simply ignored this holding and its relevance to this case.

The government further incorrectly asserts that Mr. Gonzalez-Negron “fails to show any conflict of circuit authority...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).” Opp. 13. The government appears to ignore the fact that the First Circuit in this case held 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. This holding simply cannot be reconciled with the decisions from the Sixth, Ninth, and Tenth Circuits, which have explicitly found that concurrent possession of a machine gun and drugs cannot satisfy the “in furtherance” element of § 924(c)(1)(A). See Pet. 10, 12, 13.

In short, the government fails to refute that a split persists over whether evidence that the machine gun advance or promoted the drug trafficking crime is required to secure a factually sufficient guilty plea to § 924(c)(1)(A). Only this Court's intervention can ensure uniformity on how to handle this recurring issue of federal criminal procedure, which impacts the fairness of sentencing proceedings.

II. This Case Is an Ideal Vehicle for Addressing the Question Presented.

Not until the very end of its Opposition Brief does the government make a last-ditch attempt to defeat certiorari by suggesting that “this case would be an unsuitable vehicle to review the question presented.” Opp. 14-15. The government claims that “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 comprised the fairness, integrity or public reputation of the judicial process’” that somehow this case is not a proper vehicle. *Id.* at 15. Contrary to the government’s suggestions, the court of appeals made a legal determination – not a factual determination -- in direct conflict to other decisions. Moreover, the government never refutes Mr. Gonzalez-Negron’s argument that the outcome of his case would have been different had it arisen in a different jurisdiction.

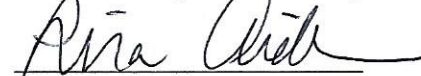
This case is the perfect vehicle to resolve the circuit split. The Rule 11 violation was fully presented in the First Circuit. This case presents a significant and often-recurring question of federal criminal procedure over which there is a clear conflict of authority. Mr. Gonzalez-Negron incurred harm by pleading guilty without

sufficient evidence to support his conviction and received an additional 120-month sentence.

CONCLUSION

For the foregoing reasons, and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,



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