

No.

IN THE SUPREME COURT OF THE UNITED STATES

AUGUSTO REYES-GONZALEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
to the Eleventh Circuit Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a confidential source's conduct constitutes relevant conduct for which a defendant is accountable under the United States Sentencing Guidelines?

PARTIES TO THE PROCEEDING

Parties to the proceeding include Augusto Reyes-Gonzalez (Appellant/Petitioner) and the United States of America (Appellee/Respondent).

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PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The decision of the Eleventh Circuit Court of Appeal, *infra*, is attached as Appendix A.

JURISDICTION

The Judgment of the Eleventh Circuit Court of Appeal was entered on July 16, 2026. A Petition for Panel Rehearing was timely filed and denied on August 20, 2026. This Court's jurisdiction is invoked under Title 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED IN THE CASE

U.S.S.G. § 1B1.3(a)(1) provides that:

(a) Chapters Two (Offense Conduct) and Three (Adjustments).--Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:

(1)(A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and

(B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all acts and omissions of others that were—

(i) within the scope of the jointly undertaken criminal activity,

(ii) in furtherance of that criminal activity, and

(iii) reasonably foreseeable in connection with that criminal activity;

that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;

U.S.S.G. § 1B1.3(a)(1).

STATEMENT OF FACTS

On January 31, 2024, a federal grand jury in the Middle District of Florida, Orlando Division, returned a nine-count Indictment naming Mr. Reyes-Gonzalez, a/k/a “Zorro,” Carlos Grijalva-Garcia, a/k/a “Kalaca,” and Brandon Charod Smith as the defendants. Mr. Reyes-Gonzalez was charged with Conspiracy to Distribute Cocaine, Conspiracy to Distribute Methamphetamine, Possession with Intent to Distribute Cocaine, three counts of Possession with Intent to Distribute Methamphetamine, and Being Found in the United States After Deportation. Mr. Reyes-Gonzalez ultimately pled guilty to each offense and a Presentence Investigation Report (“PSR”) was then prepared by the United States Probation Office for the purposes of sentencing. The PSR set forth the offense conduct as follows:

Counts One through Seven

14. The Drug Enforcement Administration (DEA), Federal Bureau of Investigation (FBI), U.S. Customs and Border Protection (CBP), and other local agencies conducted an investigation into Augusto Rene Reyes-Gonzalez (Reyes-Gonzalez), Carlos Grijalva-Garcia (GrijalvaGarcia), and Brandon Charod Smith (Smith). Law enforcement used a CBP confidential source (CS) to conduct controlled

purchases of cocaine and methamphetamine as outlined below. During these controlled purchases, the CS was equipped with audio-video recording devices.

15. Leading up to the transaction on August 25, 2023, Reyes-Gonzalez was referred to by his conspirators as “Zorro.” During conversations with the CS, Reyes-Gonzalez used drug code to discuss the sale of drugs. Specifically, Reyes-Gonzalez referred to “soup” and to three ounces of cocaine as three “potatoes.”

16. On August 25, 2023, the CS contacted Reyes-Gonzalez and Grijalva-Garcia to arrange the purchase of three ounces of cocaine. Reyes-Gonzalez provided the CS with the address to his residence, 1014 Bernice Road, Rockledge, Florida. The CS arrived at ReyesGonzalez’s residence and met with Grijalva-Garcia inside a vehicle outside the residence also occupied by a third individual who was in the driver’s seat. In the vehicle, GrijalvaGarcia placed a plastic baggie of suspected cocaine on the center console before handing it to the CS. In exchange, the CS provided \$3,300 which was placed in an open compartment on the dashboard. Grijalva-Garcia then exited the vehicle while the CS and the other occupant stayed inside. Around this time, Reyes-Gonzalez arrived and entered the vehicle with a digital scale and spoke with the CS. A couple minutes later, GrijalvaGarcia got back into the vehicle. Not long after that, the CS exited the vehicle and left the area. During this transaction, Reyes-Gonzalez told the CS that, while he had a “small scale,” he had access to a larger scale that could weigh “up to a kilo,” and invited the CS to call him for future drug deals: “if you want half a square or a square,” referring to kilograms, “I’ll get you whatever.” The contents from this controlled purchase were sent to the DEA lab and determined to contain 86.1 grams of cocaine.

17. On August 26, 2023, the CS texted Reyes-Gonzalez and another individual at approximately 10:34 a.m., “I wanted to know if you can get crystal.” At 4:15p.m. the same day, Reyes-Gonzalez responded, “let me know how much you want.” On August 28, 2023, Reyes-Gonzalez followed up with the CS and texted him, “tell me, Rooster.” The CS and Reyes-Gonzalez thereafter arranged to purchase methamphetamine from Smith.

18. On September 8, 2023, the CS traveled to Smith's residence, 2123 Pelham Street, Unit B, NE, Palm Bay, Florida, to purchase one pound of methamphetamine from Reyes-Gonzalez and Smith for \$3,500. The CS drove Reyes-Gonzalez to Smith's residence. During the drive to and from the transaction, the CS and Reyes-Gonzalez discussed numerous topics, including drug dealing and immigration....

19. The CS provided Reyes-Gonzalez with the \$3,500, he exited the CS's vehicle and entered Smith's residence. Reyes-Gonzalez then returned to the CS's vehicle with a paper bag containing suspected methamphetamine. Notably, leading up to this controlled buy, there were several phone contacts between Reyes-Gonzalez and Smith (voice calls and text messages). The contents from this controlled purchase were sent to the DEA lab and determined to contain 447.4 grams of methamphetamine hydrochloride with a 97% purity, for a total of 433.9 grams of methamphetamine (actual).

20. On October 6, 2023, the CS and Reyes-Gonzalez traveled to Smith's residence to purchase two pounds of methamphetamine \$6,500. During the drive to and from Smith's residence, the CS and Reyes-Gonzalez discussed numerous topics and Reyes-Gonzalez attempted to interest the CS in a transaction for drugs available in Georgia:

...

When the CS and Reyes-Gonzalez arrived at Smith's residence, Smith was outside on a golf cart with another male. After Reyes-Gonzalez exited the CS's vehicle with the \$6,500 provided by the CS, Reyes-Gonzalez entered the residence with Smith. Smith and Reyes-Gonzalez then exited the residence, and a short while later, another male arrived at the residence and provided a bag to Reyes-Gonzalez, which contained a white plastic bag with suspected methamphetamine inside. Reyes-Gonzalez then gave that bag to the CS inside the CS's vehicle. Additionally, as with the previous buy, leading up to this deal, there were several phone contacts between Reyes-Gonzalez and Smith (voice calls and text messages). The

contents from this controlled purchase were sent to the DEA lab and determined to contain 889.0 grams of methamphetamine hydrochloride with a 96% purity, for a total of 853.4 grams of methamphetamine (actual).

22. On December 1, 2023, the CS and Reyes-Gonzalez traveled to Smith's residence to purchase one pound of methamphetamine \$3,000. When they arrived, Smith and others were outside the residence. Reyes-Gonzalez and the CS then met with Smith, who then walked them into the residence. Inside, Smith provided a bag containing the suspected methamphetamine to Reyes-Gonzalez, who then handed the bag to the CS. The contents from this controlled purchase were sent to the DEA lab and determined to contain 447.1 grams of methamphetamine hydrochloride with a 98% purity, for a total of 438.1 grams of methamphetamine (actual).

23. During the transaction on December 1, 2023, the CS asked Smith if Smith would sell him "fire" and Smith clarified that the CS was asking for a "gun." The CS stated "like guns. I need gun, you got Glock, whatever," and Smith responded, "I don't fuck with guns." When Smith left the room to retrieve the methamphetamine, Reyes-Gonzalez told the CS, "You want gun? I have gun" and then "I can get whatever you want. I do not have them, because I do not like them, but I can get them."

24. On December 1, 2023, as the CS was driving Reyes-Gonzalez back to Rockledge, ReyesGonzalez explained how he was able to easily cross the border:

...

25. On December 22, 2023, the CS and Reyes-Gonzalez drove to a location in Cocoa, Florida. Reyes-Gonzalez got out of the car and returned minutes later with a 9 mm firearm. The CS has provided Reyes-Gonzalez \$600 for the firearm, but Reyes-Gonzalez provided him \$200 back because he had negotiated the price down. The firearm, which was a Smith and Wesson M&P Shield 9mm semi-automatic pistol bearing serial number JES8128, was subsequently retrieved by law enforcement. After purchasing the firearm, the CS and Reyes-Gonzalez then

traveled to Smith's residence to purchase three pounds of methamphetamine for \$7,500. When the CS and Reyes-Gonzalez arrived at Smith's residence, Smith provided the suspected methamphetamine to the CS. The contents from this controlled purchase were sent to the DEA lab and determined to contain 1,332.9 grams of methamphetamine hydrochloride with a 97% purity, for a total of 1,292.9 grams of methamphetamine (actual).

26. During the drive on December 22, 2023, the CS and Reyes-Gonzalez discussed numerous topics, including drug dealing, immigration enforcement, the dangers of drug dealing, and the potential punishments for drug dealing....

27. On January 31, 2024, agents obtained arrest warrants for Reyes-Gonzalez, GrijalvaGarcia, and Smith.

28. On February 9, 2024, law enforcement arrested Smith at his residence and executed a search warrant. During the search, agents located the following: a) 10.05 grams of cocaine, as confirmed by a DEA lab b) 2.78 grams of N, N-Dimethylamphetamine, as confirmed by a DEA lab c) 6.091 grams of Buprenorphine, as confirmed by a DEA lab d) 7.81 grams of fentanyl, as confirmed by a DEA lab e) 241.7 grams of Benzocaine², as confirmed by a DEA lab f) plastic baggies, digital scales, a hand press, and a chrome press mold 29. Agents also located a Romarm/Cugir Micro Draco pistol (Serial Number PMD31133) in a backpack in the front room, a Century Arms rifle (Serial Number SV7119372) under the bed in the bedroom, and assorted ammunition. During a post-Miranda interview, Smith advised that all the drugs in the house were his. Smith reported that he resided at the residence with the mother of his children, Farrah Gilles, and her three children, two of which are Smith's. Smith noted that Gilles and the children slept in the bedroom, and he slept on the couch. Smith stated that the firearm under the bed belonged to his cousin. Smith advised that he found the firearm located in the backpack following an incident where someone was shooting at him. Smith advised that while the individual who shot at him was running away, he dropped the gun, and Smith picked up the firearm and kept it.

30. Reyes-Gonzalez was arrested by agents on February 9,

2024, during a traffic stop. A subsequent search of his person yielded 7.484 grams of cocaine, as confirmed by a DEA laboratory testing.

31. Grijalva-Garcia was arrested on February 9, 2024, at his residence, 1416 Walter Street, Cocoa, Florida. During a post-Miranda interview, Grijalva-Garcia admitted to knowing Reyes-Gonzalez but denied any involvement in drug-related activity.

32. In summary Smith is responsible for 3,018.3 grams of methamphetamine (actual), 7.484 grams of cocaine, 10.05 grams of cocaine, 2.78 grams of N, NDimethylamphetamine, 6.091 grams of Buprenorphine, and 7.81 grams of fentanyl. He is also responsible for the two firearms (Romarm/Cugir Micro Draco pistol and Century Arms rifle) found at his residence. Smith maintained a premises for the purpose of distribution and storage of narcotics as evidenced by the controlled purchases conducted at his residence and the drugs and drug paraphernalia found at his residence.

33. Reyes-Gonzalez is responsible for 3,018.3 grams of methamphetamine (actual) and 93.584 grams of cocaine. Additionally, Reyes-Gonzalez was in possession of a firearm, which he purchased on behalf of the CS, during the drug transaction on December 22, 2023.

34. Grijalva-Garcia is responsible for 86.1 grams of cocaine.

Counts Eight and Nine

35. The investigation of this case revealed that at the time of the controlled purchases ReyesGonzalez and Grijalva-Garcia were voluntarily in the United States but were aliens who had previously been deported or removed from the United States on July 6, 2022, and April 4, 2018, respectively.

36. Specifically, the investigation revealed that Alien File A097668623 had previously been assigned to the Reyes-Gonzalez. According to information contained in his alien file, on June 19, 2012, Reyes-Gonzalez, who claimed to be a legal permanent resident of the United States, was

encountered at the Houston International Airport returning to the United States from Mexico. A records check revealed that on October 31, 2011, Reyes-Gonzalez had been convicted of Possession of Controlled Substance (Harris County District Court, Docket No.: 1312051) and sentenced to two years community supervision. Based on this conviction, Reyes-Gonzalez was inadmissible to the United States under Section 212(a)(2)(A)(i)(II) of the Controlled Substance Violation act and he was subsequently detained. On July 20, 2012, Reyes-Gonzalez was ordered deported and was physically removed from the United States to Guatemala on August 2, 2012.

37. On May 30, 2013, immigration officials encountered Reyes-Gonzalez at the Brevard County Jail following his arrest on May 29, 2013, for the offenses of Battery Domestic Violence, Aggravated Battery Domestic Violence, Sexual Battery Victim over 12 Physical Force No Injury (Brevard County Circuit Court, Docket No.: 13-CF-61065). On August 2, 2013, Reyes-Gonzalez was convicted of Battery Domestic Violence and sentenced to time served (66 days) (Brevard County Court, Docket No.: 13-MM-61065). Reyes-Gonzalez's prior order of removal was reinstated and on February 5, 2014, he was physically removed from the United States to Guatemala.

38. On April 18, 2022, Reyes-Gonzalez was arrested for the offenses of Theft Person 65 or Older (\$300 or More, but Less Than \$10,000) and Contracting Without a License (Brevard County Court, Docket No.: 22-CF-23925). On June 9, 2022, Reyes-Gonzalez was convicted of Petit Theft and Contracting Without a License and fined. Reyes-Gonzalez's prior order of removal was reinstated and on July 6, 2022, he was physically removed from the United States to Guatemala.

(District Court Docket Entry-195, at 6-16)(footnotes and conversation excerpts omitted).

Pursuant to the PSR, Mr. Reyes-Gonzalez's Base Offense Level was determined to be 36. *Id.* at 17. Mr. Reyes Gonzalez then received a 2-level increase

under USSG § 2D1.1(b)(1), because, according to the probation office:

During the conspiracy, Reyes-Gonzalez offered to facilitate the purchase of a firearm on behalf of the CS, and on December 21, 2023, Reyes-Gonzalez purchased a firearm on behalf of the CS, while the CS waited in his vehicle. The CS and Reyes-Gonzalez then traveled to Smith's residence to purchase methamphetamine; therefore, 2-levels are added.

Id. Mr. Reyes-Gonzalez then received a 2-level reduction for acceptance of responsibility, resulting in a total offense level of 36, and a guideline imprisonment range of 188-235 months. *Id.* at 26.

During sentencing, defense counsel objected to the 2-level increase under USSG §2D1.1(b)(1), arguing:

DEFENSE COUNSEL: Your Honor, particularly of note is Comment 11, application of Subsections (b)(1) and (b)(2). And that describes in a little bit more detail when this enhancement should be applied, and what it says midway down is "The enhancement should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense."

Factually what happened here, Your Honor, is there were a total of, I believe, five or six deals here, and the vast majority there was no firearm involved; there was no dangerousness; there was no weapon; there was nothing. At some point, I believe the deal on December 1, the confidential source brought up the issue of a firearm. "Can I get a firearm?"

And a codefendant, who you previously sentenced, Mr. Smith, indicated he didn't do firearm; he didn't have that. Mr. Reyes-Gonzalez indicated he could help do that.

So approximately 20 days later, when they were going back to Mr. Smith's house, the confidential source, and Mr. Reyes -- they stopped by someone else's home, and Mr. Reyes-Gonzalez facilitated a firearm purchase where the

money was provided by the confidential source. Mr. Reyes-Gonzalez was provided a brief amount of money.

From there they went to Mr. Smith's house. I don't think there's any fact or allegation that the firearm that was purchased ever left the vehicle that they traveled there with; but, instead, they -- Mr. Reyes-Gonzalez goes back into the house, again, no suggestion that he carried a firearm there. A deal was consummated. They left, drove home. That was that. That was it.

When you look at the facts as described in the presentence report, when there's discussions about a firearm, when there's discussions about that purchase, there's no statement or indication that that's being purchased to further the drug distribution or for any reason that the confidential source felt he was in danger at all. There's just simply nothing in the discovery to indicate that.

In each of the prior situations where the confidential source and Mr. Reyes-Gonzalez went to Mr. Smith's home to do these transactions, there's no allegation or no suggestion that that there was any violence, that there was any threat of violence, that this was anything other than a relatively - - obviously, the product is illegal, but other than that, an innocuous situation where it was a fairly friendly thing. There wasn't -- the Government provided phone calls, translations of the conversation between Mr. Reyes-Gonzalez before they arrived at the home. There's nothing to suggest that he was concerned about violence or that either one of them wanted a firearm because they were concerned.

The discussions that they do have are more about hunting, about that type of thing, but there's just no facts to believe that they were concerned for their safety and that this firearm was related to -- to the deals, to the drugs. Again, no discussion in any of the discovery that "Hey, I need this because I'm concerned that we're going to get robbed," or something like that.

In fact, if we look at the discussions that are contained in the factual basis, particularly paragraph 26 of the presentence report on page 12, on the fifth portion that's

blocked off with Mr. Reyes-Gonzalez, they're having a conversation about, essentially, the danger of doing this kind of a deal.

And Mr. Reyes-Gonzalez says, "Keep calm. They" -- meaning Mr. Smith and his folks; and, quite frankly, Black people in general is the way he's describing it. "How can I tell you? Doing business with me because they say these guys are -- inaudible -- because I" -- at the end of the day, it says, "For example, I told them, 'Man, my money.'

"And they told me, 'Look. This and that happened to me.' Okay.

"And I told them, 'It's okay. When you have product, you know, big balls of *perico*.'"

There's not a discussion of "Hey, if this doesn't go down, we need to start shooting or we need to be aggressive towards these guys." Mr. Reyes-Gonzalez is essentially saying, "Hey, the way that we do this when we deal with these folks is there's no violence. If things don't work out, it doesn't work out. We just walk away, and we'll settle it later."

So in discussions about the deals -- again, it's clear that there's not going to be any violence, that there's not threats of violence of any sort.

On December 1st, when there's conversations between the confidential source and Mr. Smith, the confidential source asks, "Hey, can you get me fire? Can you get me a gun?"

And Mr. Smith responds, "I don't deal with that. That's just not what I do."

So there's no reason to think that the confidential source would need a firearm if Mr. Smith is saying that he doesn't do guns. There's just simply not an indication that firearms were part of this and needed to further the deal or -- or that they were connected at all.

Quite frankly, I think the only evidence when Mr. Reyes-Gonzalez and the confidential source were together was when they went to these deals. So, naturally, that would be

a time, if he wanted a gun, that they would go get the gun. So it's just a coincidence that they happened to get the gun at that time. It's not related to the deal. Again, there's no conversations "Hey, thanks for the gun. Now we're safe," or anything like that.

So I think it is clear based on Application Note 11 that the enhancement should be applied if the weapon was present unless it's clearly improbable.

First I'd argue it wasn't present. There's no evidence that the firearm was anywhere but inside the car, that it ever came out. There's certainly case law to suggest if it's anywhere near, then that's enough, but the fact that it never leaves the car, I think, is evidence as well that it's not part of the deal.

And, again, it's clearly improbable that the weapon was connected with the offense. These are two entirely separate situations, and based on that, that two-point enhancement in paragraph 51 should not be applied.

(D-210, at 7-11).

The court then overruled the objection, finding:

THE COURT: All right. The Court has heard the argument of counsel and has reviewed the case law, and I believe that the -- in connection with this offense, the gun was sold in connection with the conspiracy and that the two points are properly scored. So I'm going to overrule the objection.

Id. at 15.

The court then imposed a within guidelines sentence of 235 months imprisonment on Counts One through Seven, and 24 months imprisonment on Count Nine, with all Counts to run concurrently, and defense counsel renewed his objection to the 2-level firearm enhancement to no avail. *Id.* at 41, 48.

Mr. Reyes-Gonzalez appealed the Eleventh Circuit, arguing, *inter alia*, that

the firearm had to be possessed in close proximity to the drug trafficking activity in order for the two-level firearm enhancement to apply, and that the enhancement could not be imposed on the basis of the confidential source's possession of a firearm in close proximity to the drug trafficking activity (*i.e.*, in the car), as the confidential source was not a codefendant or conspirator. The Eleventh circuit did not dispute that the firearm had to be possessed in close proximity to the drug trafficking activity, but nonetheless affirmed, concluding it was reasonable for the district court to infer that:

the CS would return to retrieve the firearm he just bought if he did leave it in his vehicle; that he left the site of the drug transaction in the same car that he arrived in; that the CS left that site with the drugs he just purchased; and that Mr. Reyes-Gonzalez left with his cut of the proceeds from that sale. From that, it follows that the firearms, drugs, and drug proceeds were all in the same car at the same time. We cannot say that the district court's inference that Mr. Reyes-Gonzalez possessed a firearm during conduct relevant to the offense of conviction was unreasonable based on the facts presented here.

United States v. Reyes-Gonzalez, No. 25-12656, 2026 WL 2058532, at *3 (11th Cir. July 16, 2026).

This Petition follows.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT REVIEW TO RESOLVE A CIRCUIT SPLIT REGARDING WHETHER A CONFIDENTIAL SOURCE'S CONDUCT CONSTITUTES RELEVANT CONDUCT FOR PURPOSES OF THE SENTENCING GUIDELINES.

At issue in this Petition is whether a confidential source's conduct constitutes relevant conduct for purposes of the sentencing guidelines. This Court should resolve the circuit split on the matter and establish it does not.

In a drug conspiracy case, the United States Sentencing Guidelines instruct that “[i]f a dangerous weapon (including a firearm) was possessed, increase by 2 levels.” U.S.S.G. § 2D1.1(b)(1). The guidelines further instruct that a defendant is to be held accountable for:

(1)(A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and

(B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all acts and omissions of others that were—

(i) within the scope of the jointly undertaken criminal activity,

(ii) in furtherance of that criminal activity, and

(iii) reasonably foreseeable in connection with that criminal activity;

that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;

U.S.S.G. § 1B1.3(a)(1).

“Courts have developed a standard inquiry to determine whether § 2D1.1(b)(1) applies to a particular case.” *United States v. Hooten*, 942 F.2d 878, 881 (5th Cir. 1991). “The government must prove weapon possession by a preponderance of the evidence before the court can apply this factor to increase a sentence.” *Id.* at 881-82 (citing, *U.S. v. Aguilera-Zapata*, 901 F.2d 1209, 1215 (5th Cir.1990)). “The government can prove possession in two ways.” *Id.* at 882. “First, the government can prove that the defendant personally possessed the weapon by showing that a temporal and spatial relation existed between the weapon, the drug trafficking activity, and the defendant.” *Id.* (citations omitted). “Alternatively, when another individual involved in the commission of an offense possessed the weapon, the government must show that the defendant could have reasonably foreseen that possession.” *Id.* “This requirement derives from U.S.S.G. § 1B1.3(a)(1), which renders a defendant accountable for any foreseeable act by a codefendant taken ‘in furtherance of the execution of [a] jointly undertaken criminal activity.’” *Id.* “[T]he Government can prove possession if a co-conspirator ‘involved in the commission of an offense possessed the weapon’ and ‘the defendant could have reasonably foreseen that possession.’” *United States v. Sincleair*, 16 F.4th 471, 475 (5th Cir. 2021)(footnotes omitted). “**This method obviously presupposes proof of a conspiracy between the defendant and the person possessing the weapon.**” *Id.* (emphasis added).

Here, the Eleventh Circuit concluded that the confidential source's possession of a firearm in a vehicle with narcotics was sufficient to apply a two-level enhancement to Mr. Reyes-Gonzalez under U.S.S.G. § 2D1.1(b)(1). However, "it is well-settled that a person cannot conspire with a government informer who secretly intends to frustrate the conspiracy" *United States v. Lively*, 803 F.2d 1124, 1126 (11th Cir. 1986) (citations omitted). Accordingly, because the confidential source was not a co-conspirator or codefendant, his actions did not constitute relevant conduct under U.S.S.G. § 1B1.3(a)(1). *See, Sinclair*, 16 F.4th at 475. Consequently, the Eleventh Circuit's decision in Mr. Reyes-Gonzalez's case directly conflicts with the Fifth Circuit's Opinion in *Sinclair*, thus necessitating this Court's intervention to resolve the circuit split.

Because a plain and ordinary reading of U.S.S.G. § 1B1.3(a)(1) supports the Fifth Circuit's Opinion, this Court should quash the decision below, establish that a confidential source's actions do not constitute relevant conduct for purposes of the United States Sentencing Guidelines, and remand Mr. Reyes-Gonzalez's case for further proceedings. *See, Sinclair*, 16 F.4th at 475.

CONCLUSION

For the reasons stated above, this Court should grant the instant Petition for Writ of Certiorari.

Respectfully Submitted.



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APPENDIX A

NOT FOR PUBLICATION

In the
United States Court of Appeals
For the Eleventh Circuit

No. 25-12656
Non-Argument Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

AUGUSTO RENE REYES-GONZALEZ,

a.k.a. Zorro,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 6:24-cr-00030-WWB-RMN-1

Before JORDAN, ROSENBAUM, and GRANT, Circuit Judges.

PER CURIAM:

Augusto Reyes-Gonzalez pled guilty to, and was sentenced to 253 months' imprisonment for, conspiracy to distribute cocaine and methamphetamine, possession with intent to distribute cocaine and methamphetamine, and illegal reentry. The district court applied the "dangerous weapon enhancement" under U.S.S.G. 2D1.1(b)(1) at sentencing because Mr. Reyes-Gonzalez sold a firearm to one of his drug customers (who was working as a confidential source ("CS")). Mr. Reyes-Gonzalez now appeals the application of that enhancement.

I

On August 25, 2023, a CS contacted Mr. Reyes-Gonzalez and another coconspirator to purchase cocaine. The CS drove to Mr. Reyes-Gonzalez's residence, where he provided the CS with cocaine in exchange for cash. From there, the relationship between the CS and Mr. Reyes-Gonzalez continued and eventually progressed to purchases of methamphetamine. During one of their transactions, Mr. Reyes-Gonzalez told the CS:

You want this or that I can get it. Whatever drug you want I can get it, whatever you ask for. If you want fentanyl I can get it. . . . I get whatever nasty thing you want. If you want synthetic drugs, I have them. I have synthetic heroin.

D.E. 195 ¶ 18.

At a later exchange, the CS purchased a pound of methamphetamine from Mr. Reyes-Gonzalez at another coconspirator's residence. *See id.* ¶ 22. The CS asked that coconspirator if he could sell him "fire," which referred to a firearm. *See id.* ¶ 23. The coconspirator told the CS that he did not deal with guns and could not sell him one. *See id.* But once he left the room, Mr. Reyes-Gonzalez told the CS, "You want gun? I have gun . . . I can get whatever you want. I do not have them, because I do not like them, but I can get them." *Id.*

On December 22, 2023, Mr. Reyes-Gonzalez met the CS for another drug transaction at the coconspirator's residence. *See id.* ¶ 25. On the way, they stopped to purchase a 9mm semi-automatic pistol. *See id.* Mr. Reyes-Gonzalez facilitated the purchase for the CS and was able to negotiate the price down from \$600 to \$400. *See id.* They then drove to the coconspirator's residence, where the CS would buy three pounds of methamphetamine. *See id.* During the drive, Mr. Reyes-Gonzalez told the CS that "it is never worth getting in a bind" with certain individuals because they "don't care to kill your ass." *Id.* ¶ 26.

Over the course of the conspiracy, Mr. Reyes-Gonzalez was responsible for the sale of 3,018.3 grams of methamphetamine (actual), 93.584 grams of cocaine, as well as the purchase of the 9mm semi-automatic pistol. *See id.* ¶ 33.

Mr. Reyes-Gonzalez pled guilty to seven counts related to his narcotics offenses and one count of illegal reentry. At his sen-

tencing hearing, he objected to the dangerous weapon enhancement under U.S.S.G. 2D1.1(b)(1). He argued that there were no discussions about the firearm being used to further the conspiracy, there was no evidence that the firearm was inside the house during the drug transaction on December 22, and that the firearm being in the CS' vehicle was pure coincidence. *See* D.E. 197 at 12.

The government responded at sentencing that there were two ways to justify the enhancement: (1) establishing that the firearm was present at the site of the charged conduct; or (2) proving that the defendant possessed a firearm during conduct associated with the offense of conviction. *See* D.E. 198 at 3. The government primarily focused on the latter in its sentencing memorandum and during the sentencing hearing. It asserted that Mr. Reyes-Gonzalez's occupation was offering connections to contraband for a price and that "selling the CS a firearm helped [him] maintain his place as a one-stop shop for contraband." *Id.* at 4. According to the government, the sale of the firearm was "part of the same course of conduct or common scheme or plan as the offense of conviction" and therefore was conduct relevant to the offense of conviction such that the dangerous weapon enhancement should be applied. *See id.*

The district court overruled Mr. Reyes-Gonzalez's objection and applied the dangerous weapon enhancement. Mr. Reyes-Gonzalez appeals.

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II

We review the district court’s findings of fact under § 2D1.1 for clear error, and the application of the guidelines to those facts *de novo*. See *United States v. Gallo*, 195 F.3d 1278, 1280 (11th Cir. 1999). We will not reverse a factual finding unless we are “left with a definite and firm conviction that a mistake has been committed.” See *United States v. Matchett*, 802 F.3d 1185, 1191 (11th Cir. 2015) (citation omitted). But as long as the court’s determination was plausible in light of the record reviewed in its entirety, we will affirm. See *Commodity Futures Trading Comm’n v. Gibraltar Monetary Corp., Inc.*, 575 F.3d 1180, 1186 (11th Cir. 2009).

III

Under § 2D1.1(b)(1), a district court may adjust a defendant’s offense level by two levels if “a dangerous weapon (including a firearm) was possessed[.]” Both the commentary to this provision and our precedents note that the increase reflects the “danger of violence when drug traffickers possess weapons” and that the enhancement “should be applied if the weapon was present[.]” 2D1.1(b)(1) cmt. n.11(A). See, e.g., *United States v. Hall*, 46 F.3d 62, 63 (11th Cir. 1995) (noting that the government need only show “by a preponderance of the evidence that the firearm was present at the site of the charged conduct” for the enhancement to apply). Our precedents also allow application of the enhancement if a firearm was possessed during conduct relevant to the offense of conviction. See *United States v. Hunter*, 172 F.3d 1307, 1309 (11th Cir. 1999). “Relevant conduct includes acts that were part of the same

course of conduct or common scheme or plan as the offense of conviction[.]” *United States v. Smith*, 127 F.3d 1388, 1390 (11th Cir. 1997) (internal quotation marks and citation omitted). Once the government meets its burden under either basis, the burden shifts to the defendant to demonstrate that any connection between the weapon and the offense was clearly improbable. *See United States v. Stallings*, 463 F.3d 1218, 1220 (11th Cir. 2006).

Mr. Reyes-Gonzalez possessed the firearm during conduct relevant to the offense of conviction. He procured the firearm on the way to another drug transaction with the CS and his coconspirator. After procuring both the firearm and the drugs, Mr. Reyes-Gonzales and the CS drove home. *See* D.E. 210 at 8.

We have also held that a defendant’s sentence can be enhanced for the possession of a firearm by another person if four requirements are met: “(1) the possessor of the firearm was a co-conspirator, (2) the possession was in furtherance of the conspiracy, (3) the defendant was a member of the conspiracy at the time of possession, and (4) the co-conspirator possession was reasonably foreseeable by the defendant.” *Gallo*, 195 F.3d at 1284 (11th Cir. 1999). Because there is a “frequent and overpowering connection” between firearms and drug trafficking, *see United States v. Cruz*, 805 F.2d 1464, 1474 (11th Cir. 1986), the CS’ possession of the firearm would be sufficient to establish that the firearm was possessed in furtherance of the conspiracy.

Moreover, Mr. Reyes-Gonzalez and the CS engaged in multiple drugs transactions using the car and discussed both drugs and

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the use of firearms while driving. For example, during a drive to and from one of their transactions, Mr. Reyes-Gonzalez told the CS, “You want this or that I can get it. Whatever drug you want I can get it, whatever you ask for. If you want fentanyl I can get it.” D.E. 195 ¶ 18. And during the drive where Mr. Reyes-Gonzalez obtained the firearm, he told the CS that “it is never worth getting in a bind” with certain individuals because they “don’t care to kill your ass.” *Id.* ¶ 26. Paired with the drug-related conversations, it is reasonable to infer that this suggestion of the need for protection connects the firearm possession to the drug trafficking conspiracy. *See United States v. Hansley*, 54 F.3d 709, 716 (11th Cir. 1995) (concluding that proximity of the firearm to where drug-related conversations or activities have occurred sufficiently shows that the firearm was possessed during the offense). *See also Cruz*, 805 F.2d at 1474 (“[N]umerous cases have recognized that guns are a tool of the drug trade. There is a frequent and overpowering connection between the use of firearms and narcotics traffic.”).

Mr. Reyes-Gonzalez attempts to challenge the enhancement in two ways.

First, he points us to *United States v. Castro-Perez*, 749 F.3d 1209 (10th Cir. 2014). In *Castro-Perez*, the defendant sold cocaine to an undercover agent who also asked if the defendant could sell him a gun. *See id.* at 1210. Later that day, the defendant sold a pistol to the same undercover agent. *See id.* The Tenth Circuit held that, on that record, there was “no physical relation between the weapon and the drug trafficking activity.” *Id.* at 1211. But unlike in *Castro-*

Perez, here there was physical proximity between the firearm and the drugs; the firearm was left in the vehicle during a drug transaction and Mr. Reyes-Gonzalez returned to the vehicle after the purchase. *Castro-Perez* recognized the distinction between a case where there was “no evidence of a spatial connection between the gun and drug trafficking activity” and a case (such as here) where there was physical proximity between the gun and the drug trafficking activity. *See id.* (citing *United States v. Foy*, 641 F.3d 455, 470 (10th Cir. 2011) (concluding that coconspirator’s arrest during an attempt to buy cocaine and law enforcement’s subsequent recovery of a firearm from his vehicle established possession by a preponderance)). As a result, *Castro-Perez* does not compel a different conclusion.

Second, in an attempt to meet his burden of establishing that the connection between the firearm and drugs was clearly improbable, Mr. Reyes-Gonzalez focuses our attention on the lack of direct evidence about what was done with the firearm after he procured it for the CS. He argues that the firearm was likely left in the car which could have been parked miles away from the site of the drug transaction, that there is no evidence that he returned to the car after the drug transaction, and that there is no direct evidence of the firearm being in the vicinity of drug trafficking activity. *See Appellant’s Br.* at 25.

There is no direct evidence of what was done with the firearm following the drug transaction, but there need not be. The district court was only required to make reasonable inferences based

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on the record evidence in determining if the enhancement should apply. It would be reasonable to infer that the CS would return to retrieve the firearm he just bought if he did leave it in his vehicle; that he left the site of the drug transaction in the same car that he arrived in; that the CS left that site with the drugs he just purchased; and that Mr. Reyes-Gonzalez left with his cut of the proceeds from that sale. From that, it follows that the firearms, drugs, and drug proceeds were all in the same car at the same time. We cannot say that the district court's inference that Mr. Reyes-Gonzalez possessed a firearm during conduct relevant to the offense of conviction was unreasonable based on the facts presented here.

IV

The district court's imposition of the § 2D1.1(b)(1) enhancement is affirmed.

AFFIRMED.

APPENDIX B

In the
United States Court of Appeals
For the Eleventh Circuit

No. 25-12656

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

AUGUSTO RENE REYES-GONZALEZ,

a.k.a. Zorro,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 6:24-cr-00030-WWB-RMN-1

Before JORDAN, ROSENBAUM, and GRANT, Circuit Judges.

PER CURIAM:

The Petition for Panel Rehearing filed by Augusto Rene Reyes-Gonzalez is DENIED.