

No.

IN THE
Supreme Court of the United States

JESUS ROBELDO AGUILAR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In a memorandum disposition, a three-judge panel of the Ninth Circuit dismissed Petitioner-Appellant Jesus Aguilar’s claim that he was entitled to safety valve relief in a single sentence, reasoning that Mr. Aguilar was disqualified because he “agreed to smuggle [] drugs, drug proceeds, and firearms between California and Washington.” (App.3a.) That conclusion conflicts with the Tenth Circuit’s recent published opinion in *United States v. Martinez*, 82 F.4th 994 (10th Cir. 2023). In *Martinez*, multiple weapons were found alongside the defendant’s drugs in a residence to which he had access. Despite close proximity between the guns and drugs at issue, the Tenth Circuit held that the defendant was entitled to safety valve relief because constructive possession of weapons—as opposed to actual possession—is insufficient to preclude application of the safety valve.

The Ninth Circuit and Tenth Circuit’s decisions are in conflict, and this Court must grant certiorari to resolve a Circuit split on the following question:

Does simultaneous constructive possession of drugs and firearms disqualify a defendant for safety valve relief?

RELATED CASES STATEMENT

- *United States of America v. Jesus Robledo Aguilar*, No. 2:21-cr-00113-GW, U.S. District Court for the Central District of California. Judgment entered on Nov. 10, 2022.
- *United States of America v. Jesus Robledo Aguilar*, No. 22-50268, U.S. Court of Appeals for the Ninth Circuit. Judgment entered on Jan. 30, 2024.

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PETITION FOR A WRIT OF CERTIORARI

Jesus Robledo Aguilar petitions for a writ of certiorari to review the judgment and disposition of the United States Court of Appeals for the Ninth Circuit in his case.



OPINIONS BELOW

The Ninth Circuit's unpublished Memorandum disposition in *United States v. Jesus Robledo Aguilar*, 22-50268 (9th Cir. 2024), is reproduced below at App.1a. The excerpt from the reporter's transcript from the sentencing hearing, dated November 10, 2022, U.S. District Court Central District of California, is reproduced below at App.5a.



JURISDICTION

The Ninth Circuit issued its memorandum disposition on January 30, 2024. (App.1a.) The court denied Mr. Aguilar's petition for panel rehearing/rehearing en banc on March 7, 2024. (App.9a.) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).



STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 3553(f):

(f) Limitation on Applicability of Statutory Minimums in Certain Cases.— Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846), section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960,

963), or section 70503 or 70506 of title 46, the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under SECTION 994 OF TITLE 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that—

(1) the defendant does not have—

(A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines;

(B) a prior 3-point offense, as determined under the sentencing guidelines; and

(C) a prior 2-point violent offense, as determined under the sentencing guidelines;

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of

a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

Information disclosed by a defendant under this subsection may not be used to enhance the sentence of the defendant unless the information relates to a violent offense.



INTRODUCTION

This case presented a single question to the Ninth Circuit on a question of first impression: whether a defendant's simultaneous constructive possession of narcotics and firearms precludes application of the safety valve?

Petitioner-Appellant Jesus Aguilar drove from Washington to California with both drugs and weapons concealed in his vehicle. Mr. Aguilar had purchased the firearms lawfully at the behest of his co-conspirator, for whom he had also agreed to transport drug proceeds and weapons across state lines. At the behest of a second co-conspirator, Mr. Aguilar transported narcotics as well.

Mr. Aguilar neither planned to, nor in fact ever, used the weapons to protect himself or the drugs he carried. The firearms were unloaded, and completely inaccessible to him—they were wrapped in bubble wrap, then wrapped again in plastic wrap, and hidden inside a spare tire beneath the truck he drove. Mr. Aguilar did not possess any ammunition.

The Probation Office concluded, in light of these facts, that Mr. Aguilar qualified for safety valve relief, finding that Mr. Aguilar’s drug offense was not “in connection with” his firearms possession. The district court disagreed, finding that Mr. Aguilar’s transportation of drugs and weapons was part and parcel of the same course of conduct. After concluding that Mr. Aguilar did not qualify for the safety valve, the district court imposed the applicable 120-month mandatory minimum sentence. The court made clear, however, that a ten-year sentence violated the parsimony principle, and invited Mr. Aguilar to appeal.

The district court’s refusal to afford Mr. Aguilar safety valve relief was clear error. By its plain terms, the safety valve’s exception applies only where the defendant’s drug offense is “linked or associated with” his firearms possession. Here, Mr. Aguilar was no more than a mule or courier and, while he transported cargo that contained both guns and drugs, there was no link or association between the two. They were separate crimes, and the only link between them was Mr. Aguilar’s constructive possession. The safety valve should have applied.

Despite their obvious merit, a three-judge panel of the Ninth Circuit rejected Mr. Aguilar’s arguments in a memorandum disposition. Mr. Aguilar filed a timely petition for panel rehearing and rehearing en banc, alerting the panel and the full court that the Tenth Circuit had reached the opposite conclusion as to the safety valve’s application to crimes of constructive possession in *Martinez*.

Mr. Aguilar’s petition was denied, creating a split between the Ninth and Tenth Circuits. This petition follows.



STATEMENT OF THE CASE

A. Mr. Aguilar's Charged Conduct.

As relevant here, on or about November 26, 2018, Mr. Aguilar and lead defendant Rigoberto Martinez engaged in discussions regarding the transportation and sale of large-scale quantities of cocaine across state lines. (PSR-15.¹) On Martinez's behalf, Mr. Aguilar agreed to purchase and transport ten kilograms of cocaine from the Central District of California to Washington State. (*Id.*) Mr. Aguilar planned to hide the cocaine in a secret compartment in a spare tire of his vehicle. (*Id.*)

Mr. Aguilar also agreed to use the secret compartment to subsequently transport drug proceeds and firearms back from Washington to California, where he planned to give them to Martinez. (*Id.*) That same day, Mr. Aguilar transported the narcotics from California to Washington, as agreed. (*Id.*)

On November 27, 2018, Mr. Aguilar met with multiple co-conspirators at Martinez's direction, distributing approximately 10 kilograms of cocaine and receiving approximately \$240,160 in return. (*Id.*)

Mr. Aguilar also agreed to meet with another co-conspirator to obtain the firearms that he was to transport for Martinez. (*Id.*) In a phone call with Martinez following that meeting, Mr. Aguilar advised Martinez that an unidentified co-

¹ PSR refers to the Presentence Report. ER refers to the Appellant's excerpts of record.

conspirator was sending back a single kilogram of cocaine along with the firearms.

(Id.)

While driving back to California from Washington, Mr. Aguilar was stopped by officers in Oregon. (PSR-16.) A search of his vehicle yielded \$240,160 in drug proceeds, two firearms, two empty magazines, and approximately 1,006.4 grams of cocaine, concealed in a spare tire beneath the truck. *(Id.)*

The firearms were inaccessible to Mr. Aguilar during his journey. Not only were they located beneath the vehicle, they were also wrapped first in bubble wrap, and then again in plastic wrap. *(Id.)* The magazines were unloaded and wrapped separately from the firearms, also in bubble wrap and plastic wrap. *(Id.)* Mr. Aguilar possessed no bullets or ammunition. *(Id.)*

B. Mr. Aguilar's Indictment and Prosecution.

On March 10, 2021, Mr. Aguilar was named in Counts 1, 11, and 14 through 17 of a 20-Count indictment. (ER-146).

On January 31, 2022, pursuant to a plea agreement, Mr. Aguilar pled guilty to Counts 1 and 11 of the indictment, which charged him with distributing a controlled substance, in violation of 21 U.S.C. §§ 841, 846, and transporting firearms across state lines, in violation of 18 U.S.C. § 371. (ER-128.) In his plea agreement, Mr. Aguilar acknowledged that he drove from Washington to California in possession of just over one kilogram of cocaine, \$240,160 in drug proceeds, two handguns, and two magazines; that he had those items concealed within a spare tire beneath his truck; and, that he intended, when he arrived in California, to give them to Martinez. (ER-135.)

C. The Presentence Report.

On June 6, 2022, the United States Probation Office disclosed its Presentence Report and Sentence Recommendation Letter. Therein, Probation wrote, “[t]he Probation Officer can independently assess that . . . Aguilar did not possess a firearm in connection with the drug distribution offense.” (PSR-18; *see also* PSR-52 (“The Probation Officer agrees that the guns identified in the offense conduct section do not preclude [Mr. Aguilar’s] eligibility for safety valve.”).) In a subsequently-filed addendum, Probation set forth the following reasoning:

In order to be ineligible for safety valve, the firearms must have been possessed in connection with the drug distribution offense. Here, the firearms were wrapped in bubble wrap and then clear plastic wrap. The magazines were unloaded, and wrapped separately from the firearms, also in bubble wrap and plastic wrap. Aguilar did not possess any ammunition. Aguilar would not have any access to the firearms while driving. Given the foregoing, there appears to be insufficient evidence to conclude that the firearms in this case were connected to the drug distribution offense.

(PSR-54.)

D. Mr. Aguilar’s Sentencing Proceedings.

During Mr. Aguilar’s sentencing proceedings, the parties heavily disputed whether Mr. Aguilar was eligible for “safety valve” relief under 18 U.S.C. § 3553(f) and U.S.S.G. § 5C1.2, which would have allowed the district court to sentence Mr. Aguilar below the otherwise-applicable mandatory minimum of 120 months, and to reduce his offense level by two, respectively. (ER-14-15.)

The government took the position “that [Mr. Aguilar’s] simultaneous commission of the interstate firearm transportation conspiracy with his codefendant

from the drug case preclude[d] application of the safety valve.” (ER-37.) Specifically, the government averred that:

Because of his admission of the conduct in the factual basis, defendant cannot now claim that he is able to prove, even by a preponderance of the evidence, that he did not possess the firearms in connection with the drug offense . . . [T]he purchases of firearms in Spokane were tied to his trips to deliver drugs to Spokane. . . . His transport of the firearms constituted an additional crime he was committing with and on behalf of his drug co-conspirator Martinez. And defendant was further helping Martinez commit a further crime of illegally possessing a firearm in southern California.

(ER-50.)

The defense countered that, to be eligible for safety valve relief, the possession of a firearm must be “in connection with the offense,” meaning the possession of firearms should have the potential to facilitate the offense and not be incidental to it. (ER-64.) Mr. Aguilar’s conduct failed to meet this standard, the defense explained, because:

Aguilar . . . never used, or threatened to use, violence. He never intimated any intent to possess firearms in order to protect himself or any contraband, nor is there any circumstantial evidence to suggest his possession was for that reason. He had the legal right to purchase the firearms and magazines. The firearms were unloaded, and Aguilar did not have any ammunition/bullets with him. Moreover, the firearms and magazines he purchased were completely inaccessible to him – wrapped in bubble wrap and hidden inside a spare tire beneath the truck he was driving. And the record suggests Aguilar purchased the firearms and magazines because a co-defendant asked him to, and was bringing them back to give to that co-defendant.

(ER-66.)

The district court ultimately determined that Mr. Aguilar was not eligible for safety valve because he had failed to establish, “by preponderance of the evidence, that the firearms were not connected with the crime charged,” and imposed the

applicable mandatory minimum sentence of 120 months. (ER-15; ER-25.) The district court made clear that the sole basis for its refusal to apply the safety valve was “the connection of the firearms with the drug crime.” (ER-21.) Focusing on the fact that “the purchase of the guns [was] discussed between the defendant and the co-conspirator, and proceeds of the sale of drugs were used to purchase those items,” the court concluded that “the handguns were involved in the crime” and were “part and parcel of the same course of conduct.” (ER-15; *see also* ER-22 (“[T]his is not a situation where it’s two separate incidents . . . This is all part and parcel of the same endeavor.”).)

After imposing 120 months of incarceration, the district court made clear that Mr. Aguilar’s sentence violates the parsimony principle and that, were the Ninth Circuit to reverse and remand, it would impose a lesser sentence. (*See* ER-25 (“I would not sentence you to 120 months if you met safety valve, but for the reasons I have said, I don’t think you do qualify, but there may be an Appellate Court that says I’m wrong, and if that is the case, they will send the case back to be [*sic*], and I will sentence you to 120 months.”).)



REASONS FOR GRANTING THE WRIT

The Ninth Circuit’s three-judge panel dismissed Mr. Aguilar’s claim that he was entitled to safety valve relief in a single sentence, reasoning that Mr. Aguilar was disqualified because he “agreed to smuggle [] drugs, drug proceeds, and firearms between California and Washington.” (App.3a.) That conclusion conflicts with the Tenth Circuit’s published opinion in *United States v. Martinez*, 82 F.4th 994 (10th

Cir. 2023). In *Martinez*, multiple weapons were found alongside the defendant's drugs in a residence located on a ranch that the defendant once owned, and to which he maintained access. Despite close proximity between the guns and drugs at issue, the Tenth Circuit held that the defendant was entitled to safety valve relief because constructive possession of weapons—as opposed to actual possession—is insufficient to preclude application of the safety valve.

Mr. Aguilar, like Mr. Martinez, had mere constructive possession of the firearms that he transported from Washington to California. Those firearms were unloaded, wrapped in bubble wrap, and secreted alongside narcotics inside a storage compartment in the vehicle he drove. If anything, the connection between the guns and drugs at issue in *Martinez* is far less attenuated than the connection at issue here. The mere fact that Mr. Aguilar constructively possessed drugs alongside firearms should not preclude safety valve relief. The Ninth Circuit panel wrongfully concluded otherwise.

Because the panel's Memorandum decision denying safety valve relief creates a conflict with a published decision of the Tenth Circuit, this Court should grant certiorari to resolve the split. Upon doing so, the Court should rule in favor of the Tenth Circuit's well-reasoned precedent.

A. The Ninth Circuit's disposition creates a needless split among the Circuits.

The facts of Mr. Aguilar's case are not meaningfully distinguishable from *Martinez*, and the application of the safety valve should not depend upon whether the defendant possesses guns and drugs in close proximity to one another in the Ninth Circuit or the Tenth Circuit.

Mr. Aguilar drove from Washington to California with both drugs and weapons concealed in his vehicle. He neither planned to, nor in fact ever, used the weapons to protect himself or the drugs he carried. The weapons were unloaded and completely inaccessible to him—they were wrapped in bubble wrap, then wrapped again in plastic wrap, and hidden inside a spare tire beneath the truck he drove. Mr. Aguilar did not possess any ammunition.

Even though mere proximity was the key connection between the guns and drugs Mr. Aguilar transported, the district court denied safety valve relief and the three-judge panel affirmed. The panel reasoned, by way of citation, that the “circumstances in which the firearms were found . . . may serve as grounds for concluding that firearms were possessed in connection with the offense of conviction,” App. 3a (quoting *United States v. Fernandez*, 526 F.3d 1247, 1252 (9th Cir. 2008)), but did not explain why or how Mr. Aguilar’s firearms transportation created the requisite connection with his narcotics offense.

In an analogous case, the Tenth Circuit reached the opposite conclusion in a published opinion. In *Martinez*, the defendant constructively possessed several firearms that the police found in close proximity to his stashes of drugs and cash, all of which were located in a residence that the defendant used to own and to which he maintained access. 82 F.4th at 1005-06. The government argued that the circumstances of the offense supplied the requisite connection between the guns and drugs, and that the court should infer the defendant’s active dominion and control

over both. *Id.* at 1006. The court declined to do so, and reversed and remanded with instructions that the safety valve should be applied. *Id.* at 1007.

Mr. Aguilar's case bears striking similarities. Mr. Aguilar, like Mr. Martinez, constructively possessed both guns and drugs, which in Mr. Aguilar's case were hidden in the secret compartment of his vehicle. Both were inaccessible to him and separately wrapped. Nothing about the attendant circumstances of the offense gave rise to an inference that the guns facilitated Mr. Aguilar's commission of narcotics trafficking. The opposite is true—Mr. Aguilar merely trafficked in both guns and drugs simultaneously.

Were mere simultaneous constructive possession of guns and drugs enough to preclude application of the safety valve, *Martinez* would have been decided differently.

This Court should not permit a baseless conflict with a well-reasoned decision of the Tenth Circuit to stand, and Mr. Aguilar should not face a vastly harsher sentence because of geographical happenstance. Instead, this Court should grant certiorari.

B. This Court should affirm the rule of the Tenth Circuit, and reject the Ninth Circuit's ill-supported decision.

18 U.S.C. § 3553(f) provides the statutory basis for safety valve relief from mandatory minimum sentences. It states that, if each of its criteria are met, “the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission ... without regard to any statutory minimum sentence....” 18 U.S.C. § 3553(f). These criteria are: (1) the defendant does not have

more than one criminal history point; (2) the defendant did not use violence or possess a firearm in connection with the offense; (3) the offense did not result in death or serious bodily injury to a person; (4) the defendant was not a leader in the offense and was not engaged in a continuing criminal enterprise; and (5) the defendant has truthfully provided to the Government all information and evidence that he has concerning the offense. *See* 18 U.S.C. § 3553(f); *see also* U.S.S.G. § 5C1.2 (implementing 18 U.S.C. § 3553(f)).

Only the second criterion, whether Mr. Aguilar possessed a firearm in connection with the offense, is at issue here. “To qualify for safety valve relief under U.S.S.G. § 5C1.2, the burden is ... on the defendant to prove, ... by a preponderance of the evidence, that he did not possess a firearm in connection with the offense.” *United States v. Ferryman*, 444 F.3d 1183, 1186 (9th Cir. 2006). The phrase “in connection with” is not defined in the statute or correlating Sentencing Guideline. Typically, therefore, courts conduct a fact-bound and contextual inquiry, focusing on details like “the circumstances in which the firearms were found,” the “implausibility of the defendants’ explanations” for how the guns were unconnected to the drugs, or the types or quantity of weapons possessed. *Id.*; *see also United States v. Fernandez*, 526 F.3d 1247, 1252 (9th Cir. 2008) (same). Courts have described “in connection with,” for purposes of safety valve eligibility, as involving a “close connection linking the individual defendant, the weapon and the [drug] offense.” *United States v. Zavalza-Rodriguez*, 379 F.3d 1182, 1187 (10th Cir. 2004).

Although the safety-valve inquiry is inherently fact-bound, Mr. Aguilar’s case presents a threshold question of statutory interpretation. What does “in connection with” mean? The answer derives from the plain meaning of the statutory text. *See McDonald v. Sun Oil Co.*, 548 F.3d 774, 780 (9th Cir. 2008) (“The preeminent canon of statutory interpretation requires us to presume that [the] legislature says in a statute what it means and means in a statute what it says there. Thus, our inquiry begins with the statutory text, and ends there as well if the text is unambiguous.”) (quoting *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) (internal quotation marks omitted)).

The Oxford Languages English Dictionary defines “connection” as “a relationship in which a person, thing, or idea is linked or associated with something else.”² The Court must determine, therefore, whether the facts of Mr. Aguilar’s offense conduct give rise to an inference that his drug offense was “linked or associated” with his firearms possession. The simple answer is no.

Mr. Aguilar transported cocaine to Washington for Martinez, and returned with weapons and drug proceeds at Martinez’s behest. The drugs that officers discovered in Mr. Aguilar’s spare tire together with the weapons were a late addition at the behest of an unindicted co-conspirator, and the proximity of the drugs and weapons was merely incidental. Indeed, Mr. Aguilar’s role in the drug conspiracy was that of mule or courier, and the fact that he carried both drugs and guns on the day of his apprehension was pure coincidence.

² See <https://languages.oup.com/google-dictionary-en>.

The additional facts and circumstances attendant to Mr. Aguilar's offense underscore this conclusion. Mr. Aguilar did not use the firearms for protection from the dangers of the drug trade. He could not plausibly have done so, since the weapons were unloaded, wrapped in bubble wrap and then plastic wrap, and hidden in a compartment below his vehicle, far out of reach. It is for this reason that the Probation Department concluded that Mr. Aguilar was eligible for safety valve relief.

Mr. Aguilar did not, moreover, proffer an implausible explanation for the guns' use – he admitted that he transported both the guns and drugs across state lines, but explained that he neither used, nor planned to use, the firearms at all. This explanation was consistent with their storage in the hidden compartment of his vehicle. *Cf. Fernandez*, 526 F.3d at 1252 (“[T]he guns found in Fernandez's residence were far from the kind or quantity associated with family protection; they included, as noted, not just a revolver, but two rifles and two protective vests. While Fernandez may simply have sought to overwhelm any would-be burglar in steadfast devotion to his kindred's welfare, we are satisfied the district court did not clearly err in deeming such explanation implausible.”); *Ferryman*, 444 F.3d at 1186-87 (rejecting the defendant's explanation that eleven firearms found in his residence, six of which were loaded, were for his family's protection); *United States v. Smith*, 175 F.3d 1147, 1148-49 (9th Cir.1999) (rejecting the defendant's explanation that a gun found in his backpack was not connected to his marijuana garden but instead was used to shoot snakes, where the “nature of the gun was more in the form of a potential weapon than it was ... a sporting type of gun” (internal quotation marks omitted)).

The facts and circumstances of Mr. Aguilar’s offense conduct thus bely any notion that his commission of drug trafficking was “linked or associated” with his firearms possession, and the district court’s overly broad interpretation of the safety valve provision—and the Ninth Circuit’s subsequent affirmance—effectively rendered its exception meaningless.

The statutory scheme further underscores this conclusion. Courts often compare the safety valve provision to U.S.S.G. § 2D1.1(b)(1), which authorizes a two-level enhancement to a defendant’s offense level if “a dangerous weapon (including a firearm) was possessed.” Although they share somewhat similar language, sections 2D1.1(b)(1) and 5C1.2(a)(2) have different burdens of proof. To avoid the enhancement under section 2D1.1(b)(1), the defendant must prove it is “clearly improbable” he possessed a firearm in connection with the offense. *See id.*, cmt. 11(A) (“The enhancement should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense.”). But with respect to the safety valve, the defendant need only show by a preponderance of the evidence that he did not possess a firearm in connection with the offense. *See Ferryman*, 444 F.3d at 1186; *United States v. Nelson*, 222 F.3d 545, 550 (9th Cir. 2000). Therefore, the standard for thwarting the weapon-possession enhancement is generally higher for a criminal defendant – it is possible to possess a firearm for purposes of the enhancement under U.S.S.G. § 2D1.1(b)(1) but not “in connection with” a drug offense for purposes of safety valve relief. *See Nelson*, 222 F.3d at 551; *Zavalza-Rodriguez*,

379 F.3d at 1188 (“The scope of activity covered by § 2D1.1 is broader than the scope of activity covered by § 5C1.2.”).

If the safety valve is meant to reach less activity than section 2D1.1(b)(1), it must encompass something more than mere constructive possession of guns and drugs during a single course of conduct. Yet that is precisely why the Ninth Circuit found Mr. Aguilar to be ineligible for safety valve relief. (*See* ER-15 (“I don’t see how the Court could not find that the drugs – I mean, the handguns were involved in the crime. It was part and parcel of the same course of conduct.”).)

In sum, both the statute’s plain text and the surrounding statutory scheme compel the conclusion that the safety valve applies to Mr. Aguilar’s case. The district court therefore clearly erred in finding him ineligible for safety valve relief, and the Ninth Circuit erred in affirming. Had Mr. Aguilar been tried and convicted in the Tenth Circuit, however, his fate would have been altogether different. Certiorari should therefore be granted.



CONCLUSION

For the foregoing reasons, the Court should issue a writ of certiorari to the Ninth Circuit.

Respectfully submitted

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APPENDIX

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FILED

NOT FOR PUBLICATION

JAN 30 2024

UNITED STATES COURT OF APPEALS

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

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JESUS ROBELDO AGUILAR, AKA
Jesse Aguilar,

Defendant-Appellant.

No. 22-50268

D.C. No. 2:21-cr-00113-GW-5

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
George H. Wu, District Judge, Presiding

Submitted January 9, 2024**
Pasadena, California

Before: RAWLINSON, MELLOY, *** and H.A. THOMAS, Circuit Judges.

Jesus Robeldo Aguilar (Aguilar) pled guilty to conspiracy to distribute and

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

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Michael J. Melloy, United States Circuit Judge for the U.S. Court of Appeals for the Eighth Circuit, sitting by designation.

possess with intent to distribute controlled substances in violation of 21 U.S.C. § 846 and 18 U.S.C. § 371. He now appeals the district court’s denial of safety valve relief under 18 U.S.C. § 3553(f). We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

“We review de novo whether an appellant has waived his right to appeal pursuant to the terms of a plea agreement . . .” *United States v. Wells*, 29 F.4th 580, 583 (9th Cir. 2022) (citation, alteration, and internal quotation marks omitted). “When reviewing sentencing decisions, we review the district court’s identification of the relevant legal standard de novo, its factual findings for clear error, and its application of the legal standard to the facts for abuse of discretion. . . .” *United States v. Vinge*, 85 F.4th 1285, 1288 (9th Cir. 2023) (citations omitted).

Aguilar argues that the district court’s remarks vitiated his appeal waiver. The enforceability of an appeal waiver may be invalidated by a district court’s statements, *see United States v. Buchanan*, 59 F.3d 914, 917-18 (9th Cir. 1995), and the “defendant’s reasonable expectations about his rights.” *United States v. Arias-Espinosa*, 704 F.3d 616, 618 (9th Cir. 2012) (citation omitted).

We need not decide whether the district court’s statements negated Aguilar’s

plea waiver because on the merits, the district court did not clearly err in finding that Aguilar was ineligible for safety valve relief. *See United States v. Ferryman*, 444 F.3d 1183, 1186 (9th Cir. 2006) (expressing that there must exist “a definite and firm conviction that a mistake has been made” for this Court to disturb the district court’s safety valve ruling) (citation omitted).

The district court is required to “impose a sentence pursuant to the sentencing guidelines without regard to any statutory minimum sentence” for specific drug offenses “if the defendant meets the criteria listed in § 3553(f)(1)-(5).” *United States v. Salazar*, 61 F.4th 723, 726 (9th Cir. 2023) (alterations omitted). The only criterion at issue is whether Aguilar “possessed a firearm in connection with the offense.” The record reflects that Aguilar agreed to smuggle the drugs, drug proceeds, and firearms between California and Washington. *See United States v. Fernandez*, 526 F.3d 1247, 1252 (9th Cir. 2008) (citation omitted) (“The circumstances in which the firearms were found . . . may serve as grounds for concluding that firearms were possessed in connection with the offense of conviction. . . .”) (citation, alteration, and internal quotation marks omitted); *see also United States v. Carrasco*, 257 F.3d 1045, 1048 (9th Cir. 2001) (“Firearms are known tools of the trade of narcotics dealing because of the danger inherent in that line of work. . . .”) (citation omitted).

AFFIRMED.

23 TERRI A. HOURIGAN, CSR NO. 3838, CCRR
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1 November 3rd, and I just was not able to set it up in time.

2 THE COURT: This is what I will say, I will base my
3 decision in this matter as if he was willing to proffer.

4 So I won't hold his failure to proffer up to this
5 point in time as a bar.

6 So, I won't use that as a basis. The only thing
7 that I'm basing his inability to qualify for safety valve is
8 the connection of the firearms with the drug crime.

9 So, that is the only basis, so if the defendant
10 wants to appeal, he has a basis to appeal this issue. Maybe
11 the Ninth Circuit will clarify this area if it needs further
12 clarification.

13 MR. AXELRAD: May I respond to some of the points?

14 THE COURT: Sure.

15 MR. AXELRAD: First of all, I don't want to get into
16 a big back and forth about the proffer, because it is
17 frustrating --

18 THE COURT: Let me stop you. Why are you getting
19 into the proffer because I indicated I'm not using the proffer
20 as a basis.

21 The only reason I'm finding safety valve -- he's
22 not eligible for safety valve -- is simply the gun issue.

23 Your proffer is off the table, so therefore, you
24 don't need to raise it on appeal, because the government is
25 indicating -- well, I have indicated to the government, insofar

1 THE COURT: Let me hear from the defendant, sir, is
2 there anything you wish to say to the Court before the Court
3 sentences you?

4 THE DEFENDANT: Well --

5 THE COURT: He can speak in the microphone.

6 THE DEFENDANT: I regret what I did. I'm ready to
7 face my consequences, you know.

8 THE COURT: All right. As I have indicated, I would
9 not sentence you to 120 months if you met the safety valve, but
10 for the reasons I have said, I don't think you do qualify, but
11 there may be an Appellate Court that says I'm wrong, and if
12 that is the case, they will send the case back to be, and I
13 will sentence you to 120 months.

14 Anything else you want to say?

15 THE DEFENDANT: No, sir.

16 THE COURT: Okay. For the record, I have considered
17 the materials that were presented to me by the government, the
18 defense, and the Probation Office.

19 I have considered the factors under 18, U.S.C.,
20 3553(a), and I will sentence as follows: First of all, I do
21 find that the guidelines calculation to a point from the
22 Probation Office is correct.

23 The guidelines range would be an offense level of
24 29, a Criminal History Category II, and equals guidelines range
25 of between 91 and 121 months. However, I do find in this

CERTIFICATE OF OFFICIAL REPORTER

3 COUNTY OF LOS ANGELES)
4 STATE OF CALIFORNIA)

6 I, TERRI A. HOURIGAN, Federal Official Realtime
7 Court Reporter, in and for the United States District Court for
8 the Central District of California, do hereby certify that
9 pursuant to Section 753, Title 28, United States Code that the
10 foregoing is a true and correct transcript of the
11 stenographically reported proceedings held in the
12 above-entitled matter and that the transcript page format is in
13 conformance with the regulations of the judicial conference of
14 the United States.

16 | Date: 20th day of January, 2023.

/s/ TERRI A. HOURIGAN

TERRI A. HOURIGAN, CSR NO. 3838, RPR, CRR
Federal Court Reporter

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

MAR 7 2024

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JESUS ROBELDO AGUILAR, AKA
Jesse Aguilar,

Defendant-Appellant.

No. 22-50268

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

D.C. No. 2:21-cr-00113-GW-5
Central District of California,
Los Angeles

ORDER

Before: RAWLINSON, MELLOY,* and H.A. THOMAS, Circuit Judges.

The panel voted to deny the Petition for Panel Rehearing.

Judges Rawlinson and Thomas voted to deny, and Judge Melloy
recommended denying, the Petition for Rehearing En Banc.

The full court has been advised of the Petition for Rehearing En Banc, and
no judge of the court has requested a vote.

Appellant's Petition for Panel Rehearing and Suggestion for Rehearing En
Banc, filed February 13, 2024, is DENIED.

* The Honorable Michael J. Melloy, United States Circuit Judge for the
U.S. Court of Appeals for the Eighth Circuit, sitting by designation.