No: 19-____

IN THE

SUPREME COURT OF THE UNITED STATES

JUAN FLETCHER GORDILLO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Whether this Court should review the decision of the Eleventh Circuit Court of Appeals to determine whether the decision in this case of apparent first impression satisfies the factual constitutional requirements to sustain a sentencing guideline enhancement.

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceeding below were:

James I. Cohn, Judge

Robert B. Cornell, Assistant United States Attorney

Phillip DiRosa, Assistant United States Attorney

Juan Fletcher Gordillo, Petitioner

Benjamin G. Greenberg, Assistant United States Attorney

Fred Haddad, Counsel for Appellant

Emily Smachetti, Assistant United States Attorney

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PETITION FOR WRIT OF CERTIORARI

Petitioner Juan Fletcher Gordillo respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

The decision of the District Court of Appeals in this matter is reported as *United States v. Gordillo*, 920 F.3d 1292 (11th Cir. 2019) and was decided on April 17, 2019.

JURISDICTIONAL STATEMENT

The opinion of the United States Court of Appeals for the Eleventh Circuit was rendered on April 17, 2019 and is included as Appendix A. The jurisdiction of this Court is also invoked pursuant to 28 U.S.C. §1254(1), see *Hohn v. United States*, 524 U.S. 236 (1998).

CONSTITUTIONAL PROVISIONS INVOKED

AMENDMENT V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Petitioner, a national of Guatemala, who had overstayed his visa by a number of years, was arrested and his home was searched and certain firearms were found. He was later indicted on December 15, 2017 in the Southern District of Florida for the offense of possession of a firearm by a prohibited person in violation of 18 U.S.C. §922(g)5(A)

After denial of a Motion to Suppress Evidence, the Petitioner eventually entered a plea of guilty to the indicted charges. He did not have a plea agreement, but rather pled "straight up" to the Court, although there was a factual proffer submitted.

After his plea of guilty before District Court Judge James I. Cohn, a Presentence Report was ordered and in response to that report, objections in the form of a "Response to the Presentence Investigation Report and Memorandum in Aid of Sentencing" were filed by Petitioner. The issue involved at sentencing and raised for consideration by this Court as it was for the Eleventh Circuit is the guideline calculation for possession of a prohibited firearm, an AR-15 with the ability to receive a high capacity magazine, and possession of a high capacity magazine.

The matter came on for a sentencing hearing, inter alia, over that issue. The Government called the agent as a witness to support the guideline calculation, while the Petitioner testified also. The sole issue was the proximity of the magazine to the actual weapon, albeit in the same room, since each was in a separate "container".

After overruling Petitioner's objection, the Court assessed a guideline level 20 and thereafter decided to grant a variance to a sentence of 24 months imprisonment.

The factual underpinnings of the case are as follows:

Petitioner pled guilty as charged and a Presentence Report was ordered. That report in paragraph 16 recited: "Base Offense Level: The guideline for a violation of 18 U.S.C. §922(g)5(a) is §2K2.1. Since the offense involved a semiautomatic firearm that is capable of accepting a large capacity magazine and the Petitioner was a prohibited person at the time the instant offense was committed, the base offense level is 20, §2K2.1(a)(4)(B)(i)(ii)".

The Petitioner, through counsel, filed his Response to the Presentence Investigation Report and the Petitioner advised that he would argue the base offense level was 14, under §2K2.1.

The Petitioner argued as follows:

For base offense level 20 and §2K2.1(a)(4)(B)(i)(ii) to apply, the defendant must be a prohibited person AND the offense must involve a semiautomatic firearm capable of accepting a large capacity magazine. Admittedly, Juan Fletcher Gordillo is a prohibited person because he is not a citizen of the United States and is out of status. However, we do not believe one of the firearms involved in this offense meets the definition of a semiautomatic firearm.

Pursuant to §2K2.1, comment. (n2), for purposes of subsection (a)(4), "a semi-automatic firearm that is capable of accepting a large capacity magazine" means a semiautomatic firearm that has the ability to fire many rounds without reloading because at the time of the offense (A) the firearm had attached to it a magazine or similar devise that could accept more than 15 rounds of ammunition was in close proximity to the firearm. In this case, (A), no magazine or similar devise was attached and (B) no magazine or similar device was in close proximity ot the firearm. Both requirements needed for base offense level 20 were found to be valid and necessary in *U.S. v. Davis*, 668 F.3d 576 (8th Cir. 2012).

The facts of this case are as follows: When Ice officers searched the Defendant's house on November 27, 2017, one of the firearms recovered, an AR-15, had a gun lock and was safely stored in an enclosed case. This firearm was found in the master bedroom. On the other side of the room, in a separate bag, was the magazine for the AR-15. With that said, the semiautomatic firearm recovered on November 27, 2017 neither had an attached magazine, or if they did neither of them were 15 rounds, nor was one in close proximity to the firearm. Therefore, the base offense level in this case should be 14, not 20, because although the defendant is a prohibited person, the standard for a semiautomatic weapon under §2K2.1, comment. (n.2) has not been met.

Consistent with our objection to the guideline calculations, we believe paragraph 16 of the PSR should reflect a base offense level 14, paragraph 21 of the PSR should reflect an adjusted offense level of 16, paragraph 25 of the PSR should reflect a total offense level 13, and

> paragraph 62 of the PSR should reflect a total offense level 13, criminal history category I, and an *advisory* guideline range of 12 to 18 months. Finally, paragraph 66 of the PSR should reflect the Defendant is in Zone C, not Zone D of the *advisory* Sentencing Table. Any corrections/clarifications to non-sentencing issues have been communicated directly with the Probation Office.

The Government filed its Response and the Government framed the issues for sentencing as follows:

> By his guilty plea and in his response, Defendant acknowledges being a prohibited person at the time of the offense. He also acknowledges that an AR-15 and magazines for that weapon were recovered from the Defendant's bedroom. Strangely, and without proffering any supporting evidence, he goes on to contest than an AR-15 is a semiautomatic firearm. He also asserts the large capacity magazines found in the same bedroom as the AR-15 were not in "close proximity." His argument fails on both counts. First, as mentioned, Defendant has proffered no evidence that an AR-15 is not a semiautomatic firearm. Second, although the Eleventh Circuit has not specifically defined "close proximity" in relation to this guideline, other courts have weighed in. *See United States v. White,* 701 F. App'x 517, 520 (8th Cir. 2017) (applying enhancement for large capacity magazine was not plain error where "rifle was recovered from the living room, while the large-capacity magazine was recovered from his upstairs bedroom"); *United States v. Mudlock*, 483 F. App'x 823, 829 (4th Cir. 2012) (not plain error to assess enhancement for large capacity magazine where gun was in a safe six to ten feet from dresser drawer where magazine was found).

The matter then came on for sentencing at which time the Petitioner articulated his objections with the crux of the argument being:

> In our case, you have the testimony from all of the officers that searched the home, and their testimony was essentially that the AR-15 that was found in this case was in a hard-type case or some sort of gun case with a gun lock on the gun. And really, the testimony itself didn't provide for where the clips were found.

The lower court took testimony and thereafter ruled.

The Eleventh Circuit upheld this ruling in a somewhat detailed opinion. The issue obviously was, as the Court stated, "whether a high capacity magazine in a bag is in 'close proximity' to a locked firearm in a case ten feet away in the same room.

The Court recognizing that it had never [nor had any other] analyzed the meaning of "close proximity" traced its meaning in several dictionaries and the "plain" meaning, as well as the U.S. Sentencing Guidelines.

The Court then turned to its analysis of cases addressing proximity in relation to "drugs and guns" enhancements found in U.S.S.G. 2K2.1(a) and (b), 2D1.1(b) and 2K2.1(b)(6)B and determined that under the Court's decision in *Smith v. United States*, 508 U.S. 223 (1993). The Appeals Court authored the following, analyzing *Smith* in the Sentencing Guideline Aspect:

> The Commission noted that it intended to conform the Guidelines to *Smith v. United States*, 508 U.S. 223 (1993), which had held that 18 U.S.C. §924(c)(1)'s "use" requirement meant that the gun be used to "facilitate[] or further[] the drug crime". *Smith*, 508 U.S. at 232. In other words, "close proximity" was intended to be a proxy for the potential of the gun to facilitate the drug crime. "A firearm found in close proximity to drugs or drug-related items simply 'has' - - without any requirement for additional evidence - - the potential to facilitate the drug offense". *United States v. Carillo-Ayala*, 713 F.3d 82, 92 (11th Cir. 2013). Similarly, §2D1.1(b) provides an enhancement when a dangerous weapon is possessed during certain drug trafficking offenses, and Application Note 11(A) clarifies that "[t]he enhancement 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), App.Note 11(A).

The Court then cited to its own cases on "drugs and guns" [slip opinion pages 12, 13], and determined based on its interpretations the phrases have the same meaning under "Application Note 2 [semiautomatic weapons[as it does in Application Note 14 [connection between drugs and guns]", slip opinion page 14].

After a continued analysis, the Appellate opinion concluded:

> The firearms and magazine were ten feet apart in the same room. They were both physically proximate and readily accessible.
>
> Under Gordillo's preferred reading, however, anytime a semiautomatic weapon is locked and in a gun case and a high-capacity magazine is in a separate container, the enhanced base offense level in the Guidelines would be inapplicable. But the Guidelines are not a safe-storage law. They are intended to punish firearms crimes involving particularly dangerous types of weapons. Gordillo does not dispute that those four high-capacity magazines were in physical proximity to the firearm or that they were actually intended for use in that firearm. His safe-storage practices notwithstanding, Gordillo is subject to the enhanced base offense level under §2K2.1(a)(4)(B)(i)-(ii).

The Court then affirmed the judgment and sentence imposed by the lower court.

REASONS FOR GRANTING THE WRIT

> Whether this Court should review the decision of the Eleventh Circuit Court of Appeals to determine whether the decision in this case of apparent first impression satisfies the factual constitutional requirements to sustain a sentencing guideline enhancement.

To be sure there is not a wealth of case law on the subject matter of the instant Petition, that is a firearm and the high capacity magazine in a non-drug related offense. Concededly, the Petitioner was a prohibited person, the weapon was certainly a semiautomatic firearm that was capable of accepting a large capacity magazine. There was no magazine in the rifle, which was in a gun case with a lock on the gun, and the magazines, high capacity by the testimony were in a gun range bag some ten feet away.

As used in the gun/drug analysis, proximity can mean something as "close" as in a car across the street from a drug transaction, *United States v. Flennory*, 145 F.3d 1264 (11th Cir. 1998) or in the same home where drugs are found, *United States v. Paneto*, 661 F.3d 709 (1st Cir. 2001) citing to *United States v. Peterson*, 233 F.3d 101 (1st Cir. 2000).

There were no drugs involved in the case at bench; this was the mere passive presence of a weapon capable of accepting a high capacity magazine that was in a gun case that was within ten feet of a high capacity magazine located in another container. There is no need for an analysis of readily accessibility for immediate use for another crime or for the possession of drugs.

One of two Appellate Court opinions on the issue as before this Court, *United States v. Mudlock*, 483 Fed.App'x 823 (4th Cir. 2012) the Court determined that that Appellant, a person prohibited from possession by virtue of a domestic violence restraining order, did not carry his burden to show the District Court erred where it was established that a high capacity magazine was in a dresser drawer in a bedroom two or three steps from an open gun safe where the rifle capable of accepting the magazine was found. The other opinion was authored in *United States v. White*, 701 Fed.App'x 517 (8th Cir. 2017) and there the Court confronted a non-objected to guideline calculation and finding deciding that there was no error in assessing the enhancement for a prohibited person for close proximity where the rifle capable of accepting the magazine was found in the living room of the home while the high capacity magazine was found in an upstairs bedroom. In denying relief to that Appellant the Court, citing, inter alia, to the decisions of this Court, held:

> White cannot carry his burden to show that the district court committed an error that was "clear or

> obvious" under the law at the time of the court's ruling. *See Poitra,* 648 F.3d at 887. White cites no controlling authority from the Supreme Court or this court that directly addresses the meaning of the phrase "close proximity", as it is used in §2K2.1(a)(4)(B). In the absence of any controlling or persuasive authority on the issue, it is at the very least "subject to reasonable dispute". See *Puckett v. United States*, 556 U.S. 129, 135, 129 S.Ct. 1423, 173 L.Ed.2d 266 (2009). Accordingly, any alleged error committed by the district court in determining that the large-capacity magazine and the Magtech rifle were in close proximity for purposes of §2K2.1(a)(4)(B) was neither clear nor obvious under the law at the time of the court's ruling and was therefore not plain. See *id.*; see also *United States v. Olano*, 507 U.S. 725, 734, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993) (noting that "plain" is synonymous with "clear" or "obvious" and that, "[a]t a minimum, court[s] of appeals cannot correct an error [under plain-error review] unless the error is clear under current law")

Petitioner submits that the Court should grant review to determine whether simple possession of a prohibited weapon that does not have an attached magazine ought be considered in the same light for sentencing as one possessed in similar circumstances to facilitate a drug offense or other crime.

CONCLUSION

For the foregoing reasons, a writ of certiorari ought issue to the Eleventh Circuit Court of Appeals to review the decision at issue and enter whatever other orders are appropriate.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has furnished to the Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001, and to Phillip DiRosa, Esq., Office of the United States, 500 E. Broward Blvd., Fort Lauderdale, Florida 33394-3000, this 13th day of June, 2019.

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