

No._____

IN THE SUPREME COURT OF THE UNITED STATES

NAOMI MICHELLE GUTIERREZ, PETITIONER

V.

UNITED STATES OF AMERICA

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

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QUESTION PRESENTED FOR REVIEW

Whether the Fifth Circuit's practice of applying a tools-of-the-trade presumption to the firearm enhancement of sentencing guidelines §2D1.1(b)(1) violates a defendant's due process rights.

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Naomi Michelle Gutierrez asks that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on September 29, 2022.

PARTIES TO THE PROCEEDING

The caption of the case names all the parties to the proceedings in the courts below.

OPINION BELOW

The unpublished opinion of the court of appeals is appended to this petition.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the court of appeals were entered on September 29, 2022. This petition is filed within 90 days after entry of judgment. *See* Supreme Court Rule 13.1. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the U.S. Constitution provides in pertinent part that “No person shall be held to answer for a capital, or other infamous crime, unless on presentment or indictment from a Grand Jury, . . . nor be deprived of life, liberty, or property without due process of law.”

U. S. SENTENCING GUIDELINES INVOLVED

Section 2D.1.(b)(1) provides “If a dangerous weapon (including a firearm) was possessed, increase by **2** levels.”

STATEMENT

Petitioner Naomi Gutierrez pleaded guilty to conspiring with Ricky Cates, Freeman Brooks, James Winstead, and Chelsie Stubblefield to possess more than 50 grams of methamphetamine with the intent to distribute it, in violation of 21 U.S.C.

§§ 841(b)(1)(A) and 846.¹ After Gutierrez entered her guilty plea, a probation officer prepared a presentence report. The officer recommended a base offense level 38 under sentencing guidelines §2D1.1(c)(1). The officer also recommended a minor-participant adjustment under §3B1.2, which had the effect of lowering the applicable base-offense level to 34, U.S.S.G. §2D1.1(a)(5)(A) and (b)(iii).

The prosecutor objected to the presentence report. He sought to deny Gutierrez a minor-participant adjustment and he sought to have her assessed a two-level increase under U.S.S.G. §2D1.1(b)(1) because codefendant Cates had possessed firearms during the course of the conspiracy. The probation officer agreed with the prosecutor on the firearm adjustment and revised the report to include that increase. The revised report recommended a guideline sentence range of 135 to 168 months' imprisonment.

At sentencing, the government renewed its minor-participant objection. The government sustained it, denying Gutierrez the reduction. It found that Gutierrez was not among the primary subdealers that Cates supplied, but she had distributed significant amounts of drugs and thus was not substantially less culpable than the other participants in her offense.

The court then heard Gutierrez's objection to the firearm adjustment added by the revised presentence report. Gutierrez argued that no evidence linked her to the guns Cates possessed and that no evidence showed she even knew Cates had guns.

¹ The district court exercised jurisdiction under 18 U.S.C. § 3231.

App. B. The government contended that the adjustment was warranted because the guns were found in the shop where Cates stored and packaged methamphetamine. App. B. The government presented no evidence as to where in the shop the guns were or whether they were visible to persons entering the shop. *See* App. B. Gutierrez pointed out that there was no evidence she had been involved with Cates in the storing or packaging of methamphetamine at the shop. App. B.

The district court overruled the objection. It found that there was a “temporal as well as a spatial relationship” between the firearms and the methamphetamine and thus that it was foreseeable to Gutierrez that Cates would have possessed guns. App. B. It found Gutierrez’s total offense level was 37, her criminal history category was III, and her advisory guidelines sentence range was 262 to 327 months’ imprisonment. Gutierrez was sentenced to 262 months.

Gutierrez appealed. She argued that it was not reasonably foreseeable to her that Cates would have had guns in his shop. She pointed out that no evidence showed that Cates had ever displayed or even mentioned guns when Gutierrez was around. The Fifth Circuit followed its rule that firearms are “tools of the trade” in drug conspiracies and affirmed because under that rule “[i]t is irrelevant that she may not have known about the co-conspirator’s firearms or possessed them.” App. A at 3 (citing *United States v. Garza*, 118 F.3d 278 (5th Cir. 1997) and *United States v. Zapata-Lara*, 615 F.3d 388 (5th Cir. 2010)).

REASONS FOR GRANTING THE WRIT

THE COURT SHOULD GRANT CERTIORARI TO RESOLVE THE DIVISION IN THE COURTS OF APPEALS AS TO THE APPLICATION OF GUIDELINES §2D1.1(b)(1) AND CLARIFY THE REQUIREMENTS OF DUE PROCESS FOR SENTENCING.

Sentencing Guidelines §2D1.1(b)(1) increases a defendant's guideline offense level when a firearm is possessed during a drug-trafficking offense. When applied, §2D1.1(b)(1) increases the sentence range that anchors the sentencing determination. *Gall v. United States*, 552 U.S. 38, 49-50 (2007); *Peugh v. United States*, 569 U.S. 530, 541-42 (2013); *Molina-Martinez v. United States*, 578 U.S. 189, 198-99 (2016). The courts of appeals have divided over what proof the government must adduce when it seeks an increase under §2D1.1(b)(1) for a defendant who did not herself possess a gun, but was merely a member of a conspiracy in which another conspirator possessed a gun. The differing approaches of the courts of appeals mean that sentencing procedures and results vary from circuit to circuit. The approach of the Fifth Circuit, which requires the no proof of the defendant's involvement with a firearm, also raises an important due process question because it appears to substitute sentencing by presumption for sentencing based on reliable evidence. *Cf. United States v. Watts*, 519 U.S. 148, 156 (1997) (discussing reliability of sentencing evidence).

In deciding whether a §2D1.1(b)(1) increase may be imposed on a conspirator who did not herself possess a firearm, the Fifth Circuit applies a tools-of-the-trade presumption under which “[o]rdinarily, one co-conspirator's use of a firearm will be

foreseeable because firearms are ‘tools of the trade’ in drug conspiracies.” *United States v. Mergerson*, 4 F.3d 337, 350 (5th Cir. 1993)). The burden this test places on the government is minimal: it requires only that the government prove “that a coconspirator knowingly possessed the weapon.” *United States v. Zapata-Lara*, 615 F.3d 388, 390 (5th Cir. 2010); *see also United States v. Aguilera-Zapata*, 901 F.2d 1209, 1215 (5th Cir. 1990)). From possession by a co-conspirator, a sentencing court is free to infer foreseeability because firearms are “tools of the trade of those engaged in illegal drug activities” *Zapata-Lara*, 615 F.3d at 390, so long as there was a temporal and spatial relation between the co-conspirator’s possession of the firearm and drugs, *United States v. Romans*, 823 F.3d 299, 317 (5th Cir. 2016).

What the Fifth Circuit does not require is any showing that the defendant was aware a conspirator had a firearm. See Appendix A at 3 (knowledge “irrelevant”). In the Fifth Circuit, a defendant can be punished for her coconspirator’s gun possession on a general presumption that those who deal in drugs should know others they associate with may have guns. That approach has been rejected by other circuits as unfair and inconsistent with the requirements of due process and individual punishment. *Cf. Gall*, 552 U.S. at 52; *Koon v. United States*, 518 U.S. 81, 98 (1996).

The Eighth Circuit, for example, has held that “[u]nder the Guidelines, a two-level firearm enhancement can be applied only 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. *United States v. Lopez*, 384 F.3d 937, 940 (8th Cir. 2004) (citing *United States v. Highsmith*, 268 F.3d 1141, 112 (9th Cir. 2001)). The Eighth Circuit adopted this rule because it recognized that, to allow the increase on a tools-of-the-trade theory “would unfairly penalize defendants for conduct over which they have no control.” *Lopez*, 384 F.3d at 940.

Like, the Eighth and Ninth Circuits, the Sixth Circuit has required actual evidence of a defendant’s awareness that a co-conspirator had a firearm. The court “explicitly rejected ‘the fiction that a firearm’s presence always will be foreseeable to persons participating in illegal drug transactions.’” *United States v. Woods*, 604 F.3d 286, 291 (6th Cir. 2010) (quoting *United States v. Catalan*, 499 F.3d 604, 607 (6th Cir. 2008)). Rather than relying on a presumption that guns are tools of the drug trade, the Sixth Circuit instead requires “objective evidence that the defendant . . . at least knew it was reasonably probable that his coconspirator would be armed.” *Woods*, 604 F.3d at 291 (quoting *United States v. Cochran*, 14 F.3d 1128, 1133 (6th 1994)).

The division among the courts of appeals is pronounced and well established. The difference in approach implicates important constitutional and criminal justice issues. Federal courts, though they have broad discretion as to what evidence they may consider in sentencing a defendant, 18 U.S.C. § 3661, are limited by the Due Process Clause. The Due Process Clause mandates that sentencing determinations be supported by information bearing reasonable indicia of reliability, a threshold the Court has indicated is satisfied by proof by a preponderance of the evidence,

United States v. Watts, 519 U.S. 148, 156 (1997); *see also United States v. Johnson*, 648 F.3d 273, 277 (5th Cir. 2011) (observing that sufficient-indicia-of-reliability standard equates to “due process requirement that sentencing facts must be established by a preponderance of the evidence.”) The approaches taken by the Sixth, Eighth, and Ninth Circuits adhere to the due process requirements of proof by reliable evidence. The Fifth Circuit’s tools-of-the-trade presumption does not. The approaches taken by the Sixth, Eighth, and Ninth Circuits adhere to the rule that fairness requires that an individual be sentenced for her conduct, not for the conduct of another without proof of responsibility for that other’s conduct. *Cf. Koon*, 518 U.S. at 98 (our system sentences each defendant as an individual). The Fifth Circuit’s tools-of-the-trade presumption does not.

The approaches taken by the Sixth, Eighth, and Ninth Circuits adhere to an empirical world. The Fifth Circuit’s tools-of-the-trade presumption does not. Studies from the Bureau of Justice Statistics demonstrate this. A 2001 Bureau of Justice Statistics showed that only 15% of federal offenders for all crimes possessed a firearm in relation to any crime. When narrowed down to a drug related offenses only 8.1% percent of federal offenders were found to have possessed a gun. <https://bjs.gov/content/pub/pdf/fuo.pdf> (last visited November 8, 2022). A 2019 study found that by 2016 the percentage of federal drug offenders who had possessed a gun had increased, but only to 12.9 percent. <https://bjs.ojp.gov/content/pub/pdf/suficspi16.pdf> (last visited November 8, 2022).

These studies show that the Fifth Circuit’s tools-of-the-trade presumption lacks factual as well as legal support.

Gutierrez’s case is a good vehicle for resolving the circuit split. There is no evidence in the record that co-conspirator Cates ever carried a gun around Gutierrez. There is no evidence in the record that Cates made statements that should have alerted Gutierrez to the possibility that he might be carrying a gun. There is no evidence that Cates had a gun with him any of the times he was around Gutierrez. Perhaps most important, Gutierrez’s case contains a statement by the Fifth Circuit that shows how far it has pushed its tools-of-the-trade presumption. According to the Fifth Circuit it was “irrelevant that she may not have known about the co-conspirator’s firearms.” Appendix A at 3. She could be punished by presumption, not evidence. Given the lack of evidence in Gutierrez’s case and the Fifth Circuit’s clear statement of its anomalous position on the need for any proof, Gutierrez’s case perfectly captures the Fifth Circuit’s presumption of culpability and thus perfectly illustrates the split among the circuits. The Court should grant certiorari to resolve that split.

Conclusion

FOR THESE REASONS, Petitioner asks that the Court grant a writ of certiorari and review the judgment of the court of appeals.

/s/ PHILIP J. LYNCH
Counsel of Record for Petitioner

DATED: November 10, 2022.