

No. 19-

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IN THE  
**Supreme Court of the United States**

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NANCY ARLENE LOPEZ ,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

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**On Petition for Writ of Certiorari  
to the United States Court of Appeals  
for the Fifth Circuit**

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**PETITION FOR WRIT OF CERTIORARI**

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### QUESTION PRESENTED FOR REVIEW

Petitioner, NANCY ARLENE LOPEZ, appealed her ten-year statutory minimum sentence imposed after she pleaded guilty to conspiracy to import 500 or more grams of methamphetamine. (Exhibit A, page 1). On direct appeal, Ms. Lopez argued there was reversible error at sentencing because the Government failed to move for a downward departure pursuant to § 5K1.1 of the Sentencing Guidelines based on the substantial assistance provided to the Government. (Exhibit A, pages 1-2). The United States Court of Appeals for the Fifth Circuit ("Fifth Circuit") disagreed and affirmed the sentence imposed by the District Court. (Exhibit A, page 2). The Fifth Circuit based its decision on the conclusion there was no unconstitutional motive for not filing a § 5K1.1 because, according to the Court, there was no violation of *Miranda v. Arizona*, 304 U.S. 436, 444 (1966). (Exhibit A, page 2).

Respectfully, the decision of the Fifth Circuit decided important federal questions in a way that conflicts with relevant decisions of this Court. Specifically, in a manner which is contrary to the stare decisis of this Court, the Fifth Circuit relied on the Government's argument that there must be a formal arrest before a person is in custody for purposes of *Miranda*. The decision was further contrary to the holdings of this Court because the Fifth Circuit failed to extend violations of § 5K1.1 to any and all unconstitutional motives by the Government. Moreover, the decision was contrary to the holdings of other Circuits. Thus, a compelling reason is presented in support of discretionary review by this Honorable Court.

### **PARTIES TO THE PROCEEDING**

The parties to the proceeding are listed in the caption:

Nancy Arlene Lopez:	Petitioner (Defendant-Appellant in the lower Courts)
United States of America:	Respondent (Plaintiff-Appellee in the lower Courts)

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### **PETITION FOR WRIT OF CERTIORARI**

Petitioner, NANCY ARLENE LOPEZ , requests this Court grant this Petition and issue a Writ of Certiorari to review the decision of the Fifth Circuit. Ms. Lopez respectfully submits the District Court committed reversible error by finding Ms. Lopez was not eligible for relief under U.S.S.G. § 5K1.1. The Fifth Circuit did not apply the correct law to the facts of this case. (Appendix A, pages 1-2). Hence, the Appellate Court affirmed the District Court without the proper application of § 5K. Therefore, it can only be concluded that a § 5K should have been available and that the Fifth Circuit did not apply the correct standard of review. Accordingly, the sentence imposed must be vacated and this matter reversed and remanded for resentencing.

### **REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE**

From the Federal Courts:

The Order of the United States Court of Appeals for the Fifth Circuit, *United States v. Nancy Arlene Lopez*, No. 19-40004 (5th Cir. Dec. 5, 2019), appears at Appendix A to this petition and is unreported.

The Judgment in a Criminal Case of the United States District Court for the Southern District of Texas, McAllen Division, appears at Appendix B to this petition and is unreported.

From the State Courts:

None.

### **GROUND FOR JURISDICTION**

This Petition arises from a direct appeal which granted final and full judgment against Ms. Lopez. This action is on a criminal prosecution initiated by the Government.

Ms. Lopez pleaded guilty and proceed to sentencing. Despite the District Court's profound concern that *Miranda* had been violated at the questioning by law enforcement which led to the prosecution of this conspiracy, no U.S.S.G. § 5K motion was filed by the Government. The lack of such motion is at issue in this Petition. A copy of the Judgment appears at Appendix B. Ms. Lopez argued to the Fifth Circuit there was reversible error because the Government should have moved for a § 5K departure. The Fifth Circuit rejected this argument in an unpublished opinion dated December 5, 2019, and affirmed the decision of the District Court. A copy of the decision appears at Appendix A. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

### CONSTITUTIONAL PROVISIONS

#### U.S. CONST. Amend. 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.

#### U.S. CONST. Amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation: to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in this favor; and to have Assistance of Counsel for his defense.



## STATEMENT OF THE CASE

### Overview:

Pursuant to a written plea agreement, Ms. Lopez pleaded guilty to conspiring to import 500 grams or more of methamphetamine. ROA.58, 137-38. The plea agreement provided that Ms. Lopez would plead guilty to Count One of the indictment and the remaining counts would be dismissed. ROA.137. The agreement also provided that Ms. Lopez would receive a 2-level reduction for her acceptance of responsibility. ROA.137-38.

### Background:

The District Court accepted Ms. Lopez's guilty plea. ROA.65-112. During her guilty plea allocation, Ms. Lopez and her co-defendant, Moses Rene Hernandez, admitted certain facts were true and correct as recited by counsel for the Government and based on questioning by the Court. Ms. Lopez admitted she conspired to smuggle methamphetamine into the United States from Mexico inside of candles. ROA.104-07. Ms. Lopez was not present, but her co-defendant was arrested by federal authorities. ROA.104-07. The co-defendant claimed he had been recruited by Ms. Lopez. ROA.104-07.

Approximately a month after he co-defendant was taken into custody, federal agents arrived at Ms. Lopez's home. ROA.146. The agents took Ms. Lopez to the Edinburg Police Department located in Edinburg, Texas. ROA.146. Despite this action, the agents claimed they told Ms. Lopez she was not in custody and free to leave. ROA.146. Ms. Lopez confessed and gave the agents extensive information concerning drug smuggling into the United States. ROA.146-47. This exchange led to the filing of this case.



On April 24, 2018, a federal warrant was issued for Ms. Lopez's arrest. ROA.147. She was taken into custody on April 27, 2018. ROA.147. However, this time Ms. Lopez was read her *Miranda* warnings, she elected to waive those rights, and debriefed. ROA. ROA.147. Ms. Lopez disclosed that she worked with a man named "Tito," who was the source of the supply of the drugs she moved, and that she was to be paid \$3,500 by Tito for smuggling drugs. She also disclosed additional specifics about the day Mr. Hernandez and she brought the candles containing methamphetamine into the United States. ROA.147. The interview was terminated. ROA.147.

Following Ms. Lopez's guilty plea, a Presentence Investigation Report ("PSR" or "the report") was prepared. The Probation Officer concluded in the report that, because the methamphetamine had been extracted from the candle wax, the total gross weight for the methamphetamine was 11,192 grams. ROA.149. Five percent was deducted from this amount because there was still some wax particles in the methamphetamine. ROA.149-50. This brought the gross amount of the methamphetamine at issue to 11.13 kilograms. ROA.150. Thus, pursuant to U.S.S.G. 2D1.1(c)(2), the officer concluded this case involved "at least 5 kilograms but less than 15 kilograms of methamphetamine." ROA.150. The officer therefore assigned Ms. Lopez a base offense level of 34. ROA.150.

Two levels were added due to the fact this offense involved the importation of methamphetamine. ROA.150. The officer further concluded, pursuant to U.S.S.G. § 3B1.1(c), that Ms. Lopez was an organizer, leader, manager, or supervisor of this criminal activity,

and increased the offense level by 2. ROA.150. Two levels were deducted for acceptance of responsibility, which brought Ms. Lopez's total offense level to 36. ROA.151.

With respect to criminal history, Ms. Lopez first received 3 points for 2 misdemeanor theft cases and 1 felony theft of property case. ROA.151-52. Because Ms. Lopez was on probation for the felony when she committed the instant offense, 2 points were added. ROA.153. Thus, Ms. Lopez was assigned 5 points and a criminal history category of III. ROA.154.

However, the mandatory minimum for this offense is 10 years imprisonment. ROA.157. The Probation Officer determined, based on an offense level of 36 and a criminal history category of III, that the Guidelines range of punishment was set at 235 months to 293 months in the custody of the Bureau of Prisons. ROA.157. If the Government moved for a third point for acceptance of responsibility, the imprisonment range would be set at 210 to 262 months. ROA.157.

Ms. Lopez filed objections to the PSR, to which the Probation Officer responded. The first and main objection by Ms. Lopez to the PSR was that the weight of the contraband was incorrect due to the mix between the wax and the methamphetamine. ROA.162. The officer asserted the gross weight had been correctly reduced for any remaining wax in the methamphetamine. ROA.162-63.

The next objection to the report involved the upward role adjustment. ROA.163. However, the District Court at sentencing determined there would be no upward role adjustment but rather that there would be a 1 point downward adjustment for Ms. Lopez's



role in the offense. ROA.131. Therefore, the role adjustment issue does not need further discussion.

At the sentencing hearing, an exchange took place on the record as to the Court's profound disagreement with the methods employed by the Government to interrogate Ms. Lopez. The court began by asking if Ms. Lopez was given her *Miranda* rights when she was taken to the Edinburg police stations. ROA.124. It was agreed she was not. ROA.124-25. The Court asked if that was the way the officers were trained to handle such a situation. ROA.125. The Judge declared: I don't understand why she wasn't given her rights." ROA.126.

At this point, the Court established that Ms. Lopez was not the owner of the methamphetamine, and that she was merely a courier. ROA.127. The Judge then expressed his concern over the agent's interrogation of Ms. Lopez, and the following exchange took place:

**THE COURT:** And, you know, in the old days, you all used to make cases from these people, but now we don't. I mean, this one, actually, without even given her rights, went ahead and gave you the whole story. But, yes, we can spend our whole time here with the people crossing the bridge as opposed to trying to get to the bottom, either through wiretaps or some other situation, where

we actually end up with the people who really are the ones that are sending people across doing this.

**MR. BROWN:** Again, I respectfully disagree, your Honor. This defendant has connections with the cartels in Mexico. She used that connection to get the methamphetamine. She recruited –

**THE COURT:** Okay. Where do you get the information that she used that information about – we all know about the cartels in Mexico. Who doesn't?

**MR. BROWN:** Sure. And she used her connections with that cartel to get the methamphetamine, provide it to her co-defendant, whom she recruited; in fact, she preyed upon, as it's indicated in the report, because she knew he was a desperate drug addict. She gave him a few hundred dollars and pocketed several thousand dollars, or at least was going to, for herself.

**THE COURT:** Which is minuscule compared to how much somebody was going to make with this amount of methamphetamine.

**MR. BROWN:** Sure. But she's not just the transporter, like her co-defendant is. She organized and set this whole thing up. That's –

**THE COURT:** yeah, but she's also not the top of it either.

**MR. BROWN:** Sure. Fair enough.

**THE COURT:** I mean – no, not fair enough; it's the facts. And, frankly, you do have somebody who was not read her rights and gave the entire story here and really was a helpful as could possibly be with regards to being honest about what happened here. That's very unusual. And it's very unusual not to read somebody their rights when you're, basically, getting a confession from them.

**MR. BROWN:** Sure. Though, again, I would disagree. I – her co-defendant already pointed her out and gave the agents the case without her cooperation, so I would disagree that her cooperation is what gave them this whole case. I don't think that's quite true.

**THE COURT:** Well, what do you make about the point that she wasn't read her rights and she just made a confession and you didn't have that without her?

**MR. BROWN:** My understanding is Miranda rights are required under custodial interrogation.

**THE COURT:** When you go pick somebody up, that's not custodial interrogation?

**MR. BROWN:** No, not if they're not under arrest and not if they're going voluntarily, under their own free will. Absolutely not.

**THE COURT:** But that would mean just everybody, basically.



**MR. BROWN:** No, because usually people are arrested. They're put in handcuffs –

**THE COURT:** I have had tapes introduced here where the question was did the person understand their rights, where it's the same fact situation, they go voluntarily or something, they are read their rights. I don't have a problem with that.

**MR. BROWN:** Well, I agree with the Court, as a practice, they should, but I don't think it's required, so –

**THE COURT:** Yes, that would have been the proper thing to have done, in all likelihood.

**MR. BROWN:** I agree with the Court. Absolutely.

**THE COURT:** Right.

**MR. BROWN:** The only other thing I would like to say is, although the Government is not seeking it, this defendant's criminal history would certainly justify an upward departure based on all the prior smuggling and narcotics trafficking. Paragraphs 47 to 50 was of particular concern for the Government, the prior smuggling of a minor. This is a lot of methamphetamine here, and the Court is well aware of the destructiveness of that drug, and I would leave it at that. Thank you, your Honor.

**MR. BARRERA:** Judge, I will say my conversations with the prior AUSA on this were very different from the comments here. They were very appreciative that she gave the information, and the information that she gave later –

**THE COURT:** And that's somebody who's been working here for a long time, the prior U.S. Attorney, just like I've been working here for a long time, and, yes, this is a very unusual case in the sense that she completely came through and gave all this information. This is not your regular case. And it just depends on how long you've been here with regards to what your information is and how these cases work. And, frankly, yes, the fact that somebody wasn't read their rights is very unusual under the circumstances.

ROA.123-31.

The Court then recalculated the Guidelines. ROA.131-32. Based on this recalculation, Ms. Lopez was sentenced to serve 120 months in the custody of the Bureau of Prisons. ROA.132.

Notice of Appeal and Petition Concerning Decision of the Fifth Circuit

After judgment was entered, Appendix B, Ms. Lopez timely filed a notice of appeal, ROA.46, and proceedings were held in the Fifth Circuit Court of Appeals. The Appellate Court affirmed, Appendix A, which is the basis for this Petition for Writ of Certiorari.

**ARGUMENT AMPLIFYING REASONS RELIED  
ON FOR ALLOWANCE OF THE WRIT**

I.

Applicability of U.S.S.G. § 5K1.1

The Fifth Circuit cited this Court and duly noted the rule with respect to an unconstitutional refusal by the Government to move for relief under § 5K1.1. The Fifth Circuit explained that “[t]he government retained . . . discretion [to not file a § 5K1.1 motion] so its refusal to move for a downward departure would warrant relief only if it acted with an unconstitutional motive.” (Exhibit A, page 2) (citing *United States v. Aderholt*, 87 F.3d 740, 742-43 (5th Cir. 1996)). The Fifth Circuit then cited this Court and declared “an ‘unconstitutional motive’ would exist if a prosecutor refused to file a § 5K1.1 motion ‘because of the defendant’s race or religion’ or for any other reason ‘not rationally related to any legitimate government end.’” (Exhibit A, page 2) (quoting *Wade v. United States*, 504 U.S. 181, 185 (1992)). Hence, the Fifth Circuit was fully aware that the Government’s refusal to file a § 5K1.1 motion is unconstitutional if the Government’s reason for refusing was “not



rationally related to any legitimate government end.” *See* (Exhibit A, page 2) (quoting *Wade*, 504 U.S. at 185).

On direct appeal, Ms. Lopez argued that the Government’s failure to file a § 5K1.1 motion was based on an unconstitutional motive on the part of the Government. (Opening Brief, page 24). The Fifth Circuit, however, failed to address this argument. Instead, the Fifth Circuit found only that Ms. “Lopez does not assert that the government’s decision not to file a § 5K1.1 motion was based on her membership in any group or any of her specific characteristics.” (Exhibit A, page 2). Respectfully, Ms. Lopez’s failure to allege “membership in any group” or assert “any of her specific characteristics” is irrelevant to the requisite inquiry of whether the Government’s refusal to file a § 5K1.1 motion “was . . . rationally related to any legitimate government end.” *See* (Exhibit A, page 2) (applying different standard of review than that quoted in *Wade*). In other words, the Fifth Circuit did not apply this Court’s carefully crafted rule for unconstitutional motive.

This is important in this case because, as the Fifth Circuit acknowledged, Ms. Lopez’s argument was that the Government had obtained information in violation of *Miranda*, then continued to exploit Ms. Lopez without the benefit of a § 5K1.1 motion, and that such action was not rationally related to any legitimate Government end. (Exhibit A, page 2). Given that the Fifth Circuit never addressed whether the Government’s position was based on an unconstitutional motive, and in light of Ms. Lopez’s argument that she has established such a motive, this Petition should be granted to allow this case to proceed to further review.

II.  
Split in the Circuits on U.S.S.G. § 5K1.1

In her opening brief, Ms. Lopez cited a case from the United States Court of Appeals for the Third Circuit (“Third Circuit”) which is now clearly in conflict with the Fifth Circuit’s holding in this case. The case Ms. Lopez cited is *United States v. Issac*, 141 F.3d 477, 483 (3d Cir. 1998). (Opening Brief, page 24). With respect to § 5K1.1 motions, Ms. Lopez argued: “it should be noted that some Circuits have stated that the Government cannot refuse to agree or move for a reduction based on bad faith.” (Opening Brief, page 24) (citing *Issac*, 141 F.3d at 483). Indeed, in *Issac*, the Third Circuit explained that “a district court is empowered to examine for ‘good faith’ a prosecutor’s refusal to file a § 5K1.1 motion pursuant to a plea agreement that gives the prosecutor ‘sole discretion’ to determine whether the defendant’s assistance was substantial.”

Ms. Lopez submits this merits further consideration because there is now a split in the Circuits. Further, because the Fifth Circuit did not address this holding, Ms. Lopez respectfully contends this Court should exercise its discretion over this case to address the issues raised herein and grant this Petition.

III.  
The Opinion of the Fifth Circuit and *Miranda*

On the issue of *Miranda*, the Fifth Circuit opined that Ms. Lopez maintained “that the government did not file a § 5K1.1 motion for the unconstitutional purpose of taking statements in violation of *Miranda v. Arizona*, 484 U.S. 436 (1966).” (Exhibit A, page 2). To this, the Fifth Circuit responded “the record contains no evidence that shows plainly or



clearly that her statement was made in violation of *Miranda*.” (Exhibit A, page 2) (citing *Puckett v. United States*, 556 U.S. 129, 134-35 (2009)).

Respectfully, this conclusion is without merit for two reasons. First, as established above, the District Court was adamant that the agents violated the tenants of *Miranda* by placing Ms. Lopez in a patrol vehicle and escorting her to the police station for questioning and failing to give her *Miranda* warnings. ROA.123-31. This went unaddressed by the Fifth Circuit.

Furthermore, it must be noted the Government argued *Miranda* applies when the accused is formally arrested. (Government’s Brief, page 20). This is contrary to the judicial holding of this Court which establishes that *Miranda* is implicated when the accused is “deprived of his freedom of movement in any significant way.” *Miranda v. Arizona*, 384 U.S. 436, 442 (1996). Ms. Lopez argued that *Miranda* was violated because she was in custody under *Miranda* and that the District Judge affirmed this concept. Thus, this is an additional reason to grant the Petition in this case.

### CONCLUSION

Respectfully, despite the arguments and citation to *Issac*, the opinion of the Fifth Circuit does not respond to the arguments regarding the Government’s alleged unconstitutional motive for failing to file a motion for a U.S.S.G. § 5K1.1 departure. The decision therefore mandates the use of the discretionary authority of this Court to grant this writ. Accordingly, Ms. Lopez submits, on the important issue of federal sentencing concerns, compelling reasons are presented in support of discretionary review.

WHEREFORE, PREMISES CONSIDERED, Petitioner herein respectfully requests that this Honorable Court grant this petition and issue a Writ of Certiorari and review the decision of the United States Court of Appeals for the Fifth Circuit which affirmed the sentence imposed by the District Court. Ms. Lopez also respectfully requests any further relief to which she may be entitled under the law and in equity.

Respectfully Submitted,



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