No.

IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 2020

JOSE PONCE-ULLOA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

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QUESTION PRESENTED

The question presented which has divided federal courts of appeal is whether a sentencing court can add two offense levels for possession of a weapon under USSG § 2D1.1(b)(1) when the gun is not used nor present in the actual offense and when there is little temporal connection between the offense and the possession because the weapon was found almost a year after the offense.

PARTIES TO THE PROCEEDINGS

Petitioner, Jose Ponce-Ulloa, was the defendant in the district court and the appellant in the court of appeals. The United States of America was the plaintiff in the district court and the appellee in the court of appeals.

RELATED PROCEEDINGS

United States v. Ponce-Ulloa, No. 17-cr-150-EJL (Idaho District Court, Judgment entered on January 24, 2019, aff'd No. 19-30025 (9th Circuit, November 18, 2020, unreported, order denying rehearing and rehearing en banc, entered on December 30, 2020, unreported).

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Jose Ponce-Ulloa respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit affirming his sentence.

OPINIONS BELOW

The Ninth Circuit opinion affirming the sentence below is not reported. Pet. App. 1- 1. A Petition for Rehearing was denied on December 31, 2020. Pet. App. 1- 9.

JURISDICTION

The Ninth Circuit entered judgment on December 31, 2021. This filing is made within 150 days of that decision. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Petitioner Jose Ponce-Ulloa was convicted after trial of four counts of selling methamphetamine, allegedly occurring on May 18, May 26, June 16, and July 5, 2016, in violation of 21 U.S.C. § 841(a)(1).

He proceeded to jury trial and on November 16, 2018, was convicted of all four counts. On January 24, 2019, the district court imposed a sentence of 240 months.

On appeal, a divided panel of the Ninth Circuit affirmed the two-level offense adjustment based on Petitioner's alleged possession of a gun. The dissenting judge concluded that the temporal connection did not warrant imposition of the enhancement. The panel denied rehearing and the petition for en banc review was denied with Judge Tashima recommending hearing en banc.

STATEMENT OF FACTS

The underlying allegations of Mr. Ponce-Ulloa's sale of methamphetamine to an undercover agent were not disputed at trial.

On May 18, 2016, the agent went to Mr. Ponce-Ulloa's home and purchased approximately 13 grams of methamphetamine. On May 26, 2016, Mr. Ponce-Ulloa sold the agent approximately 55 grams of methamphetamine. On June 16, 2016, he sold the agent approximately 111 grams and on July 5, 2016, another 55 grams. The jury rejected Mr. Ponce-Ulloa's duress defense.

The agent made no further drug purchases from Mr. Ponce-Ulloa, who was arrested the following year on May 8, 2017. At the time of his arrest, a gun was found during the search of his residence, but no drugs were uncovered during that search.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW REFLECTS A CLEAR SPLIT AMONG NUMEROUS FEDERAL COURTS OF APPEAL

The imposition of an enhancement for possession of a weapon during a drug trafficking offense has serious implications for many defendants. For example, in this case, the two level offense adjustment pursuant to USSG § 2D1.1(b)(1) increased Mr. Ponce-Ulloa's guideline range by 52-65 months, about a quarter of the 240 month-sentence imposed. Since the district court departed below the low end of the guidelines by 22 months, it is likely that the court would have imposed a sentence in the fifteen year range without the weapon enhancement.

Moreover, the safety valve provisions are not available to a defendant who is found to possess a weapon. See, 18 U.S.C. § 3553(f)(2) (stating that the safety valve is available "if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that . . . the defendant did not . . . possess a firearm or other dangerous weapon . . . in connection with the offense").

While Mr. Ponce-Ulloa was not eligible for the safety valve since he proceeded to trial and did not cooperate with the government, this issue has great significance for those defendants who would otherwise be safety valve eligible.

Whether the mere possession of a gun almost a year after the alleged drug sales warrants an enhancement finding under these facts is thus a question of exceptional importance which this Court should hear. The Ninth Circuit, unlike other circuits, has given an expansive reading to the language of the weapon possession enhancement.

In contrast to other courts, at least one Ninth Circuit panel has noted that "this circuit's established case law does not require a concrete temporal and spatial connection between the weapon, the drug trafficking and the defendant in order to trigger the two-level sentencing enhancement under U.S.S.G. § 2D1.1(b)(1)." *United States v. Miller*, 203 Fed. Appx. 835, 836 (9th Cir. 2006), citing *United States v. Pitts*, 6 F.3d 1366, 1373 (9th Cir. 1993). Thus, the law of the Ninth Circuit permits the application of this enhancement for mere possession of a weapon, unrelated to the commission of the drug crimes. Indeed, the government conceded at sentencing that "[the gun] was not found in close proximity to drugs, and it was found in a temporal distance from when the actual transactions occurred." Thus, if this Court were to adopt the temporal and spatial requirement, the government's concession at sentencing would require reversal of Mr Ponce-Ulloa's enhancement.

Most other circuits require *both* a temporal and spatial relationship in order to support this gun enhancement. For example, the Fifth Circuit requires that the government prove "by a preponderance of the evidence that the defendant possessed the weapon and may do so by showing 'that a temporal *and* spatial relation existed between the weapon, the drug trafficking activity, and the defendant,' which suffices to establish that the defendant personally possessed the weapon. *United States v. Cisneros-Gutierrez*, 517 F.3d 751, 764-65 (5th Cir. 2008)." *United States v. Ruiz*, 621 F.3d 390, 396 (5th Cir. 2010)(emphasis added); accord *United States v. King*, 773 F.3d 48, 53 (5th Cir. 2014). The Third, Fourth, Seventh, Eighth and Tenth circuits all require a temporal as well as spatial relationship between the drug trafficking and the weapons to support the enhancement. *See, e.g., United States v. Williams*, 974 F.3d 320, 375-76 (3d Cir. 2020); *United States v. Apple*, 962 F.2d 335, 338 (4th Cir. 1992); *United States v. Edwards*, 940 F.2d 1061, 1063 (7th Cir. 1991); *United States v. Savage*, 414 F.3d 964, 966 (8th Cir. 2005); and *United States v. Roederer*, 11 F.3d 973, 982 (10th Cir. 1993).

The D.C. Circuit requires that the government demonstrate a "nexus" between the weapon and the substantive offense of conviction. *United States v. Miller*, 890 F.3d 317, 328-29 (D.C. Cir. 2018) (reversing enhancement where

defendant found with weapon at home near drugs, but his convictions were not for the drugs found at his home.)

Had Mr. Ponce-Ulloa been convicted in any of these other circuits, the two level weapon enhancement would not have been sustained. The gun was located in Mr. Ponce-Ulloa's home almost a year *after* the drug sales and where no drugs were found at the time the weapon was discovered. Had any further indicia of continuing drug sales been discovered at the premises *when* the weapon was discovered, there would have been sufficient evidence to support the enhancement. But as the district court noted, the only basis for the offense enhancement finding was that drugs had been previously sold from the home a year before the gun was found there and that was enough under current circuit law.

Because of the split among the circuits and the importance of the weapon enhancement in drug case sentencings across the country, this Court should grant certiorari to resolve the circuit split.

CONCLUSION

The petition for a writ of certiorari should be granted.

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JOSE ORIBEL PONCE-ULLOA, Defendant-Appellant.	No. 19-30025 D.C. No. 1:17-cr-00150-EJL-1 MEMORANDUM*

Appeal from the United States District Court
for the District of Idaho
Edward J. Lodge, District Judge, Presiding

Argued and Submitted October 29, 2020
Portland, Oregon

Before: TASHIMA, GRABER, and IKUTA, Circuit Judges.
Partial Dissent by Judge TASHIMA

Jose Oribel Ponce-Ulloa appeals the district court's imposition of his 240-month sentence. We have jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a) and affirm.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

The district court did not err in imposing a two-level enhancement for possession of a firearm. U.S. Sent'g Guidelines Manual (U.S.S.G.) § 2D1.1(b)(1). The district court did not clearly err in finding, by a preponderance of the evidence, that Ponce possessed the firearm during the commission of the offense, which refers to the entire course of criminal conduct, including all "relevant conduct" as defined in § 1B1.3 of the Guidelines. *See United States v. Willard*, 919 F.2d 606, 610 (9th Cir. 1990) ("Thus, for purposes of the firearm enhancement, the court properly looked to all of the offense conduct, not just the crime of conviction."); *United States v. Burnett*, 16 F.3d 358, 361 (9th Cir. 1994). Negotiations for future drug transactions may be considered as relevant conduct. *See United States v. Becerra*, 992 F.2d 960, 963, 966 (9th Cir. 1993) (holding that conversations and meetings "may be considered as relevant conduct . . . even if the drugs are never produced"). The evidence showed that Ponce admitted at sentencing that he possessed the firearm when he returned from Mexico, that in March 2017, following his return from Mexico, Ponce met with an undercover officer and discussed (among other things) arrangements for future drug transactions, and that the government found the firearm while searching Ponce's home in May 2017, less than two months after the March 2017 meeting. This evidence is sufficient to

establish that Ponce possessed a firearm while engaged in relevant conduct. *See United States v. Pitts*, 6 F.3d 1366, 1373 (9th Cir. 1993).

The district court did not err in relying on trial testimony to determine the amounts of cocaine and mixtures of methamphetamine that could be attributed to Ponce. U.S.S.G. § 2D1.1(c); *see United States v. Alvarez*, 358 F.3d 1194, 1213 (9th Cir. 2004). Any error in the district court's calculation was harmless, because Ponce sold more than 3,000 kg in converted drug weight of pure methamphetamine, and therefore his base offense level would remain 32 regardless whether the calculation included cocaine and mixtures of methamphetamine. U.S.S.G. § 2D1.1(c)(4). The district court did not abuse its discretion in implicitly rejecting Ponce's argument that the Sentencing Guidelines improperly treats the quantity of pure methamphetamine as equivalent to ten times the quantity of a mixture of methamphetamine for sentencing purposes. There is no obligation for a district court to depart from the Guidelines on policy grounds. *United States v. Carper*, 659 F.3d 923, 925 (9th Cir. 2011).

The district court did not abuse its discretion in applying the two-level premises enhancement. U.S.S.G. § 2D1.1(b)(12). At trial, Ponce testified that he had told the undercover officer that he had a stash house, also known as a clavo:

Q: And you also told Detective Bustos that you had a stash house also

known as a clavo?

A: Exactly

. . . .

Q: And when you were talking to Detective Bustos, you didn't say it was somebody else's stash house, did you?

A: No.

Q: You said it was your stash house?

A: Exactly.

While Ponce also testified that he was under duress when he told Detective Bustos that he had a stash house, the district court did not clearly err in resolving this conflicting testimony and finding that Ponce had a stash house. *See United States v. Garro*, 517 F.3d 1163, 1167 (9th Cir. 2008). The district court properly resolved Ponce's objection to the premises enhancement when it adopted the PSR at sentencing. *United States v. Williams*, 41 F.3d 496, 498 (9th Cir. 1994) ("[W]here the district court has received the PSR and the defendant's objections to it, allowed argument to be made and then adopted the PSR, no more is required under Rule 32(c)(3)(D).").

The district court did not err in applying the two-level organizer enhancement. U.S.S.G. § 3B1.1(c). The government adduced evidence that before

Ponce went to Mexico, he introduced Diaz-Araiza to an undercover officer and directed Diaz-Araiza to call the officer to continue selling methamphetamine to him while Ponce was gone. Diaz-Araiza called the officer and sold him methamphetamine. Upon his return to the United States, Ponce explained that Diaz-Araiza was no longer working with him because he wanted to sell methamphetamine on his own. Based on this evidence, Diaz-Araiza qualified as a "participant" because he had been working with Ponce and was "criminally responsible for the commission" of the drug offense. *See* U.S.S.G. § 3B1.1, cmt. n.1. Ponce exercised his "influence and ability to coordinate" drug transactions through Diaz-Araiza, and therefore was responsible as an organizer. *See United States v. Doe*, 778 F.3d 814, 818, 823–26 (9th Cir. 2015) (holding that a defendant was an organizer when he gave a buyer pricing information and a seller's contact information, but was not present for the transaction and did not hold a supervisory role); *see also United States v. Bonilla-Guizar*, 729 F.3d 1179, 1187 (9th Cir. 2013). The government did not need to show that Ponce had a supervisory role in the offense. *See Doe*, 778 F.3d at 825.

The district court did not abuse its discretion in refusing to allow Ponce to present documents to challenge the government's trial evidence and to rehabilitate his credibility; these issues had already been determined at trial by the jury. *Cf.*

Oregon v. Guzek, 546 U.S. 517, 526 (2006). Further, Ponce failed to carry his burden of establishing that the documents he sought to introduce would show that the government's evidence at trial was false or that Ponce was credible. *See United States v. Kimball*, 975 F.2d 563, 567 (9th Cir. 1992) ("One cannot allege that there are mistakes and then stand mute without showing why they are mistakes." (internal quotation marks omitted)). Therefore, Ponce's due process claim fails.

AFFIRMED.

United States v. Ponce-Ulloa, No. 19-30025

TASHIMA, Circuit Judge, dissenting in part:

I concur in all of the majority's memorandum, except for its holding that "[t]he district court did not err in imposing a two-level enhancement for possession of a firearm, U.S.S.G. § 2D1.1(b)(1)," Memo. at 2, from which I dissent.

In *United States v. Pitts*, 6 F.3d 1366, 1373 (9th Cir. 1993), a case relied on by the majority, we held:

> The district court considered the shotguns confiscated on March 3,1991 as part of the "entire course of criminal conduct." U.S.S.G. § 1B1.3(a)(2). In this case, appellant was not, however, charged with conspiracy. Instead, he was charged with four separate counts of distribution. He was convicted of two of those counts, one of wich occurred on May 29, 1991 and one which occurred on July 31, 1991. Because the shotguns from the March 3, 1991 arrest had already been confiscated, appellant could not have "possessed" them on May 29, 1991 or July 31, 1991. Given that the guns from the March 3, 1991 arrest were confiscated and the fact that appellant was not charged with conspiracy, we hold appellant did not possess the shotguns for purposes of the May 29, 1991 and July 21, 1991 offenses. Because he no longer possessed these shotguns during the offenses for which he was convicted, the weapons certainly were not connected with them.

The facts in this case parallel the facts recited above from *Pitts*, except that here, the time lapse between any possible possession of the firearm and the crimes of conviction is much greater. Here, the firearm was found in May 2017, and the offenses of conviction were between May and July, 2016, *one year before discovery of the firearm.* The majority relies on a "discussion" with an undercover

officer in March 2017 as part of "relevant conduct." But mere speech of which nothing comes, with nothing more, is not "conduct."[1] and the majority cites no case to the contrary.

Because I would reverse the district court's imposition of the firearm enhancement and remand for resentencing without that enhancement, I respectfully dissent from the majority's affirmance of that enhancement.

[1] In fact, although the record is not well-developed on this point, the discussion may even have been part of a sentencing entrapment scheme.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JOSE ORIBEL PONCE-ULLOA, Defendant-Appellant.	No. 19-30025 D.C. No. 1:17-cr-00150-EJL-1 District of Idaho, Boise ORDER

Before: TASHIMA, GRABER, and IKUTA, Circuit Judges.

Judges Graber and Ikuta have voted to deny the petition for panel rehearing. Judge Tashima would grant the petition. Judges Graber and Ikuta voted to deny the petition for rehearing en banc, and Judge Tashima so recommended. The petition for rehearing en banc was circulated to the judges of the court, and no judge requested en banc consideration.

The petition for rehearing and rehearing en banc (Dkt. 45) are DENIED.