No. --

IN THE

SUPREME COURT OF THE UNITED STATES

EMERENCIO ROSA, JR.,

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

APPENDIX

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-11344

United States Court of Appeals
Fif h Circuit
FILED
October 5, 2017
Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

EMERENCIO ROSA, JR.,

Defendant-Appellant

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:15-CR-499-1

Before DAVIS, CLEMENT, and PRADO, Circuit Judges

PER CURIAM:*

Emerencio Rosa., Jr., appeals the within-guidelines sentence of 42 months of imprisonment and a 3-year term of supervised release imposed on his guilty plea conviction for possession of a firearm after a felony conviction.[1] The sentence largely results from a base offense level of 20 fixed by the presentence report (PSR) under U.S.S.G. §§ 2K2.1(a)(4)(B)(i)(I) and (ii)(I) on the basis that Rosa was a convicted felon in possession of a semiautomatic

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

[1] *See* 18 U.S.C. §§ 922(g)(1), 924(a)(2).

weapon—a Glock 9-millimeter caliber pistol—together with a drum magazine for that firearm that can hold 50 rounds of ammunition, both of which investigators found in Rosa's bedroom.

A base offense level of 20 is proper if the Government shows that Rosa is a prohibited person and that his offense involved a semiautomatic firearm capable of accepting a large capacity magazine.[2] Rosa, a convicted felon, does not deny that he is a prohibited person. Assuming without deciding the commentary to § 2K2.1(a)(4)(B)(i)(I) is authoritative,[3] the Government is required to show that the semiautomatic firearm involved in Rosa's offense, i.e., the Glock 9-millimeter pistol, is capable of firing "many rounds without reloading."[4] That showing could be made by demonstrating that "at the time of the offense . . . a magazine or similar device that could accept more than 15 rounds of ammunition was in close proximity to the firearm."[5] Rosa has abandoned his district court argument that the drum magazine the investigators seized was not in close proximity to the pistol.[6]

The sole remaining question is whether the district court erred in its implicit determination that the Government met its burden of showing that the seized Glock pistol is capable of receiving the seized drum magazine, i.e., that they are compatible, and that the drum magazine can accept more than 15 rounds of ammunition.[7] The PSR stated that Rosa's offense involved the Glock semiautomatic firearm and that he possessed with it a drum magazine that can hold 50 rounds of ammunition. Rosa introduced no evidence to dispute

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[2] *See* U.S.S.G. § 2K2.1(a)(4)(B); *United States v. Rodriguez*, 630 F.3d 377, 380 (5th Cir. 2011).

[3] *Stinson v. United States*, 508 U.S. 36, 37–38 (1993).

[4] § 2K2.1 cmt. n.2.

[5] *Id.*

[6] *See United States v. Scroggins*, 599 F.3d 433, 446–47 (5th Cir. 2010).

[7] *See Rodriguez*, 630 F.3d at 380; *United States v. Castillo*, 430 F.3d 230, 238–39 (5th Cir. 2005).

the PSR as to this issue.[8] Instead, he argues that the evidence does not establish that anyone physically determined the large capacity drum magazine actually fit or could be accepted by the Glock firearm. He cites no precedent of our court requiring such a determination. Moreover, Collin County (Texas) Sheriff's Office Investigator Gerald Rutledge validated the PSR when he testified, based on his 25 years of experience with Glock pistols, that the drum magazine found in Rosa's bedroom is a Glock magazine made to hold more than 50 rounds and is compatible with the pistol found in the bedroom.

By adopting the PSR, the district court implicitly accepted Rutledge's testimony about the compatibility of the pistol and the drum magazine.[9] Rosa does not show that we should ignore precedent and not defer to the district court's credibility determination.[10] Nor does he show that the district court's finding about compatibility is implausible,[11] or that we could arrive at a definite and firm conviction that a mistake was made.[12] Rutledge emphasized that he had sufficient experience to be able to say that the Glock pistol at issue can accept the Glock drum magazine at issue. The district court was entitled to rely on that testimony.[13]

Additionally, Rosa asserts that 18 U.S.C. § 922(g) is unconstitutional because it regulates conduct falling outside the Government's power to regulate commerce and does not require a sufficient mens rea. He acknowledges that the claim is foreclosed by precedent and raises it to preserve it for further review.

AFFIRMED.

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[8] *See United States v. Angulo*, 927 F.2d 202, 204 (5th Cir. 1991).

[9] *See United States v. Ford*, 558 F.3d 371, 376–77 (5th Cir. 2009); *United States v. Lowder*, 148 F.3d 548, 552 (5th Cir. 1998); *see also* U.S.S.G. § 6A1.3.

[10] *See United States v. Juarez-Duarte*, 513 F.3d 204, 208 (5th Cir. 2008).

[11] *See United States v. Villanueva*, 408 F.3d 193, 203 (5th Cir. 2005).

[12] *See United States v. Coleman*, 609 F.3d 699, 708 (5th Cir. 2010).

[13] *See* U.S.S.G. § 6A1.3.

APPENDIX B

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

UNITED STATES OF AMERICA	§	**JUDGMENT IN A CRIMINAL CASE**
	§	
v.	§	
	§	Case Number: **3:15-CR-00499-M(1)**
EMERENCIO ROSA, JR.	§	USM Number: **50606-177**
	§	**John M. Nicholson (at sentencing)**
	§	Defendant's Attorney

THE DEFENDANT:

☐	pleaded guilty to count(s)	
☒	pleaded guilty to count(s) before a U.S. Magistrate Judge, which was accepted by the court.	**Count 1 of the Indictment, filed November 4, 2015**
☐	pleaded nolo contendere to count(s) which was accepted by the court	
☐	was found guilty on count(s) after a plea of not guilty	

The defendant is adjudicated guilty of these offenses:

Title & Section / Nature of Offense	**Offense Ended**	**Count**
18 U.S.C. §§ 922(g)(1) & 924(a)(2) **Felon in Possession of a Firearm**	**05/04/2015**	**1**

The defendant is sentenced as provided in pages **2** through **6** of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☐ Count(s) ☐ is ☐ are dismissed on the motion of the United States

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

August 31, 2016
Date of Imposition of Judgment

Signature of Judge

BARBARA M. G. LYNN
CHIEF UNITED STATES DISTRICT JUDGE
Name and Title of Judge

September 22, 2016
Date

DEFENDANT: EMERENCIO ROSA, JR
CASE NUMBER: 3:15-CR-00499-M(1)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: **FORTY-TWO (42) MONTHS. The defendant shall receive credit for time already served since November 13, 2015.**

☒ The court makes the following recommendations to the Bureau of Prisons:

The Court recommends the Defendant participate in remedial training while incarcerated within the Bureau of Prisons, if appropriate.

☒ **The defendant is remanded to the custody of the United States Marshal.**

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at ☐ a.m. ☐ p.m. on

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on ____________________ to

at ________________________, with a certified copy of this judgment.

UNITED STATES MARSHAL

By
DEPUTY UNITED STATES MARSHAL

DEFENDANT: EMERENCIO ROSA, JR
CASE NUMBER: 3:15-CR-00499-M(1)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of : **THREE (3) YEARS**.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. *(Check, if applicable.)*

☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. *(Check, if applicable.)*

☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*

☐ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. *(Check, if applicable.)*

☐ The defendant shall participate in an approved program for domestic violence. *(Check, if applicable.)*

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. the defendant shall not leave the judicial district without the permission of the court or probation officer;
2. the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;
3. the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. the defendant shall support his or her dependents and meet other family responsibilities;
5. the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7. the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10. the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11. the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12. the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13. as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: EMERENCIO ROSA, JR
CASE NUMBER: 3:15-CR-00499-M(1)

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall cooperate in the collection of DNA as directed by the U.S. Probation Officer, as authorized by the Justice for All Act of 2004.

The defendant shall participate in a program (inpatient and/or outpatient) approved by the U.S. Probation Office for treatment of narcotic, drug, or alcohol dependency, which will include testing for the detection of substance use or abuse. If the defendant is receiving treatment, the defendant may not use alcohol and/or all other intoxicants at any time. The defendant shall contribute to the costs of services rendered (copayment) at a rate of at least $10 per month.

The defendant shall report in person at least once every week any time he is unemployed and provide proof or evidence he is making a good-faith effort to secure a legitimate, verifiable, full-time job. Once the defendant secures employment, he shall furnish proof of earnings each month and report to the U.S. Probation Officer as directed.

The defendant shall participate in mental health treatment services as directed by the U.S. Probation Officer until successfully discharged. These services may include medications prescribed by a licensed physician. The defendant shall contribute to the costs of services rendered (copayment) at a rate of at least $10 per month.

DEFENDANT: EMERENCIO ROSA, JR
CASE NUMBER: 3:15-CR-00499-M(1)

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$100.00	$.00	$.00

☐ The determination of restitution is deferred until An *Amended Judgment in a Criminal Case (AO245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

☐ Restitution amount ordered pursuant to plea agreement $

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: EMERENCIO ROSA, JR
CASE NUMBER: 3:15-CR-00499-M(1)

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☐ Lump sum payments of $ ____________________ due immediately, balance due

☐ not later than , or

☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal ____________ *(e.g., weekly, monthly, quarterly)* installments of $ ____________ over a period of ______________ *(e.g., months or years)*, to commence _________ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal 20 *(e.g., weekly, monthly, quarterly)* installments of $ ____________ over a period of ______________ *(e.g., months or years)*, to commence _________ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within ____________ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☒ Special instructions regarding the payment of criminal monetary penalties:
It is ordered that the Defendant shall pay to the United States a special assessment of $100.00, for Count 1, which shall be paid immediately. Said special assessment shall be paid to the Clerk, U.S. District Court.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several
See above for Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ Defendant shall receive credit on his restitution obligation for recovery from other defendants who contributed to the same loss that gave rise to defendant's restitution obligation.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☒ The defendant shall forfeit the defendant's interest in the following property to the United States:
A Glock, Model 17, 9mm caliber pistol, bearing serial number BUS140US and any ammunition recovered with the weapon ("the property").

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.