No.

In The Supreme Court of the United States

JUAN LUIS RIVERA ARREOLA, PETITIONER

V.

UNITED STATES OF AMERICA

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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in forma pauperis

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QUESTION PRESENTED

In order to warrant a two-level enhancement for possession of a firearm, pursuant to U.S.S.G. § 2D1.1(b)(1), is it sufficient to simply label firearms as "tools of the trade" which allows for an inference of possession when possessed by a co-defendant, as is the rule in the Fifth Circuit, or must there be reasonable foreseeability as required by the Sixth, Eight, Ninth, Eleventh and D.C. Circuits?

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Don Bailey, on behalf of Juan Luis Rivera Arreola, respectfully petitions 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 opinion of the United States Court of Appeals for the Fifth Circuit (Pet. App. 2) is reported at *United States v. Rivera Arreola*, 831 Fed. Appx. 690, 2020 WL 765848 (5th Cir. October 12, 2020). The United States District Court for the Eastern District of Texas entered a Judgment, sentencing Mr. Rivera Arreola to

360 months. *United States v. Rivera Arreola*, 4:17cr176(5) (E.D.TX February 26, 2020) (Pet. App. 1).

JURISDICTION

The judgment of the court of appeals was entered on October 12, 2020.[1] The jurisdiction of this Court rests on 28 U.S.C. 1254(1). The United States Court of Appeals for the Fifth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291.

This appeal is submitted pursuant to Supreme Court rule 10(a) in that the underlying decision by the Fifth Circuit conflicts with the Sixth, Eighth, Ninth, Eleventh and D.C. Circuits regarding an important matter.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Due Process Clause of the Fifth Amendment.

STATEMENT OF THE CASE

Mr. Arreola was in the business of brokering drug transactions over the phone from his home in South Texas. Agent Richard Martinez, of the Drug Enforcement Agency (DEA), received information from a BOP prisoner named Maxon Morgan regarding an individual who was trafficking drugs who had been housed with him at LaTuna FCI. Agent Martinez went to West Virginia and interviewed Mr. Morgan regarding his information about a person known as "Michi." After the individual was identified as Mr. Arreola, Agent Martinez

[1] In accordance with emergency COVID rules of the Supreme Court, this petition is submitted within the 150 days allowed.

employed a DEA informant named Jose Vasquez to see if a drug transaction could be arranged with “Michi”, from Michoacan, Mexico. On September 21, 2017, Mr. Arreola put Mr. Vasquez in touch with an individual in the Dallas area that could deliver five kilograms of methamphetamine to Mr. Vasquez at a Lowes Department Store in Lewisville, Texas. Mr. Arreola negotiated the price and amounts with Mr. Vasquez. When the five kilograms was brought to Lewisville, Officers pulled over the two people delivering the methamphetamine and seized the drugs pursuant to a consent search. Mr. Vasquez then told Mr. Arreola that the drugs had never arrived. (ROA.473-511, 1177-1212)

After the original transaction resulted in the seizure of five kilograms of methamphetamine, Mr. Vasquez told Mr. Arreola that the drugs did not arrive and he still needed methamphetamine. Mr. Arreola agreed the following day, September 22, 2017, to deliver methamphetamine to a location in Grand Prairie, Texas. The delivery person was to be a Mr. Ramirez-Benitez. The transaction was originally to be for ten kilograms but Mr. Ramirez-Benitez only had eight kilograms of methamphetamine. The subsequent stop resulted in the seizure of the eight kilograms and $ 5,000 in cash. (ROA.580-605, 1435-1467)

After the Grand Prairie seizure, Agent Martinez switched informants to Eberardo Mora, a convicted drug dealer who became an informant after his release from his federal sentence. On December 12, 2017, Mr. Mora was able to

communicate with Mr. Arreola after intervention of Mr. Morgan from his prison in West Virginia. Mr. Mora and Mr. Arreola had discussions about a methamphetamine purchase of ten kilograms that was to be delivered at a Walmart in Denton, Texas. The drugs were to be supplied by a supplier in Austin named Jacob Duarte and delivered by Gerardo Zivieta-Torres. When Mr. Zivieta-Torres arrived, the officers converged and arrested Mr. Zivieta-Torres. In the pickup officers located the ten kilograms of methamphetamine and two firearms. (ROA.606-643, 1502-1539)

There was no testimony that Mr. Arreola knew Mr. Zuvieta-Torres or that he was carrying two firearms during the third delivery. Mr. Arreola had arranged the transaction over the phone with Mr. Duarte, who Mr. Zuvieta-Torres worked for. Mr. Zuvieta-Torres had been using drugs and started selling drugs when he was seventeen. He was involved in receiving the methamphetamine from Mexico, which was mixed with water and diesel and transported in diesel tanks on trucks. The quantity would vary from 90 to 130 kilograms of cocaine after the product was cooked off by Mr. Zuvieta-Torres. Mr. Zuvieta-Torres was working for Jacob Duarte and deliveries would be from 10 to 100 kilograms of methamphetamine at a time. On the third seizure brokered by Mr. Arreola on December 12, 2017, Mr. Zuvieta-Torres was arrested in Denton, Texas delivering 10 kilograms of methamphetamine from Austin, Texas. (ROA.932-952)

The pre-sentencing report imposed a two-level enhancement because a co-defendant possessed a firearm during the December 10, 2017, delivery of ten kilograms in Denton, Texas. (ROA.1761) Counsel objected to this enhancement based upon that the previous two transactions did not involve a firearm and the firearm was not foreseeable to Mr. Arreola given the chain of events. (ROA.1773-1774) The Government did not respond.

On February 25, 2020, Mr. Arreola appeared for sentencing before the District Court. In addressing the issue of the objection, the Court stated that "it is reasonably foreseeable for him to be held responsible for the courier in this case that had the firearm, considering his position in this overall conspiracy." (ROA.1158) The objection was overruled. Mr. Arreola was sentenced to 360 months confinement.

The issue was appealed because there was no foreseeability and the Fifth Circuit's determination that firearms are "tools of the trade of those engaged in drug activities" and a district court "may ordinarily infer that a defendant should have foreseen a co-defendant's possession of a dangerous weapon, such as a firearm, if the government demonstrates that another participant knowingly possessed the weapon while he and the defendant committed the offense by jointly engaging in concerted criminal activity involving a quantity of narcotics sufficient

to support an inference of an intent to distribute"[2] is contrary to the holdings of the Sixth, Eighth, Ninth and D.C. Circuits which all apply the reasonably foreseeable acts test.

The Fifth Circuit, in denying the appeal, stated that "one panel of this court may not overrule another panel's decision without en banc reconsideration or a superseding contrary Supreme Court decision."[3] The appeal was denied based upon the tools of the trade and inference because it was drug trafficking holding of *United States v. Aguilera-Zapata*, 901 F.2d at1215-1216, regarding tools of the trade and may ordinarily infer language set out above. *See United States v. Rivera Arreola*, 2020 WL 765848.

REASONS FOR GRANTING THE PETITION

The Fifth Circuit has taken the approach that if a firearm is located in the possession of a co-defendant, then it is reasonably foreseeable because if it involves drugs, there will be firearms and thus the Court is free to infer possession by anyone connected with the conspiracy. As noted by Trial Counsel in the objections to the PSR, the Court of Appeals for the Fifth Circuit has addressed reasonably foreseeable requirement in *United States v. Zapata-Lara*, 615 F.3d 388, 390 (5th Cir. 2010):

[2] *United States v. Zapata-Lara*, 615 F.3d 388, 390 (5th Cir. 2010); *citing United States v. Aguilara-Zapata*, 901 F.3d 1209, 1215 (5th Cir. 1990)
[3] *United States v. Rivera Arreola*, 2020 WL 765848 (5th Cir. October 12, 2020)

> In *Hooten,* 942 F.2d at 881–82,[4] the district court applied § 2D1.1(b)(1) where a handgun was found on the back porch of a residence near a shed in which amphetamine was being manufactured. At sentencing, the defendant claimed no knowledge that the handgun existed or that a gun was involved in the offense. *Id.* at 881. Noting that the district court had failed to make a finding regarding the defendant's objection, we remanded and instructed the court to make an explicit finding as to whether the defendant personally possessed the pistol, or, if a coconspirator possessed it, whether the defendant reasonably could have foreseen that possession. *Id.* at 881–82. In *Aguilera–Zapata*,[5] we addressed the application of § 2D1.1(b)(1) in light of the relevant-conduct provision of § 1B1.3(a)(1). We held that because firearms are "tools of the trade of those engaged in illegal drug activities,"a district court "may ordinarily infer that a defendant should have foreseen a co-defendant's possession of a dangerous weapon, such as a firearm, if the government demonstrates that another participant knowingly possessed the weapon while he and the defendant committed the offense by jointly engaging in concerted criminal activity involving a quantity of narcotics sufficient to support an inference of an intent to distribute." *Aguilera–Zapata,* 901 F.2d at 1215.

United States v. Zapata-Lara, 615 F.3d 388, 390 (5th Cir. 2010).

While the Fifth Circuit's approach may have its supporters based on what they see on television, it is simply not true. According to the Bureau of Justice Statistics only 18% of state offenders, and 15% of federal offenders for all crimes possess a firearm in relation to any crime with most of those being violent crimes or public disturbance crimes. When it is narrowed down to a drug related offense it is only 8.1%.[6]

[4] *United States v. Hooten,* 942 F.3d 878 (5th Cir. 1991)
[5] *United States v. Aguilera-Zapata,* 901 F.2d. 1209 (5th Cir. 1990)
[6] https://bjs.gov/content/pub/pdf/fuo.pdf

A more recent study, regarding figures from 2016, based upon increased firearms emphasis, still found that only 12.9% of federal inmates **who were serving a sentence for drug trafficking** had possession of a firearm.[7] So, an implication by the Fifth Circuit, or any other court, that firearms are simply tools of the trade and thus an inference of a firearm, without more, demonstrates that the myth does not reflect the reality. Firearms are the exception and not the rule in the trade of drug traffickers and that is simply a fact the Court needs to recognize because other Circuits certainly have.

The Eighth Circuit noted in *United States v. Lopez,* 384 F.3d 937 (8th Cir. 2004);

> the Government argues that we can infer a defendant's knowledge based solely on the nature of drug dealing. *Cf. United States v. Claxton*, 276 F.3d 420, 423 (8th Cir.2002) (acknowledging the close connection between firearms and drugs). We disagree. Under the Guidelines, a two-level firearm enhancement can only be applied if the Government shows that the defendant knew or should have known based on specific past experiences with the co-conspirator that the co-conspirator possessed a gun and used it during drug deals. *See United States v. Highsmith*, 268 F.3d 1141, 1142 (9th Cir.2001) (holding that the firearm enhancement was not applicable where the defendant had access to the co-conspirator's weapon but did not know that the weapon existed). To hold otherwise would unfairly penalize defendants for conduct over which they have no control. Here the Government failed to present any evidence showing that Lara knew or should have known that Baccam possessed a firearm.

Id. at 940. Likewise, the Sixth Circuit found that a firearms presence at a site where defendant had been, and methamphetamine was being manufactured, was

[7] https://www.bjs.gov/content/pub/pdf/suficspi16.pdf

insufficient to demonstrate reasonable foreseeability. *United States v. Woods,* 604 F.3d 286 (6th Cir. 2010). As the Sixth Circuit noted;

> To find that it was reasonably foreseeable that someone would possess a firearm, the district court relied on an inference that if a drug conspiracy involves a "substantial" amount of drugs, a defendant should foresee that a co-conspirator is likely to possess firearms. Our cases "have explicitly rejected 'the fiction that a firearm's presence always will be foreseeable to persons participating in illegal drug transactions.' " *United States v. Catalan,* 499 F.3d 604, 607 (6th Cir.2007) (citing *United States v. Cochran,* 14 F.3d 1128, 1133 (6th Cir. 1994). "[A]t a minimum, we require that there be objective evidence that the defendant ... at least knew it was reasonably probable that his coconspirator would be armed." *Cochran,* 14 F.3d at 1133.

United States v. Woods, 604 F.3d at 291.

The United States Court of Appeals for the District of Columbia considered a case where a defendant knew of the "Mahdi gang" and their violent propensity to use guns in murders and assaults but argued he was not involved in their activities and was a fringe operator within the conspiracy. *United States v. Tabron,* 437 F.3d 63 (D.C. Cir. 2006). What is interesting about *Tabron* is he had a Rule 11(c)(1)(C) agreement for a sentence far below what was recommended with the enhancement[8] and the District Court recognized that it could avoid ruling on the issue by citing Fed. R. Crim. P. 32(i)(3)(B) but went on and ruled on it anyway. *Id.* 437 F.3d at 316-17 In *Tabron,* the Court stated:

[88] The plea agreement allowed for a sentence of 84-90 months and the lowest he could get without the gun enhancement was 210 months. *Id.* 437 F.3d at 316

> "the well-settled principle of conspiracy law that someone who jointly undertakes a criminal activity with others is accountable for their reasonably foreseeable conduct in furtherance of the joint undertaking." *United States v. Saro,* 24 F.3d 283, 288 (D.C.Cir.1994). In attributing co-conspirators' acts to a criminal defendant, however, district courts must take great care: as Judge Friendly observed, "[a]lthough it is usual and often necessary in conspiracy cases for the agreement to be proved by inference from acts, the gist of the offense remains the agreement, and it is therefore essential to determine what kind of agreement or understanding existed as to each defendant." *United States v. Borelli,* 336 F.2d 376, 384 (2d Cir.1964). To that end, we have established a "strict procedural mandate" that requires district courts to make explicit findings as to the scope of a defendant's conspiratorial agreement before holding him responsible for a co-conspirator's reasonably foreseeable acts. *United States v. Childress,* 58 F.3d 693, 722 (D.C.Cir.1995) (per curiam). Absolute conformity with this mandate is critical, else we risk holding defendants accountable for crimes committed in furtherance of conspiracies they never joined.

Tabron, 437 F.3d at 318.

The Eleventh Circuit in *United States v. Gallo,* 195 F.3d 1278 (11th Cir. 1999), also requires a reasonable foreseeability test on firearm enhancements. The Eleventh Circuit found that the proper analysis is a four part test requiring; (1) the possessor of the firearm was a co-conspirator, (2) the possession was in furtherance of the conspiracy, (3) the defendant was a member of the conspiracy at the time of possession, *and* (4) the co-conspirator possession was reasonably foreseeable. The Eleventh Circuit reasoned that the requirement for reasonable foreseeability was mandated in 1994, when the Sentencing Commission expressly amended the Guidelines to include the reasonable foreseeability requirement directly in U.S.S.G. § 1B1.3(a)(1)(b). *Id.* at 1283-1284

Thus, under the fact-based determinations of the Sixth, Eighth, Ninth, Eleventh and D.C. Courts of Appeals, Mr. Arreola could not be held to have foreseen the presence of a firearm in the drug transaction. The record is silent as to reasonable foreseeability and thus the "tools of the trade" standard of the Fifth Circuit has no basis in law or fact and the Sixth, Eighth, Ninth, Eleventh and D.C. Circuits standard of reasonable foreseeability test should prevail.

CONCLUSION

The Fifth Circuit "tools of the trade" standard for applying two-level enhancements for possession of a firearm is clearly not based on factual reality or the holdings of other circuits. The correct standard should be what is applied in the Sixth, Eighth, Ninth, Eleventh and D.C. Circuits, which is the fact-based reasonable foreseeability test. The Court should grant the writ of certiorari to determine the correct standard.

Respectfully Submitted;

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