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United States Court of Appeals
Tenth Circuit

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Christopher M. Wolpert
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PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. RICARDO MARTINEZ, Defendant - Appellant.	No. 21-7054

Appeal from the United States District Court
for the Eastern District of Oklahoma
(D.C. No. 6:19-CR-00049-JFH-1)

Ryan J. Villa, The Law Office of Ryan J. Villa, Albuquerque, New Mexico, for Defendant-Appellant

James R.W. Braun, Special Assistant United States Attorney (Christopher J. Wilson, United States Attorney, with him on the brief), Muskogee, Oklahoma, for Plaintiff-Appellee

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Before **MATHESON**, **CARSON**, and **ROSSMAN**, Circuit Judges.

ROSSMAN, Circuit Judge.

Appellant Ricardo Martinez was convicted after pleading guilty to one count of distribution of methamphetamine in violation of 21 U.S.C.

§§ 841(a)(1) and (b)(1)(A). He now appeals the sentence imposed, contending the district court miscalculated his advisory Sentencing Guidelines range. Mr. Martinez claims the district court erred, first, by adding a two-level sentencing enhancement under U.S.S.G. § 2D1.1(b)(1) for possession of a dangerous weapon in connection with a drug trafficking offense, and second, by refusing to apply a two-level "safety-valve" reduction under U.S.S.G. §§ 2D1.1(b)(18) and 5C1.2. Exercising jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a), we agree with Mr. Martinez that he was entitled to the safety-valve reduction but otherwise discern no error. Accordingly, we affirm in part, reverse in part, and remand for resentencing.

I[1]

A

Mr. Martinez operated a restaurant in De Queen, Arkansas.[2] In February 2019, a confidential source (CS) informed local law enforcement that Mr. Martinez was using the restaurant "as a [drug] distribution and money laundering front." R. vol. IV at 5, ¶ 7. According to the CS, they negotiated "ounce quantity methamphetamine transactions directly with

[1] These facts are undisputed and derive from the Presentence Investigation Report (PSR), which the district court adopted.

[2] Mr. Martinez is a lawful permanent resident who moved to the United States from Mexico in 1990.

[Mr.] Martinez." *Id.* This information triggered a four-month federal investigation. In late February and early March 2019, the CS arranged three controlled buys from Mr. Martinez over the phone. Each time, the methamphetamine was delivered to the CS "by an unknown Hispanic male functioning as a courier, who was later identified as [co-defendant] Carlos Medina-Tamayo." *Id.* ¶ 8.

Beginning in March 2019, federal agents, through the CS, arranged additional controlled buys of methamphetamine from Mr. Martinez. These transactions occurred at a 40-acre ranch in Eagletown, Oklahoma. The ranch "consisted of two manufactured homes placed in close proximity to one another." *Id.* ¶ 9. One home was unoccupied (Mobile Home 1); Mr. Medina-Tamayo lived in the other (Mobile Home 2). Mr. Martinez originally owned the ranch, but in 2011, he transferred ownership of the property to his brother by quit claim deed. After the transfer, Mr. Martinez still had access to the ranch.

On March 22, the CS received a phone call from Mr. Martinez and negotiated the purchase of one-half kilogram of methamphetamine for $5,000. Mr. Martinez explained he was in De Queen, on his way to Oklahoma, and "directed the CS to meet him in Eagletown, and from there the CS could follow Martinez to his ranch." R. vol. IV at 5, ¶ 11. Surveillance units followed as the CS and Mr. Martinez drove in their respective vehicles

from the pre-buy location to the ranch. Mr. Martinez "opened the gate to the property," and both vehicles entered, stopping outside a "trailer house." *Id.* Mr. Medina-Tamayo was present, but he remained outside on the porch while the CS and Mr. Martinez entered "the residence."[3] *Id.* The CS paid Mr. Martinez $4,000 for the methamphetamine and agreed to provide the remaining $1,000 later. After leaving the ranch, the CS met federal agents at a predetermined location, relinquished control of the methamphetamine, and described seeing "multiple kilogram quantities of methamphetamine on the coffee table in the main room along with a scale."[4] *Id.* at 6, ¶ 12. The CS met Mr. Martinez a week later and negotiated the final $1,000 payment for the March 22 transaction.

On April 10, 2019, the CS and Mr. Martinez negotiated a second controlled purchase over the phone. The CS met Mr. Martinez at the Eagletown ranch to complete the transaction. Mr. Martinez sold the CS one-half kilogram of methamphetamine inside "the residence." *Id.* ¶ 14. The CS

[3] The PSR states the controlled buys took place at "the residence." *See* R. vol. IV at 5-7, ¶¶ 11, 14, 17. At times, "residence" refers to one of the mobile homes, but that term also is used generally to refer to the Eagletown ranch.

[4] The CS was equipped with audio and video recording equipment during each transaction but it malfunctioned on this occasion, "resulting in no recording shortly after the CS arrived at the premises." R. vol. IV at 6, ¶ 12.

again met agents at a predetermined location and reported seeing "approximately ten to fifteen kilograms of methamphetamine in boxes inside the residence." *Id.*

On May 9, the CS conducted a final controlled buy from Mr. Martinez. Again, they met at the Eagletown ranch, where Mr. Martinez sold the CS one-half kilogram of methamphetamine inside "the residence." The CS made a partial payment, and Mr. Martinez instructed the CS to pay the balance in the next week. According to the CS, Mr. Martinez said he was expecting "to receive an additional twenty-nine kilograms of methamphetamine." *Id.* at 7, ¶ 17.

On May 17, federal agents obtained a warrant to search the ranch. That day, surveillance followed Mr. Medina-Tamayo as he left the property and then arrested him during a traffic stop in De Queen. Mr. Medina-Tamayo identified himself by a different name but said "the vehicle he was driving belonged to his boss, Martinez." *Id.* ¶ 18. Mr. Medina-Tamayo was permitted to call Mr. Martinez "for what [he] believed was to release the truck to the registered owner in lieu of impounding" it; however, Mr. Martinez was arrested once he arrived. *Id.*

Meanwhile, agents executed the search warrant at the Eagletown ranch. In Mobile Home 1, agents located eight baggies of methamphetamine in two of the floor vents and $16,721 in United States currency in another

floor vent. Agents also recovered three firearms from Mobile Home 1.[5] In Mobile Home 2, where Mr. Medina-Tamayo lived with his girlfriend, agents found two loaded firearms.

Mr. Medina-Tamayo's girlfriend and her young daughter were inside Mobile Home 2 during the search. In an interview at the scene, Mr. Medina-Tamayo's girlfriend told the agents "Medina-Tamayo brought the firearms into the residence." *Id.* at 8, ¶ 20. She also reported he "had on occasion taken the firearms outside the residence and fired them before returning them into the residence." *Id.*

B

On June 11, 2019, a federal grand jury in the Eastern District of Oklahoma named Mr. Martinez and Mr. Medina-Tamayo in a sealed six-count indictment. Count 2 charged Mr. Martinez with knowingly and intentionally distributing 50 grams or more of methamphetamine on or about March 22, 2019.[6] Mr. Martinez pleaded guilty to Count 2 without a

[5] Agents discovered a bolt action rifle with scope, a 20-gauge break-over shotgun, and a .22 caliber rifle. In the district court, Mr. Martinez argued these firearms were hunting rifles, "as opposed to semi automatic firearms or handguns typically associated with drug dealers." R. vol. IV at 18. He does not make this argument on appeal.

[6] In Count 1, the indictment charged both defendants with conspiracy to distribute 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A). Counts 2 and 3 charged Mr. Martinez with

plea agreement. The government dismissed the remaining charges against him.

Probation prepared a PSR before the sentencing hearing. In calculating Mr. Martinez's advisory Sentencing Guidelines range, the PSR started with a base offense level of 38 because the offense "involve[d] at least 4.5 kilograms[] of methamphetamine." R. vol. IV at 9, ¶¶ 27-28. The PSR added a two-level enhancement under U.S.S.G. § 2D1.1(b)(1), which applies "[i]f a dangerous weapon (including a firearm) was possessed," based on the "three firearms located in the residence near the methamphetamine and drug proceeds." *Id.* ¶ 29. The PSR also recommended a two-level increase under § 2D1.1(b)(12) because Mr. Martinez "owned and maintained"[7] the Eagletown ranch "for the purpose of storing and selling methamphetamine." *Id.* at 10, ¶ 30. After a three-level

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distribution of 50 grams or more of methamphetamine (actual) for the controlled purchases at the Eagletown ranch in April and May 2019. Count 5 charged both defendants with possession with intent to distribute 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A). Finally, Count 6 charged Mr. Medina-Tamayo with being an illegal alien in possession of the firearms found in Mobile Home 2 in violation of 18 U.S.C. §§ 922(g)(5) and 924(a)(2).

[7] As the PSR later acknowledged, however, Mr. Martinez's "brother[] is listed as the actual owner of the property." R. vol. IV at 9, ¶ 22.

reduction for acceptance of responsibility, Probation calculated Mr. Martinez's total offense level at 39:

- Base Offense Level **38**
- Specific Offense Characteristics – § 2D1.1(b)(1) **+2**
- Specific Offense Characteristics – § 2D1.1(b)(12) **+2**
- Acceptance of Responsibility **-3**
- Total Offense Level **39**

See id. ¶¶ 36-37, 43. At criminal history category I, Mr. Martinez's advisory Sentencing Guidelines range was 262 to 327 months' imprisonment. *Id.* at 14, ¶ 58.

Mr. Martinez objected to the PSR on two grounds. He first challenged the firearms enhancement under § 2D1.1(b)(1). Mr. Martinez acknowledged he "maintained [Mobile Home 1] for the purpose of storing and selling drugs,"[8] but insisted he was "unaware" of the firearms discovered in Mobile Home 1. R. vol. IV at 17-18. He contended "there is no evidence that the Confidential Source involved in the controlled drug purchases ever saw the firearms, or that Martinez ever brandished them." *Id.* Mr. Martinez also argued "it was clearly improbable that the firearms were connected with the offense [of conviction]."[9] *Id.*

[8] Mr. Martinez did not object to the PSR's recommended two-level enhancement under U.S.S.G. § 2D1.1(b)(12).

[9] He does not reprise this argument on appeal, as we discuss.

Mr. Martinez next objected to "the PSR not including a two-level [safety-valve] reduction" under U.S.S.G. § 2D1.1(b)(18). *Id.* at 18-19. The Guidelines allow a reduction if the defendant can show, among other criteria, he "did not . . . possess a firearm or other dangerous weapon . . . in connection with the offense." U.S.S.G. § 5C1.2(a)(2). According to Mr. Martinez, "[t]he test for possession of a weapon under § 5C1.2 is narrower than under § 2D1.1, so a defendant who possesses a gun for the purposes of § 2D1.1 does not necessarily possess it for purposes of § 5C1.2." R. vol. IV at 18 (citing *United States* v. *Zavalza-Rodriguez*, 379 F.3d 1182, 1186-87 (10th Cir. 2004)).

Probation maintained § 2D1.1 applied because Mr. Martinez admittedly used "the two manufactured homes on his property . . . for the purpose of distributing a controlled substance," and law enforcement discovered three firearms in close proximity to the controlled substances and drug proceeds on his property. *Id.* at 21. According to Probation, therefore, "it appears that the firearms were connected with the distribution of methamphetamine that is the offense of conviction." *Id.* Probation also concluded Mr. Martinez did not qualify for the safety-valve reduction "due to the possession of firearms." *Id.* at 22.

At sentencing, the district court overruled Mr. Martinez's PSR objections. The district court applied the firearms enhancement under

§ 2D1.1(b)(1). Rejecting Mr. Martinez's contrary arguments, the district court concluded the government need not show Mr. Martinez "knew the weapon was present" but only must demonstrate "the weapon was found in the same location where the drugs or drug paraphernalia are stored." R. vol. II at 7 (citing *United States* v. *Underwood*, 938 F.2d 1086 (10th Cir. 1991)). The court determined, relying on the PSR, the government established by a preponderance of the evidence (1) "the weapons [in Mobile Home 1] were found in the same location where the drugs were stored" and (2) Mr. Martinez had "access to the property and sold methamphetamine from the property on at least three occasions." *Id.* at 8-9. The district court next denied safety-valve relief under § 5C1.2, finding "the defendant did possess a firearm in connection with the offense." R. vol. II at 9-10.

The district court sentenced Mr. Martinez to 262 months in prison—the bottom of the advisory Sentencing Guidelines range—followed by a five-year term of supervised release.[10] This timely appeal followed.

II

Mr. Martinez appeals the district court's calculation of his advisory Sentencing Guidelines range, which is a challenge to the procedural reasonableness of the sentence imposed. *See United States* v. *Ellis*, 23 F.4th

[10] The district court denied Mr. Martinez's request for a downward variance under 18 U.S.C. § 3553(a) but that ruling is not on appeal.

1228, 1238 (10th Cir. 2022) (Where the appellate "challenge[] relates to the propriety of the district court's calculation of [a] Guidelines sentence, our focus is on the procedural reasonableness of [the] sentence."). He urges reversal for two reasons. First, Mr. Martinez contends there was insufficient evidence to support the application of the firearms enhancement under § 2D1.1(b)(1). Second, even assuming the firearms enhancement was appropriate, Mr. Martinez maintains he qualified for the safety-valve reduction because he never actively possessed a firearm in connection with the offense of conviction. We discuss each argument in turn. As we explain, the district court correctly applied the firearms enhancement but erroneously denied the safety-valve reduction.

A

We first must decide "whether the undisputed facts in the PSR support the district court's conclusion that Mr. Martinez possessed the firearms located in Mobile Home 1 for purposes of applying § 2D1.1(b)(1)." Opening Br. at 12. "[W]here the appellant 'ask[s] us to interpret the Guidelines or hold the facts found by the district court are insufficient as a matter of law to warrant an enhancement, we must conduct a de novo review.'" *United States* v. *Valdez*, 225 F.3d 1137, 1142 (10th Cir. 2000) (citation omitted); *see also United States* v. *Castro-Perez*, 749 F.3d 1209, 1210 (10th Cir. 2014) (We review de novo "whether the undisputed facts of

this case warrant a sentencing enhancement under § 2D1.1(b)(1)." (citing *United States* v. *Alexander*, 292 F.3d 1226, 1229 (10th Cir. 2002))). The parties agree the PSR comprises the entire factual basis for Mr. Martinez's sentence. The Statement of Reasons form attached to the Judgment confirms the district court "adopt[ed] the presentence investigation report without change." R. vol. IV at 23. We thus consider Mr. Martinez's legal argument based on the undisputed facts in the PSR.

The Guidelines provide for a two-level sentencing enhancement for drug crimes "[i]f a dangerous weapon (including a firearm) was possessed." U.S.S.G. § 2D1.1(b)(1). The Guidelines commentary states: "The adjustment should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense." U.S.S.G. § 2D1.1(b)(1) cmt. n.11(A).

The government "bears the initial burden" of proving possession under § 2D1.1(b)(1) by a preponderance of the evidence. *Castro-Perez*, 749 F.3d at 1211. The government may satisfy this burden by showing "that a temporal and spatial relation existed between the weapon, the drug trafficking activity, and the defendant." *Id.* (quoting *Zavalza-Rodriguez*, 379 F.3d at 1185). As we have explained, "physical proximity is a touchstone of the § 2D1.1(b)(1) firearm enhancement." *Id.* "Possession in the context of § 2D1.1(b)(1) is . . . possession by proximity—constructive possession,"

which means "mere proximity" of the drug trafficking activity "to the weapon." *Zavalza-Rodriguez*, 379 F.3d at 1187. The government can meet its initial burden, therefore, "by showing that the weapon was located nearby the general location where drugs or drug paraphernalia are stored or where part of the transaction occurred." *Alexander*, 292 F.3d at 1231 (quoting *United States* v. *Flores*, 149 F.3d 1272, 1280 (10th Cir.1998)).

"[O]nce the Government proves that a weapon was found in near proximity to a distributable quantity of illegal drugs, the burden shifts to the defendant to prove that it was highly unlikely that the weapon had anything to do with the drug offense." *Flores*, 149 F.3d at 1280. In other words, a defendant can avoid the enhancement "only if he establishes 'that it is clearly improbable the weapon was connected with the offense.'" *Zavalza Rodriguez*, 379 F.3d at 1185 (quoting *United States* v. *Pompey*, 264 F.3d 1176, 1181 (10th Cir. 2001)).

Mr. Martinez does not contend on appeal it is clearly improbable the firearms found in Mobile Home 1 were connected with the offense. Rather, he insists "the burden never shifted" because the government did not prove by a preponderance of the evidence that he "possessed" the firearms within the meaning of § 2D1.1(b)(1). Opening Br. at 9-10, 15-18. We are not persuaded.

The PSR says agents found drugs and money in the floor vents of Mobile Home 1, along with three firearms. As the PSR confirms, Mr. Martinez maintained the ranch, including Mobile Home 1, for purposes of "storing and selling methamphetamine." R. vol. IV at 10. Mr. Martinez admittedly "had access to the property and sold methamphetamine from [it] on at least three occasions." R. vol. II at 8-9. These undisputed facts show Mr. Martinez had constructive possession of the firearms found in Mobile Home 1, which squarely supports the district court's decision to apply the firearms enhancement under our circuit's precedent. Moreover, Mr. Martinez appears to concede the undisputed evidence in the PSR shows "any 'possession' of the firearms by [him] was constructive possession." R. vol. IV at 19.

Mr. Martinez's contrary arguments are unavailing.

First, Mr. Martinez contends the government failed to prove the requisite spatial nexus. He insists the PSR does not establish whether the drug transactions, in fact, occurred in Mobile Home 1. Even if unknown, these facts are not material. The § 2D1.1 enhancement is appropriate where the government shows, by a preponderance of the evidence, the "mere proximity" of firearms to the drug trafficking activity. *Zavalza-Rodriguez*, 379 F.3d at 1187. Here, the government met its burden because the

undisputed facts show "the firearms were located in close proximity to the drugs and drug proceeds." R. vol. IV at 9.

Relatedly, Mr. Martinez contends the record is silent on exactly where inside Mobile Home 1 the firearms were found in relation to the drugs. The absence of this information likewise does not disturb our conclusion that § 2D1.1 applies. "Nothing in our case law or the Guidelines requires that the drugs and firearms be found together in the same room for a firearm enhancement to apply." *United States* v. *Medina-Cabuto*, 248 F. App'x 900, 904 (10th Cir. 2007) (unpublished) (cited for persuasive value under Fed. R. App. P. 32.1; 10th Cir. R. 32.1(A)); *see also United States* v. *Williams*, 431 F.3d 1234, 1238 (10th Cir. 2005) (gun and digital scale found in living room and crack cocaine found on kitchen table); *United States* v. *Smith*, 131 F.3d 1392, 1400 (10th Cir. 1997) (gun "found in the garage near the entrance to [defendant's] drug lab").

Mr. Martinez also asserts the CS never reported seeing any firearms in Mobile Home 1 during the controlled buys. On that basis, he claims the "increased danger of violence when drug traffickers possess weapons" is absent. Opening Br. at 13 (quoting U.S.S.G. § 2D1.1(b)(1) cmt. n.11(A)). But as the government correctly points out, the danger did not dissipate here, where the "firearms were present in the general location where [Mr.] Martinez stored his methamphetamine and drug proceeds." Answer Br. at

13; *see also Flores*, 149 F.3d at 1280 (§ 2D1.1(b)(1) enhancement is "designed to reflect the increased danger of violence when drug traffickers add firearms to the mix").

Mr. Martinez relies on *Castro-Perez* but that case does not help his cause. There, the drugs and the firearm were part of distinct transactions involving the defendant and so were never in the same place at the same time. 749 F.3d at 1210-11; *id.* at 1211 (holding the government failed to establish the defendant "possessed a firearm in the vicinity of the drug trafficking activity"). Here, the firearms were discovered in "close proximity to where the drugs and drug proceeds were stored" on May 17, 2019. R. vol. IV at 9.

Second, Mr. Martinez claims the government failed to prove the requisite temporal nexus. The mere fact that he had access to the ranch, Mr. Martinez argues, cannot support a sufficient temporal connection to justify the firearms enhancement. Mr. Martinez points us to *Portillo-Uranga,* where we upheld the firearms enhancement, *see United States* v. *Portillo-Uranga*, 28 F.4th 168, 179-80 (10th Cir. 2022), but contends that case supports reversal here. Unlike the defendant in *Portillo-Uranga*, Mr. Martinez did not own or reside at the property where the firearms were discovered. *Cf. id.* at 173. Absent proof of ownership or residence, Mr.

Martinez maintains, the temporal connection is not satisfied on this record.[11]

We are not persuaded. The firearms enhancement in *Portillo-Uranga* was not imposed because the defendant lived at or owned the property. Rather, "a temporal nexus existed because Portillo-Uranga possessed the firearms near indicia of drug trafficking while actively participating in a drug trafficking conspiracy." *Id.* at 179. We explained "[n]early all the firearms possessed by Portillo-Uranga were discovered in the vicinity of items likely used to facilitate drug trafficking," such as "fictitious passports" and gas tanks used by defendant's drivers during an ongoing conspiracy to "secrete money or drugs." *Id.* at 179.

To be sure, the temporal link in this case is more attenuated. As Mr. Martinez correctly points out, nothing in the PSR established he was ever inside Mobile Home 1 at the same time as the firearms. And he emphasizes, again correctly, the record shows he had not been at the ranch for at least a week before agents executed the search warrant. But Mr. Martinez conceded he "sold methamphetamine from the property on at least three occasions," R. vol. II at 8-9, and admitted he "maintained [Mobile Home 1]

[11] At oral argument, Mr. Martinez suggested, under *Portilla-Uranga*, the temporal nexus would be satisfied in this case if the evidence showed he lived at the ranch. *See* Oral Arg. at 7:08-8:46.

. . . for the purpose of storing and selling methamphetamine," R. vol. IV at 10. In Mobile Home 1, agents discovered three firearms located near methamphetamine and cash proceeds. This is sufficient to demonstrate, by a preponderance of the evidence, a temporal link between the firearms and Mr. Martinez's drug trafficking activity. *See Zavalza-Rodriguez*, 379 F.3d at 1186-87 ("For purposes of § 2D1.1(b)(1), the government need only show that 'the weapon was found in the same location where drugs or drug paraphernalia are stored.'" (quoting *United States* v. *Roederer*, 11 F.3d 973, 982-83 (10th Cir. 1993))).

Accordingly, we affirm the district court's application of the § 2D1.1(b)(1) enhancement increasing Mr. Martinez's base offense by two levels.

B

We next turn to Mr. Martinez's contention that the district court mistakenly concluded he was ineligible for a two-level reduction under § 5C1.2.

A mandatory-minimum sentence is a feature of the penalty for many federal drug crimes. Under 18 U.S.C. § 3553(f)—a provision known as the "safety valve," *Dorsey* v. *United States*, 567 U.S. 260, 285 (2012)—defendants convicted of specified drug offenses, like violations of § 841, are exempted from the otherwise-applicable statutory minimum if certain

criteria are met. "The basic purpose of the safety valve [is] 'to permit courts to sentence less culpable defendants to sentences under the guidelines, instead of imposing mandatory minimum sentences.'" *United States* v. *Pena-Sarabia*, 297 F.3d 983, 988 (10th Cir. 2002) (citation omitted); *see also United States* v. *Hargrove*, 911 F.3d 1306, 1326 (10th Cir. 2019) (explaining Congress has "refine[d]" the operation of mandatory-minimum provisions for "the least culpable participants" in federal drug trafficking offenses). Otherwise, the "least culpable offenders may receive the same sentences as their relatively more culpable counterparts." H.R. Rep. No. 103-460, 103d Cong., 2d Sess. (1994), 1994 WL 107571.[12]

"At Congress's direction, the Sentencing Commission has inserted the safety valve provision into the Guidelines." *Hargrove*, 911 F.3d at 1326 (citing U.S.S.G. § 5C1.2, cmt. Background). Section 5C1.2 provides a court shall impose a Guidelines sentence, without regard to a statutory minimum, if the defendant meets five criteria:

> (1) "the defendant does not have more than 1 criminal history point . . . ";

[12] The availability of safety-valve relief has significant implications for those eligible defendants subject to mandatory-minimum sentences. *See* U.S. Sent'g Comm'n, 2021 Annual Report and Sourcebook of Federal Sentencing Statistics 121 (2022) (compiling data showing over 5,000 drug offenders were granted safety-valve relief in 2022).

> (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 . . . "; and
>
> (5) "the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense . . . ."

U.S.S.G. § 5C1.2(a).[13] It is the defendant's burden to prove by a preponderance of the evidence entitlement to a safety-valve reduction. *See Zavalza-Rodriguez*, 379 F.3d at 1185 (citing *United States* v. *Verners*, 103 F.3d 108, 110 (10th Cir.1996)). If the defendant satisfies all five criteria, the sentencing "court shall impose a sentence without regard to a statutory minimum." *Id.* Only the second criterion—that "the defendant did not . . . possess a firearm . . . in connection with the offense"—is at issue in this appeal.[14]

In the district court, Mr. Martinez contended he was entitled to safety-valve relief because he "had no knowledge of the firearms found in the first mobile home," and "no evidence [demonstrated] that [he] ever used

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[13] The First Step Act of 2018 (FSA) amended § 3553(f)'s safety-valve provision. *See* First Step Act of 2018, Pub. L. No. 115-391, § 402(a), 132 Stat. 5194. Those amendments are not relevant to this appeal.

[14] The parties do not dispute Mr. Martinez otherwise satisfies the requirements of § 5C1.2(a).

the firearms in connection with the offense or that the firearms facilitated the offense in any way." R. vol. IV at 18-19. The district court disagreed, explaining "there were five firearms seized from two manufactured homes on properties maintained by the defendant, three of which were in close proximity to the controlled substances and drug proceeds." R. vol. II at 9. On this basis, the district court found "by a preponderance of the evidence that the defendant was aware of the firearms located in the manufactured home which was used to distribute methamphetamine on multiple occasions" and thus "did possess a firearm in connection with the offense" for purposes of § 5C1.2(a). *Id.* at 9-10.

On appeal, Mr. Martinez insists nothing in the record supports the district court's conclusion he "possessed, much less *actively possessed*, any of the firearms." Opening Br. at 21. According to Mr. Martinez, the undisputed evidence in the PSR shows "any 'possession' of the firearms by [him] was constructive possession," and even if that supports the firearms enhancement under § 2D1.1(b)(1), it does not make him ineligible for safety-valve relief. R. vol. IV at 19. As we explain, Mr. Martinez has satisfied his burden under § 5C1.2(a)(2) to show, by a preponderance of the evidence, that he "did not . . . possess a firearm . . . in connection with the offense."

We review for clear error the district court's denial of safety-valve relief under U.S.S.G. §§ 2D1.1(b)(18) and 5C1.2, "giving due deference to the district court's application of the Sentencing Guidelines to the facts." *Zavalza-Rodriguez*, 379 F.3d at 1184. "A district court's legal interpretation guiding its application of the safety-valve provision is reviewed de novo." *United States* v. *Cervantes*, 519 F.3d 1254, 1256 (10th Cir. 2008).

We look first to *Zavalza-Rodriguez*, the key authority in our circuit on the interaction of the firearms enhancement and the safety-valve provision of the Guidelines. In *Zavalza-Rodriguez*, the defendant stipulated to possessing the firearm, and under the circumstances, the government maintained "there is an inherent logical inconsistency in finding both that the government met its burden of proving possession for purposes of § 2D1.1(b)(1) . . . and also finding that the defendant met his burden of proving non-possession for purposes of § 5C1.2(a)(2)." 379 F.3d at 1185. We rejected that argument, holding "a finding that a § 2D1.1 [firearms] sentence enhancement applies does not necessarily preclude a finding that a § 5C1.2 [safety-valve] sentence reduction also applies." *Id.* at 1183. Focusing on the "defendant's own conduct" and recognizing "a distinction between constructive and actual possession," we found it consistent "to refer to the same weapon that 'was possessed' by the defendant for purposes of § 2D1.1(b)(1) as a weapon that the defendant did not 'possess . . . in

connection with the offense' for purposes of § 5C1.2(a)(2), without any taint of contradiction in the use of 'possess.'" *Id.* at 1186; *accord Hargrove*, 911 F.3d at 1328 (recognizing the "own conduct" and "active possession" principles discussed in *Zavalza-Rodriguez* "explain[] why the firearms provision of the safety valve is materially distinct from a related firearms enhancement in § 2D1.1(b)(1)").

In *Zavalza-Rodriguez*, we emphasized "possession in § 5C1.2(a)(2) is an active possession whereby there is a close connection linking the individual defendant, the weapon and the offense." 379 F.3d at 1187. We have since clarified that "mere constructive possession (*without more*)" does not justify withholding the safety-valve reduction. *Hargrove*, 911 F.3d at 1329 (emphasis added). For example, "where a defendant *acknowledged* actual possession of a firearm," the denial of safety-valve relief may be appropriate even on a record that shows only constructive possession. *Id.* (emphasis added).

Here, the district court, consistent with *Zavalza-Rodriguez*, correctly recognized Mr. Martinez remained safety-valve eligible, notwithstanding the application of the firearms enhancement. But the district court incorrectly denied safety-valve relief based on its mistaken conclusion that Mr. Martinez was aware of the firearms in Mobile Home 1. It is undisputed Mr. Martinez did not actively possess the firearms discovered in Mobile

Home 1. There is no evidence Mr. Martinez knew about the firearms in Mobile Home 1. Rather, the record shows Mr. Martinez repeatedly denied having any knowledge about the firearms.[15] Under these circumstances, the district court's "awareness" finding was clearly erroneous and cannot sustain the decision to deny safety-valve relief. *See United States* v. *Hooks*, 551 F.3d 1205, 1217 (10th Cir. 2009) ("Clear error exists if a factual finding 'is wholly without factual support in the record, or after reviewing the evidence, we are definitively and firmly convinced that a mistake has been made.'") (citation omitted).

Resisting this conclusion, the government points to our post-*Zavalza-Rodriguez* decisions in *Hargrove*, 911 F.3d 1306, and *United States* v. *Andrade-Vargas*, 459 F. App'x 762, 764, 768 (10th Cir. 2012) (unpublished), but those cases do not compel affirmance.

In *Hargrove*, we held "when a defendant concedes actual possession of a firearm (as opposed to mere constructive possession), the requirement of active possession—based on the defendant's own conduct—may be rounded out and completed by further evidence that the possessed firearm was in close proximity to the offense and had the potential to facilitate it." 911 F.3d

[15] Indeed, the only evidence of actual possession in this case concerns Mr. Medina-Tamayo's possession of the firearms found in Mobile Home 2.

at 1331. There, unlike here, the defendant "freely admitted that the firearms belonged to him and indicated that he had brought them in the vehicle to the scene of his arrest." *Id.* Under those circumstances, we concluded "the district court's express focus on the firearms' proximity and potential to facilitate the offense did not reflect an analytical disregard of [the defendant's] own conduct." *Id.* The same simply cannot be said of the record before us. Here, the undisputed facts in the PSR establish Mr. Martinez had "mere constructive possession"—and no more. *Id.* at 1329.

Still, the government suggests we can infer Mr. Martinez did more than constructively possess the firearms given his "dominion and control over the premises where [they] were found." Answer Br. at 18-19. In support, the government relies on *Andrade-Vargas*, an unpublished decision where we explained, "[e]ven if a defendant does not have 'actual possession' of a firearm by means of 'direct physical control over a firearm at a given time,'" we may infer such control if, for instance, the defendant "'knowingly holds the power and ability to exercise dominion and control' over the firearm" or the premises where it is found. *Andrade-Vargas*, 459 F. App'x at 767 (quoting *United States* v. *King*, 632 F.3d 646, 651 (10th Cir. 2011)). But such an inference is inappropriate here, where the record shows Mr. Martinez did not exclusively possess the ranch. *Cf. King*, 632 F.3d at 651 ("Constructive possession is often found where an individual has

'ownership, dominion, or control' over the premises where the firearm was found. This inference of knowing dominion over or control of a firearm is appropriate where the defendant has *exclusive* possession over the premises.") (emphasis added) (citation omitted). Recall, Mr. Martinez transferred ownership of the ranch to his brother by quit claim deed in 2011, years before the events in this case. And it is undisputed Mr. Medina-Tamayo lived in one of the manufactured homes on the ranch, R. vol. IV at 5, ¶ 9, and his girlfriend and her young daughter were inside that residence when agents searched the property, *id.* at ¶ 20.

Accordingly, the district court clearly erred in finding Mr. Martinez ineligible for a "safety-valve" reduction under §§ 2D1.1(b)(18) and 5C1.2.

III

We **AFFIRM** the district court's application of a two-level sentencing enhancement for possession of firearms under § 2D1.1(b)(1). We **REVERSE** the district court's denial of safety-valve relief under §§ 2D1.1(b)(18) and 5C1.2, and **REMAND** for resentencing with a two-level safety-valve reduction.