NO._____

IN THE SUPREME COURT OF THE UNITED STATES

ADAM ALFREDO FLORES, also known as Adam Flores
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Was a maximum ten year sentence above the guidelines of 70 to 87 months' imprisonment for Felon in Possession of a Firearm substantively unreasonable, cruel and unusual punishment and disproportionate to the offense, which involved his possessing a firearm underneath his seat in his vehicle, thus violating Mr. Flores' Eighth Amendment right to be free from extreme sentences that are grossly disproportionate to the crime, even though Mr. Flores had an extensive criminal history and the Court cited the need to protect the public?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings are named in the caption of the case before this Court.

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PRAYER

Petitioner Adam Flores ("*Mr. Flores*") respectfully prays that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Fifth Circuit issued on June 25, 2020.

OPINION BELOW

On June 25, 2020, the United States Court of Appeals for the Fifth Circuit entered its judgment and opinion affirming the judgment of conviction and sentence. The Westlaw version of the Fifth Circuit's opinion is reproduced in the appendix to this petition.

JURISDICTION

On June 25, 2020, the United States Court of Appeals for the Fifth Circuit entered its judgment and opinion affirming the judgment of conviction and sentence. This petition is filed within 90 days after that date and thus is timely. See Sup. Ct. R. 13.1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

I. The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. amend. VIII.

STATEMENT OF THE CASE

A. Course of proceedings.

On November 29, 2017, a federal grand jury in the Corpus Christi Division of the Southern District of Texas returned a one-count indictment charging Defendant-Appellant Adam Flores with one count of knowingly possessing a firearm and ammunition while a convicted felon in and affecting foreign and interstate commerce, in violation of 18 U.S.C. § 922(g)(1) and 924(a)(2). ROA.11.

On January 4, 2018, pursuant to a written plea agreement, Mr. Flores appeared before United States Magistrate Judge Janice Ellington[1] and pleaded guilty to Count One of the indictment. ROA.36, 38-41.

After receiving a copy of the PSR, Mr. Flores filed an Amended Objection to the PSR on March 31, 2018 challenging the base offense level of 24 and his enhancement under the Armed Career Criminal Act. ROA.234-242, 283-296.

At sentencing on April 10, 2018, Mr. Flores' objected to the ACCA enhancement as well as a base offense level of 24, and the Court over-ruled the objection and sentenced Mr. Flores to 180 months in the custody of the Bureau of Prisons, to be followed by a 3-year term of supervised release. ROA.153-179. The district court waived imposition of a fine, but the court imposed the mandatory $100 special assessment. ROA.66-71, 153-179. In the Statement of Reasons on April 11, 2018, the Court adopted the PSR without change, noting the sentence was within the guideline range, without departures or variances. ROA. 297-300.

[1] Mr. Flores consented to plead guilty before a United States Magistrate Judge. ROA.36.

On April 10, 2018, Mr. Flores timely filed notice of appeal. ROA.64-65.

On May 22, 2019, the Fifth Circuit issued an Opinion vacating the sentence and remanding for a re-sentencing because Mr. Flores' Texas juvenile adjudication for Aggravated Assault did not qualify as a predicate offense under the Armed Career Criminal Act ("*ACCA*"). ROA.81-88.

The Court ordered a revised presentence report ("PSR") be prepared to assist the court in sentencing him. The PSR calculated Mr. Flores' total offense level as 21, and placed Mr. Flores in a criminal history category of V, resulting in an advisory

At re-sentencing on October 31, 2019, Mr. Flores requested a sentence of 70 months, which was within the guideline range, and the Government requested a sentence of 87 months within the guideline range, per the plea agreement. ROA. 183-187. The court sentenced Mr. Flores to the maximum statutory sentence of 120 months in the custody of the Bureau of Prisons, to be followed by a 3-year term of supervised release. ROA.180-191. In the Statement of Reasons, imposed a variance above the guideline range due to "the history and characteristics of the defendant pursuant to 18 U.S.C. § 3553(a)(1)," "issues with criminal history," "to afford adequate deterrence to criminal conduct," "to protect the public from further crimes of the defendant," and the Court noted, "the court considered the defendant's violent nature and propensity for recidivism." ROA.322-323. After sentence was pronounced at the hearing, the defense raised the constitutional issue of cruel and unusual punishment. ROA.189-190.

On November 7, 2019, Mr. Flores timely filed notice of appeal to the United

States Court of Appeals for the Fifth Circuit. ROA.97-98. 100-101. On November 13, 2019, Mr. Flores filed a Motion for New Trial, which was denied via an Order issued on December 5, 2019. ROA.349. And on June 25, 2020, the Fifth Circuit affirmed the judgment of conviction and sentence. See United States v. ADAM ALFREDO FLORES, also known as Adam Flores, 810 Fed.Appx. 360 (Mem)(5th Cir. June 25, 2020) (unpublished) (Appendix A).

B. Statement of the relevant facts.

1. District Court.

Indictment and plea.

On November 29, 2017, a federal grand jury in the Corpus Christi Division of the Southern District of Texas returned a one-count indictment charging Defendant-Appellant Adam Flores with one count of knowingly possessing a firearm and ammunition while a convicted felon in and affecting foreign and interstate commerce, in violation of 18 U.S.C. § 922(g)(1) and 924(a)(2). ROA.11.

On January 4, 2018, pursuant to a written plea agreement, Mr. Flores appeared before United States Magistrate Judge Janice Ellington[2] and pleaded guilty to Count One of the indictment. ROA.36, 38-41. The plea agreement provided that, in exchange for Mr. Flores' guilty plea to Count One, the government would (1) recommend a sentence within the Guidelines range; and (2) recommend maximum credit under the Guidelines for acceptance of responsibility. ROA.229-233.

[2] Mr. Flores consented to plead guilty before a United States Magistrate Judge. ROA.36.

To provide a factual basis for Mr. Flores' plea, the prosecutor proffered the following facts at the rearraignment:

> "If required to do so at trial, Your Honor, the Government would call Witnesses that establish on July 16th, 2017, Corpus Christi Police Officers conducted a traffic stop of a motor vehicle for a traffic violation in Corpus Christi. At the time of the stop, the driver of the vehicle was identified as a Joe Flores, and the passenger was identified as the Defendant, Mr. Adam Flores.
>
> During the traffic stop, neither Mr. Flores, the Defendant, or Mr. Joe Flores, the driver, provided or had with them any identification card. Officers also observed what appeared to be open containers of alcohol in the vehicle and smelled the presence of Marijuana coming from inside the vehicle.
>
> Based on the observations and no identification of the individuals, the Officers conducted a search of the vehicle and located a .22-caliber pistol described as a Jennings Model J22 .22-caliber pistol serial number 254196 underneath the front passenger seat, which was the seat that the Defendant, Mr. Adam Flores, was sitting in.
>
> Officers discovered that the firearm was loaded with seven rounds of .22-caliber ammunition, which contained a head stamp of Super X.
>
> Mr. Adam Flores, the Defendant, was advised of his rights and agreed to provide a statement to the Officer. In that statement, Mr. Flores admitted that he was in possession of the firearm.
>
> Records checks showed that Mr. Flores previously had been convicted of several felony offenses, specifically felon in possession of a firearm, in the United States District Court, Southern District of Texas, in Cause Number 2:03-231. That conviction and judgment was on January 31st of 2004.
>
> ATF Agents examined the firearm and ammunition and determined that the Jennings .22-caliber pistol was manufactured in the state of California, and the seven rounds of .22-caliber ammunition were manufactured by Winchester in the state of Illinois, therefore affecting interstate and foreign commerce."

ROA.146-150. Mr. Flores agreed that those facts were true but remained silent regarding the prior felonies, except for the prior felon in possession in federal court. ROA.149. In response to the district court's questions, Mr. Flores specifically

admitted that (1) he possessed the firearm described in the indictment; and (2) he knew he was not supposed to possess the firearm and ammunition because he was a convicted felon. ROA.149-150.

The magistrate judge issued a report recommending that United States District Judge Janis Graham Jack accept Mr. Flores' guilty plea. ROA.38-41. On February 2, 2018, Judge Jack adopted the magistrate judge's findings, accepted Mr. Flores' guilty plea, and adjudged Mr. Flores guilty of the offense charged in Count One of the indictment. ROA.45-46.

Presentence report and Sentencing.

After Mr. Flores' plea, the court ordered that a presentence report ("PSR") be prepared to assist the court in sentencing him. Using the 2016 edition of the United States Sentencing Guidelines ("USSG"), the PSR as adopted by the district court calculated Mr. Flores' total offense level as shown in the table below: ROA. 243-259.

Calculation	**Levels**	**USSG §**	**Description**	**Where in record?**
Base offense level	24	2K2.1(a)(2)	18 U.S.C. § 922(g) and U.S.S.G. § 2K2.1(a)(2)	ROA.202 (PSR ¶ 13)
Chapter 4 Enhancement	33	U.S.S.G.§ 4B1.4	18 U.S.C. § 922(g) and 924(e)	ROA.203 (PSR ¶ 19)
Adjustment to offense level	-3	3E1.1(a)& (b)	Acceptance of responsibility	ROA.203 (PSR ¶ 20)
Total offense level	**30**			ROA.203 (PSR ¶ 21)

The PSR placed Mr. Flores in a criminal history category of V. ROA.208 (PSR ¶ 32). Based on a total offense level of 30 and a criminal history category of V, the

district court calculated an advisory Guidelines imprisonment range of 151 to 188 months. ROA.213 (PSR ¶ 65). However, the PSR noted that 18 U.S.C. § 922(g) and 924(e) carries a mandatory minimum sentence of fifteen years and therefore the applicable guideline range was 180 to 188 months. ROA.213 (PSR ¶ 65).

Mr. Flores filed an Objection to the PSR on February 15, 2018, and an Amended Objection to the PSR on March 31, 2018 challenging the base offense level of 24 and his enhancement under the Armed Career Criminal Act. ROA.234-242, 283-296.

At sentencing on April 10, 2018, Mr. Flores' objected to the ACCA enhancement as well as a base offense level of 24, and after evidence presented and argument, the court sentenced Mr. Flores to 180 months in the custody of the Bureau of Prisons, to be followed by a 3-year term of supervised release. ROA.153-179. The district court waived imposition of a fine, but the court imposed the mandatory $100 special assessment. ROA.66-71, 153-179.

In the Statement of Reasons on April 11, 2018, the Court adopted the PSR without change, noting the sentence was within the guideline range, without departures or variances. ROA. 297-300.

On April 10, 2018, Mr. Flores timely filed notice of appeal. ROA.64-65.

On May 22, 2019, the Fifth Circuit issued an Opinion vacating the sentence and remanding for a re-sentencing because Mr. Flores' Texas juvenile adjudication for Aggravated Assault did not qualify as a predicate offense under the Armed Career Criminal Act ("*ACCA*"). ROA.81-88.

The Court ordered a revised presentence report ("PSR") be prepared to assist the court in sentencing him. Using the 2016 edition of the United States Sentencing Guidelines ("USSG"), ROA.301-320, the PSR as adopted by the district court calculated Mr. Flores' total offense level as 21, and placed Mr. Flores in a criminal history category of V. ROA.305, 310. (PSR ¶ 21, 32). Based on a total offense level of 21 and a criminal history category of V, the district court calculated an advisory Guidelines imprisonment range of 70 to 87 months. ROA.315. (PSR ¶ 65).

At re-sentencing on October 31, 2019, Mr. Flores requested a sentence of 70 months, which was within the guideline range, arguing that he had a new level of maturity, he was attending a non-gang prison, he had positive life goals, was sober, smart and he intended to go into the electrical business with his father, and the Government requested a sentence of 87 months within the guideline range, per the plea agreement. ROA. 183-187. After evidence presented and argument, the court sentenced Mr. Flores to the maximum statutory sentence of 120 months in the custody of the Bureau of Prisons, to be followed by a 3-year term of supervised release. ROA.180-191. The district court waived imposition of a fine, but the court imposed the mandatory $100 special assessment. ROA.91-96, 180-191. In the Statement of Reasons, the District Court adopted the PSR without change, and imposed a variance (a sentence otherwise outside the guideline system) above the guideline range due to "the history and characteristics of the defendant pursuant to 18 U.S.C. § 3553(a)(1)," "issues with criminal history," "to afford adequate deterrence to criminal conduct," "to protect the public from further crimes of the defendant," and the Court noted, "the

court considered the defendant's violent nature and propensity for recidivism." ROA.322-323. After sentence was pronounced at the hearing, the defense raised the constitutional issue of cruel and unusual punishment. ROA.189-190.

On November 13, 2019, Mr. Flores filed a Motion for New Trial, which was denied via an Order issued on December 5, 2019. ROA.349.

Appeal.

After sentencing, Mr. Flores filed notice of appeal. In his brief to the Fifth Circuit Court of Appeals, Mr. Flores challenged the ten year maximum sentence, arguing it was cruel and unusual punishment, unreasonable and greater than necessary to accomplish the goals set forth in 18 U.S.C. § 3553(a).

The Fifth Circuit affirmed, rejecting Mr. Flores' argument, because "the record showed the court imposed the sentence it found warranted in light of Mr. Flores' extensive criminal history, as well as the need to protect the public, all of which," the Court found, "were proper sentencing considerations; the record did not show the court ignored a factor that should have been given considerable weight, heavily weighted an improper factor, or made a 'clear error of judgment in balancing the sentencing factors;' rather, the record and Flores' contentions show he simply disagrees with the court's balancing of the pertinent consideration, which does not constitute error;" and Mr. Flores did not make a showing under the Eighth Amendment there was an extreme or grossly disproportionate to the crime sentence.

BASIS OF FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

The district court has jurisdiction pursuant to 18 U.S.C. § 3231.

REASONS FOR GRANTING THE WRIT

> This Court should grant certiorari to address the district court's imposition of a maximum ten year sentence above the guidelines of 70 to 87 months' imprisonment for Felon in Possession of a Firearm because it was substantively unreasonable, cruel and unusual punishment and disproportionate to the offense, which involved his possessing a firearm underneath his seat in his vehicle, thus violating Mr. Flores' Eighth Amendment right to be free from extreme sentences that are grossly disproportionate to the crime, even though Mr. Flores had an extensive criminal history and the Court cited the need to protect the public.

Improper Sentence.

Mr. Flores' ten year sentence was well above the guideline range of 70 to 87 months, and was unreasonable because it was greater than necessary to satisfy the sentencing goals of 18 U.S.C. § 3553(a). His sentence did not appropriately reflect the crime committed because the firearm was under the seat of a vehicle and was not used or exhibited at the time of the offense.

Although the Court expressly considered relevant factors under § 3553, Mr. Flores would argue the Court misapplied those factors because the Court considered a juvenile adjudication, among his other listed offenses, which was over twenty years ago when Mr. Flores was 15 years old (he is now 38 years old) in determining he was a danger to the public and his propensity towards recidivism. ROA.306, 187-188. Furthermore, Mr. Flores' prior adult violent criminal history was already taken into account when his base offense level was increased significantly to a 24, and to again consider those same offenses to justify an upward departure was unreasonable.

Further, those same adult violent offenses were used to establish a criminal history category of five (5) for Mr. Flores.

During the re-sentencing, the Government commented on the remand, suggesting:

> "GOVERNMENT: Your Honor, in this particular case *the Government was going to point out to the Court footnote number 7 in the Fifth Circuit Opinion where they remanded the case back*. That footnote says "based on the result highlights, and difficulties caused by the categorical approach it's undisputed, of course, the juvenile adjudication stems from aggravated assault where he caused serious bodily injury by shooting the victim with a firearm. Nevertheless, he will now be treated differently than other juveniles who acted the exact same way but were convicted under a narrower statute. As we've stated before in light of the precedent, we conclude that we must apply the categorical approach even if it leads to such an unfortunate outcome." In this particular case, *Your Honor, the Government is bound by the plea agreement*…the high end of the guidelines…
>
> THE COURT: Well, as I explained to him at the time of the plea, *I'm not bound by the plea agreement.*
>
> GOVERNMENT: *Yes,* Your Honor. *The Court's, obviously, highlighted with the Government's concern* was at the time of the initial sentencing, and, *obviously, I think what's referenced by the Fifth Circuit's footnote* during their Opinion, Your Honor. So, I believe an 87-months sentence, *based on the plea agreement*, would be appropriate in this case.
>
> THE COURT: And what are you recommending?
>
> DEFENSE: …I'm asking for 70 months, Your Honor. Also, in the plea agreement the Government did agree to recommend within the guideline range. At that time, no one knew, for sure, if he would be within the Armed Career Criminal statute. And so, I would ask… that it be within the guideline range."

ROA. 186-188.

The Eighth Circuit in U.S. v. Haac, 403 F.3d 997 (8th Cir.2005), found a district court abused its discretion by departing downward to an unreasonable degree under U.S.S.G. § 5K1.1, noting it was troubled by the district court's comments indicating

the downward departure was at least partly based upon an improper or irrelevant factor concerning the court's dissatisfaction with the then-mandatory sentencing guidelines, and thus vacated the sentence. In that particular case, the Eighth Circuit found an 18 month sentence for conspiracy to distribute 1000 kilograms of marijuana and for using a firearm during and in relation to a drug offense was unreasonable and too lenient.

Conversely, in this case, although Mr. Flores' base offense level was significantly increased to a 24 due to two prior violent crimes and his criminal history score was a five, because the Fifth Circuit found Mr. Flores was not an Armed Career Criminal, the Government appeared to suggest to the Court dissatisfaction with Mr. Flores not falling within the ACCA, and stated the Court was "obviously, highlighted with the Government's concern." The Government emphasized it was "bound by the plea agreement," in the same soliloquy in which it read portions of the Remand (Fifth Circuit's opinion), and responded "Yes" when the Court stated it (the Court) was not bound by the plea agreement. Arguably, the fact Mr. Flores' original sentence was set aside because he was not deemed to be an Armed Career was an improper or irrelevant factor to be considered at sentencing. To consider such a factor and to then assess a maximum sentence of ten years would be cruel and unusual punishment, especially in light of Mr. Flores' sobriety, immersion in a program to disassociate himself from gangs, his childhood experiences and his new maturity level.

The Government's appearance of dissatisfaction with the remand of the case and the removal of the Armed Career Criminal enhancement was an improper

consideration for sentencing, especially in light of the plea agreement in which the Government, before it was determined whether or not the Armed Career Criminal enhancement would be applicable, and presumably in good faith, agreed to recommend the Guideline range, whatever it might be, for Mr. Flores. The Government was aware of Mr. Flores' prior offenses, and was amply warned during Mr. Flores' guilty plea that the defense was not in agreement Mr. Flores would fall within the ACCA enhancement, yet the Government proceeded with the plea agreement. During Mr. Flores' guilty plea hearing, the following occurred:

> "GOVERNMENT: Your Honor… the Government believes the only enhancement in the Guidelines would possibly be the classification of Mr. Flores' prior felony convictions. The Government believes that it is possible that he will have three that will qualify as prior crimes of violence or serious drug trafficking offenses, which would qualify him potentially for the Armed Career Criminal minimum of 15. If not all those score as crimes of violence, I believe he would still have two, which I believe would make a base offense level of 24, if it was only two, as opposed to the three for the Armed Care /sic/ Criminal Act.
> …
>
> DEFENSE: …And I've told my Client that it may be an Armed Career Criminal; but we are hoping it will not be.
> …
>
> THE COURT: This document is a Plea Agreement you've reached with the United States Attorney's office. You have no agreement with Judge Jack. It has to do with the recommendation the Government makes to the Court at the time of your sentencing.
> …
> THE COURT: …You want to summarize for me…the Plea Agreements?
>
> GOVERNMENT: Yes, Your Honor. In return for the Defendant's plea to Count One in the Indictment, the Government will make certain recommendations. Specifically, the Government will recommend the Defendant receive maximum credit of acceptance and responsibility, and… the Government would recommend the Defendant receive a sentence within the applicable guideline range.

ROA.133-139.

The Plea Agreement stated:

> "…and in consideration for the Defendant's plea of guilty and truthful testimony to the Court at the time of the Defendant's re-arraignment and sentencing and for the Defendant's truthful rendition of facts to the U.S. Probation Department for the preparation of the Defendant's Pre-sentence Investigation Report, the Government will recommend the Defendant be given a sentence of imprisonment within the applicable guideline range."

ROA.229-230. Mr. Flores had a one count indictment not necessitating a dismissal of other counts; therefore, the most important element of the plea agreement was the Government's agreement to recommend a sentence within the applicable guideline range. The magistrate judge issued a report recommending that United States District Judge Janis Graham Jack accept Mr. Flores' guilty plea, referencing in paragraph 8 the plea agreement. ROA.38-41. The District Court adopted the magistrate judge's findings and accepted Mr. Flores' guilty plea. ROA.45-46. There was no indication from the Government during sentencing that Mr. Flores had not fulfilled his obligations under the plea agreement to warrant the Government expressing dissatisfaction with Mr. Flores not falling under the ACCA classification. Although sentencing was entirely up to the Court, the Court did ask for the Government's recommendation, and did respond to the Government's comments.

Mr. Flores relied in good faith upon the Government's agreement to recommend a sentence within the applicable guideline range. This can be contrasted with a Ninth Circuit case, *United States v. Maldonado*, 215 F.3d 1046 (9th Cir.2000),

in which the prosecutor agreed to recommend a sentence based on an offense level of 32 under the federal sentencing guidelines, not realizing the correct offense level was 34, and when asked by the court, the government acknowledged its miscalculation but nevertheless stood by its promise to recommend a score of 32. In the *Maldonado* case, the district court imposed a sentence within the correct guideline range, and the Court of Appeals rejected the defendant's argument the prosecutor had breached the plea agreement by acknowledging his miscalculation:

> "We conclude that a plea agreement does not bar the government from honestly answering the district court's questions. To the contrary, honest response of the government to direct judicial inquiry is a prosecutor's professional obligation that cannot be barred, eroded or impaired by a plea agreement. Thus, we hold there could be no plain error."

In the present case, the Court did not ask the prosecutor what he thought of the non-ACCA status of Mr. Flores, but only of his recommendation for sentencing. Rather than simply recommend the high end of the guidelines based upon Mr. Flores' criminal history, the Government, instead, read a portion of the Fifth Circuit Opinion's footnote, appearing to suggest Mr. Flores was deserving to be placed in the ACCA category, but was nevertheless bound by the plea agreement to recommend a sentence within the guideline range ; therefore, circumventing the spirit of the plea agreement.

Following the Government's comments expressing dissatisfaction with Mr. Flores' non-ACCA classification, the defense pointed out the plea agreement was made by the Government before the guidelines range was computed. The Government's dissatisfaction with Mr. Flores' non-ACCA status was an improper

consideration for sentencing, and appeared to undermine the spirit of the plea agreement and negotiation, and led to a cruel and unusual sentence.

Further, Mr. Flores' prior violent offenses were already taken into account in the guideline sentencing range, and it was improper and unreasonable, leading to cruel and unusual punishment, for the Court to further take them into account. Per Section 2K2.1(a)(2) of the United States Sentencing Guidelines, a person has a base offense level of 24 if:

> "the defendant committed any part of the instant offense subsequent to sustaining at least ***two felony convictions*** of either a ***crime of violence*** or a controlled substance offense;"

USSG, § 2K2.1(a)(2), 18 U.S.C.A.

The maximum sentence of ten years constitutes cruel and unusual punishment under the Eighth Amendment, and is unconstitutionally disproportionate, as the Eighth Amendment precludes a sentence that is greatly disproportionate to the offense, because such sentences are cruel and unusual. *United States v. Thomas*, 627 F.3d 146, 160 (5th Cir.2010). Mr. Flores' sentence was disparate. During his first (original) sentencing, he was given a sentence at the low end of the guideline range (with no upward departure/variance), and per the Statement of Reasons filed on April 11, 2018, the Court found the sentence to be within the guideline range. ROA.254-256. After his sentence was overturned, the Court imposed the maximum statutory sentence of ten years, which was much higher than the guideline range. It was unusual because the guidelines are taken into consideration for other defendants similarly situated with two violent criminal history prior convictions and a criminal

history category of Five (5). During the re-sentencing, the Court deviated from the original sentence and, this time, upwardly departed to the maximum allowable sentence, which constituted cruel and unusual punishment.

Albeit, post-*Booker,* the Sentencing Guidelines are advisory only, the district court must still properly calculate the Guideline-sentencing range for use in deciding on the sentence to impose. *Gall v. United States*, 552 U.S. 38, 51, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007). The Fifth Circuit has previously rejected an eighth amendment challenge to a sentence imposed under the guidelines, holding that "the Guidelines are a convincing objective indicator of proportionality." *United States v. Sullivan*, 895 F.2d 1030, 1032 (5th Cir.1990). The United States Supreme Court found in *Rita v. United States*, 551 U.S. 338 (2007) that a sentence within the advisory guidelines range would be considered presumptively reasonable, not grossly disproportionate (holding that a court of appeals may apply "a presumption of reasonableness" to a sentence falling within the guidelines range). In the instant case, had Mr. Flores been sentenced within the guideline range, with no upward departures, much like his original sentencing (no upward departures), his sentence would have been reasonable and not disproportionate. Instead, Mr. Flores was re-sentenced well above the guideline range, even though at his first sentencing (prior to his appeal) he was sentenced at the low end of the guideline range. This would appear to be presumptively unreasonable since the guideline range was created for defendants similarly situated, taking into account their prior violent criminal convictions and criminal history category.

Mr. Flores was found with a gun, albeit loaded, under his seat, and was in a criminal history category of VI. Still, there was no evidence presented at sentencing that at the time of *this* crime, Possession of a Firearm by a Felon, he brandished the firearm or committed a violent act at that time. As the U.S Supreme Court noted in *Carmona v. Ward*, 439 U.S. 1091 (1979):

> "Few legal principles are more firmly rooted in the Bill of Rights and its common-law antecedents than the requirement ***1094** of proportionality between a crime and its punishment. The precept that sanctions should be commensurate with the seriousness of a crime found expression in both the Magna Carta and the English Bill of Rights.[8] And this Court has long recognized that the Eighth Amendment embodies a similar prohibition against disproportionate punishment."

The Court in *Weems v. United States*, 217 U.S. 349 (1910) struck down as cruel and unusual punishment a sentence under the Philippine Code for falsification of a Government document, finding the sentence was excessive in its length and in its conditions—15 years of hard labor in chains, with lifetime surveillance after release. In other cases, applying the analysis set forth in *Weems*, the U.S. Supreme Court has invalidated punishments that were disproportionate to the nature of the offense charged, *Robinson v. California*, 370 U.S. 660 (1962) (imprisonment for the status of drug addiction), and to the penalties imposed in other jurisdictions, *Trop v. Dulles*, 356 U.S. 86 (1958) (plurality opinion) (denationalization for wartime desertion). Although certainly Mr. Flores has not been subjected to hard labor or life-time surveillance, he has been given ten years for a gun under his seat. Mr. Flores contended he grew up under difficult circumstances, and carried the gun for protection.

As such, in light of the improper dissatisfaction the Government urged the Court to consider with the non-ACCA status of Mr. Flores, which appeared to undermine the spirit of the plea agreement, and the fact Mr. Flores' priors were already taken into consideration in the guidelines calculation, Mr. Flores' maximum ten year sentence was cruel and unusual.

CONCLUSION

For the foregoing reasons, petitioner Adam Flores prays that this Court grant certiorari to review the judgment of the Fifth Circuit in his case.

Date: September 23, 2020

Respectfully submitted,

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APPENDIX A- United States Court of Appeals, Fifth Circuit- Memorandum Opinion (June 25, 2020)

810 Fed.Appx. 360 (Mem)
This case was not selected for
publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial decisions
issued on or after Jan. 1, 2007. See also
U.S.Ct. of App. 5th Cir. Rules 28.7 and 47.5.
United States Court of Appeals, Fifth Circuit.

UNITED STATES of
America, Plaintiff - Appellee
v.
Adam Alfredo FLORES, also known as
Adam Flores, Defendant - Appellant

No. 19-40945
|
Summary Calendar
|
FILED June 25, 2020

Appeal from the United States District Court for the Southern District of Texas, USDC No. 2:17-CR-739-1

Attorneys and Law Firms

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Sandra Eastwood, Law Office of Sandra Eastwood, Corpus Christi, TX, for Defendant-Appellant

Before BARKSDALE, HAYNES, and ENGELHARDT, Circuit Judges.

Opinion

PER CURIAM:[*]

Adam Alfredo Flores pleaded guilty to one count of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1), and was sentenced on remand—*see United States v. Flores*, 922 F.3d 681, 685 (5th Cir. 2019) (vacating sentence because Flores' juvenile aggravated-assault ***361** adjudication did not constitute ACCA-predicate offense)—to the statutory-maximum 120 months' imprisonment, *see* 18 U.S.C. § 924(a)(2). Flores contends that sentence is substantively unreasonable and amounts to cruel and unusual punishment because it is: well above the 70–87 months' imprisonment Sentencing Guidelines sentencing range; and disproportionate to his offense, which involved his possessing a firearm underneath his seat in a vehicle.

Although post-*Booker*, the Guidelines are advisory only, the district court must avoid significant procedural error, such as improperly calculating the Guidelines sentencing range. *Gall v. United States*, 552 U.S. 38, 46, 51, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007). If no such procedural error exists, a properly preserved objection to an ultimate sentence is reviewed for substantive reasonableness under an abuse-of-discretion standard. *Id.* at 51, 128 S.Ct. 586; *United States v. Delgado-Martinez*, 564 F.3d 750, 751–53 (5th Cir. 2009). In that respect, for issues preserved in district court, its application of the Guidelines is reviewed *de novo*; its factual findings, only for clear error. *E.g.*, *United States v. Cisneros-Gutierrez*, 517 F.3d 751, 764 (5th Cir. 2008).

The record shows the court imposed the sentence it found warranted in the light of Flores' extensive criminal history, as well as the need to protect the public, all of which are proper sentencing considerations. 18 U.S.C. § 3553(a); *Gall*, 552 U.S. at 46, 49–50, 128 S.Ct. 586. Additionally, the record does not show the court ignored a factor that should have been given considerable weight, heavily weighted an improper factor, or made "a clear error of judgment in balancing the sentencing factors". *United States v. Chandler*, 732 F.3d 434, 437 (5th Cir. 2013) (citation omitted). Rather, the record and Flores' contentions show he simply disagrees with the court's balancing of the pertinent considerations, which does not constitute error. *See Gall*, 552 U.S. at 51, 128 S.Ct. 586.

Regarding Flores' related cruel-and-unusual-punishment claim, "[t]he Eighth Amendment forbids only extreme sentences that are grossly disproportionate to the crime". *United States v. Farrar*, 876 F.3d 702, 715 (5th Cir. 2017) (internal quotation marks and citation omitted). "Gross disproportionality concerns showing the sentence is completely arbitrary and shocking to the sense of justice." *Id.* (internal quotation marks and citation omitted). Flores has not made this showing. *See id.*

AFFIRMED.

All Citations

810 Fed.Appx. 360 (Mem)

Footnotes

* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

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