

No. _____

In the
Supreme Court of the United States
OCTOBER TERM, 2019

PAUL SUAREZ,
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

- 1) DID THE PANEL ERR BY HOLDING THAT THE “LAW OF THE CASE” GOVERNED ITS DECISION IN HOLDING THAT THE EVIDENCE WAS LEGALLY SUFFICIENT TO SUSTAIN THE PETITIONER’S CONVICTION?

The Panel erred by relying on the “law of the case” doctrine to summarily affirm Petitioner’s conviction. The reluctance to reopening settled matters must give way because the earlier decision is clearly erroneous and works a manifest injustice.

- 2) DID THE PANEL ERR BY HOLDING THAT FOR PURPOSES OF A CONVICTION UNDER 18 U.S.C. § 924(C)(1)(A), WHETHER A DEFENDANT USED A PARTICULAR FIREARM PERTAINS TO THE MEANS BY WHICH THE CRIME WAS COMMITTED, AND THEREFORE A JURY IS NOT REQUIRED TO DETERMINE UNANIMOUSLY THAT A PARTICULAR FIREARM WAS USED?

The Panel erred by holding that possession of a particular type of firearm is not an element of the offense for a conviction of possession of a firearm in furtherance of drug trafficking crime.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW	I
TABLE OF AUTHORITIES	iii
REPORTS OF OPINIONS	v
JURISDICTION	v
BASIS OF FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE	v
STATEMENT OF THE CASE.....	1
Procedural History	1
Statement of Facts.....	1
REASONS WHY CERTIORARI SHOULD BE GRANTED	5
ARGUMENT AND AUTHORITIES.....	6
CONCLUSION.....	21
RELIEF REQUESTED.....	22
CERTIFICATE OF SERVICE	23
APPENDIX.....	24

TABLE OF AUTHORITIES

CASES

<u>United States v. Cardenas</u> , 748 F.2d 1015 (5th Cir.1984).....	18
<u>United States v. Ceballos-Torres</u> , 218 F.3d 409 (5th Cir. 2000).....	18
<u>United States v. Fitzharris</u> , 633 F.2d 416 (5th Cir.1980), cert. denied, 451U.S. 988 (1981)	17
<u>United States v. Floyd</u> , 343 F.3d 363 (5th Cir.2003).....	7
<u>In re Ford Motor Co.</u> , 591 F.3d 406 (5th Cir.2009).....	7
<u>United States v. Gallo</u> , 927 F.2d 815 (5th Cir.1991).....	16
<u>United States v. Galvan</u> , 693 F.2d 417 (5th Cir.1982)	17
<u>United States v. Horton</u> , 622 F.2d 144 (5th Cir. 1980)	6
<u>United States v. Jackson</u> , 700 F.2d 181 (5th Cir.), cert. denied, 464 U.S. 842 (1983)	17
<u>United States v. Lee</u> , 358 F.3d 315 (5th Cir. 2004).....	6
<u>United States v. Lentz</u> , 823 F.2d 867 (5th Cir.).....	17
<u>United States v. Magee</u> , 821 F.2d 234 (5th Cir.1987).....	17
<u>United States v. Matthews</u> , 312 F.3d 652 (5th Cir. 2002).....	3, 4, 7
<u>McKay v. Novartis Pharm. Corporation</u> , 751 F.3d 694 (5th Cir. 2014)	7
<u>United States v. Suarez</u> , 879 F.3d 626 (5th Cir. 2018)	4, 6, 7
<u>United States v. Vergara</u> , 687 F.2d 57 (5th Cir.1982), cert. denied, 484 U.S. 957 (1987)	17

STATUTES

18 U.S.C. § 924 c	18
18 U.S.C. § 924 (c)	1
18 U.S.C. § 924(C)(1)(A)	2, 5, 7, 19
18 U.S.C. § 4401	6
21 U.S.C. §§ 841(a)(1)	16
21 U.S.C. § 846	1, 16
26 U.S.C. § 5861(d).....	1, 20
28 U.S.C., § 1254(1)	6

REPORTS OF OPINIONS

The decision of the Court of Appeals for the Fifth Circuit is reported as United States v. Paul Suarez, No. 18-40302, (5th Cir. May 3, 2019)(not published). It is attached to this Petition in the Appendix. A previous decision of the Court of Appeals for the Fifth Circuit in this matter is reported as *United States v. Suarez*, 879 F.3d 626, 629 (5th Cir. 2018).

JURISDICTION

The decision by the United States Court of Appeals for the Fifth Circuit affirmed the District Court's judgment of conviction and sentence in the Eastern District of Texas.

Consequently, Petitioner files the instant Application for a Writ of Certiorari under the authority of Title 28, U.S.C., § 1254(1).

BASIS OF FEDERAL JURISDICTION

IN THE COURT OF FIRST INSTANCE

Jurisdiction was proper in the United States District Court for the Eastern District of Texas because Petitioner was indicted for violations of Federal law by the United States Grand Jury for the Eastern District of Texas.

STATEMENT OF THE CASE

1. Procedural History.

On May 14, 2015, Petitioner Paul Suarez (“Suarez”) and two codefendants were charged in a four-count Indictment returned by the Grand Jury for the United States District Court, Eastern District of Texas, Sherman Division. ROA.12—17. Count 1 charged all three codefendants with Conspiracy to Distribute and Possess with Intent to Distribute Methamphetamine from January 15, 2015, until May 14, 2015, in violation of 21 U.S.C. § 846. ROA.12. Count 2 charged Erica Gutierrez and Paul Suarez with Possession of a Firearm in Furtherance of a Drug Trafficking Crime on February 4, 2015, (specifically a “sawed-off pump action Winchester .20 gauge shotgun” and a “Davis, model P-380, .380 caliber pistol”) in violation of 18 U.S.C. § 924 (c). ROA.13. Counts 3 and 4 charged Erica Gutierrez and Paul Suarez with Possession of an Unregistered Firearm on February 4, 2015, in violation of 26 U.S.C. § 5861(d). ROA.13—14. Specifically, Count 3 alleged the possession of the same Winchester shotgun identified in Count 2, and Count . ROA. 9-17.¹

Count 4 alleged the possession of a “loaded sawed-off Ithaca, model 37, .20 gauge shotgun.” ROA.13—14.

On May 31, 2016, Petitioner appeared before a United States District Court for a jury trial. After two days of testimony, the case was submitted to the jury for deliberations. On June 2, 2016, the jury returned verdicts of guilty as to Counts 1-4 of the Indictment. ROA.143—46. Specifically, the jury held Mr. Suarez responsible for 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine. ROA.144.

¹In the references to the Record on Appeal, references are made according to the pagination assigned by the Clerk of the Court.

Petitioner Suarez made an oral motion for acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure during the trial after the close of the Government's case-in-chief and the conclusion of the evidence. This motion was denied by the court.

Mr. Suarez was sentenced on September 7, 2016. Judge Mazzant sentenced Mr. Suarez to 60 months imprisonment on Counts 1, 3, and 4 to be served concurrently and 120 months imprisonment on Count , to be served consecutively to Counts 1, 3, and 4 for a total term of imprisonment of 180 months confinement in the Bureau of Prisons. ROA.152. Judge Mazzant also ordered a special assessment of \$400 and a term of supervised release for five years after release from incarceration. ROA.153—57.

Mr. Suarez appealed. On January 12, 2018, a panel of the Fifth Circuit vacated Mr. Suarez's sentence and remanded the case for a new sentencing hearing. On March 20, 2018, the District Court sentenced Mr. Suarez to a total sentence of 120 months: 60 months for Counts One, Three and Four, to run concurrently to each other, and 60 months for Count Two to run consecutive to the other counts.

Mr. Suarez then timely filed a notice of appeal from his re-sentencing hearing. On May 3, 2019, the Fifth Circuit Court of Appeals summarily affirmed the Petitioner's conviction in an unpublished decision, citing the "law of the case" doctrine.

2. Statement of Facts.

On May 31, 2013, Paul Suarez entered pleas of not guilty to Counts 1-4 of the Indictment and a jury trial commenced before the United States District Court for the Eastern District of Texas. This case began when an individual named Timothy Sharp, who would eventually be named as a co-defendant in the Indictment, was stopped by Cooke County deputy Bradley Marc Parsons for the

traffic infraction of failure to maintain a single lane. During this stop and the subsequent search of Sharp's residence, various quantities of methamphetamine and indicators of distribution were discovered. The discovery of these items lead to a search on February 4, 2015 of a house in Gainesville, owned by co-defendant Erica Gutierrez.

During the February 4 residential search, officers located Petitioner Paul Suarez in the master bedroom along with Ms. Gutierrez. Two other individuals were in a second bedroom. This search drugs, paraphernalia, and the three firearms are identified in the Indictment. The two individuals in the second bedroom were not named in this indictment.

It is the position of Mr. Suarez that the government's case against Mr. Suarez relied exclusively on Mr. Suarez's proximity to the contraband at the time of his arrest, and the uncorroborated testimony of two individuals; co-defendant Erica Gutierrez, who claimed Suarez assisted her in distributing drugs, but denied Mr. Suarez had knowledge or possession of at least two of the guns, and Travis Puckett who loosely connected Suarez with one of (but not both) the shotguns. The remaining government witnesses could only testify as to the items found during the execution of the search warrant and where they were in relation to Mr. Suarez.

The government did not provide any, much less sufficient, physical evidence linking Mr. Suarez to narcotic distribution or to firearm possession: no recordings with Mr. Suarez, no drug seizures from Mr. Suarez, no videos or any other physical evidence of any kind showing Mr. Suarez engaged in illegal activity. The Fifth Circuit held that:

Under the law of the case doctrine, an issue of fact or law decided on appeal may not be reexamined either by the district court on remand or by the appellate court on a subsequent appeal." *United States v. Matthews*, 312 F.3d 652, 657 (5th Cir. 2002) (internal quotation marks and citation omitted). We have previously decided that Suarez's convictions are supported by sufficient evidence, and Suarez fails to

demonstrate the applicability of any exception to the law of the case doctrine that might warrant reexamining that conclusion. See *id.* Accordingly, we will not reexamine the issue Suarez raises in this appeal.

United States v. Suarez, No. 18-40302 (5th Cir. 2019)(not published).

Petitioner seeks certiorari to determine if the Fifth Circuit has correctly applied the “Law of the case” doctrine to this case, and ultimately whether the evidence was sufficient to sustain the jury’s verdict.

REASONS WHY CERTIORARI SHOULD BE GRANTED

Question#1

The Panel erred by relying on the “law of the case” doctrine to summarily affirm Petitioner’s conviction. The reluctance to reopening settled matters must give way because the earlier decision is clearly erroneous and works a manifest injustice. Certiorari should be granted so that this Court may correct the Panel’s original finding that the conviction was supported by sufficient evidence.

Question #2

The Panel erroneously held in its first opinion that the jury need not unanimously agree on which firearm supports the conviction for this offense. This Court should clarify for purposes of a conviction under 18 U.S.C. § 924(c)(1)(A), whether a defendant used a particular firearm pertains to the means by which the crime was committed, or if a jury is required to determine unanimously that a particular firearm was used.

ARGUMENTS AND AUTHORITIES

QUESTIONS FOR REVIEW

ARGUMENT

- I. DID THE FIFTH CIRCUIT ERR BY APPLYING THE “LAW OF THE CASE” DOCTRINE TO THE PETITIONER’S APPEAL AND REFUSING TO REVIEW THE LEGAL SUFFICIENCY OF THE EVIDENCE?
- II. DID THE PANEL ERR BY HOLDING THAT FOR PURPOSES OF A CONVICTION UNDER 18 U.S.C. § 924(C)(1)(A), WHETHER A DEFENDANT USED A PARTICULAR FIREARM PERTAINS TO THE MEANS BY WHICH THE CRIME WAS COMMITTED, AND THEREFORE A JURY IS NOT REQUIRED TO DETERMINE UNANIMOUSLY THAT A PARTICULAR FIREARM WAS USED?

The question of whether a district court may revisit prior rulings in a single case is governed by the law-of-the-case doctrine. Wright, Miller, & Cooper, 18 Fed. Prac. & Proc. Juris. § 4401. Law-of-the-case is more flexible than res judicata. It recognizes that a district court’s rulings are not “immutable.” *See United States v. Horton*, 622 F.2d 144, 148 (5th Cir. 1980) (“While the ruling on the motion for partial summary judgment is the law of the case on the issues decided, this ruling is not immutable and has no res judicata effect.”).

Law-of-the-case, generally described, is:

Once a court finally decides a contested point, that decision governs later stages of the dispute. That is, courts should treat the same litigants in the same case the same way throughout the same dispute. They have created a law of the case.

B. Garner et al., *The Law of Judicial Precedent* p. 441 (2016).

This doctrine is a flexible one:

The courts are understandably reluctant to reopen a ruling once made. This general reluctance is augmented by comity concerns when one judge or court is asked to

reconsider the ruling of a different judge or court. Reluctance, however, does not equal lack of authority. The constraint is a matter of discretion. So long as the same case remains alive, there is power to alter or revoke earlier rulings.

See 18B Wright, Miller, & Cooper, Fed. Prac. & Proc. Juris. § 4478 (2d ed.); *accord*, Garner, *supra*, at 445–447; *see also* *United States v. Lee*, 358 F.3d 315, 320 (5th Cir. 2004) (“The law of the case doctrine . . . is an exercise of judicial discretion which ‘merely expresses the practice of courts generally to refuse to reopen what has been decided,’ not a limit on judicial power.”)

Law of the case “is not inviolate.” *United States v. Matthews*, 312 F.3d 652, 657 (5th Cir. 2002). Even when a superior court has ruled on a question, the natural reluctance to reopening settled matters must give way when “the earlier decision is clearly erroneous and would work a manifest injustice.” *Id.*; *accord* *McKay v. Novartis Pharm. Corp.*, 751 F.3d 694, 703 (5th Cir. 2014); *In re Ford Motor Co.*, 591 F.3d 406, 411 (5th Cir. 2009).

The Panel’s previous decision was clearly erroneous and works a manifest injustice. Therefore, the Panel erred by relying on “law of the case” to resolve Petitioner’s sufficiency of the evidence claims.

Mr. Suarez made a motion for judgment of acquittal after the Government rested and contemporaneously with his own resting of the case. ROA.555. The district court’s denial of a motion for judgment of acquittal is reviewed *de novo*. *United States v. Floyd*, 343 F.3d 363, 370 (5th Cir. 2003).² The evidence introduced during the two-day jury trial is insufficient to sustain the jury’s verdict for any of the four counts of the Indictment. Beyond his presence at the scene where firearms and controlled substances were found, there is little compelling evidence to support the

²Petitioner contends that the Panel employed the incorrect standard of review for holding that the evidence was legally sufficient. The panel in the Fifth Circuit’s first opinion used a “plain error” standard of review. *See United States v. Suarez*,

jury's verdict that Mr. Suarez was guilty of the offenses alleged in the indictment. Further, the Panel also erroneously held that, for purposes of a conviction under 18 U.S.C. § 924(c)(1)(A), whether a defendant used a particular firearm pertains to the means by which the crime was committed, and therefore a jury is not required to determine unanimously that a particular firearm was used.

The Government's case rested in large part upon the law enforcement witnesses who testified against Mr. Suarez regarding his presence in the residence of co-defendant Erica Gutierrez.

Bradley Marc Parsons (ROA.272—97)

Gainesville Police Officer Bradley Marc Parsons initiated the traffic stop on Timothy Sharp which resulted in the investigation into this conspiracy. ROA.274. At the time of the traffic stop, Officer Parsons located a small amount of methamphetamine. ROA.276. Based on information obtained from a subsequent interview with Mr. Sharp and his passenger, a search warrant was obtained for Mr. Sharp's residence, where more methamphetamine and indicators of distribution were discovered. ROA.281—84. Officer Parsons also assisted in the execution of the February 4, 2015 search warrant of Erica Gutierrez' home which lead to the arrest of Suarez. ROA.284. Specifically, Officer Parsons searched Ms. Gutierrez' master bedroom where Gutierrez and Suarez were located. ROA.284. During this search, Officer Parsons located a closed plastic container containing baggies containing methamphetamine. ROA.286—88. This container was secreted under the bed. ROA.286—88.

Michael Young (ROA.297—309)

Gainesville Police Officer Michael Young was the canine handler that assisted in the searches of Sharp's vehicle, Sharp's residence, and Gutierrez' residence. ROA.297—309. He had little to

offer linking Suarez to any illegal activity except to indicate that his canine did not alert on Mr. Suarez' vehicle at the time of the search.

Q. But can you tell the jury whether or not she alerted on any of the vehicles outside?

A. Best I recall, no, she did not, sir. ROA.307 at 5—7.

On day two of the trial proceedings, the Government continued its presentation of evidence through the use of ten additional witnesses; Officer Ron Alford, Officer David Walters, Officer Timothy Green, Officer Shane Norie, Forensic Analyst Renea Eckelkamp, co-defendants Erica Gutierrez and Travis Puckett, and ATF Agents Justin Holbert, Kenneth Earl Mason and Gus Benavides.

Ron Alford (ROA.313—29)

Investigator Ron Alford with the Gainesville Police Department also assisted in the search of Ms. Gutierrez' house on February 4, 2015. ROA.314.

Investigator Alford knew the house to belong to Ms. Gutierrez and her family. ROA.316 at 1—10. While Alford did testify that he had received some information from Michael Young indicating Suarez resided at this house as well, this was uncorroborated. ROA.320. Michael Young did not testify to this fact during his testimony the day prior. In fact, Investigator Alford testified that he had been called to this address “several times” prior to this search, and had never once observed Paul Suarez at the residence prior to the day of the search. ROA.326—27.

During Alford's search of Ms. Gutierrez' room, he located portions of the disassembled Winchester shotgun named in Count 3 of the Indictment tucked underneath the mattress. ROA.317 at 3—9; ROA.323—24. The mattress had to be physically moved to see the shotgun portions. ROA.325 at 7—10. Alford did not testify to locating any drugs or drug paraphernalia.

David Walters (ROA.329—38)

Officer David Walters with the Cooke County Sheriff's Department also assisted with the search of Ms. Gutierrez' residence on February 4, 2015. ROA.330. Specifically, Walters searched the second bedroom, where Ashley Alexander and Demetrius Franklin were located. ROA.330. In this bedroom, the Ithaca shotgun named in Count 4 of the Indictment was located tucked underneath a mattress. ROA.331 at 12—17. Walters did not testify that he located any drugs or drug paraphernalia during his search.

Timothy Green (ROA.339—409)

Investigator Timothy Green is a Cooke County Sergeant Investigator and was the "main investigator" of this case. ROA.339; ROA.344 at 21—23. After the arrest of Timothy Sharp and his passenger, Investigator Green was told that their source of supply was "Erica Gutierrez and Paul Suarez." ROA.353 at 5—10. This testimony was in direct contrast with his later testimony given during cross-examination:

Q. Thank you. In your direct testimony you stated that

you interviewed Mr. Sharp, is that correct?

A. Yes.

Q. And he told you about his illegal activities, is that

correct?

A. Yes, that's correct.

Q. He also told you that his source of supply was Erica Gutierrez, is that correct?

A. Yes.

Q. He never told you that Paul Suarez was his source of supply, is that correct?

A. That's correct

ROA.386 at 18—387 at 4.

Q. Yes. I'm sorry. You never stated in here, in your report, that Tim Sharp told you that he purchased this 27.2 grams of methamphetamine from Paul Suarez, is that correct?

A. That's correct.

Q. And he purchased that from Erica Gutierrez, is that right?

A. Yes.

Q. He also told you that Gutierrez was the distributor of methamphetamine, is that correct?

A. Yes.

Q. He never told you Paul Suarez was a distributor, is that correct?

A. That's correct.

Q. He also identified a person, a third individual that he stated was Ashley Nicole Alexander, is that correct?

A. That's correct.

Q. And that she was present during this particular transaction, is that right?

A. Yes, that's correct.

Q. Tim Sharp told you that he had gone to this residence on numerous occasions and had obtained quantities of methamphetamine from Gutierrez, is that correct?

A. Yes.

Q. Not Suarez, is that correct?

A. That's correct.

Q. And you also interviewed Mr. Glover, is that correct?

A. Yes.

Q. You interviewed him a second time, is that correct?

A. Yes.

Q. And he told you he had been to this residence on Taylor Street, is that right?

A. Yes, that's correct.

Q. And you showed Mr. Glover a photograph of this residence at 702 North Taylor Street, is that right?

A. Yes.

Q. And he told you that was the residence that he and Tim Sharp had gone to, is that right?

A. Yes.

Q. But he told you that he did not witness any drug transactions during his visit, is that right?

A. Yes.

ROA.387 at 25—389 at 16.

During the search of Ms. Gutierrez' home on February 4, 2015, Investigator Green searched the master bedroom. ROA.360 at 1—2. During this search, Green testified that he found a quantity of methamphetamine that was "inside of a cell phone box" which was inside of another bag and "underneath a little end table." ROA.360 at 15—21. Green also testified to another quantity of methamphetamine tucked underneath the left side of the bed. ROA. 361 at 3—7. Green also testified that the portions of the disassembled Winchester shotgun were found tucked underneath the right

side of the bed, (ROA.361 at 13—362 at 1) a pistol was located inside of the master bedroom closet, (ROA.362 at 2—4) and verified that the second shotgun was located underneath a mattress in the second bedroom (ROA.362 at 17—19).

The Winchester shotgun located in the master bedroom was in “three separate pieces in three different places.” ROA.390 at 3—10.

Finally, Green testified that he did not locate any mail bearing Mr. Suarez’s name inside of Ms. Gutierrez’ house and all the money discovered was inside of a woman’s purse, Mr. Suarez did not have any money on his person when he was arrested. ROA.394 at 20—22; ROA.398—399.

Shane Norie (ROA.409—28)

Lieutenant Shane Norie with the Cooke County Sheriff’s Office also assisted with the search of Ms. Gutierrez’ house. ROA.409 at 18—20; ROA.415 at 9—16. Norie discovered the pistol in the master bedroom closet. ROA.416 at 7—12. After the conclusion of the search, Lt. Norie answered a call that was coming into what was eventually determined to be Erica Gutierrez’ cell phone from a man (Travis Puckett) attempting to purchase drugs. ROA.417 at 15—418 at 6. After Puckett’s subsequent arrest, Norie downloaded his text message history from his phone and discovered requests made to Erica Gutierrez for methamphetamine.

Q. So it sounds like Travis is asking whoever that number is 940-902-2248, will you give me that [meth] for a hundred [dollars]?

A. That's absolutely what he's doing.

Q. Are you familiar with whose phone number that is?

A. I believe it's Erica's.

Q. When you say Erica, you mean Erica Gutierrez?

A. Yes, Ms. Gutierrez.

ROA.422 at 9—15.

Q. Now, in Exhibit No. 22 [Puckett's text message history] you stated that you saw Mrs. Gutierrez's phone number, is that correct?

A. Yes, sir.

Q. You never saw Mr. Paul Suarez's phone number in there, is that correct?

A. I did not.

Q. As a matter of fact, you never found a phone on my client, is that correct?

A. That's correct.

ROA.424 at 4—12.

Erica Gutierrez (ROA.435—56)

Erica Gutierrez was a co-defendant of Mr. Suarez and the owner of the house that was searched on February 4, 2015. Prior to trial, Ms. Gutierrez pled guilty and appeared to testify as part of her plea agreement with the government. While she did testify that Mr. Suarez assisted her in distributing narcotics, her testimony was in direct contrast with the testimony of the investigating officers by stating that Sharp was her source of supply, not the other way around. ROA.451 at 15—25. She also stated that all of the money recovered was her money, and did not belong to Suarez:

Q. Thank you. The officers testified that you had a purse that contained approximately \$2100 when you were arrested. Do you remember that?

A. Yes, I do.

Q. And that was your money?

A. My money.

Q. And you stated that the person that distributed these drugs to you was Tim Sharp, is that correct?

A. Yes, sir.

Q. And that he was your supplier?

A. Yes, sir.

ROA.451 at 15—25.

Most importantly, Erica Gutierrez testified numerous times that Suarez had absolutely no knowledge, ownership, or possession of the second (Ithaca) shotgun located in the house and that it belonged to her ex-boyfriend, Brian Lee Maker. ROA.444 at 17—445 at 10. Brian and Erica had split up about a week prior to the February 4, 2015 search and Brian was still in the process of clearing all his belongings out of the house. ROA.453 at 10—21.

Gutierrez testified that Mr. Suarez had knowledge of the disassembled Winchester shotgun that was tucked underneath her mattress. ROA.444 at 3—10. Gutierrez also testified that Mr. Suarez did not normally stay at her house. It was Mr. Suarez's misfortune to stay the evening before the search. ROA.452 at 1—14.

Travis Puckett (ROA.458—74)

Travis Puckett was the methamphetamine customer of Erica Gutierrez who called Gutierrez' phone during the execution of the search. Based on receiving this call, Investigator Norie set up the sting operation leading to his arrest. Puckett confirmed that he showed up at the Days Inn attempting to purchase methamphetamine directly from Ms. Gutierrez. ROA.460 at 10—15.

Puckett testified that he received methamphetamine from Mr. Suarez “a couple of times when Erica [Gutierrez] wasn’t available.” ROA.462 at 2—13. Puckett was literally the only witness that attempted to link Suarez with the shotguns in the house. ROA.463 at 11—22. This testimony was directly contrary to Mr. Suarez’ co-defendant, Erica Gutierrez.

At the time of his testimony, Puckett was facing charges of possession of child pornography and failure to register as a sex offender. ROA.467 at 25—468 at 8. He was dishonorably discharged from his service in the Army after being court marshaled and being convicted of carnal knowledge, indecent acts upon a child under 16, sodomy, false swearing, and obstruction of justice. ROA.468 at 15—469 at 5.

Gus Benavides (ROA.483—89)

Gus Benavides is a special agent with the Bureau of Alcohol, Tobacco and Firearms who assisted in this investigation. ROA.483 at 13—14. He testified as to information he received that allegedly linked Mr. Suarez to some unidentified shotgun. ROA.485 at 23—486 at 7. This statement allegedly came from Tim Sharp and was not objected to at trial. It also directly contradicted the testimony from Erica Gutierrez. The evidence was insufficient that the Petitioner was a member of the charged conspiracy as alleged in Count 1 of the Indictment.

Mr. Suarez contends that the Government failed to introduce sufficient evidence for the jury to find Petitioner guilty beyond a reasonable doubt of Conspiracy to Distribute and Possess with Intent to Distribute Methamphetamine, in violation of 21 U.S.C. § 846, as charged in Count 1 of the Indictment. Therefore, this Court should reverse the conviction and enter a finding of acquittal.

In a drug conspiracy prosecution under 21 U.S.C. §§ 841(a)(1) and 846, the government must prove beyond a reasonable doubt (1) the existence of an agreement between two or more persons to

violate the narcotics laws, (2) that the defendant knew of the agreement, and (3) that he voluntarily participated in the agreement. United States v. Gallo, 927 F.2d 815, 820 (5th Cir.1991). The government need not prove the essential elements by direct evidence alone.“The agreement, a defendant's guilty knowledge and a defendant's participation in the conspiracy all may be inferred from the ‘development and collocation of circumstances.’” United States v. Lentz, 823 F.2d 867, 868 (5th Cir.); see also United States v. Vergara, 687 F.2d 57, 61 (5th Cir.1982), *cert. denied*, 484 U.S. 957 (1987).

While “presence or association is one factor that the jury may rely on, along with other evidence, in finding conspiratorial activity by a defendant,” United States v. Magee, 821 F.2d 234, 239 (5th Cir.1987), it is well established that mere presence at the crime scene or close association with conspirators, standing alone, will not support an inference of participation in the conspiracy. United States v. Fitzharris, 633 F.2d 416, 423 (5th Cir.1980), *cert. denied*, 451U.S. 988 (1981). Although circumstantial evidence may be particularly valuable in proving the existence of the conspiratorial agreement, this Court has repeatedly stressed that it will not lightly infer a defendant's knowledge of and participation in a conspiracy. United States v. Jackson, 700 F.2d 181, 185 (5th Cir.), *cert. denied*, 464 U.S. 842 (1983). Thus, the government may not prove up a conspiracy merely by presenting evidence placing the defendant in “a climate of activity that reeks of something foul.” *Id*; see also United States v. Galvan, 693 F.2d 417, 419 (5th Cir.1982).

The government's evidence that connects Mr. Suarez to the conspiracy was the uncorroborated and contradictory testimony from two unreliable witnesses that were in direct conflict with one another and with the other witnesses at trial. The testimony at trial revealed that Mr. Suarez did not reside at the residence in question, he did not have a cell phone, he did not have

any money, and that all of the drugs and money recovered from the house, as well as the house itself, belonged to Ms. Gutierrez. Therefore, there is insufficient evidence to support this conviction. This conviction should be overturned.

The evidence was insufficient that the Petitioner possessed a firearm in furtherance of drug trafficking activity as alleged in Count 2 of the Indictment.

Mr. Suarez contends that the Government failed to introduce sufficient evidence for the jury to find Petitioner guilty beyond a reasonable doubt of Possession of a Firearm in Furtherance of a Drug Trafficking Crime in violation of 18 U.S.C. § 924(c), as charged in Count 2 of the Indictment. Therefore, this Court should reverse the conviction and enter a finding of acquittal.

In order to prove the essential elements of Count 2, the government must first prove the defendant actually or constructively possessed the firearm in question. Possession of contraband may be either actual or constructive. United States v. Cardenas, 748 F.2d 1015, 1019 (5th Cir. 1984). In general, a person has constructive possession if he knowingly has ownership, dominion, or control over the contraband itself or over the premises in which the contraband is located. *Id.* Constructive possession need not be exclusive, it may be joint with others, and it may be proven with circumstantial evidence. *Id.* More evidence than mere physical proximity of the defendant to the controlled substance is required. *Id.* at 1019–20.

The government was required to prove that the firearm in question was used “in furtherance of” the drug trafficking activity. United States v. Ceballos-Torres, 218 F.3d 409, 414 (5th Cir. 2000), amended on reh'g in part, 226 F.3d 651 (5th Cir. 2000) (“The “mere presence” test is one based on generality—anytime a drug dealer possesses a gun, that possession is in furtherance, because drug dealers generally use guns to protect themselves and their drugs. What is instead required is evidence

more specific to the particular defendant, showing that his or her possession actually furthered the drug trafficking offense.).

Here, the Government did not prove these elements.

All the evidence established was that Suarez was in physical proximity to the three firearms recovered at the scene. Erica Gutierrez testified that Mr. Suarez had no knowledge of the shotgun located in the second bedroom, and only minimal knowledge of the disassembled shotgun located under her bed mattress. The only testimony that linked any of the firearms to the drug trafficking activity was the testimony of Travis Puckett, who testified in direct contrast to Gutierrez.

The government failed to prove that Mr. Suarez actually or constructively possessed any of the firearms in question, and certainly did not prove that his possession ever furthered any narcotic activity.

The evidence in Count II was also legally insufficient based on the failure of the district court to require that the jury unanimously determine which firearm formed the basis of the conviction.

The first opinion by the Circuit held that

We have also held that the jury need not unanimously agree on which firearm supports the conviction for this offense. For purposes of a conviction under 18 U.S.C. § 924(c)(1)(A), whether a defendant used a particular firearm pertains to the means by which the crime was committed, and therefore a jury is not required to determine unanimously that a particular firearm was used.

The Panel erred by holding that possession of a particular type of firearm is not an element of the offense for purposes of a conviction of possession of a firearm in furtherance of drug trafficking crime.

Therefore, this conviction should be overturned.

The evidence was insufficient that Petitioner actually or constructively possessed either the Winchester or the Ithaca shotguns as alleged in Counts 3 and 4 of the Indictment.

Mr. Suarez contends that the Government failed to introduce sufficient evidence for the jury to find Petitioner guilty beyond a reasonable doubt of Possession of an Unregistered Firearm on February 4, 2015, in violation of 26 U.S.C. § 5861(d), as charged in Counts 3 and 4 of the Indictment. Therefore, this Court should reverse these convictions and enter a finding of acquittal.

No evidence was presented other than the uncorroborated and contradictory testimony of Travis Puckett, a problematic witness, to show that Mr. Suarez actually or constructively possessed either of these two firearms. Mere presence or proximity is insufficient to sustain such a conviction. Mr. Suarez did not have any form of ownership, dominion, or control of these firearms which were secreted under furniture in a house he did not own, rent, or reside.

The Government relies on the testimony of Travis Puckett. Puckett was previously an individual previously found guilty of lying under oath, who testified that he witnessed Suarez possessing the firearm about which Gutierrez testified Mr. Suarez knew nothing. At the time of his testimony, Puckett was facing charges of possession of child pornography and failure to register as a sex offender. He was dishonorably discharged from his service in the Army after being court marshaled and being convicted of carnal knowledge, indecent acts upon a child under 16, sodomy, false swearing, and obstruction of justice. Yet, this is the individual upon whom the sufficiency of the evidence for the firearm counts rests. The government could not, and did not prove beyond a reasonable doubt that either of these two firearms were ever actually or constructively possessed by Mr. Suarez.

Therefore, these convictions should be overturned. The Panel Opinion erred by applying the law of the case doctrine to Mr. Suarez's case. This petition should be granted, the Fifth Circuit's opinion should be vacated, and the case should be remanded for further proceedings in light of this Court's opinion.

CONCLUSION

This Petition for Writ of Certiorari should be granted and the decision of the Fifth Circuit should be vacated, and the case should be remanded for proceedings consistent with this Court's opinion.

Respectfully submitted,

/s/ Amy R. Blalock
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RELIEF REQUESTED

FOR THESE REASONS, the Petitioner moves this Court to grant a Writ of Certiorari in order to review the Judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

/s/ Amy R. Blalock
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CERTIFICATE OF SERVICE

I certify that on the 1st day of August 2019, I served one (1) copy of the foregoing Petition for Writ of Certiorari on the following individuals by mail (certified mail return receipt requested) by depositing same, enclosed in post paid, properly addressed wrapper, in a Post Office or official depository, under the care and custody of the United States Postal Service, or by other recognized means pursuant to the Rules of the Supreme Court of The United States of America, Rule 29:

Solicitor General
U.S. Department of Justice
Washington, D.C. 20530

Traci Kenner
US Attorney's Office
Tyler, Texas

PAUL SUAREZ
USM # 23158-078
USP POLLOCK
U.S. PENITENTIARY
P.O. BOX 2099
POLLOCK, LA 71467

/s/ Amy R. Blalock
AMY R. BLALOCK

No. _____

In the
Supreme Court of the United States
OCTOBER TERM, 2019

PAUL SUAREZ,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

APPENDIX

OPINION OF THE UNITED STATES COURT
OF APPEALS FOR THE FIFTH CIRCUIT

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

United States Court of Appeals
Fifth Circuit

FILED

May 3, 2019

Lyle W. Cayce
Clerk

No. 18-40302
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

PAUL SUAREZ,

Defendant-Appellant

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 4:15-CR-79-1

Before DENNIS, CLEMENT, and OWEN, Circuit Judges.

PER CURIAM:*

Paul Suarez was convicted by a jury of one drug conspiracy offense and three firearms offenses. In his initial appeal, we concluded that all of his convictions were supported by sufficient evidence, but we vacated his sentence on one count and remanded for resentencing. *See United States v. Suarez*, 879 F.3d 626, 629 (5th Cir. 2018). Appealing from the judgment entered after resentencing, Suarez again challenges the sufficiency of the evidence to

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

No. 18-40302

support his convictions. The Government has filed an opposed motion for summary affirmance based on the law of the case doctrine. In the alternative, the Government requests an extension of time to file a merits brief.

“Under the law of the case doctrine, an issue of fact or law decided on appeal may not be reexamined either by the district court on remand or by the appellate court on a subsequent appeal.” *United States v. Matthews*, 312 F.3d 652, 657 (5th Cir. 2002) (internal quotation marks and citation omitted). We have previously decided that Suarez’s convictions are supported by sufficient evidence, and Suarez fails to demonstrate the applicability of any exception to the law of the case doctrine that might warrant reexamining that conclusion. *See id.* Accordingly, we will not reexamine the issue Suarez raises in this appeal.

The Government’s motion for summary affirmance is GRANTED, and the judgment is AFFIRMED. The Government’s alternative motion for an extension of time to file a brief is DENIED.