

DEC 18 1998

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

PATRICK FISHER
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOHNNY RAY MONTOYA,

Defendant-Appellant.

No. 97-2329
(D.C. No. CR-97-80-LH)
(District of New Mexico)

ORDER AND JUDGMENT*

Before **PORFILIO, MCWILLIAMS, and HENRY**, Circuit Judges.

This case presents a single issue of whether appellant's possession of a firearm which he kept in the same closet as the controlled substance he distributed provides sufficient evidence to deny him the benefit of the sentencing "safety valve,"¹ 18 U.S.C.

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. This court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

¹ The "safety valve" allows departure below minimum sentencing.

§ 3553(f)(1)-(5), in the absence of any evidence he ever possessed, used, or carried any dangerous weapon in connection with the offense. Notwithstanding an inventive oral argument, we believe this case is absolutely controlled by *United States v. Hallum*, 103 F.3d 87, 89 (10th Cir. 1996), a case this panel cannot overrule. *United States v. Foster*, 104 F.3d 1228, 1229 (10th Cir. 1997). Accordingly, we **AFFIRM** the judgment of the district court.

ENTERED FOR THE COURT

John C. Porfilio
Circuit Judge