

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

SCOTT MATTHEW GOSS,

PETITIONER,

VS.

UNITED STATES OF AMERICA,

RESPONDENT.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. May a court accept a mere allegation of possession of a weapon as satisfaction of the Government's initial burden of proof requirement supporting the 2-level enhancement for possession of a weapon in connection with drug trafficking under U.S.S.G. § 2D1.1 (b)(1) consistent with due process of law?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, SCOTT MATTHEW GOSS, respectfully petitions for a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit, entered on January 18, 2019.

OPINION BELOW

The unpublished opinion of the United States Court of Appeals for the Fifth Circuit *United States v. Scott Matthew Goss*, No. 18-10101 (5th Cir., January 18, 2019), is reproduced in the Appendix. (Pet. App. Ia-2a).

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the circuit court's decision on a writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Due Process Clause of the Fifth Amendment to the Constitution of the United States which provides that:

"[no] person shall be...deprived of life, liberty, or property without due process of law."

2. This case also involves Sentencing Guideline § 2 D1.1 (b)(1) which provides, in pertinent part that:

"(1) If a dangerous weapon (including a firearm) was possessed, increase by 2 levels."

STATEMENT OF THE CASE

Scott Matthew Goss was charged on September 20, 2017 in a one count Information in the Northern District of Texas, Fort Worth Division with Conspiracy to Possess With

Intent to Distribute a controlled substance in violation of 21 U.S.C. § 846 and 841(a)(1) and 841(b)(1)(B). On September 25, 2017, Goss pleaded guilty to the offense without a written plea agreement. On January 16, 2018, Goss was sentenced to 144 months in prison.

The Fifth Circuit affirmed Goss's conviction in an opinion which concluded that the district court's determination of drug quantity was plausible in light of the record as a whole and that the Government submitted evidence at sentencing establishing that a "temporal and spatial relation existed between" a firearm, drug trafficking activity, and Goss, and "given that Goss failed to submit any competent rebuttal evidence, he cannot show" that the district court's application of the § 2D1.1(b)(1) enhancement was clear error.

REASONS FOR GRANTING THE WRIT

I. The Fifth Circuit Court of Appeals decision is in conflict with at least one other Circuit over whether a court may accept a mere allegation as satisfaction of the Government's burden of proof of possession of a weapon in connection with applying the 2-level enhancement for possession of a weapon in connection with drug trafficking.

It is a violation of due process and the right of confrontation, as well as clear error to enhance a defendant where there is no evidence to support the enhancement, only conclusory statements in the Presentence Investigation Report ("PSR"), unsupported by any facts or any witness testimony, and disputed by the defendant in detailed and specific objections. The Eighth Circuit has said that it is sufficient for the Government to show

that it is "not clearly improbable" that a weapon was connected to the drug offense, a position that leaves the burden of proof standard vague and uncertain, and varying depending upon the circuit.

1. Facts Supporting a § 2D1.1 (b)(1) Enhancement for Possession of a Firearm Must be Proven by the Government by a Preponderance of the Evidence.

The Government bears the burden of proving by a preponderance of the relevant and reliable evidence that the facts support a sentencing enhancement. *United States v. Rodriguez*, 630 F.3d 377, 380 (5th Cir. 2011). The Government has the initial burden of proving by a preponderance of the evidence that a temporal and spatial relation existed between the weapon, the drug trafficking activity, and the defendant. *United States v. Cooper*, 274 F.3d 230, 246 (5th Cir. 2001).

2. There Must Be a Showing that a Temporal and Spatial Relation Existed Between the Weapon, the Drug Trafficking Activity and the Defendant.

The only "evidence" of possession of a firearm in connection with drug trafficking activity in this case was the unsubstantiated allegation of two coconspirators, phrased in conclusory fashion that petitioner "possessed firearms(s) in connection with his drug trafficking activity" even though the PSR Addendum admitted that "the investigation did not contain information directly related to the defendant's distribution activities." This was not "evidence" but only unsubstantiated allegations from coconspirators. This is not a preponderance of the evidence and does not meet the requirement of the Government to prove that the "facts" support a sentencing enhancement. *United States v. Rodriguez*, 630 F.3d 377, 380 (5th Cir. 2011). The

Government cannot meet its burden of proving by a preponderance of the evidence that a temporal and spatial relation existed between the weapon, the drug trafficking activity, and the defendant (*see, United States v. Cooper*, 274 F.3d 230, 246 (5th Cir. 2001)) where the PSR admits there was no "information directly related to the defendant's distribution activities." If there was no such information, how could there possibly be "facts" showing a temporal and spatial relation between the alleged weapon and the drug trafficking activity of the defendant? This case illustrates why the weapons enhancement is the most used enhancement under the Sentencing Guidelines. The standards for its application are so weak and vague as to be virtually undefined. Such conclusory "statements are insufficient standing alone to support the enhancement unless otherwise supported by the record." *See United States v. Rome*, 207 F.3d 251, 254(5th Cir. 2000). There was no other support for the enhancement in the record. It is a violation of due process to enhance petitioner where there is no valid evidence to support a claim of possession of a weapon in connection with the offense. This is a case where the Government's position is essentially that once an allegation is made, even if completely unsubstantiated as to "who, what, where and when," it becomes the burden of an accused defendant to prove himself innocent, which, of course, is almost never successful. Questionable or inconclusive evidence standing alone does not meet the preponderance standard. *United States v. Blaylock*, 249 F.3d 1298, 1303 n.1 (11th Cir. 2001)(citing McCormick's Handbook of the Law of Evidence, Sec. 339). The Government's own uncontradicted evidence must itself satisfy the preponderance standard.

In this case, there was no evidence that petitioner possessed a firearm during the

commission of the offense. The Government never met its initial burden to show that there was a temporal and spatial relation between the weapon, the drug trafficking activity and petitioner. Since the Government never met its initial burden, it was never necessary for petitioner to show that it was clearly improbable that a firearm was possessed in connection with petitioner's offense.

3. The Commentary to § 2D1.1 (b)(1) Does Not Support the Application of the Enhancement to Petitioner.

Application Note 11. (A) to Subsection (b)(1) of § 2D1.1 provides that "[t]he enhancement should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense." The operative word in the guideline is "possessed" while the Application Note states that the enhancement "should be applied if the weapon was present." Presence and possession are not the same thing.

II. The Fifth Circuit Court of Appeals Has Decided an Important Question of Federal Law that Has Not Been, But Should Be Settled by this Court.

Most circuit courts of appeal take the position that once the Government makes out a *prima facie* showing that the defendant drug-dealer possessed a weapon, the burden of production shifts to the defendant to demonstrate that the connection between the weapon and the drug offense was "clearly improbable." *See United States v. Napolitan*, 762 F.3d 297, 309 (3d Cir. 2014). However, the Eighth Circuit has said that the Government must "show that it is not clearly improbable that the weapon was connected to the drug offense." *United States v. Peroceski*, 520 F.3d 886, 889 (8th Cir. 2008). The Eighth

Circuit holds that "[t]he mere presence of a firearm is an insufficient predicate for a 2D1.1 (b)(1) enhancement." *United States v. Savage*, 414 F.3d 964, 966 (8th Cir. 2005). All the evidence against a defendant at a sentencing hearing should meet at least a preponderance of the evidence standard. The Government is arguably permitted to show that it is "not improbable" that the weapon was connected to the drug offense but even permitted to show that it is "not clearly improbable"--an even looser standard. "A 'not clearly improbable' standard, in effect, shifts the burden of proof to the defendant." *See United States v. Anderson*, 618 F.3d 873, 885 (8th Cir. 2010)(Kornmann, D.J., concurring). This is a violation of due process and, as Judge Kornmann stated in *Anderson*, "[t]his should not be permitted under our system of justice." And this is particularly true where it involves the most frequently applied sentencing enhancement of all, the weapons enhancement under § 2D1.1 (b)(1), making it "imperative that the boundaries for application of the enhancement remain clear and meaningful." *United States v. Manigan*, 592 F.3d 621, 633 (4th Cir. 2010)(Michael, J., concurring in part and dissenting in part).

1. It Is a Violation of Due Process to Increase A Sentence Based on False or Incorrect Evidence.

Due process "guarantees every defendant a right to be sentenced upon information which is not false or materially incorrect." *United States v. Tavano*, 12 F.3d 301, 305 (1st Cir. 1993). *See also, United States v. Galbraith*, 200 F.3d 1006, 1012 (7th Cir. 2000) (a defendant has a due process right to be sentenced on the basis of reliable information). The district court cannot impose a sentence enhancement such as § 2D1.1(b)(1) unless the Government has proven any facts necessary to support the

enhancement by a preponderance of the evidence. *United States v. Rodriguez*, 630 F.3d 377, 380 (5th Cir. 2011).

The issue here is whether imposition of the sentencing enhancement based on no evidence or inaccurate or incorrect information violates due process.

In this case, there is no direct evidence or testimony that any person ever saw petitioner with a firearm at a time or place having the necessary connection with any drug trafficking activities of petitioner. The only references from the entire PSR about firearms possession were those general and unspecific allegations of two coconspirators.

The PSR's determination to apply the enhancement was conclusory and had no specific information to support the conclusion that a dangerous weapon was possessed in connection with petitioner's offense. If the factual recitations in the PSR do not support the PSR's recommendation, adopting the PSR does not satisfy the requirements of Rule 32(i)(3)(B). *United States v. Flores-Alvarado*, 779 F.3d 250, 256 (4th Cir. 2015); *United States v. Hammond*, 201 F.3d 346, 352 (5th Cir. 1999)(vacating sentence which attributed to defendant losses incurred by third parties because the PSR adopted by the court did not contain the "absolute prerequisite []" factual finding as to the scope of the jointly undertaken criminal activity). If there are no "findings" in the PSR relating to possession of a firearm "in connection with" petitioner's drug trafficking offense, the district court's "adoption" of the PSR findings is an adoption of no evidence and ineffective. There was no evidence that a firearm was ever possessed by petitioner in connection with his offense.

It is a procedural error for a district court to premise a sentence upon a clearly

erroneous fact. *Gall v. United States*, 552 U.S. 38, 51 (2007). Due process guarantees every defendant a right to be sentenced upon information which is not false or materially incorrect. *United States v. Tavano*, 12 F.3d 301, 305 (1st Cir. 1993).

2. No Evidence Connected Petitioner With a Firearm Having a Temporal and Spatial Relationship with his Drug Offense.

It violates due process to sentence petitioner to additional prison time based on incorrect information. The district court cannot impose a sentence enhancement such as § 2D1.1 (b)(1) unless the Government has proven any facts necessary to support the enhancement by a preponderance of the evidence. *United States v. Rodriguez*, 630 F.3d 377, 380 (5th Cir. 2011). Questionable or inconclusive evidence standing alone does not meet the preponderance standard. *United States v. Blaylock*, 249 F.3d 1298, 1303 n.1 (11th Cir. 2001).

The Government must prove by a preponderance of the evidence that petitioner possessed a firearm with a temporal and spatial relationship with his drug offense. That was not done in petitioner's case.

3. Simple Assertions in the PSR Do Not Meet the Government's Burden to Show that Goss Possessed a Firearm in Connection With a Drug Trafficking Offense.

There was no showing that petitioner possessed a firearm in connection with the drug offense. Guilt cannot be proven by speculation or assumption of the existence of certain facts. Proof by a preponderance of evidence is required. Where there is no such evidence, but only speculation, the enhancement must fail. Simply asserting in the PSR that a certain individual possessed a firearm does not establish that fact or that there was possession in connection with a drug trafficking offense. *See United States v. Bernegger*,

661 F.3d 232, 242 (5th Cir. 2011).

The district court did not make any express finding of the facts on this issue, either at sentencing or in its Statement of Reasons, except to adopt the conclusions of the PSR. It is "clearly improbable" that petitioner possessed a firearm in connection with his offense. Petitioner's enhancement was unsupported by any evidence and violated due process.

CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that the petition for writ of certiorari should be granted.

DATED: April 18, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

RANDALL H. NUNN, a member of the Bar of the State of Texas and appointed under the Criminal Justice Act, certifies that, pursuant to Rule 29.5, he served the preceding Petition for Writ of Certiorari and the accompanying Motion for Leave to Proceed In Forma Pauperis on counsel for the Respondent by enclosing a copy of these documents by United States Postal Service mail, and addressed to:

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and further certifies that all were served on April 18, 2019.

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