

18-8885

IN THE SUPREME COURT OF THE UNITED STATES

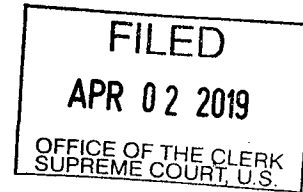
MARCH TERM, 2019

JOSE ROMAN  
PETITIONER,

v.

UNITED STATES OF AMERICA  
RESPONDENT.

ORIGINAL



ON PETITION FOR WRIT OF CETIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Jose Roman, acting Pro se, hereby respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The decision of the Fifth Circuit *United States v. Jose Roman*, No. 17-41172 (January 11, 2019), is reproduced in the appendix to this petition. App. 1.

JURISDICTION

The Fifth Circuit issued its opinion and judgment (App. 1) on January 11, 2019. The jurisdiction of this Court is invoked under 28 U.S.C Section 1254(1).

**QUESTIONS PRESENTED**

***WHETHER THE GUIDELINES ARE MISAPPLIED UNER 2D1.1 (b)(1)  
BY MAKING A GENERAL PRESUMPTION THAT FIREARMS  
ARE "TOOLS OF THE TRADE" AND THAT ALWAYS IS  
FORSEEABLE THAT THEY WILL BE USED DURING  
CRIMINAL ACTIVITY***

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## **APPENDIX**

### OPINION FROM THE FIFTH CIRCUIT

UNITED STATES v. JOSE ROMAN No. 17-41172.....Pet. App. 1.

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## CONSTITUTIONAL PROVISIONS INVOLVED

The Equal protection Clause Provides:

Nor shall any State...deny to any person within its  
Jurisdiction the equal protection of laws.

The Due Process Clause provides:

No person shall...be deprived of life, liberty  
Or property, without due process of law.

## STATEMENT OF THE CASE

### A. *Course of Proceeding and Disposition Below.*

On June 8, 2016, Roman was indicted, along with several co-conspirators, in the McAllen Division of the Southern District of Texas on one count of conspiracy to possess with intent to distribute 5-kilograms or more of cocaine, in violation of 28 U.S.C Sections 846, 842(a)(1) and 841(b)(1)(A). A superseding indictment was filed on November 22, 2016, and April 5, 2017. (ROA, 13,17, 186). In July 2017, Roman pleaded guilty, pursuant to a plea agreement, to the charge. (ROA. 18,19). Roman was sentenced to 120 months' imprisonment, followed by a five-year period of supervised release (ROA. 20, 246, 382). Roman filed a timely notice of appeal on November 16, 2017. (ROA. 20, 223).

### B. *Statement of the Facts.*

#### 1. *The Offense and Plea.*

In 2015, Drug Enforcement Administration (DEA) special agents indicated an interstate narcotic investigation based on information related to a known drug trafficker. (ROA. 341; PSR at 41). Working with Homeland Security Investigation (HIS) agents, the DEA agents obtained information regarding multi-kilogram cocaine shipments being routed through Falcon Dam and McAllen, Texas to other

parts of the country. (ROA. 341; PSR at 41). During this operation, the HIS and DEA agents learned of several participants in the scheme, including Jose Roman and his brother Rodrigo (ROA. 341; PSR 41).

In late 2015, using the information gleaned from the Falcon Dam and McAllen investigation (including information obtained via court authorized intercepts), HIS agents in Chicago successfully executed a consent search on apartment occupied by Roman. (ROA. 341; PSR at 42). Agents found and seized a half kilogram of cocaine and \$163, 584 in U.S. currency as part of the search (ROA; PSR at 42).

On March 3, 2016, Ismael Lechuga provided Sealed defendant (No. 1) with the contact number for Appellant who was coordinating the receipt of two cocaine loads of 43 and 64 kilograms from McAllen, Texas to Chicago, Illinois. (ROA. 341). HIS SA Otterson and DEA SA Hansen subsequently contacted HIS in Chicago and provided the information, particularly the contact number for Jose Roman, which was subsequently monitored on March 5, 2016, via court authorized GPS pings. (ROA. 343).

On March 5, 2016, at approximately 5:00 a.m., Chicago HIS agents established surveillance in the vicinity of a residence where the GPS ping for Appellant was stationary. At approximately 9:10 a.m., Chicago HIS agents commenced mobile surveillance after observing Jose Roman enter a silver Acura and drive to a Chicago barbershop followed by a residence in Melrose Park. (ROA. 343). At the residence, located at 1216 North 33trd Street, Appellant entered a green Ford Explorer and departed the property, traveling to another location. He then entered the garage of the second residence, where he has met by Moises Ramos. As Chicago HIS agents approached the garage, they observed Jose Roman removing a black and blue duffel bag from the rear passenger area of the green Ford Explorer. Upon noticing the Chicago HIS agents entered the garage, Jose Roman and co-defendant, Moises Ramos, attempted to run however, shortly thereafter, they were apprehended. Chicago HSI agents retrieved the duffel bag and discovered it contained six packages of cocaine with a gross weight of approximately six kilograms. (ROA. 343). Jose Roman and Ramos were then read

their Miranda Rights, which they elected to waive, both agreeing to provide post-Miranda statements in the absence of an attorney.

Consent to search the green Ford Explorer was subsequently obtained from Jose Roman and resulted in the discovery of an aftermarket compartment behind the rear passenger seat area. Joe Roman provided the Chicago HIS agents with instructions on how to open said compartment; however, said instructions proved to be futile. (ROA. 344). An officer with the Chicago Police Department (CPD), who is considered to be a concealed compartment expert, was summoned to the scene for assistance. Upon arrival, the CPD officer opened said compartment, which led to the discovery of a large sum of U.S. currency and the amount was unknown.

Jose Roman voluntarily admitted arriving at the residence in Berwyn, Illinois, to drop off the black and blue duffel bag to Romans, who was to provide him with an unidentified amount of money in return. (ROA. 344). When questions as to the green Ford Explorer, Jose Roman claimed he had borrowed it from a friend. He was questioned in reference to the U.S. currency discovered in the green Ford Explorer, but he denied ownership. Jose Roman disclosed that upon receiving funds from Ramos, he was supposed to deliver said funds to an unidentified male's residence. Jose Roman indicated he had transported approximately \$125,000 to the unidentified male on March 3, 2016.

Simultaneously, while Jose Roman and Ramos were being questioned, other Chicago HIS agents who continued surveillance at the 1216 North 33<sup>rd</sup> Street residence, obtained and received consent to search said residence from the owner, identified as Rodrigo Roman, Jose Roman's brother. (ROA. 345). A search of the 1216 North 33<sup>rd</sup> residence and surrounding property resulted in the discovery of approximately 4.7 kilograms of cocaine, approximately \$48,130 in U.S. currency, a money counter, a homemade firearm silencer, and three firearms, which were identified as Ithaca Model 37 12-gauge shot gun (barrel determined to be sawed off and less than 18 inches); an aPPA Walther .380 semiautomatic piston with a threaded barrel for a suppressor (silencer); and a Ruger .38 special pistol, all of which were subsequently seized. The 4.72 kilograms

of cocaine was located in a concealed compartment in a Chevrolet Tahoe, which was also, located on the residence property. Rodrigo Roman was thereafter read his Miranda Rights, and placed under arrest. Information as to his post-Miranda statement is currently unavailable as such has yet to be provided.

### ***Sentencing.***

At sentencing, the district court adopted the PSR with one addendum after overruling Jose Roman's objections. (ROA. 319-320). The district court adopted the factual basis in the PSR and deducted three points for acceptance of responsibility. (ROA. 318). Jose Roman requested a safety valve reduction in this case and objected to the two-point enhancement for a firearm pursuant to U.S.S.G. 2D1.1 (b)(1).

The district court overruled Jose Roman's objection to the two-point enhancement finding that it was foreseeable that his co-defendant would have a firearm in the course of the drug conspiracy. (ROA. 317). Specifically, the district court held that this finding did not disqualify Jose Roman from the safety valve. (ROA. 317).

The Government argued at sentencing that Jose Roman was less than credible in debriefing with it and the district court ultimately found that this was the basis to deny his safety valve request. (ROA. 320).

Basis on the objections and additional one-point deduction for acceptance of responsibility, Jose Roman total offense level was 29, with a criminal history category I, giving a Guidelines range of 87 to 108 months. (ROA. 320). With the safety valve, this Guideline range would be 120 months, which the district sentenced him to. As well as five years supervised release, a \$100 assessment fee and ordered Jose Roman be placed in a facility close to his family in Chicago. (ROA. 321). The Government moved to dismiss the other counts of the indictment, which the district court ordered. (ROA. 321).

## **SUMMARY OF THE ARGUMENT**

The district court clearly erred by enhancing Jose Roma's sentence by two



points pursuant to U.S.S.G 2D.1.1 (b)(1), based on its conclusion that because firearms are a “tool of the trade” in a drug conspiracy, it is always “foreseeable”. Even when there is an inference of foreseeability that firearm possessed by a co-defendant in a drug conspiracy, where Jose Roman rebuts that inference with evidence, the Government then has the burden to show facts that support the finding that a firearm is “foreseeable”. Here, Jose Roman’s co-defendant was his brother who had firearm in his home, where Jose Roman, was seen leaving after making a pick up. The guns located were a shotgun found in the basement and the firearms located upstairs in a locked safe that Jose Roman did not have the combination to. So, too, two surprise searches of Jose Roman’s home and no firearms were located. Therefore, it is not reasonably foreseeable that the firearms in his co-defendant’s home were utilized for the offense conduct.

For all these reasons, the district court clearly erred in its holding that “foreseeability” always applies to firearms in a drug conspiracy and where the Government failed to show it was reasonable that Jose Roman knew his brother had weapons in his home as part of this drug conspiracy.

## **ARGUMENT AND AUTHORITIES**

### **QUESTION RESTATED**

**WHETHER THE GUIDELINES ARE MISAPPLIED UNDER 2D1.1 (b)(1) BY MAKING A GENERAL PRESUMPTION THAT FIREARMS ARE “TOOLS OF THE TRADE” AND THAT ALWAYS IS FORESEEABLE THAT THEY WILL BE USED DURING CRIMINAL ACTIVITY**

#### **A. Statement of Facts**

Jose Roman was assessed a two-point enhancement based on the Government’s contention that his co-defendant’s possession of a firearm was foreseeable. Relevant to this issue, the following findings were made:

### **1. Presentence Report Recommendation**

Probation recommended the district court enhance Jose Roman's sentence by two points pursuant to 2D1.1 (b)(1) and probation reasoned that.

In this case, the defendant participated in a jointly undertaken criminal Activity, which was inclusive of the March 5, 2016, seizure of 10.72 Kilograms (gross weight) of cocaine and three dangerous weapons: an Ithaca Model 37 12-gauge shot gun 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) accompanied by a home made silencer; and a Ruger .38 special pistol. Said firearms were discovered at Rodrigo Roman's residence, where the defendant had picked up a portion (6 kilograms) of the aforementioned cocaine. Further said firearms were discovered along with corresponding ammunition. Because the defendant and his brother Rodrigo Roman dealt with a Significant amount of cocaine, it is highly foreseeable that the firearms Seized from the residence, one of which was modified, were utilized to Protect the same. Therefore, a two-level enhancement is warranted. (ROA. 364).

### **2. Jose Roman's Objection to Firearm Enhancement.**

Jose Roman objected to the PSR's two-point enhancement and argued,

**Objection to Firearm Enhancement:** A 2-level increase is not warranted Defendant's brother, Rodrigo Roman., had the firearm in his house. With the exception of the shotgun located in the basement, the firearms were located upstairs and in a locked safe for which Rodrigo Roman did not know the combination, Rodrigo Roman called upon his wife to open the safe for the police investigators. Some of the firearms were duly registered.

Possession of Firearm Was Not Foreseeable. These is not evidenced to suggest that the conspiratorial agreement implied gun possession. The firearms were out

of the sight and out of reach in the basement or in locked safe in Rodrigo Roman's home. There is no evidence to suggest that Jose Roman was aware of the firearms; presence or location. There is no evidence to suggest that Jose Roman has accesses to the area to the home where located. Although whether the firearms are registered or not is not a determinative factor, it should also be noted that some of the firearms are duly registered and therefore would be likely to be used as "tools of the trade". Finally, the Romans are not known to tote guns or use guns in the drug transactions. In fact, after two surprised searches of Jose Roman's home, no fire arms were located. Therefore, it is not reasonably foreseeable that Rodrigo Roman would be in possession of firearms. Moreover, it is not reasonably foreseeable that the firearms in Rodrigo Roman's home were utilized for the offense conduct of to protect cocaine. (ROA. 325. 326).

### **3. PSR Addendum**

On August 31, 2017, in response to Jose Roman's objections, probation filed an Addendum reaffirming its position that the two-level enhancement was correct under Section 2D1.1 (b)(1). (ROA. 378).

**OBJECTION #2:** Referencing the Specific Offense Characteristic subsection of the presentence report, defense counsel objects to the two-level increase pursuant to U.S.S.G. 2D1.1 (b)(1). Defense counsel argues that the defendant was unaware his brother, Rodrigo Roman (a codefendant and co-conspirator in this case) was in possession of firearms or that he (the defendant) was cognizant of the location of the same. He further contends the defendant did not have access to said firearms as they were in a safe for which he (the defendant) was unfamiliar with the combination.

**RESPONSE:** In this case, the defendant participation in a jointly undertaken criminal activity, which was inclusive of March 5, 2016 seized of 10.72 kilograms (gross weight) of cocaine and three dangerous weapons: a Ithaca Model 37 12-gauge shot gun with a barrel of less than 18-inches as the same was sawed off; an aPPA Walther 380 semi-automatic pistol with threaded barrel for a suppressor

(silencer) accompanied by a homemade silence; and a Ruger .38 special pistol. Said firearms were discovered at the residence of the defendant's brother Rodrigo Roman, and the residence is where the defendant had picked up a portion (6 kilograms) of the aforementioned cocaine. Further the aforementioned firearms were discovered along with corresponding ammunition. Because the defendant and his brother (Rodrigo Roman) dealt with a significant amount of cocaine, it is highly foreseeable that the firearms seized from the residence, one of which was modified, were utilized to protect the same. (ROA. 378. 379).

#### 4. *District Court's Finding at Sentencing.*

**THE COURT:** I don't know how I ruled but as I reviewed for today, my belief was that he didn't fit—he didn't personally possess the wire—the weapons, therefore, he would still be eligible for safety valve; however, his brother ha the weapons he's part of the conspiracy. And the question then is it reasonably foreseeable that a coconspirator would have a weapon as part of the conspiracy; and since weapons are tools of the trade, it's very well established Fifth Circuit precedent that they are ***and that that are always foreseeable in drug trafficking offenses.*** And I—and conclude just on the facts here that it was foreseeable that his brother would possess weapons in connection with his drug trafficking activities and he was part of that conspiracy. And so, I find the two points appropriate assessed but it--- but they don't disqualify him for safety valve. I'll also make that note because you're going to have this appellate point here on safety valve qualification. So, I find he's---the weapons did not disqualify him from safety valve. (ROA. 317. 318).

### B. Standard of Review

Although the sentencing Guidelines are advisory, the district court must avoid significant procedural error, such as improperly calculating the Guidelines range. Gall v. United States, 552 U.S. 38. 48-51 (2007). Generally, the interpretation or application of the advisory sentencing guidelines is reviewed de novo. United States v. Huff, 370 F.3d 454, 463—464 (5<sup>th</sup> Cir. 2004). A finding by the district court that a firearm in possession of a co-defendant in “foreseeable” for

sentencing purposes is review under the clearly erroneous standards. *Id.* “A factual finding is not clearly erroneous as long as it is plausible in light of the record as a whole.” *United States v. Rhine*, 583 F.3d. 878, 884 (5<sup>th</sup> Cir. 2009), see also *United States v. Sanders*, 942 F.2d 894, 897 (5<sup>th</sup> Cir. 1991).

### **1. Foreseeability and the Government’s Burden of Proof**

A district court’s determination that co-defendant’s possession of a firearm in a drug conspiracy is “foreseeable” in order to warrant a 2D1.1 (b)(1) enhancement must be supported by a sufficient factual basis. In this case, the district court clearly erred in holding that because firearms are “tools of the trade” in a drug conspiracy, a firearm is always foreseeable, therefore a firearm located at the home of Jose Roman’s co-defendant was necessary “foreseeable” to Jose Roman to justify the enhancement. (ROA. 317.18).

Section 2D1.1 (b)(1), specific offenses characteristics, states, “if a dangerous weapon (including a firearm) was possessed, increase by 2 levels.” U.S.S.G 2d1.1 (b)(1). The commentary to subsection (b)(1) provides:

#### **(A) Application of Subsection**

(b)(1).---Definitions of “firearm” and “dangerous weapon” are found in the Commentary to 1B1.1 (Application Instructions). The enhancement for weapon possession in subsection (b)(1) reflects the increased danger of violence when drug traffickers possess weapons. The enhancement should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense. For example, the enhancement would not be applied if the defendant, arrested at the defendant’s residence, had an unloaded hunting rifle in the closet. The enhancement also applies to offenses that are referenced to 2D1.1; see Section 2D1.2(a)(1) and (2), 2D1.5(a)(1), 2D1.6. 2D1.7(b)(1), 2D1.11 (c)(1), and 2D1.12(c)(1).

The government bears the burden of proving by a preponderance of the evidence that a firearm was foreseeable, even in a drug conspiracy. *United States v. Aguirre-Zapata*, 901 F.2d 1215-16, see also *United States v. Burke*,

888 F.2d 862 (D.C. Cir. 1989) (“[I]nsofar as section 2D1.1 (b)... would enhance the defendant’s sentence, the burden of proof is on the prosecution to satisfy the factual prerequisite of the provision” by a preponderance of the evidence). The Fifth Circuit has previously observed that “firearms are ‘tools of the trade’ of those engaged in illegal drug activities.” United States v. Martinez, 808 F.2d 1050, 1057 (5<sup>th</sup> Cir.), cert. denied, 481 U.S. 1032, 107 S.Ct. 1962, 95 L.Ed.2d 533 (1987); see also United States v. White, 875 F.2d 427, 433 (4<sup>th</sup> Cir. 1989). Therefore, the Fifth Circuit has also held that district courts may infer that a defendant should have foreseen a codefendant’s possession of a firearm or dangerous weapon if the Government demonstrates that another party knowingly possessed a weapon while each committed criminal activity together involving narcotics. United States v. Aquilera-Zapata, 901 F.2d at 1216. That said, even if there is a basis for such an inference, if contrary evidence presented by the defendant rebuts that inference, it is incumbent upon the Government to provide evidence to support the finding that it was reasonably foreseeable in light of that contrary evidence. *Id.*

## ***2. The Error. Misapplication of Sentencing Guidelines***

The district court improperly calculated Jose Roman’s Guidelines range by erroneously enhancing it by two points based on the Government’s assertion that his co-defendant’s possession of firearms at his home was foreseeable. Jose Roman contends the district court erred by failing to consider the facts in this case and instead relying on this the Fifth Circuit court’s holding that fire arms are “tools of the trade” in a drug conspiracy, therefore “foreseeability” can be inferred in any case where there is a weapon and drug conspiracy.

In this case, Jose Roman provided rebuttal evidence to overcome the inference of foreseeability by arguing that he did not possess the weapons at his brother’s home, had no knowledge that his brother had weapons at his home, and they were located in areas he did not have access, such as the basement and a locked safe. (ROA. 325. 326). There was no evidence that Jose Roman ever went to the basement or that any stored in that area of the home.

Importantly, the Government did not file a response to Jose Roman's sentencing objection, and it did not argue against the objection at sentencing. Probation filed an addendum to the PSR responding to Jose Roman's argument which stated, *inter alia*, that:

*. Because the defendant and his brother (Rodrigo Roman) dealt with a significant amount of cocaine, it is highly foreseeable that the firearms seized from the residence, one of which was modified, were utilized to protect the same. (ROA. 364. 378. 379).*

This conclusory argument does not address the issue raised by Jose Roman that while there is an inference of foreseeability where there are drugs and guns, of that inference is rebutted, there must be a preponderance of the evidence to support this fact finding. See, United States v. Burke, 888 F.2d 862 (D.C Cir. 1989) (“[I]nsofar as section 2d1.1(b)... would enhance the defendant's sentence, the burden of proof is on the prosecution to satisfy the factual prerequisite of the provision” by a preponderance of the evidence.).

Importantly, the Government make clear that “the enhancement should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense.” U.S.S.G. 2D1.1 (b)(1), cmt. A. In this case, with the additional facts provided by Jose Roman it is one where it is “improbable that the weapon was connected with the offense” without more. In fact, it is just as likely that the weapons were used for home safety and not as part of a drug conspiracy. Significant, the Government established simply that Jose Roman went by the residence before being stopped with drugs in his vehicle. Additionally, two surprise searches of Jose Roman's home revealed no guns. (ROA. 325. 326). Due all these reasons, and because the Government does not meet its burden of proving evidence sufficient to establish that the firearms at Jose Roman's co-defendant's home were reasonably foreseeable as part of this drug conspiracy, the district court erred in assessing the two-point enhancement.

### **3. Harm: A Clear Misapplication of the Guidelines**

To show harm, Jose Roman need only show that a misapplication of the Guidelines occurred in this case. See. United States v. Corley, 978 F.2d 185, 186 (5<sup>th</sup> Cir. 1992). Here, Jose Roman has met this burden by showing a clear misapplication occurred where the district court calculated the two additional points for possession of a firearm that was not reasonably foreseeable in this drug conspiracy because Jose Roman had no knowledge or access to the weapons. The burden then shifts to the Government to “prove that ‘but for’ the misapplication of the Guidelines, the district court would have imposed an identical sentence.” *Id.*

At sentencing, the district court made clear that since Jose Roman was not in possession of the firearm it did not disqualify him from a safety valve. (ROA. 318.). Instead, the court determined that Jose Roman was less credible than the Government’s evidence as regards a factual dispute surrounding the investigation. (ROA. 320). Inexplicably, much of this discussion occurred off the record and the letter that was purportedly filed by Jose Roman setting out this factual dispute, and reviewed the trial court, is not part of the record on appeal. (ROA. 316.). At any rate, it is not all clear that if the correct Guidelines calculation were made in this case that the district court would give an identical sentence.

Instead, in the present case both district and appeals court cannot say that the district court did not clearly erred when it based its enhancement of Jose Roman’s sentence on the reasoning foreseeability to Jose Roman of a firearm, particularly where the evidence ,presented at sentencing overcomes any inference as to this fact and the Government fails to prove any response to support its contention.

For all the foregoing reasons, the United States Supreme Court should vacate Jose Roman’s sentence and remand for a new sentencing hearing based on the proper application of the Sentencing Guidelines.



## CONCLUSION AND PRAYER

For the foregoing reasons, Jose Roman requests to the Supreme Court that his sentence be vacated and remanded to the District Court for resentencing.

Respectfully Submitted

Executed this 2 day of April, 2019.



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Jose Roman Reg No. 51238-424  
2193 Sagecrest Loop NE.  
Rio Rancho, New Mex.

87144

## CERTIFICATE OF SERVICE

I, Jose Roman, hereby certify under penalty of perjury that on this April 2, 2019, a copy of the foregoing Writ of Certiorari Petition was placed on the hands of prison officials at MDC Brooklyn with sufficient prepaid postage. A copy of the foregoing was also served to the Solicitor General and United States District Attorney's Office for the Southern District of Texas.

Respectfully Submitted



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