

No. 19-

IN THE
Supreme Court of the United States

RODRIGO ROMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

JAMES SCOTT SULLIVAN
LAW OFFICES OF J. SCOTT SULLIVAN
22211 I.H. 10 WEST, SUITE 1206
SAN ANTONIO, TEXAS 78257
(210) 722-2807

QUESTION PRESENTED FOR REVIEW

Petitioner, RODRIGO ROMAN, appealed his ten-year statutory minimum sentence imposed after he pleaded guilty to conspiracy to possess with intent to distribute over five kilograms of cocaine. On direct appeal, Mr. Roman argued to the District Court erred in finding Mr. Roman possessed a firearm in connection with his drug offense. The finding was crucial because it resulted in a two-level enhancement to Mr. Roman's offense level under U.S.S.G. § 2D1.1(b)(1) and made him ineligible for a sentence reduction under U.S.S.G. § 5C1.2(a), the safety valve provision. The United States Court of Appeals for the Fifth Circuit ("Fifth Circuit") disagreed and affirmed the sentence imposed by the District Court.

Respectfully, the decision of the Fifth Circuit decided important federal questions in a way that conflicts with relevant decisions of this Court. In a manner which is contrary to the stare decisis of this Court, the Fifth Circuit did not require the Government to establish that the firearm was possessed in connection with the drug offense to which Mr. Roman pleaded guilty. Indeed, the weapons were in a home where there were no drugs. Thus, a compelling reason is presented in support of discretionary review by this Honorable Court. Mr. Roman therefore respectfully requests that this Honorable Court grant this Petition for Writ of Certiorari and proceed to resentencing without the weapons enhancement.

PARTIES TO THE PROCEEDING

The parties to the proceeding are listed in the caption:

Rodrigo Roman:	Petitioner (Defendant-Appellant in the lower Courts)
United States of America:	Respondent (Plaintiff-Appellee in the lower Courts)

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW.....	i
PARTIES TO THE PROCEEDING.....	ii
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES.....	iv
CITATIONS TO OPINIONS AND RELEVANT ORDERS.....	1
GROUNDΣ FOR JURISDICTION.....	2
CONSTITUTIONAL PROVISIONS.....	2-3
STATEMENT OF THE CASE.....	3-15
ARGUMENT AMPLIFYING REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.....	16-18
CONCLUSION.....	18

INDEX TO APPENDIX

APPENDIX A	Judgment in a Criminal Case issued by the United States District Court for the Southern District of Texas, McAllen Division.
APPENDIX B	Decision of the United States Court of Appeals for the Fifth Circuit denying relief on direct appeal.

TABLE OF AUTHORITIES

CASES:

<i>Muscarello v. United States</i> , 524 U.S. 125, 132 (1998).....	17
<i>Smith v. United States</i> , 508 U.S. 223, 240 (1993).....	17
<i>United States v. Juluke</i> , 426 F.3d 323, 328 (5th Cir. 2005).....	16
<i>United States v. McFadden</i> , 13 F.3d 463, 467 (1st Cir. 1994).....	17
<i>United States v. Ruiz</i> , 621 F.3d 390, 396 (5th Cir. 2010).....	16
<i>United States v. Vasquez</i> , 161 F.3d 909, 912 (5th Cir. 1998).....	16, 18

CONSTITUTIONAL PROVISION:

U.S. CONST. amend V.....	2
U.S. CONST. amend VI.....	2-3

STATUTES:

28 U.S.C. § 1254.....	1
-----------------------	---

U.S. SENTENCING GUIDELINES:

U.S.S.G. § 2D1.1(b)(1).....	i, 2, 8-10, 12, 17
U.S.S.G. § 5C1.2(a).....	i, 2, 9, 10

PETITION FOR WRIT OF CERTIORARI

Petitioner, RODRIGO ROMAN, requests this Court grant this petition and issue a Writ of Certiorari to review the decision of the Fifth Circuit. Mr. Roman respectfully submits the District Court committed reversible error by finding Mr. Roman possessed a weapon in connection with a drug offense. The Fifth Circuit did not apply the correct law to the facts of this case. (Appendix A, page 2). Hence, the Appellate Court affirmed the District Court without the proper application of the sentencing enhancement at issue. Therefore, it can only be concluded that the District Court's findings were invalid on this point of error and that the Fifth Circuit did not apply the correct standard of review. Accordingly, the sentence imposed must be vacated and this matter reversed and remanded for resentencing without the finding supporting the weapons enhancement.

REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE

From the Federal Courts:

The Order of the United States Court of Appeals for the Fifth Circuit, *United States v. Rodrigo Roman*, No. 17-41033 (5th Cir. Oct. 10, 2018), appears at Appendix A to this petition and is unreported.

The Judgment in a Criminal Case of the United States District Court for the Southern District of Texas, McAllen Division, appears at Appendix B to this petition and is unreported.

From the State Courts:

None.

GROUND FOR JURISDICTION

This Petition arises from a direct appeal which granted final and full judgment against Mr. Roman. This action is on a criminal prosecution initiated by the Government. Mr. Roman pleaded guilty and proceed to sentencing. The District Court imposed a two-level sentencing enhancement for possession of a weapon pursuant to U.S.S.G. § 2D1.1(b)(1), which made Mr. Roman ineligible for a sentencing reduction under the safety valve provision, U.S.S.G. § 5C1.2(a)). This finding is at issue in this Petition. A copy of the Judgment appears at Appendix B. Mr. Roman argued to the Fifth Circuit that the District Court committed reversible error in applying the weapons enhancement to the facts of this case. The Fifth Circuit rejected this argument in an unpublished opinion dated October 10, 2018, and affirmed the decision of the District Court. A copy of the decision appears at Appendix A. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS

U.S. CONST. Amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. Amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously

ascertained by law, and to be informed of the nature and cause of the accusation: to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in this favor; and to have Assistance of Counsel for his defense.

STATEMENT OF THE CASE

Overview:

Mr. Roman, who pleaded guilty to one count of conspiring to possess with the intent to distribute cocaine, respectfully appeals the sentence imposed upon him by the United States District Court for the Southern District of Texas. ROA.215-19. The count of the superceding indictment to which he pleaded guilty was recited in open court:

In the United States District Court, Southern District of Texas, McAllen Division, United States of America, Rodrigo Roman, Criminal No. M-16-0876-S2, the Grand Jury charges Count 1: From on or about June 2011 to on or about June 16, 2016 in the Southern District of Texas and within the jurisdiction of the Court, Defendants . . . Rodrigo Roman, [and others] did knowingly and intentionally conspire and agree together and with persons known and unknown to the Grand Jurors to possess with intent to distribute a controlled substance.

The controlled substance involved was 5 kilograms or more of a mixture or substance containing a detectible amount of cocaine, a Schedule II Controlled Substance.

In violation of Title 21, United States Code, Sections 846, 841(a)(1), and 841(b)(1)(A).

ROA.275-76. The remaining counts of the superceding indictment were dismissed as part of the plea bargain agreement. ROA.323.

Background

On November 22, 2016, a sealed superceding indictment was filed charging Mr. Roman and several other defendants with conspiracy charges related to the possession and

distribution of a controlled substance; to wit, cocaine. ROA.228-36. Mr. Roman ultimately signed a plea agreement. ROA.21, 323, 458. On February 8, 2017, Mr. Roman pleaded guilty in accordance with the plea agreement. ROA.275-281. He was sentenced on September 14, 2017, and this appeal followed. ROA.220-22, 289-308.

The Guilty Plea Hearing

At his guilty plea hearing, Mr. Roman admitted the following facts were true and correct as recited by counsel for the United States:

Beginning sometime in March of 2016, the Defendant, Rodrigo Roman, entered into an agreement with Jose Roman,¹ Moises Ramos, and others, to possess with the intent to distribute over 5 kilograms of cocaine.

In furtherance of this agreement on March 5th, 2016, Jose Roman picked up a green-colored Ford Explorer from the driveway at 2016 North 33rd Street, home of Rodrigo Roman. Jose Roman drove the Ford Explorer to a detached garage at 1342 Grove Avenue in Berlin, Illinois, where he was met by Moises Ramos.

And there they encountered police and approximately 6 kilograms of cocaine were recovered from a duffle bag and approximately \$199,000 was recovered from a trap located in the Ford Explorer.

The officers proceeded back to 1216 North 33rd Street. There investigators located a black Chevy Tahoe with an after-market hidden compartment containing approximately 4 kilograms of cocaine. Investigators also located an additional \$40,000 in cash in the residence, along with a scale, food saver packaging machine, money counter and rubber bands that belonged to Rodrigo Roman.

Rodrigo Roman knew what he was doing was wrong, but he did it nonetheless.

ROA.284-85.

¹Jose Roman is Mr. Roman's brother. ROA.421.

The Presentence Investigation Report: Overview

A United States Probation Officer prepared a lengthy Presentence Investigation Report (“PSR” or “the report”), which was later revised. ROA.325-360; ROA.391-442. Important to the issues in this appeal is the final version the PSR, which provides: (1) a factual basis for the offense and relevant conduct of the offense; (2) the recognition of potential sentencing Guideline provisions for Mr. Roman; and (3) a conclusion by the Probation Officer as to which Guidelines are applicable in this case. ROA.391-442. To this end, the PSR describes how Mr. Roman and the co-conspirators had different roles in this crime. ROA.391-442.

Most of the details in the PSR, at least as they relate to Mr. Roman, were collected from reports and interviews conducted by agents of the different law enforcement entities. ROA.403-04. These reports and interviews provided the specifics for “the bulk cash and narcotics smuggling activities of the Gulf Cartel Money Laundering and Drug Trafficking Organization (“MLDTO”). ROA.403.

As set forth in this documentation, the MLDTO spread from Texas to Illinois and Ohio. ROA.403. The investigation was conducted via wiretaps, pen resisters, “trap and trace devices,” toll analysis, global positioning systems and physical surveillance. ROA.403.

The recited facts of this offense were complex and extended. ROA.404-25. The investigation began with a single co-conspirator and information on cocaine shipments and monetary consignments. ROA.404. With court authorized intercepts, federal agents seized narcotics and bulk cash. ROA.404. This led to the identification of twenty-three more co-

conspirators, including Mr. Roman. ROA.404. Subsequently, the agents collected and seized illegal drugs and currency from several of these co-conspirators. ROA.405-08.

As part of the investigation, law enforcement officers followed one of the co-conspirators to a residence located at 1216 North 33rd Street in Chicago, Illinois (“the 33rd Street house”). ROA.408. The agents ultimately determined that the 33rd Street house belonged to Mr. Roman, who consented to a search of the property. ROA.408. The agents seized 4.72 kilograms of cocaine from a vehicle on the property. ROA.408. In addition to U.S. currency, the agents also seized a shotgun (described as “sawed off” because the length of the barrel was less than eighteen inches) and two pistols. ROA.408. The PSR also notes that the agents found a homemade silencer and that one of the pistols had a “threaded band for a suppressor (silencer).” ROA.408. However, there is no mention that the homemade silencer could be attached to either of the pistols. ROA.408.

The PSR further makes note that Jose Roman and Mr. Roman had been previously “encountered” with \$399,850 in their vehicle. ROA.403. However, there is no indication that authorities took any action with regard to this alleged encounter and its relevancy is further diminished because the allegation is that the encounter took place five years before the arrest in this case. ROA.405-08.

The PSR reflects that agents formed the opinion that Mr. Roman and his co-conspirators operated “under” a man identified as Omar Vasquez. ROA.408. Apparently, investigators believed that Mr. Vasquez was sending between 1 to 2 million dollars to the Texas Rio Grande Valley and had been assisting in transactions involving bulk amounts of

cocaine. ROA.408. Based on this information, the agents continued their investigation with respect to the other individuals who were eventually indicted in this case. ROA.409-19.

The PSR also provides a description of each co-conspirator's role in the offense. ROA.419. With respect to Mr. Roman's role in the conspiracy, the PSR reflects:

Rodrigo Roman's role in the instant offense was that of a narcotics and currency stash house caretaker as well as a street-level vendor and distributor, who worked under the direction of Omar Vasquez. **Rodrigo Roman** was tasked with storing significant amounts of cocaine and currency at his residence until he was provided with instructions to deliver or distribute some of the same to other unindicted and/or sealed co-conspirators. However, his participation in the aforementioned illicit activity was restricted to March 5, 2016, although the same does not appear to be the only occasion wherein he engaged in narcotics trafficking, specifically within the United States, in relation to the MLDTO. On said date, **Rodrigo Roman** provided a vehicle to Jose Roman loaded with approximately 6 kilograms of cocaine and an unidentified amount of bulk cash in a concealed non-factors compartment. The 6 kilograms of cocaine were to be delivered by Jose Roman and to Moises Ramos in exchange for an unknown amount of currency. Because **Rodrigo Roman** worked closely with his brother (Jose Roman) in the drug trafficking and money laundering trade, and he afforded the aforementioned amount of cocaine to him (Jose Roman), he in all likelihood was cognizant of the \$13,000 in U.S. currency Jose Roman had in his (Jose Roman's) possession. Moreover, **Rodrigo Roman**, had in his possession an additional 4.72 kilograms of cocaine, which he had concealed and stored in another vehicle equipped with a non-factory compartment located on his property. Along with said amount of cocaine, **Rodrigo Roman** had in his possession three firearms, approximately \$48,150 in U.S. currency, and other items consistent with the drug trafficking and money laundering trade. Although **Rodrigo Roman** took affirmative steps to commit the instant offense, it does not appear that he orchestrated or organized the same. Conversely, it is apparent that the defendant was under the direction of (indicted, unindicted, and/or sealed co-conspirators (including Omar Vasquez). Nonetheless, **Rodrigo Roman** agreed to commit the instant offense by assisting said individuals (indicted, unindicted, and/or sealed co-conspirators) with the shipments of a significant amount of cocaine within the United States in an attempt to further a drug trafficking venture. **Rodrigo Roman** will be held accountable for the 10.72

kilograms of cocaine, the three firearms in his possession, and the \$61,150 in U.S. currency seized on March 5, 2016.

ROA.421 (emphasis in original).

The PSR: Calculations

As noted above, Mr. Roman pleaded guilty to conspiring to possess with intent to distribute 5 kilograms or more of cocaine in violation of 21 U.S.C. § 846, 21 U.S.C. § 841(a)(1), and 21 U.S.C. § 841(b)(1)(A). ROA.276, 426. This resulted in a base offense level of 30 per U.S.S.G. § 2D1.1(a)(5). ROA.426.

The PSR then recommended a 2-level enhancement for possession of a weapon pursuant to U.S.S.G. § 2D1.1(b)(1). ROA.426. The Probation Officer based this conclusion on the following incomplete explanation:

In this case, the defendant was involved in a jointly undertaken criminal activity wherein approximately 10 kilograms of cocaine were seized along with three dangerous weapons: an Ithaco Model 37 12-gauge shotgun with a barrel of less than 18 inches as the same was sawed off; an aPPA Walther .380 semi-automatic pistol with a threaded barrel for a suppressor (silencer), which was accompanied by a homemade silencer; and a Ruger .38 special pistol, all of which are firearms that were discovered at his residence located at 1216 North 33rd Street in Melrose Park, Illinois. Further said firearms were discovered along with corresponding ammunition. Thus, the aforementioned residence was not only being inhabited as a dwelling, but the same was being utilized as a stash house for narcotics and illicit proceeds. Of the 10.72 kilograms of cocaine, Mr. Roman was in actual possession of 4.72 kilograms as such was seized on his property. Because Mr. Roman dealt with a significant amount of cocaine, it is highly foreseeable that the firearms seized from his residence, one of which was modified, were utilized to protect the same. Therefore, a two-level increase is warranted.

ROA.426-27.

The PSR provided one further 2-level adjustment. ROA.427. Pursuant to U.S.S.G. § 2D1.1(b)(12), the Probation Officer recommended the adjustment because the 33rd Street house was used for the purpose of manufacturing or distributing a controlled substance. ROA.427.

Finally, with respect to the Guidelines, the Probation Officer made the following determination:

Pursuant to U.S.S.G. § 2D1.1(b)(17), if the defendant meets the criteria set forth in divisions (1)-(5) of U.S.S.G. § 5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases), decrease by two levels. In this case, the defendant was in possession of three firearms, thereby not meeting the section pursuant to U.S.S.G. § 5C1.2(a)(2).

ROA.427. Thus, the Probation Officer concluded “a two-level decrease is not warranted.” ROA.427.

There being no other recommended adjustments, Mr. Roman received 0 criminal history points. ROA.428-30. This left Mr. Roman with an offense level of 34, and therefore the Guideline range was 151 to 188 months in the custody of the Bureau of Prisons. ROA.434.

Mr. Roman’s Objections to the PSR and his Sentencing Memorandum

Mr. Roman filed objections to the PSR. ROA.366. The objections, which are the points raised in this appeal, provide:

Defendant Roman specifically objects to paragraphs 78, 80, and 83-86² of the PSR. In Paragraph 78, United States Probation finds that Defendant Roman

²The paragraph numbers set forth in the objections were based on an early version of the PSR, which was subsequently amended to provide additional information. Therefore, the paragraph numbers changed in the final version of the PSR.

possessed a dangerous weapon in relation to the criminal activity for which he has pleaded guilty. PSR, p. 26. This finding is based on the recovery of two handguns and a shotgun from Defendant Roman's home during a search. Pursuant to USSG § 2D1.1(b)(1), Probation suggests that this court add two points to Defendant Roman's offense level. Defendant Roman objects to the addition of these two points.

There have been no allegations and no evidence that the firearms recovered from Mr. Roman's home were ever used for violence, or that they were possessed in connection to the crime for which he has pleaded guilty. As the commentary to § 2D1.1 suggests, the enhancement should be applied unless it is "improbable that the weapon was connected with the offense." USSG § 2D1.1, n.2. In this case, there is nothing, other than the simple presence of firearms, to warrant the application of 2D1.1. With no further allegations or evidence, Defendant Roman urges this Court to find that he did not possess the firearms in connection with Defendant Roman's role in the offense, and further find that the two-point enhancement is not warranted.

Regarding Paragraph 80, Probation suggests that, based on the possession of firearms as described above, USSG § 5C1.2(a)(2) is not satisfied. PSI, p. 27. As a result, it is Probation's position that Defendant Roman is ineligible for the two-level reduction associated with § 5C1.2. This Court should find that Defendant Roman did not possess the firearms in connection with this offense, and further find that Defendant Roman satisfies the criteria of USSG § 5C1.2.

ROA.366-67. The remainder of the objections and sentencing memorandum argue in favor of a lower sentence in accordance with 18 U.S.C. § 3553(a). ROA.367-81.

The Sentencing Hearing: The Evidence and Arguments

The Court sentenced Mr. Roman on September 14, 2017. ROA.289. As an initial matter, the Court granted Mr. Roman's request for a 3-Level reduction for acceptance of responsibility. ROA.291. Thus, the only remaining issue at the sentencing hearing was whether Mr. Roman had possessed a firearm in relation to the drug trafficking offense. ROA.291. It was understood the resolution of the firearm issue would be relevant to the above-discussed 2-Level enhancement, as well as whether the safety valve provisions would

be available to Mr. Roman so he could be sentenced below the statutory minimums. ROA.292-94. Indeed, it was the Government's suggestion that Mr. Roman might be eligible for the safety valve and, therefore, the United States did not contest its application to Mr. Roman's sentence.

ROA.292.

Mr. Roman's attorney first quoted directly from the Sentencing Guideline commentary when arguing his objection the proposed firearms enhancement:

The enhancement should be applied if the weapon is present unless it is clearly improbable that the weapon was connected to the offense. For example, the enhancement would not be applied to the Defendant arrested at Defendant's residence with an unloaded hunting rifle in the closet.

ROA.293-94 (emphasis added).

The attorney then evaluated the evidence concerning the shotgun and made the following observations:

- * the shotgun was in the basement while the drugs were outside in a vehicle;
- * the shotgun was not loaded;
- * there were no shells for the shotgun anywhere on the property;
- * the lack of any shells in the shotgun and any shells on the property made the gun inoperable;
- * the shotgun was additionally inoperable because it was merely an old, "rusted out" gun.

ROA.294.

With regard to the other two firearms, Mr. Roman's attorney made the following observations:

- * the two pistols were located upstairs in an office and the currency was on the top of the refrigerator on the main floor;
- * the two pistols were locked in a safe;
- * the seized drugs were not in the house where the pistols were found;
- * the two pistols were not loaded; and
- * guns which are being used to protect drugs or drug money “are not locked up in a safe and unloaded.”

ROA.294-95.

With respect to all three of the weapons, it was noted that the guns were for self-defense because the home was in a “high-crime area with a lot of gangs.” ROA.295. A Chicago Tribune article verified that a stray bullet had “killed a boy a block away” from the house. ROA.295-96. The FBI had done a raid in that neighborhood and thirty-four Latin King members were arrested. ROA.296. It was clear Mr. Roman was worried about his family and needed to protect them. ROA.296. Accordingly, the record demonstrates that these weapons were the reasonable equivalent of the hunting rifle carved out in U.S.S.G. § 2D1.1. ROA.296.

The Court nonetheless determined that if the guns were possessed it would be “presumed” they were used “in connection with these drug trafficking activities.” ROA.298-99. The Judge found Mr. Roman had not overcome this presumption. ROA.299. The Judge explained:

I believe that these weapons loaded and unloaded with ammunition, without being used for facilitation of drug-trafficking activities, including the defense of these drugs and drug proceeds that were commonly at the residence. So that’s how I come out factually on that.

ROA.299. The Judge further determined that this finding disqualified Mr. Roman from the benefit of the safety valve. ROA.299.

However, Mr. Roman's attorney continued to urge his position on the matter. He correctly noted that the evidence showed that Mr. Roman was holding the gun for Omar Vasquez. ROA.299. Significantly, the State of Illinois had conducted a background check when Mr. Roman bought one of the firearms, and the State determined he was eligible to purchase and register the pistol. ROA.300. Indeed, Mr. Roman had purchased the gun for home defense. ROA.300.

Nonetheless, the District Court believed the fact that the gun was legally obtained was a "non-sequitur" on the issue of whether the gun was used for legal purpose. ROA.301. Although the attorney noted Illinois gun possession laws are very strict, the Judge declared that Mr. Roman "had arrests but no criminal convictions" and, hence, it did not "sound like a very strict requirement." ROA.301. The attorney again urged his position that the gun was not possessed in connection to the drug offense and added that two stray bullets from gang gunfire "shot out" two of Mr. Roman's windows. ROA.302.

Regardless, the District Judge again stated his position:
All right. And I have no doubt he used it for his defense against potential criminal elements in the neighborhood as well but I also believe that they were—he had them because he was involved in drug trafficking, two of them having been gifted to him by Omar Vasquez, a Co-defendant with whom he was involved in drug trafficking and, again, they're presumed to be and I do not believe that you have overcome that presumption.

ROA.302-03.

All of this caused the Assistant United States Attorney to correctly observe that the two guns Mr. Roman was holding for Mr. Vasquez were not “gifted” to Mr. Roman and, therefore, the guns were not “actually given to him for his possession.” ROA.303. In other words, the government argued in support of the conclusion that Mr. Roman was not in possession of those two guns for any criminal purpose. *See* ROA.303. Stated another way, the government’s position was that the firearms were not possessed in connection with any drug transaction. *See* ROA.303.

Even after this, the District Judge stood his ground because he believed the guns were tools of drug trafficking activities. ROA.303. The Judge continued to maintain his position that he was required to presume that the firearms were connected to the drug trade. ROA.303. He also determined “it [was] more likely than not [that the guns] were connected to drug-trafficking activities and secondarily the defense of his home from the Latin Kings in the neighborhood.” ROA.304.

The Sentencing Hearing: The Sentencing of Mr. Roman

The Court next indicated it would proceed to sentence Mr. Roman. ROA.305. However, before the Judge announced Mr. Roman’s sentence and the reasons for his sentence, the prosecutor took the unusual step of implicitly arguing for a lenient sentence by volunteering positive character evidence on behalf of Mr. Roman. *See* ROA.305. Specifically, the prosecutor impressed upon the Court:

The Defendant was very truthful when we met with him and in terms of his truthfulness and stuff, I think he was impressive in his sincerity in terms of how he had involved himself in this and there were regrets that he had for involving himself in this but he was very easy to deal with which considering

that we've had so many individuals that have not been easy to deal with, this is something that the Government appreciates, his veracity, his truthfulness and his honesty.

ROA.305.

The Court then pronounced sentence on Mr. Roman. ROA.305-06. The Judge determined Mr. Roman's sentence would be calculated as a Level 31, with a range of 108 months to 135 months imprisonment. ROA.305.

It should be noted the level would have been 29 without the gun possession enhancement, with a range of 87 to 108 months in the custody of the Bureau of Prisons. ROA.304. Because the Court found that Mr. Roman did not qualify the safety valve due to the gun possession finding, the mandatory minimum sentence was 120 months in custody and the Guidelines maximum sentence was 135 months of incarceration. ROA.304-05.

In any event, based on these conclusions, the District Court sentenced Mr. Roman to spend 120 months in the custody of the Bureau of Prisons. ROA.306. The sentencing proceeding was thus concluded.

The Notice of Appeal

The Court entered the Judgment on September 18, 2017. ROA.215-19. Mr. Roman's attorney timely filed a Notice of Appeal on September 28, 2017. ROA.220-22.

The Opinion of the Fifth Circuit

As noted above, Mr. Roman on direct appeal challenged the finding that a firearm was used in connection with the drug offence. Appendix B. The Fifth Circuit affirmed, which is the basis for this Petition of Writ of Certiorari. Appendix B.

**ARGUMENT AMPLIFYING REASONS RELIED
ON FOR ALLOWANCE OF THE WRIT**

I.

The Opinion of the Fifth Circuit and Unresolved Issues

The Fifth Circuit correctly concurred with Mr. Roman that the enhancement only applies when the defendant possesses a firearm in connection with a drug offense. Appendix B, page 2 (citing *United States v. Vasquez*, 161 F.3d 909, 912 (5th Cir. 1998)). In other words, mere possession or use of a firearm is insufficient for the application of this sentencing enhancement. The Fifth Circuit also correctly noted that the Government must meet its initial burden to demonstrate “a temporal and spatial relation existed between the weapon, the drug trafficking activity, and the defendant.” Appendix B, page 2 (citing *United States v. Juluke*, 426 F.3d 323, 328 (5th Cir. 2005)). To this end, the Court went on to explain that, presuming the Government meets its burden, the defendant must show “it was clearly improbable that the weapon was connected with the offense.” Appendix B, page 2 (citing *United States v. Ruiz*, 621 F.3d 390, 396 (5th Cir. 2010)).

With regard to this case, the Fifth Circuit concluded that the guns were used to “facilitate drug trafficking including defending drugs and drug proceeds kept at the residence.” Appendix B, page 3. The Fifth Circuit emphasized the “mere presence” of the firearm heightened the danger inherent in drug trafficking.” Appendix B, page 3. The Court claimed that “what matters is that the weapons were accessible to Roman.” Appendix B, page 3. In this regard, however, the Court never addressed the uncontested facts that there were no drugs in the house where the guns were found and, thus, the Court avoided a

discussion on the lack of the necessary connection between the drugs and the weapons pursuant to the facts of this case.

II. Analysis

The United States Supreme Court has made it clear that this sentencing enhancement for weapons in drug cases must include a crucial connection between “drugs and guns.” *Smith v. United States*, 508 U.S. 223, 240 (1993). These provisions are designed to combat this “dangerous combination.” *Muscarello v. United States*, 524 U.S. 125, 132 (1998). As one author of the *Muscarello* opinion pointed out, “the sentencing guidelines . . . provide for a two-level sentence enhancement where a firearm was possessed by a drug offender, U.S.S.G. § 2D1.1(b)(1), unless the possession clearly was not connected with the [drug] offense.” *United States v. McFadden*, 13 F.3d 463, 467 (1st Cir. 1994) (Breyer, C.J. dissenting). Despite this clear directive, the mandate of which applies in this case, the Fifth Circuit did not address the connection between the offense and the presence of weapons and ignored the fact that guns were not in the house where the drugs were found.

Respectfully, this crucial connection between the guns and the drugs in this context establishes that the Fifth Circuit’s failure to require the Government to make this necessary nexus is fatal. Clearly, it is undisputed the guns were in a house where there was no drugs. Likewise, the drugs were in a car where there was no gun. The Fifth Circuit wholly failed to address that fact and establish under those circumstances how there could have been the necessary connection between the contraband and the weapons. Indeed, it was never challenged by the Court as to how such a connection could be made from what is in the car

to what is in the house. Given that this crucial connection was not addressed nor considered to be so by the Fifth Circuit, Mr. Ramon respectfully requests that this Court grant this Petition, allow this case to proceed for further review, and ultimately reverse the decision of the District Court imposing the weapons enhancement upon Mr. Roman's sentence.

CONCLUSION

Despite the citation to *Vasquez*, the opinion of the Fifth Circuit does not respond to a necessary element of the weapons sentencing enhancement. The decision therefore mandates the use of the discretionary authority of this Court to grant this writ. Accordingly, for the reasons set forth above, Mr. Ramon respectfully submits, on the important issue of federal sentencing concerns, compelling reasons are presented in support of discretionary review by this Honorable Court.

WHEREFORE, PREMISES CONSIDERED, Petitioner herein respectfully requests that this Honorable Court grant this petition and issue a Writ of Certiorari and review the decision of the United States Court of Appeals for the Fifth Circuit which affirmed the sentence imposed by the District Court. Mr. Ramon also respectfully requests any further relief to which he may be entitled under the law and in equity.

Respectfully Submitted,



JAMES SCOTT SULLIVAN
LAW OFFICES OF J. SCOTT SULLIVAN
22211 I.H. 10 WEST, SUITE 1206
SAN ANTONIO, TEXAS 78257
(210) 722-2807