

No._____

IN THE SUPREME COURT OF THE UNITED STATES

RICHARD VILLAREAL, 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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Richard Villareal 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 July 2, 2024.

PARTIES TO THE PROCEEDING

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

RELATED PROCEEDINGS

United States v. Villareal, U.S. District Court for the Western District of Texas, Number 2:22 CR 02981-DC-1, Judgment entered September 19, 2023.

United States v. Villareal, U.S. Court of Appeals for the Fifth Circuit, Number 23-507658, Judgment entered July 2, 2024.

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The unpublished opinion of the court of appeals is appended to this petition.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 July 2, 2024. This petition is filed within 90 days after the denial of rehearing. *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 . . . deprived of life, liberty, or property without due process of law.”

U. S. SENTENCING GUIDELINES PROVISION INVOLVED

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

STATEMENT

Petitioner Richard Villareal pleaded guilty to conspiring to possess methamphetamine with the intent to distribute it, a violation of 21 U.S.C. §§

841(b)(1)(C) and 846.¹ After Villareal entered his plea, a probation officer prepared a presentence report for the district court's use at sentencing. The officer found that the conspiracy involved the 62.7 grams that Villareal had possessed, as well as 4.1 kilograms of methamphetamine and a couple of hundred grams each of cocaine and heroin that a man named Miguel Vargas had in his house. Villareal had obtained his 62.7 grams from Vargas. The probation officer attributed all the Vargas drugs to Villareal as relevant conduct and assigned him a base offense level of 36. *See U.S.S.G. §1B1.3, §2D1.1(c)(2).*

The officer also recommended a two-level increase to Villareal's offense level because Vargas had two firearms in the closet of his bedroom in which he kept his methamphetamine. U.S.S.G. §2D1.1(b)(1). The officer recommended a three-level decrease to the offense level because Villareal had accepted responsibility for his offense. U.S.S.G. §3E1.1.

Villareal objected to the presentence report. He argued that the firearm increase was unwarranted because it was not reasonably foreseeable to him that Vargas would have firearms in his bedroom closet. The district court took up the objection at sentencing but overruled it. It held it was reasonably foreseeable to Villareal that Vargas would have a gun, and sentenced Villareal to 240 months' imprisonment, the statutory maximum punishment.

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

Villareal appealed, arguing that the district court had erred in its application of the firearm enhancement. The Fifth Circuit disagreed and affirmed the sentence. The court of appeals wrote that its precedent considers firearms “tools of the trade of those engaged in illegal drug activities.” *United States v. Aguilera-Zapata*, 901 F.2d 1209, 1215 (5th Cir. 1990) (citation omitted). Therefore, a coconspirator’s possession of a firearm is foreseeable to defendant ‘if the government demonstrates that the coconspirator knowingly possessed the weapon while he and the defendant committed the offense by jointly engaging in concerted criminal activity involving a quantity of narcotics sufficient to support an inference of intent to distribute.’” Appendix at 2 (quoting *United States v. Aguilera-Zapata*, 901 F.2d 1209, 1215 (5th Cir. 1990)) (cleaned up).

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.

United States 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 provides the analytical anchor for 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 himself 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 appeal mean that sentencing procedures and results vary from circuit to circuit. And the approach of the Fifth Circuit, which requires the least proof from the government, 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 himself possess a firearm, the Fifth Circuit applies a 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 some sort of 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. In the Fifth Circuit, a defendant can be punished for his coconspirator's gun possession on a presumption that those who deal in drugs should know those they interact with may have guns. Other circuits have rejected that approach as unfair and inconsistent with the requirements of due process and individual punishment. *Cf. Gall*, 552 U.S. at 52 (sentencing is always an individualized process); *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 under a tools-of-the-trade theory without evidence of awareness of a firearm “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 his 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 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 January 18, 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 January 18, 2022). These studies show that the Fifth Circuit's tools-of-the-trade presumption lacks factual as well as legal support.

Villareal's case is a good vehicle for resolving the circuit split. There is no evidence in the record that co-conspirator Vargas ever carried a gun around Villareal. There is no evidence that Vargas ever had a gun with him when he met with Villareal. There is no evidence in the record that Vargas made statements that should have alerted Villareal to the possibility that he might have a gun. There was no evidence that Villareal had ever been in the bedroom in which Vargas kept his firearms in a closet. Given this lack of evidence, Villareal'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 this Honorable 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: July 22, 2024.