

NOT FOR PUBLICATION

FILED

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

DEC 27 2023

**MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS**

UNITED STATES OF AMERICA,

No. 22-10250

Plaintiff-Appellee,

D.C. No.
1:19-cr-00161-DAD-BAM-1

v.

HECTOR MANUEL GOMEZ
RODRIGUEZ,

MEMORANDUM*

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of California
Dale A. Drozd, District Judge, Presiding

Argued and Submitted December 14, 2023
San Francisco, California

Before: KOH, H.A. THOMAS, and DESAI, Circuit Judges.

Mr. Gomez Rodriguez pled guilty to conspiracy to manufacture over 1,000 marijuana plants in violation of 21 U.S.C. §§ 841(a)(1) and 846 after being arrested during a marijuana grow site raid. As part of his plea agreement, he agreed to an appellate waiver. At the end of his sentencing hearings, the district court found that Mr. Gomez Rodriguez was ineligible for a safety valve exemption from the statutory

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

mandatory minimum sentence, 18 U.S.C. § 3553(f)(2), because he had possessed a firearm at the grow site. The court sentenced him to a mandatory minimum term of 120 months with a five-year supervised release period. On appeal, Mr. Gomez Rodriguez challenges his sentence and asserts that the appellate waiver does not apply. We have jurisdiction under 18 U.S.C. § 3742. We dismiss in part and affirm in part.

We review whether a defendant has waived his right to appeal by plea agreement *de novo*. *United States v. Joyce*, 357 F.3d 921, 922 (9th Cir. 2004). We typically review the constitutionality of a sentence *de novo*. *United States v. Hungerford*, 465 F.3d 1113, 1116 (9th Cir. 2006). But when a defendant raises an issue for the first time on appeal, we review for plain error. *See United States v. Olano*, 507 U.S. 725, 731 (1993).

1. We dismiss Mr. Gomez Rodriguez's appeal in part because he knowingly and voluntarily agreed to the plea agreement, and the plain language of the agreement includes a waiver of his right to appeal his sentence. *See Davies v. Benov*, 856 F.3d 1243, 1246–47 (9th Cir. 2017) (“A defendant's waiver of his rights to appeal . . . is generally enforced if (1) the language of the waiver encompasses his right to appeal on the grounds raised, and (2) the waiver is knowingly and voluntarily made” (internal citation omitted)). Although an appellate waiver does not prevent challenges to “illegal” sentences, *United States v. Torres*, 828 F.3d 1113, 1125 (9th

Cir. 2016), a sentence is only “illegal if it exceeds the permissible statutory penalty for the crime or violates the Constitution,” *United States v. Bibler*, 495 F.3d 621, 624 (9th Cir. 2007).¹ Therefore, this exception does not permit Mr. Gomez Rodriguez to appeal the district court’s refusal to apply the safety valve statute to his sentence. *See United States v. Wells*, 29 F.4th 580, 585 (9th Cir. 2022) (declining to extend meaning of “illegal sentence” to encompass sentences potentially violating 18 U.S.C. § 3553). The exception does, however, cover his constitutional claim that his sentence violates the Eighth Amendment. *See id.* at 587. Accordingly, we dismiss Mr. Gomez Rodriguez’s safety valve claim, but reach the merits of his constitutional claim.

2. The district court’s sentence does not violate the Eighth Amendment. The Eighth Amendment forbids sentences that are “grossly disproportionate” to the crime. *Graham v. Florida*, 560 U.S. 48, 59–60 (2010). When a defendant challenges his sentence, we first compare “the gravity of the offense to the severity of the sentence.” *United States v. Hammond*, 742 F.3d 880, 884 (9th Cir. 2014) (quoting *United States v. Williams*, 636 F.3d 1229, 1232 (9th Cir. 2011)). If the initial comparison “leads to an inference of gross disproportionality,” we then “compare

¹ Mr. Gomez Rodriguez asks us to interpret “illegal sentence” to include a sentence which is based on a finding of safety valve ineligibility, but our circuit’s precedent forecloses us from doing so. *See United States v. Wells*, 29 F.4th 580, 585 (9th Cir. 2022); *United States v. Vences*, 169 F.3d 611, 613 (9th Cir. 1999).

the defendant's sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions." *Id.* (quoting *Graham*, 560 U.S. at 60).

Here, the first step of the analysis is dispositive. Mr. Gomez Rodriguez was involved in growing 4,494 marijuana plants that damaged federal land, and the district court imposed the mandatory minimum sentence under 21 U.S.C. § 841(b)(1)(A)(vii). As applied to Mr. Gomez Rodriguez's offense, the sentence imposed does not give rise to "an inference of gross disproportionality," *Hammond*, 742 F.3d at 884 (quoting *Graham*, 560 U.S. at 60), especially considering the "substantial deference" we grant to Congress's authority in determining the punishments for federal crimes, *Solem v. Helm*, 463 U.S. 277, 290 (1983); *see also United States v. Albino*, 432 F.3d 937, 938 (9th Cir. 2005) (per curiam).

We **DISMISS** in part and **AFFIRM** in part.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
HON. DALE A. DROZD, JUDGE

UNITED STATES OF AMERICA,)
Plaintiff,) No. 19-CR-161-DAD
vs.) PROCEEDINGS RE SENTENCING
HECTOR MANUEL GOMEZ RODRIGUEZ,)
Defendant.)

Tuesday, May 31, 2022

REPORTER'S TRANSCRIPT OF PROCEEDINGS

APPEARANCES OF COUNSEL:

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For the Defendant: **JAMES HOMOLA**
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REPORTED BY: KAREN HOOVEN, RMR, CRR, Official Court Reporter

Proceedings recorded by mechanical stenography, transcript produced by computer aided transcription.

1 Tuesday, May 31, 2022

Fresno, California

2 10:45 a.m.

3 (The following proceedings were had by Zoom with the aid
4 of Certified Spanish Court Interpreter Gloria Hughes,
5 oath on file.)

6 THE CLERK: Court calls 19-CR-161. United States
7 versus Hector Manuel Gomez Rodriguez. Scheduled for
8 sentencing.

9 THE COURT: Please state your appearances for the
10 record.

11 MS. MONTOYA: Good morning, Your Honor. Laurel
12 Montoya appearing on behalf of the United States.

13 THE COURT: I'm sorry, you're muted, Mr. Homola.

14 MR. HOMOLA: Good morning, Your Honor. Jim Homola,
15 appointed counsel for Mr. Hector Manuel Gomez Rodriguez, who
16 is personally present being assisted by the certified Spanish
17 speaking interpreter. We consent to having a Zoom sentencing
18 rather than being in person. And we're ready to proceed.

19 THE COURT: And is Mr. Rodriguez, Gomez Rodriguez
20 utilizing the Spanish interpreter, I believe.

21 MR. HOMOLA: Yes, Your Honor.

22 THE COURT: Your appearance, ma'am.

23 THE INTERPRETER: Good morning, Your Honor, my name is
24 Gloria Hughes and I'm a federally certified state court
25 interpreter.

1 THE COURT: With an oath on file?

2 THE INTERPRETER: Yes, Your Honor. I apologize.

3 THE COURT: All right. No problem.

4 And Mr. Gomez Rodriguez can hear us all right? Is he
5 communicating with you, Ms. Hughes?

6 THE INTERPRETER: No, Your Honor.

7 THE COURT: He's muted, right? He can't?

8 THE INTERPRETER: Yes. Let me ask him again, Your
9 Honor.

10 THE COURT: We need to get somebody to unmute his
11 device. If he can't do it himself.

12 THE CLERK: Marshals, can you assist?

13 THE MARSHAL: Yes.

14 THE CLERK: Thank you.

15 THE COURT: There we go. Thank you.

16 THE DEFENDANT: Yes, I can hear you very well.

17 THE COURT: Great. And Mr. Gomez Rodriguez, your
18 attorney, Mr. Homola, has indicated that you wish to waive any
19 right you have to an in-person appearance before the Court for
20 sentencing and that you wish to instead agree to proceed with
21 your sentencing in this case by way of this video conference
22 with each of us appearing remotely. Is that, in fact,
23 correct?

24 THE DEFENDANT: Yes.

25 THE COURT: I find that a national state of emergency

1 has been declared in response to the spread of the
2 Coronavirus. For everyone's health and safety, the general
3 population of California had been under a gubernatorial order
4 to shelter in place and remains under emergency order.
5 Detention facilities have imposed quarantines or restrictions
6 on access to detainees for the health of the detainees and
7 staff.

8 The Judicial Conference of the United States has
9 found that conditions due to the national emergency are
10 materially affecting the functioning of the federal courts.
11 And the Judicial Council of the Ninth Circuit has certified
12 that emergency conditions existing in the Eastern District of
13 California justify the temporary suspension of the 70-day
14 period to bring defendants to trial. Public health
15 recommendations and restrictions have impacted this Court's
16 ability to function as it usually does to conduct in-person
17 proceedings and has impaired the availability of counsel, the
18 parties and court staff to be present in the courtroom.

19 I therefore find, pursuant to the CARES Act, that the
20 use of video conferencing to conduct these sentencing
21 proceedings with the consent of the defendant Hector Manuel
22 Gomez Rodriguez is in the interest of justice and that
23 utilization of that procedure may prevent the defendant from
24 remaining incarcerated longer than is necessary and will
25 satisfy the objectives of sentencing under the US Sentencing

1 Guidelines and 18 USC Section 3553. I also find that this
2 sentencing proceeding cannot be further delayed without doing
3 possible serious harm to the interest of justice.

4 In connection with sentencing, the Court has reviewed
5 the presentence report that was filed April 22nd, 2022 as well
6 as the defense sentencing memorandum filed May 20th, docket
7 number 82. And the government's sentencing memorandum filed
8 May 26th, docket number 83.

9 Is there anything else that I should have reviewed in
10 connection with sentencing?

11 MS. MONTOYA: Not on behalf of the government, Your
12 Honor.

13 MR. HOMOLA: Not on behalf of the defense, Your
14 Honor.

15 THE COURT: And Mr. Homola, have you had the
16 opportunity to review the presentence report and discuss it
17 with Mr. Gomez Rodriguez?

18 MR. HOMOLA: Yes, Your Honor.

19 THE COURT: And Mr. Gomez Rodriguez, have you been
20 able to review the presentence report in your case and have
21 the opportunity to discuss it with your attorney?

22 THE DEFENDANT: Yes.

23 THE COURT: There are no objections to -- formal
24 objections to the presentence report. I think that's fair to
25 say. Although really the main issue with respect to

1 sentencing in this case is whether Mr. Gomez Rodriguez is
2 safety valve eligible. And that would impact the sentencing
3 guideline calculation. As I understand it, I has been -- he
4 at least arguably has satisfied the fifth criteria for safety
5 valve relief.

6 Probation has determined that he's not eligible for
7 safety valve relief under Guideline Section 5C1.2 due to the
8 possession of a firearm at the grow site. If that weren't the
9 case and he were safety valve eligible, the guideline range
10 would be 57 to 71 months. But because -- if I agree with
11 probation that he's not safety valve eligible, the mandatory
12 minimum becomes the guideline range, which is 120 months.

13 So let's talk about that now. Mr. Homola, do I
14 understand the issue correctly.

15 MR. HOMOLA: Absolutely, Your Honor. He's there
16 three days. The gun is present. You know, how far it was
17 from him, whether there were fingerprints on the gun of his
18 was never determined. No one ever saw him handle the gun,
19 throw the gun away, fire the gun.

20 He was debriefed. He was only there three days. So
21 it's -- you know, he doesn't have any excellent intel to
22 provide to law enforcement. And it's the Court's call whether
23 or not three days and nearness to a weapon makes him
24 ineligible for the safety valve and the mandatory minimum
25 applies. It's a tough call and that's why we put it on your

1 Tap, Your Honor.

2 THE COURT: Ms. Montoya, anything the government
3 wishes to add on this issue other than what's in the
4 sentencing brief?

5 MS. MONTOYA: Other than that Mr. Homola is correct.
6 There was not any fingerprint examination done of either the
7 45 caliber or the pellet gun that was found in the other
8 sleeping area. Additionally, we don't have sufficient
9 evidence to disprove the defendant's statement that he was in
10 the grow site for three days. But as noted in the
11 government's sentencing memorandum, he did state that he had
12 handled the gun.

13 THE COURT: I have previously researched this issue.
14 You know, Mr. Homola, you argue in the sentencing brief that,
15 you know, it's a matter of Court's discretion. If it was
16 totally a matter of discretion, yes, I would readily make a
17 finding that Mr. Gomez Rodriguez is eligible for safety valve
18 relief and sentence him to a guideline sentence. I mean, it
19 doesn't appear that he's anything more than a tender of
20 plants, not atypical of many defendants in that position. But
21 I don't think it's completely a matter of my discretion. I've
22 got to find that he -- in order to apply 5C1.2 --

23 MR. HOMOLA: I think on page three, line 17 on 18 USC
24 3553(f)(2) also guides the Court on the weapon. That's where
25 I -- that's where I'm laying my basis.

1 THE COURT: I mean, the guideline provision,
2 5C1.2(a)(2). In order to be eligible, the defendant must not
3 have possessed a firearm in connection with the offense. I
4 mean, if it was use a firearm, maybe I'd have more discretion
5 in making a finding whether a firearm was used. But the
6 guideline provision says that the defendant -- it's a question
7 of whether he possessed a firearm in connection with the
8 offense.

9 And I've researched this in other contexts where it
10 was disputed, usually in the context of a gun found in the
11 vehicle, sometimes in a glovebox or compartment, and the
12 dispute being whether or not the defendant possessed the
13 firearm in connection with the offense. But here, I'm
14 not -- I don't feel like, at least at first blush, that I can
15 make a finding that this defendant did not possess a firearm
16 in connection with the offense. It seems pretty clear that he
17 did. Even if he didn't use it, even if he didn't fire it,
18 even all those things can be true.

19 What -- I'm -- what's the legal hook that allows me
20 to find that he's safety valve eligible despite the presence
21 of that firearm just at the grow site and despite his
22 admission that he, in fact, handled it?

23 MR. HOMOLA: Well, it would be really semantics that
24 it was in the area rather than possession. I mean, you can
25 have constructive possession if it's in the area. But what

1 I'm saying is that it's present rather than possessed.

2 THE COURT: But he -- hasn't he admitted that he
3 handled it the day before?

4 MR. HOMOLA: Yes, Your Honor. I -- you know, it is
5 what it is.

6 THE COURT: What other what part of 3553 were you
7 directing me to?

8 MR. HOMOLA: It's really the same argument that the
9 Court just went through, Your Honor. Is that it says the
10 defendant did not use violence or credible threats of violence
11 or possess a firearm or other dangerous weapon. You know,
12 it's constructive possession, but I'm saying it's in the area
13 rather than, you know, being under his dominion and control.
14 I'm trying to expand the requirements of possession, Your
15 Honor.

16 THE COURT: Well, I apologize. This is a very busy
17 calendar. And I've got a great number of cases on and I'm in
18 trial as well that I've got to get to this afternoon plus
19 other civil hearings. If I were to sentence right now, I
20 would have -- I don't see how I can make a conclusion based
21 upon what I know right now that a firearm was not possessed.
22 I'm I just -- I don't have any basis to make that finding, I
23 don't think. Now, I'd be happy to think about it some more,
24 do some research, see if I can come up with anything.

25 Because this -- I mean, I have no desire to reach the

1 conclusion that the mandatory minimum is the guideline range
2 here, though I fear that it is. But without any legal hook to
3 hang my hat on, if I sentence right now, I'm sentencing -- I
4 feel like I have no choice but to sentence to the 120 months.
5 Do you want me to put it over and take another -- put it over
6 a week and take a harder look at it or do you want to go
7 forward?

8 MR. HOMOLA: No. I'd prefer having a week's delay
9 and I'll look at it more and try to get some case law that
10 would be defense friendly as to, quote, the possession and see
11 what goes on and try to file it by this Wednesday afternoon or
12 early Thursday morning so Ms. Montoya has a chance to look at
13 it and respond.

14 MS. MONTOYA: Your Honor.

15 THE COURT: Yes.

16 MS. MONTOYA: As far as -- I'm sorry. As far as
17 scheduling, I was planning not to be in the office Thursday
18 through Monday.

19 THE COURT: Two weeks then?

20 MS. MONTOYA: The co-defendant is set for sentencing
21 on June 6th. However, there was some discussion about
22 continuing it to the 21st. I don't know if the Court is
23 amenable to maybe putting Mr. Hector Gomez' Rodriguez' matter
24 over to the 21st at well.

25 THE COURT: Any objection, Mr. Homola, to putting

1 both the defendants on on the 21st?

2 MR. HOMOLA: No, Your Honor.

3 THE COURT: Mr. Gomez Rodriguez, do you understand
4 what we're talking about? I'd like to take a longer look at
5 this issue about whether or not the presence of that gun at
6 the grow site means that you're not eligible for a lesser
7 sentence. As I sit here right now, I think you may well be
8 ineligible for a lesser sentence, but I would like to take a
9 good look at it because it means several years difference.

10 Is it okay with you if we continue the sentencing in
11 your case to the June 21st date?

12 MR. HOMOLA: Mr. Gomez, I --

13 | THE DEFENDANT: Yes, that's fine. Very well.

14 THE COURT: All right.

15 MR. HOMOLA: Thank you, Your Honor.

16 THE COURT: That's what we'll do then. We'll
17 continue this to June 21st at nine a.m.

18 | MR. HOMOLA: Thank you, Your Honor.

19 MS. MONTOYA: Thank you, Your Honor. . .

20 THE COURT: Let the guards there know we're done with
21 your case, sir. Thank you.

22 (The proceedings were concluded at 11:03 a.m.)

23 I, KAREN HOOVEN, Official Reporter, do hereby certify
24 that the foregoing transcript as true and correct.

25 DATED: 17th of November, 2022 /s/ Karen Hooven
KAREN HOOVEN, RMR-CRR

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
HON. DALE A. DROZD

UNITED STATES OF AMERICA,) 1:19-cr-00161-DAD-BAM-1
Plaintiff,) Sentencing Hearing
vs.)
HECTOR MANUEL GOMEZ)
RODRIGUEZ,)
Defendant.)

Fresno, California

Tuesday, June 21, 2022

REPORTER'S TRANSCRIPT OF PROCEEDINGS

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BY: JAMES RAYMOND HOMOLA, ESQ.

REPORTED BY: RACHAEL LUNDY, CSR, RPR, Official Reporter

Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription.

2 9:43 a.m.

3 (The following proceedings were had with the aid of
4 Certified Spanish Court Interpreter Aimee Benavides, oath
5 on file.)

6 THE CLERK: The Court is calls 19-cr-161,
7 United States vs. Hector Manuel Gomez Rodriguez, scheduled for
8 sentencing.

9 THE COURT: And please state your appearances.

10 MS. MONTOYA: Good morning, Your Honor.

11 Laurel Montoya appearing on behalf of the United States.

12 MR. HOMOLA: Good morning, Your Honor. James Ho

13 appointed counsel for Hector Manuel Gomez Rodriguez, who's
14 personally present, being assisted by the certified Spanish
15 speaking interpreter via Zoom/teleconference. We waive his
16 personal appearance and ask to proceed by Zoom, and we're
17 ready for sentencing, Your Honor.

18 THE INTERPRETER: Good morning, Your Honor.

19 Aimee Benavides, federally certified Spanish interpreter. My
20 oath is on file.

21 THE COURT: Okay. And Mr. Gomez Rodriguez, do you
22 wish to waive any right you have to an in-person appearance
23 before the Court for purposes of sentencing, and do you agree
24 instead to proceed with sentencing by way of video conference?

25 THE INTERPRETER: Your Honor, he's still muted.

1 THE COURT: Oh, we need to unmute Mr. Gomez
2 Rodriguez's screen. Thank you, sir.

3 And Mr. Gomez Rodriguez, do you wish to waive any
4 right you have to an in-person appearance before the Court for
5 purposes of sentencing, and do you agree instead to proceed
6 with sentencing by way of this video conference?

7 THE DEFENDANT: Yes. Yes.

8 THE COURT: (Reading:)

9 I find a national state of emergency has been
10 declared in response to the spread of the Coronavirus. For
11 everyone's health and safety, the general population of
12 California had been under a gubernatorial order to shelter in
13 place, and remains under an emergency order.

14 The detention facilities have imposed quarantines or
15 restrictions on access to detainees for the health of the
16 detainees and staff.

17 The Judicial Conference of the United States has
18 found the conditions due to the national emergency are
19 materially affecting the functioning of the federal courts,
20 and the Judicial Council of the Ninth Circuit has certified
21 that emergency conditions existing in the Eastern District of
22 California justify the temporary suspension of the 70-day
23 period to bring defendants to trial.

24 Public health recommendations and restrictions have
25 impacted this Court's ability to function as it usually does,

1 to conduct in-person proceedings and has impaired the
2 availability of counsel, the parties, and court staff to be
3 present in the courtroom.

4 I, therefore, find that pursuant to the CARES Act,
5 that the use of video conferencing to conduct these sentencing
6 proceedings, with the consent of the defendant, Hector Manuel
7 Gomez Rodriguez, is in the interest of justice, and that
8 utilization of such a procedure may prevent the defendant from
9 remaining incarcerated longer than is necessary, and will
10 satisfy the objectives of sentencing under the U.S. Sentencing
11 Guidelines in 18 U.S.C. Section 3553.

12 I also find that the sentencing proceeding cannot be
13 further delayed without doing possible serious harm to the
14 interest of justice.

15 And we continued this sentencing from May 31st based
16 upon the issue for the Court to consider, and for supplemental
17 briefing from the defense on the issue of whether or not
18 Mr. Gomez Rodriguez had qualified for safety valve relief
19 under the provisions of 5C1.2.

20 In connection with sentencing, I have reviewed the
21 presentence report, filed April 22; the defendant's sentencing
22 memorandum, filed May 20th; the government's sentencing
23 memorandum, filed May 26th; and then, the defendant's
24 supplemental sentencing memorandum addressing the safety valve
25 relief issue, filed June 13th. I've also done some

1 independent research. Is there anything else I should have
2 received in connection with sentencing?

3 MS. MONTOYA: Not on behalf of the government,
4 Your Honor.

5 MR. HOMOLA: Not on behalf of the defense,
6 Your Honor.

7 THE COURT: And Mr. -- oh, I should have also stated
8 for the record, we have Mr. Mora, the author of the
9 presentence report, with us as well.

10 Mr. Homola, have you had the opportunity to review
11 the presentence report and discuss it with Mr. Gomez
12 Rodriguez?

13 MR. HOMOLA: Yes, I have, Your Honor.

14 THE COURT: And Mr. Gomez Rodriguez, have you had the
15 opportunity to review the presentence report in your case and
16 discuss it with your attorney?

17 THE DEFENDANT: Yes.

18 THE COURT: So in this case -- and we talked about
19 this a little bit on May 31st, whether or not Mr. Gomez
20 Rodriguez qualifies for safety valve relief despite the
21 presence of a firearm at the marijuana grow site makes a
22 considerable amount of difference in his sentence.

23 I think I've got this right. It's a mandatory
24 minimum of ten-year term of imprisonment, so it's 120 months.
25 That's what probation has recommended. When probation wrote

1 their report, they didn't really have to grapple with this
2 issue too much, because at that point, Mr. Gomez Rodriguez had
3 not satisfied the fifth criteria for safety relief. So
4 whether or not the firearm -- presence of the firearm
5 precluded safety valve relief or not wasn't a relevant issue.
6 So probation --

7 I got that right, don't I, Mr. Mora, probation didn't
8 really weigh in on this, correct?

9 PROBATION OFFICER: Correct, Your Honor.

10 THE COURT: Right.

11 PROBATION OFFICER: Yeah.

12 THE COURT: So after the presentence report was
13 issued, Mr. Gomez Rodriguez did satisfy the fifth component.
14 And so now the issue of whether the presence of that firearm,
15 which was loaded, whether that precludes his eligibility for
16 safety valve relief.

17 If he is safety valve relief eligible -- and you all
18 tell me if I'm wrong with about this. If he were safety-valve
19 eligible, his offense level would go from 25 to 23, because he
20 would get to a two-point reduction. And the result would be
21 an advisory sentencing guideline range calling for a term of
22 imprisonment of between 46 and 57 months.

23 And under the plea agreement, I think, in this case,
24 the government had agreed to recommend a low-end sentence
25 taking into account the minimum mandatory if it was found to

1 be applicable. So we're basically talking about the
2 difference between 121 -- 120 months sentence, or a 46 month
3 recommendation. That's a pretty big difference. And to
4 Mr. Gomez Rodriguez, I'm sure it sounds like one heck of a lot
5 of difference.

6 Mr. Homola, I want to thank you, because your brief
7 did enlighten me further. I think if you had asked me before
8 I read your supplemental brief, I might have been -- I may not
9 have been aware of the decision in *Nelson*, and I may have been
10 under the mistaken belief that if there was a 2D1.1(b)(1)
11 adjustment for possession of a firearm, then that
12 automatically made the defendant ineligible for safety valve
13 relief under 5C1.2.

14 And as you've pointed out in your supplemental brief,
15 no, that's not the case. Those are measured by two different
16 standards. The 2D1.1(b)(1) standard, is very demanding on the
17 defendant. I forget what the magic language is. It's clearly
18 implausible that the --

19 MR. HOMOLA: Correct.

20 THE COURT: -- that the firearm was connected to the
21 offense.

22 Whereas the 5C1.2, the defendant still bears the
23 burden of proof on that issue, but it is proof by a
24 preponderance of the evidence of whether --

25 MR. HOMOLA: Page 3 of my brief, Your Honor.

1 THE COURT: -- of whether the --

2 MS. MONTOYA: And also in my brief.

3 THE COURT: -- firearm or other dangerous weapon was
4 possessed in connection with the offense.

5 And the defendant bears that burden that it was not
6 possessed in connection with the offense by a preponderance of
7 the evidence standard, but it is the defense burden.

8 MR. HOMOLA: Correct.

9 THE COURT: And that's a lesser standard of proof.
10 So what *Nelson* teaches is -- and subsequent cases, is that you
11 can get an upward adjustment under 2D1.1(b)(1) for the
12 presence of a firearm and still be found to be safety valve
13 eligible, theoretically. Though often, the both -- you
14 will -- you will both get an upward adjustment and be found
15 ineligible, but it's theoretically possible because of the
16 different standard of proof.

17 So I guess, in this case what it really comes down to
18 is, okay, what is the evidence? And has defendant established
19 by a preponderance of that evidence that the firearm was not
20 possessed by him in connection with the offense?

21 And what do we got? We've got a marijuana grow out
22 in the wilderness. We've got a loaded handgun that's in,
23 according to the PSR, relative, near proximity to Mr. Gomez
24 Rodriguez when officers arrive at the camp. The firearm is
25 loaded. And in a postarrest statement he states that the day

1 before he had handled the gun a little bit, but that he had
2 never used it, never fired it.

3 We also have been -- the defense also told the
4 officers, and he still, through counsel, contends that he had
5 only arrived three days earlier at the grow site. When the
6 officers did arrive, he didn't reach for the firearm. He
7 instead attempted to evade the officers by running away. So I
8 don't know whether the defense wants to profer any evidence or
9 whether the government would want to cross-examine or anything
10 else, but the ultimate question is, does -- do those facts
11 establish by the preponderance of the evidence that Defendant
12 Gomez Rodriguez possessed that firearm in connection with the
13 offense?

14 MR. HOMOLA: The only thing I'd like to point out is
15 on page 5 is the jury instruction 6.15 for possession, knows
16 of its presence, he saw it, he admitted touching it, and has
17 physical control of the firearm, and has the power and
18 intention to control it.

19 I don't believe that he had, so I don't believe that
20 he has possession. It's, you know, presence of the weapon.
21 He admitted touching it. He did. He said he didn't -- never
22 fired it. There's spent shell casings. Is that the probation
23 report on page 5 said between June 19th and June 25th
24 surveillance cameras of the area were there and showed
25 multiple subjects and multiple vehicles, never said that they

1 saw his -- his -- my client was there. That the spent shell
2 casings could have been from someone else. Is that, my client
3 said he didn't own the weapon, didn't bring it, didn't use it.

4 So it's why you have the robe and -- and the big
5 dollars, Your Honor.

6 THE COURT: We don't have a lot of the evidence is
7 the problem.

8 MR. HOMOLA: Well, I think that's in favor of him.
9 That's not a lot of evidence that -- other than mere presence,
10 and that he had touched it. He was only there three days.
11 There's no evidence that his fingerprints were on it, that he
12 had fired it, that he was there June 19th through June 25th on
13 surveillance camera. That he was just there.

14 THE COURT: Ms. Montoya, you know, the last time I
15 can think of where I really grappled with this was in a case
16 where the owner of a car -- he was the owner of the car, and
17 the firearm was located in a center console of a SUV that the
18 defendant was driving, and that defendant owned. And there
19 were drugs in the backseat of car, a fairly large amount.

20 I don't know if that -- I looked for marijuana
21 cultivation cases to see if I could find one, and I was not
22 successful in my research.

23 Mr. Homola makes the point that there isn't a lot of
24 evidence, but what little evidence there is just as
25 susceptible to the conclusion that somebody else brought in

1 the gun. It was present at the site. He may have known it
2 was there, but he wasn't using it. Is there anything in
3 qualifying for the fifth -- the fifth cog of safety valve
4 relief inconsistent with the argument that the defense is
5 making now, or anything else you want to say? I -- I'm
6 really -- I've recognized what a big difference it makes in
7 terms of the ultimate sentence. In this particular case, it
8 makes a significant difference.

9 MS. MONTOYA: It does, Your Honor. And there -- the
10 government de -- it wasn't a marijuana cultivation of
11 clandestine out in the wilderness site case, but it was the
12 *Ferryman* case where safety valve relief was denied. The Court
13 found the defendant had not met its burden that he didn't
14 possess a firearm with the connection of the offense, because
15 the firearms were strategically placed in an area where one
16 would seek to protect the marijuana grow. And that case is
17 cited on page 2 of my sentencing memorandum.

18 Regarding the facts of this case, the firearm was in
19 the camp area, which was where the defendant was at the time
20 law enforcement came into the grow area. The defendant
21 admitted touching it. He did have access to it. I think that
22 the jury instruction that Mr. Homola cited lends itself based
23 on these facts to the fact that the defendant did possess it.
24 Because although he didn't say, yes, this was my gun. I
25 brought it into the grow site so I could use it for

1 protection, it was strategically placed where one would expect
2 to have a firearm for protection of the grow site. And the
3 fact that he didn't pick it up when the government --
4 thankfully he didn't pick it up when law enforcement came into
5 effect the arrests and searched the grow site, it really is of
6 no moment, because the facts lend itself to where the gun was,
7 the fact that there were unspent shells, and also the firearm
8 was loaded.

9 And also -- I believe that there were
10 approximately -- there was additional ammunition not just what
11 was in the firearm. It lends itself to the fact that this gun
12 was possessed in order to protect the grow site, because
13 there --

14 THE COURT: Right.

15 MS. MONTOYA: -- there was also a pellet gun in one
16 of the other areas. And you know, that sort of would be, in
17 my thinking, to -- if you need to shoot animals away or
18 something of that nature versus to actually -- actually
19 protect the grow site from human intervention.

20 THE COURT: I guess what I'm struggling with is, I
21 think that that firearm/loaded handgun was present in the grow
22 site in connection with the cultivation, but was it possessed
23 there by the defendant who immediately admitted he had touched
24 it, but claims to have never fired it, who says, I was only
25 there three days, who didn't reach for it when someone

1 arrives, is he in possession of it, or was it left there by
2 others working there who had come and gone? I know at one
3 point in the conversation or the presentence report one -- I
4 can't remember if it was this defendant or the co-defendant
5 said, We were still there because the other guys that were
6 supposed to arrive hadn't gotten there when they were supposed
7 to. That's the only reason we were still here.

8 MR. HOMOLA: It was the co-defendant, Your Honor.

9 THE COURT: Like, who's -- who's possessing it? Is
10 anybody at the grow site is possessing it even if they never
11 fired it?

12 MS. MONTOYA: Yes.

13 THE COURT: Yeah, that's your -- that's the
14 government's position?

15 MS. MONTOYA: Yes. That is my position, Your Honor.
16 Because even though it's like we don't have to show that the
17 toothbrush was his, but there were two brushes and,
18 ostensibly, he possessed a toothbrush in order to -- and he
19 possessed a cot the same way he possessed the firearm even
20 though maybe he -- perhaps he wasn't the person who brought
21 the toothbrush or brought the cot or brought the food within
22 the grow site, it's there. It's strategically placed, and
23 he -- it was available for him to use. The fact that he
24 didn't use it on the date of his arrest, again, I don't know
25 that that's necessarily significant.

1 MR. HOMOLA: And in rebuttal, Your Honor, I think
2 *Nelson*, preponderance of the evidence, that he didn't
3 possesses the weapon. He's there for three days. He touched
4 it the day before, didn't reach for it, ran away. You know,
5 that he wasn't an organizer or wasn't continuing criminal
6 enterprises --

7 THE COURT: Yeah, well, I know -- you've got me in
8 the -- you've convinced me that your argument is at least
9 potentially meritorious. What I'm really struggling with is,
10 it's your burden --

11 MR. HOMOLA: I agree.

12 THE COURT: -- and the burden is by a preponderance
13 of the evidence. So somewhat more likely that he didn't
14 possess it than he did.

15 I'm -- I'm leaning the opposite way. It's more
16 likely that he did possess it than he didn't. Do you have any
17 other proffer or evidence that you could present regarding
18 where it was found, you know, was in plain view or open view
19 within five feet from his location when the officers came in,
20 or was it in the sleeping bag or under a blanket or -- you
21 know, somewhere where you could say, look, I didn't even know
22 where it was at the time?

23 MR. HOMOLA: Well, you know, Your Honor, the police
24 reports nor the probation report states that other than the
25 five-feet location. Is that the client was -- came twice to

1 debrief. The first time we didn't have a Spanish-speaking
2 interpreter. The second time, we did. He said, I don't know
3 anything, because I was only there three days.

4 And Ms. Schuh and Ms. Montoya, debriefed him as did
5 two members of law enforcement from -- I think from forestry.
6 And they didn't really grill him about the possession of it,
7 is that they wanted other facts.

8 I think within five feet, didn't reach for it, and
9 ran away, is that it's mere presence. And I think
10 preponderance of the evidence that he didn't possess it in
11 connection with the offense, and that then the other factors
12 that I cited, he's not involved in CCE.

13 THE COURT: Yeah, well, he -- he otherwise qualifies.
14 It all stands or falls on the gun.

15 MR. HOMOLA: I totally agree with, Your Honor. And I
16 could not find any marijuana cases.

17 The other things about even under the mattress or in
18 there, or the one case where it's in a sealed container that
19 had drugs, and the client said, Well, I didn't know about it,
20 is that -- you know, someone else packaged it. I was supposed
21 to take the box with the drugs in it.

22 But you know, like on page 5, line 10 of my
23 supplemental, contends that "the evidence connected
24 Gomez-Rodriguez to the firearm consists of proximity, alone,
25 and is not enough quantum of evidence that's presented in

1 Cazares, Zavala-Rodriguez, found insufficient to qualify the
2 defendants for safety valve."

3 MS. MONTOYA: I might agree with that argument if he
4 didn't admit that he had handled the firearm and knew of its
5 presence.

6 And Your Honor, I don't have -- I did not go back and
7 review the photographs -- if there were photographs. I took
8 over this case late, and so I apologize, because I don't have
9 additional information as to whether or not the firearm was
10 out in the open or not. I could -- again, I should have
11 looked into that, but I did not. I'm happy to do that if that
12 would assist the Court.

13 MR. HOMOLA: But the photographs -- unless my client
14 is in the photographs and it's date and time-stamped that the
15 mere fact that it's -- that wherever it is on that particular
16 photograph, I don't think would implicate my client unless
17 it's within the three-day period before his arrest.

18 MS. MONTOYA: Well, I -- I don't know if photographs
19 existed as far as whether or not the agents took photographs
20 when they went into -- those are the photographs I'm -- any
21 photographs I'm referring to.

22 MR. HOMOLA: You're talking about at the time of the
23 arrest?

24 MS. MONTOYA: Yes.

25 MR. HOMOLA: Okay. Whatever we can do to help the

1 Court, Your Honor.

2 I think also the preponderance of the evidence is
3 that no prior criminal history of the client that -- you know,
4 wasn't convicted of prior offenses, prior drug offenses things
5 like that.

6 THE COURT: Under *United States vs. Terry* 911 F.2d
7 272, at 279, Ninth Circuit 1990, mere proximity presence on
8 property where something is found an association with a person
9 or persons having control of it are all insufficient to
10 establish constructive possession. The more difficult
11 situation where premises are shared by more than one person,
12 Ninth Circuit has found that if a party has knowledge of the
13 weapon, and both the power and intention to exercise dominion
14 and control over it then he has constructive possession.

15 That's *Terry* at 278.

16 And under *Carrasco*, cited by the defense, the
17 defendant must show by a preponderance of the evidence that he
18 did not possess a firearm or other dangerous weapon in
19 connection with the offense in order to show his eligibility
20 for safety valve relief.

21 And in *Ferryman*, which the government cites here, in
22 most cases or ordinarily, a 2D1.1(b)(1), upward adjustment
23 will defeat application of safety valve. But *Nelson* makes it
24 clear that that's not always the case.

25 MS. MONTOYA: Your Honor, there were photographs, and

1 I'm attempting to scroll through them now. I don't know if --

2 THE COURT: I -- let me say two things. You know, I
3 thought I was prepared to decide this, and I'm not sure that I
4 am.

5 I wish -- I wish it didn't make quite as such a
6 substantial difference as it does. It's -- you know, triple
7 basically, or close to it.

8 MR. HOMOLA: If I may, Your Honor, is that I've even
9 contacted a member of the United States Sentencing Commission
10 and talked to him about this. And gave him a copy of my
11 supplemental brief before I filed it. I talked to him and
12 he's basically a friend of a friend, and he looked over that,
13 and he did not give me any further information about this.

14 THE COURT: Yeah.

15 MR. HOMOLA: So I don't know what else I can present
16 to the Court, but I'm willing and able to postpone it, or do
17 anything to assist the Court. If I --

18 THE COURT: Obviously, I've love for it to be
19 resolved, but understanding that that is unlikely under the
20 circumstances.

21 MR. HOMOLA: Well, I personally --

22 THE COURT: If there are photographs of the scene as
23 well as any indication from the officers about where that gun
24 was at the time they entered the camp and what -- whether it
25 was out in the open, in plain view, you know, was it -- was it

1 literally five feet away from the defendant, in plain view
2 when they entered the camp? Or was it, yeah, it was five feet
3 away, but -- but it was not necessarily otherwise associated
4 with him? All these things -- I mean, it's razor thin.

5 And I understand it is the defense's burden. It's
6 not the government's burden. It's the defense burden. And
7 I've got to tell you, Mr. Homola, my -- I keep trending
8 towards, yeah, it's a close call. But it's defense burden by
9 a preponderance of the evidence. There's got to be something
10 in the evidence that indicates that it's more likely than not
11 that it wasn't possessed by the defendant in connection with
12 the -- with the offense.

13 And if it's equally -- even if it's equally
14 plausible, the defense is losing that argument.

15 MR. HOMOLA: Well, I would think -- and Ms. Montoya,
16 like she said, she came in late. Ms. Schuh had the case for a
17 considerable amount of time. I believe at the debriefing we
18 talked to the forestry people and said that no fingerprints
19 were taken off the gun, which would, you know --

20 THE COURT: Although he's admitted to handling it.

21 MR. HOMOLA: He admitted, his words was "touching."

22 THE COURT: Touching.

23 MR. HOMOLA: But he also admitted he never fired it.

24 So I'm going with the information that -- the
25 extensive police reports and the very good probation report.

1 And particularly, I know it's my burden but, you
2 know, the other cases that I've cited, you know, that -- you
3 know, had more quantum of evidence against him and safety
4 valve was still granted by the Court. It's -- it's the tough
5 decision that Your Honor has to make.

6 THE COURT: See, I don't see any of those. I see
7 cases where the Courts have sent it back saying, no, the
8 district court erred, because the district court relied upon
9 the 2D1.1 upward adjustment, and that's inconsistent with the
10 law.

11 I don't see any cases where there's even less -- or
12 even more evidence of possession where Courts have said, yeah,
13 that's still -- that's enough for safety valve eligibility and
14 preponderance of the evidence on the defense side. Which
15 cases are you telling me that you think --

16 MR. HOMOLA: I agree with the Court's comment, is
17 that I was looking at page 4 of my supplemental, but that
18 concerns in connection with the offense which doesn't preclude
19 a safety valve.

20 So I do not have a definitive case that would be the
21 bright-line rule for the Court to follow.

22 THE COURT: Mr. Gomez Rodriguez, I especially
23 apologize to you, because I know you've now appeared twice
24 before me for sentencing.

25 I am very much struggling with this. Mr. Homola, I

1 think if you want me to find safety valve eligibility, you're
2 going to have to submit a declaration from the defendant, or
3 put him on the stand to testify subject to cross-examination,
4 or a declaration subject to cross-examination, and maybe even
5 call the officers who executed the search, and -- because I --
6 as a factual matter, I -- if I had to decide right now, I
7 don't believe the defense has satisfied a preponderance of the
8 evidence standard that the firearm was not possessed by this
9 defendant in connection with these offenses.

10 I think it's a close call, but if it's going to be
11 more likely than not under the preponderance standard, I don't
12 think I'm there yet.

13 MR. HOMOLA: Okay. Well, then what I will suggest,
14 and with the Court's calendar and Ms. Montoya's calendar, I
15 would suggest either July 5th, because what I'd do is that I
16 would subpoena the two officers and debrief them -- and both
17 nice people. They were at both of the debriefings, and they
18 are very familiar with the case -- and to present a
19 declaration from the client. So having all that in mind, I
20 would suggest the date of Monday, July 18th.

21 MS. MONTOYA: I'm not available that day, Your Honor.

22 THE COURT: I can specially set this if we need to.

23 MS. MONTOYA: I'm out the 18th and the 19th of July.

24 THE COURT: I'd be willing to specially set it.

25 THE CLERK: The Court is not available June 18th due

1 to the Ninth Circuit conference.

2 THE COURT: How about the prior week?

3 THE CLERK: We can possibly set it on Tuesday, July
4 12th, at nine o'clock.

5 MR. HOMOLA: I'm free all day, Your Honor, if
6 Ms. Montoya --

7 MS. MONTOYA: That date is agreeable, Your Honor.

8 THE COURT: Let's set July 12th, at nine o'clock.
9 I'll set it. If it turns out that the individuals who would
10 testify are not available, then just contact Mamie, and
11 identify a date that both I'm available and they're available.
12 And I'll keep this one, because even -- whenever the
13 reassignment starts happening -- I don't think it will happen
14 that soon, but even if it's after that, I'll keep this one,
15 because I've put a lot of time into it already.

16 MR. HOMOLA: Okay. And I'll contact Ms. Montoya.
17 And I think maybe Ms. Montoya and I may do a joint phone call
18 to the -- to the forestry people and see if any kind of
19 declaration, or if they have specific pages of police reports
20 to submit to the Court.

21 There will be a declaration by my client, and I'll
22 see what I can get from his brother who is also the
23 co-defendant that I think -- the 1st of August.

24 So I thank the Court for its time and indulgence on
25 this matter.

1 THE COURT: Well, I'm sorry I'm not ready to decide
2 it.

3 MR. HOMOLA: Well, I thank the Court for its hard
4 work on doing this. Putting my feet even farther into the
5 fire. So we'll get it done, Your Honor.

6 THE COURT: All right. Thank you, Ms. Montoya.

7 MS. MONTOYA: Thank you, Your Honor.

8 MR. HOMOLA: Thank you.

15 MR. HOMOLA: We waive time until.

16 THE COURT: You can let the guards there know we're
17 done with your case for today, sir.

18 MR. HOMOLA: Thank you, Your Honor.

19 Thank you, Ms. Montoya.

20 Thank you, Mamie.

21 (Proceedings concluded at 10:23 a.m.)

22 I, RACHAEL LUNDY, Official Reporter, do hereby certify the
23 foregoing transcript as true and correct.

24 Dated: December 6, 2022

/s/ Rachael Lundy
RACHAEL LUNDY, CSR-RPR

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

HECTOR MANUEL GOMEZ RODRIGUEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Petition for A Writ of *Certiorari* to The United States Court of Appeals for
the Ninth Circuit**

PROOF OF SERVICE

I, David A. Schlesinger, declare that on March 26, 2024, as required by Supreme Court Rule 29, I served Petitioner Hector Manuel Gomez Rodriguez's MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on counsel for Respondent by depositing an envelope containing the motion and the petition in the United States mail (Priority, first-class), properly addressed to her, and with first-class postage prepaid.

The name and address of counsel for Respondent is as follows:

The Honorable Elizabeth B. Prelogar, Esq.
Solicitor General of the United States
United States Department of Justice
950 Pennsylvania Ave., N.W., Room 5614
Washington, DC 20530-0001
Counsel for Respondent

Additionally, I mailed a copy of the motion and the petition to my client, Petitioner Hector Manuel Gomez Rodriguez, by depositing an envelope containing the documents in the U.S. mail, first-class postage prepaid, and sending it to the following address:

Hector Manuel Gomez Rodriguez
Federal Inmate Register No. 78327-097
USP Lompoc
U.S. Penitentiary
3901 Klein Blvd.
Lompoc, CA 93436

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 26, 2024



DAVID A. SCHLESINGER
Declarant