

NO. \_\_\_\_\_

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IN THE  
SUPREME COURT OF THE UNITED STATES

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ANTHONY MORENO,

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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## QUESTIONS PRESENTED

1. Does the use of an interest-balancing test to evaluate the Second Amendment rights of a person to keep and bear arms in his home (or vehicle where possession in a vehicle is lawful) and which allows those rights to be restricted or taken away because a person "poses a risk to society that is enhanced by their possessing firearms" meet the requirements of the Second Amendment?
2. Can the right to possess firearms in the home, as guaranteed in the Second Amendment, be taken away based on a presumption in a sentencing guideline that does not require evidence or proof of use or possession of such firearms for unlawful purposes?
3. Does an accused drug trafficker with no prior felony convictions or other disqualifications have the right, under the Second Amendment, to possess firearms for defense of home and hearth if that possession has not been shown to be connected in any way with his drug trafficking or otherwise unlawful or can such rights be denied to a citizen because he "poses a risk to society that is enhanced by his possessing firearms"?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the United States Court of Appeals for the Fifth Circuit were petitioner Anthony Moreno and respondent United States of America.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner, Anthony Moreno, 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 March 18, 2020.

This Court has held that the Second Amendment's "right of the people to keep and bear Arms" is a "fundamental right" that is necessary to our system of ordered liberty. *McDonald v. Chicago*, 561 U.S. 742, 778 (2010).

Sentencing Guideline § 2D1.1 (b)(1) provides a 2-level increase in the base offense level "if a dangerous weapon (including a firearm) was possessed."

U.S.S.G. § 2D1.1 (b)(1). The commentary to the Guideline states that the 2-level enhancement "*should* be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense."

(emphasis supplied). § 2D1.1 (b)(1), cmt. n. 11(A).

Petitioner was punished by having his offense level increased 2 levels as a result of his possession of 3 bolt action rifles and 2 handguns in his home and one handgun in his truck when he was stopped and arrested. Petitioner has effectively been barred from exercising this right unless he can show that it is "clearly improbable" that firearms "possessed" by him in his home (and a firearm possessed in his vehicle, as permitted under Texas law) were



not possessed by him "in connection with" a drug trafficking offense.

### OPINION BELOW

The unpublished opinion of the United States Court of Appeals for the Fifth Circuit *United States v. Anthony Moreno*, No. 19-10401, April 23, 2020, Fifth Circuit Court of Appeals, is reproduced in the Appendix. (Pet. App. 1a-12a).

### 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 Second Amendment to the Constitution of the United States which provides that:

“A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”

United States Sentencing Guideline § 2D1.1 (b)(1) states:

**§ 2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (including Possession with Intent to Commit These Offenses); Attempt or Conspiracy.**

\* \* \*

(b) Special Offense Characteristics

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

\* \* \*

Commentary

Application Notes:

\* \* \*

11. Application of Subsections (b)(1) and (b)(2).--

(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 §§2D1.2(a)(1) and (2), 2D1.5(a)(1), 2D1.6, 2D1.7(b)(1), 2D1.8, 2D1.11(c)(1), and 2D1.12(c)(1).

\* \* \*

U.S.S.G. § 2D1.1.

STATEMENT OF THE CASE

Anthony Moreno ("petitioner") was charged on June 27, 2018 in a one count Indictment 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 December 13, 2018, petitioner pleaded guilty to the offense without a written plea agreement. On April 1, 2019, petitioner was sentenced to 300 months in prison.

Petitioner asserted five errors on appeal: (1) the district court erred in enhancing petitioner's sentence for possession of firearms where petitioner's possession was lawful under the Second Amendment and there was no showing that such possession was in connection with the drug trafficking offense; (2) the Sentencing Guidelines are an unconstitutional delegation of powers that belong to Congress and sentencing enhancements under such Guidelines are invalid; (3) the Commentary to U.S.S.G. § 2D1.1 (b)(1) conflicts with the Guidelines and is invalid; (4) the district court erred in applying a sentencing enhancement for maintaining a drug premises, and (5) petitioner's relevant conduct did not involve any importation activities and his offense of conviction did not involve importation of methamphetamine.

This petition involves only the first alleged error involving violation of the Second Amendment, which petitioner contends placed him in the wrong offense level under the United States Sentencing Guidelines ("Guidelines") and resulted in improperly calculating petitioner's Guidelines range, thereby committing significant procedural error. *See Molina-Martinez v. United States*, 136 S.Ct. 1338, 1345-46 (2016).

The Fifth Circuit affirmed the judgment of the district court in an opinion which concluded, in pertinent part, that the enhancement for possessing firearms in connection with his drug offense was constitutional as applied to Moreno since "drug traffickers pose a risk to society that is enhanced by their possessing firearms" and that the "historical traditions associated with the Second Amendment do not include ensuring admittedly-guilty-drug-offense conspirators' sentences are not enhanced when they have possessed firearms during activities related to their offense."

#### REASONS FOR GRANTING THE WRIT

**I. The Fifth Circuit Court of Appeals decision is in conflict with decisions of this Court and other Circuits over the standard that should be applied in evaluating Second Amendment challenges to statutes and guidelines.**

**A. The Court Below Used an Improper Test in Evaluating the Constitutionality of the Guideline as Applied to Petitioner.**

The court in this case evaluated the provisions of the guideline, using the interpretations of the commentary, and weighed the interests protected by the Second Amendment against the government public safety concerns. The court determined and applied what it considered to be "the appropriate level of means-ends scrutiny--either strict or intermediate" and selected intermediate scrutiny.

This Court explicitly rejected the invitation to evaluate Second Amendment challenges under an "interest-balancing inquiry, with the interests protected by the Second Amendment on one side and the governmental public-safety concerns on the other." *See District of Columbia v. Heller*, 554 U.S. 570, 689 (2008) (Breyer, J., dissenting). The application of the test adopted by the Fifth Circuit in *United States v. Moreno* did just that. The analysis was based on an incorrect standard.

The Fifth Circuit in *Moreno* stated that "drug traffickers pose a risk to society that is enhanced by their possessing firearms." The Fifth Circuit deprived petitioner of the protection of the Second Amendment even though he was wise enough never to possess, use or threaten to use firearms in

connection with his unlawful activities and otherwise was in lawful possession of the firearms. Petitioner could not, in any way, avail himself of the right of self-defense for himself, his family and home because the mere presence of a firearm in his residence could trigger a 2-level sentence enhancement. This is analogous to a "prior restraint" that chills the exercise of Second Amendment rights where the restraint leaves a defendant who has never used his firearms "in connection with" the drug offense without the right of self-defense under the Second Amendment.

A circuit split exists on the proper method of analysis of the constitutionality of the guideline. Under the Fifth Circuit approach, the petitioner must show that it is "clearly improbable" that the weapon was connected with the drug offense. The burden is on the possessor of the protected right guaranteed by the Second Amendment. At least one circuit requires the government to prove by a preponderance of the evidence that "it was not 'clearly improbable' that the weapon had a nexus with [the] conspiracy." *See United States v. Perez-Guerrero*, 334 F.3d 778, 783 (8th Cir. 2003). There is a circuit conflict in the standards and burdens of proof used to evaluate the weapons enhancement application as affected by the Second Amendment right.

The Fifth Circuit's two-step analytical framework that incorporates tiers of scrutiny on a sliding scale is not in compliance with *Heller* and will result in differing and conflicting interpretation and application throughout the United States. *Heller* did not use a "two-step" analytical framework for the inquiry into the constitutionality of laws and regulations restricting the Second Amendment rights but instead looked at text, history and tradition in determining whether a challenged law violates the right to keep and bear arms. *Heller*, 554 U.S. at 626-27. *Heller* recognized that the Second Amendment "codified a pre-existing right." *Heller*, 554 U.S. at 592.

"Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad." *Heller*, 554 U.S. at 634-35. The courts of appeal have not "filled the analytical vacuum" (*see NRA v. ATF*, 700 F.3d 185, 194 (5th Cir. 2012)) but have created an analytical framework that strays from *Heller* and leads into uncertainty, unpredictability and endless unresolved disputes.

**B. The Commentary to the Guideline and Some Cases Suggest a Differentiation between Handguns and Rifles, Creating Illogical Results.**

The commentary to Guideline 2D1.1 (b)(1) states that "the enhancement would not be applied if the defendant, arrested at defendant's residence, had an unloaded hunting rifle in the closet." U.S.S.G. § 2D1.1 (b)(1), App. Note 11. (A). If a defendant can possess a "hunting rifle in the closet" and not be subject to the 2-level enhancement under the guideline, then it is clear that such a defendant can, if not otherwise prohibited from possession of a firearm, lawfully possess such a firearm for self-defense in his home. Some courts have found that drug traffickers are more likely to use a handgun than a rifle or long gun (*see, e.g., United States v. Lipford*, 203 F.3d 259, 267 n.7 (4th Cir. 2000)) and some have found lacking the requirement for some relation to the gun and the drug offense where the firearm was a rifle. *See, e.g., United States v. Wilson*, 115 F.3d 1185, 1191 (4th Cir. 1997). But if the firearm is a handgun, the presumption that it is possessed "in connection with" the drug trafficking offense springs into being, allowing the defendant's imprisonment to be increased by 2 levels simply because of the type of firearm. This is an illogical and prejudicial result. The only way to prevent this is for the defendant to show that it was "clearly improbable" that the handgun was "connected" to the offense.

*Heller* describes the handgun as "an entire class of 'arms' that is



overwhelmingly chosen by American society for [the] lawful purpose" of self-defense and "the most preferred firearm in the nation for protection of one's home and family." *Heller*, 554 U.S. at 628-29. Yet, in the context of a drug case, the handgun is often described as a "tool of the trade" and therefore a part of the evidence of drug trafficking when possessed by a defendant. It is possible for one to be involved in drug activities and not use, or possess with the intent to use, firearms "in connection with" any such offense. Indeed, there are people who do not use firearms in connection with any such activities because they know the consequences that can be expected. Do they not have any right to possess firearms for their own self-defense and the defense of home and family? If a person can possess a "hunting rifle in a closet" and not be subject to the 2-level enhancement under the guideline, then it is clear that such a person can, in fact, lawfully possess a firearm for self-defense in his home. *Heller* said the handgun is the "overwhelming choice" and "most preferred firearm[] in the nation for protection of one's home and family." Surely a pejorative term like "tool of the trade" should not be allowed to override the effective exercise of the enumerated right in the Second Amendment, such that a presumption in the commentary to a guideline that mere presence of a

firearm is sufficient to negate that right.

The problematic issue in this case is that the connection of the firearm with the offense must be shown before the possession can be termed unlawful, because petitioner's right to possess the firearms in his home was otherwise lawful. He was not a convicted felon and he had the right under the Second Amendment to possess firearms. The government never showed, and the district court made no finding, that the firearms were possessed "in connection with" the drug trafficking offense, as opposed to lawfully possessed for self-defense. To use a presumption in the commentary to the guideline to shift the burden to petitioner to show that it was "clearly improbable" that the firearms had a nexus to the drug conspiracy requires petitioner to first show that he had a right before he could exercise that right. The right is clear under the Second Amendment and *Heller*, and petitioner should not be required to show his entitlement before he can exercise the right.

A hunting rifle in a closet is acceptable according to the commentary but a handgun in a nightstand is not. *Heller* said that a handgun is the most used firearm in the United States for self-defense and that ready access is an important aspect of that right. *Heller*, 554 U.S. at 629. Yet the presumption

in the commentary that presence of a firearm makes a handgun presumptively unlawful in the hands of one accused of drug trafficking, and deprives a defendant otherwise entitled to lawfully possess a handgun for self-defense of his constitutional right under the Second Amendment. This effectively denies the right to one entitled to exercise the right.

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

**A. A Presumption in the Commentary of a Sentencing Guideline Cannot Override the Guarantee of the Second Amendment's Right to Possess a Firearm for Self-Defense.**

A presumption that uses "presence" of the handgun as a substitute for proof of "connection" cannot meet the government's initial burden. When possession "in connection with" the drug offense is not shown, the right to possess for self-defense still exists, and the possession is, and was, lawful. Not just lawful, but constitutionally protected. Petitioner had a "protected constitutional right" to have a firearm in his residence and in his nightstand. *See Heller*, 554 U.S. at 629. If petitioner has that right, a "presumption" found in the commentary to the Guideline (which is inconsistent with that Guideline) cannot take precedence and override his enumerated constitutional right, making his lawful possession for self-defense into

"unlawful" possession simply because the firearms were "present" in his residence, even though no connection with the offense of conviction was shown.

The commentary to the Guideline clearly uses an "interest-balancing inquiry" to determine when possession of firearms may be restricted. The Application Note states that "[t]he enhancement for weapon possession ... reflects the increased danger of violence when drug traffickers possess weapons." The court below also used such an "interest-balancing inquiry" in determining that petitioner's possession triggered the enhancement. The presumption described in the commentary to the Guideline clearly exempted only unloaded hunting rifles in a closet from the application of the enhancement. There was no recognition of the historical right to possess firearms for self-defense or defense of home and hearth. In fact, the commentary which informs the sentencing enhancement subordinates the use of firearms for self-defense, as described and permitted in *Heller*, to the effort to increase punishment for "drug traffickers [who] possess weapons" based on a risk of "increased danger of violence."

Where a "protected constitutional right" is involved, the government should have the burden to prove that the firearm was "connected with" the

drug offense or else leave the protected right intact. So long as the government cannot prove unlawful use, the protected natural right remains.

**B. If Petitioner is not Otherwise Denied the Right of Self-Defense Guaranteed by the Second Amendment, He is Entitled to Possess Firearms in His Home for Self-Defense.**

One engaged in a criminal activity may well have periods in which he is not engaging in unlawful criminal conduct. He has a zone of lawful conduct, which should allow for the possibility of lawful exercise of the protected constitutional right provided under the Second Amendment, if his possession and use of a firearm has not been compromised by unlawful use of that firearm "in connection with" the unlawful drug activities. Petitioner had no felony convictions at the time of his offense and was never shown to have used or possessed the firearms "in connection with" the drug offense. So long as he kept such firearms "fenced off" from such activities (which many involved in such activities are wise enough to do), he retained his Second Amendment rights.

The district court made no findings with respect to petitioner's possession of the firearms. The district court adopted, at sentencing, the "findings" of the probation officer "in the addendum to the PSR." There were no findings

in the PSR or in the Addendum to the PSR relevant to this issue and essentially no fact findings at all by the district court relevant to this issue.

*See, e.g., United States v. Clinton*, 825 F.3d 809, 813 (7th Cir.

2016)(essentially no fact findings by district court regarding proximity of firearms to drugs). The mere fact that guns and drugs are found near each other does not establish a nexus between them. *See United States v. LePage*, 477 F.3d 485, 489 (7th Cir. 2007). Petitioner never admitted that he used his residence to distribute drugs from or that he used it to store or manufacture drugs. There was no evidence of such distribution or storage from his residence.

Possession of a gun alone is not blameworthy. Petitioner's membership in a drug conspiracy is all that stands between innocent and criminal conduct where the label of "drug conspirator" is all that is required to activate the presumption that the presence of the firearm shifts the burden to the defendant to prove himself innocent. How does one prove a negative? How does one who states that something never occurred "prove" that it did not happen? And if he cannot do that to the satisfaction of a skeptical judge, he is enhanced. Once a place is labeled a distribution point or a storage location and a firearm is "present" that is enough to shift the burden of proof

to the defendant to "prove" that it was "clearly improbable" that the firearm was connected with the drug offense. That can only be done by denials and statements of individuals that they never saw petitioner with a firearm at the site of any drug transaction or storage location. But there were no allegations of any such conduct to begin with, only the use of a presumption that equates "presence" with possession of a firearm "in connection with" the drug offense, shifting the burden to the defendant to disprove something that was never shown. A presumption based upon such weak inferences should never be allowed to trump a protected constitutional right of the stature of the Second Amendment. The Second Amendment's guarantee is stronger than that.

CONCLUSION

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

DATED: September 16, 2020

Respectfully submitted,

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