

No. 22-

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

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NATHAN LEE TAMEZ,

*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**

Whether the decision of the United States Court of Appeals for the Fifth Circuit (“Fifth Circuit”)—which affirmed the decision of the District Court that Mr. Tamez discharged a firearm during the offense and thus significantly increasing his Guidelines range—conflicts with decisions of this Court on an important matter, and thus the decision by the Fifth Circuit calls for an exercise of this Court’s supervisory powers such that 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:

Nathan Lee Tamez:	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, NATHAN LEE TAMEZ, requests that this Honorable Court grant this petition and issue a Writ of Certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit. Mr. Tamez submits the District Court committed reversible error by determining Mr. Tamez discharged a firearm and thus increasing his Guidelines sentencing range. Respectfully, the decision by the Fifth Circuit is in conflict with decisions of this Court and therefore a compelling reason is presented in support of discretionary review.

### **CITATIONS TO THE OFFICIAL AND UNOFFICIAL 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. Nathan Lee Tamez*, No. 20-40848 (5th Cir. December 21, 2021), 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 of a sentence concerning, *inter alia*, a Guidelines sentencing enhancement for discharging a firearm. A copy of the Judgment appears at Appendix B. A copy of the decision by the Appellate Court 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**

On June 27, 2019, a Dodge Nitro vehicle arrived at a Burger King in Alamo, Texas. ROA.271-72. Natalia Pena was driving. ROA.271. Mr. Tamez was in the passenger front seat and two undocumented aliens were passengers in the back seat. ROA.27.

David Davila, an alien smuggler for profit known as ‘El Tigre,’ had arranged for Ms. Pena and Mr. Tamez to drive to the Burger King to deliver the two aliens to a man named “Chuy.” ROA.273. Davila needed to settle a financial matter relevant to the previous



smuggling of the two aliens. ROA.273. Davila followed Ms. Pena into the Burger King parking area. ROA.273. Davila exited his vehicle and spoke with a group of individuals in a white SUV. ROA.273. When Davila saw someone in the SUV “reach underneath his seat,” he departed in his vehicle. ROA.273.

During this same time period, Mr. Tamez had exited the Nitro. ROA.272. However, as he got back in the car, he heard gunshots. ROA.272. A window of the Nitro was shattered. ROA.272. At that point, Ms. Pena, who was driving the Nitro, “reversed the vehicle and fled the scene.” ROA.272.

The driver of the white SUV followed the Nitro. ROA.272. Individuals inside the SUV continued shooting at the Nitro. ROA.272. A bullet struck Ms. Pena. ROA.272. She crashed the Nitro and died as a result of her injuries. ROA.272. The two undocumented aliens were not injured. ROA.272. Mr. Tamez, however, was left with five gunshot wounds. ROA.272.

Alamo Police Department officers responded to the scene and come into contact with Mr. Tamez, the one with the five bullet wounds. ROA.213. Mr. Tamez stated that he ran away after the wreck, but returned to the scene. ROA.213, 273-74. Mr. Tamez was not in possession of a firearm. ROA.273-74. For his services to the alien smugglers, Mr. Tamez received \$100, five bullet wounds, a federal indictment, and 151 months in prison. ROA.252. The significant sentencing enhancement in this case was for discharging a firearm and that enhancement is the issue in this Petition.

### The Superceding Indictment

On September 10, 2019, after it was determined Ms. Pena had died, a superceding indictment was filed. ROA.49-52. Two counts against Mr. Tamez were relevant to this case. The first count, Count One, charged him with “conspiracy to transport an undocumented alien by means of a motor vehicle and during and in relation to the foregoing a death of a person resulted.” ROA.49. The other count, Count Four, charged that Mr. Tamez was “a felon illegally and unlawfully possessing in and affecting interstate commerce, ammunition.” ROA.51

### Mr. Tamez Pleads Guilty

On October 31, 2019, the Government and Mr. Tamez entered into a plea agreement. ROA.257-58. It was agreed Mr. Tamez would plead guilty to the above two charges and the Government would dismiss the remaining counts. ROA.257. It was further agreed Mr. Tamez’s Offense Level would be decreased by two levels if Mr. Tamez demonstrated acceptance of responsibility. ROA.257. On October 31, 2019, the Court held a hearing and accepted Mr. Tamez’s guilty plea.

### The Facts and the Guilty Plea

During the guilty plea, it was agreed:

On June 27th of 2019, Alamo Police Officers responded to the scene of a vehicle collision and came into contact with Mr. Tamez, who admitted that he was an occupant of the vehicle and that there was a female driver and two other male occupants in the back seat of the vehicle. The two male occupants fled the scene, but were later apprehended and it was determined they were both aliens present in the United States unlawfully.

Initially, Mr. Tamez denied knowing the male occupants in the back seat. However, when interviewed on July 3rd of 2019, Mr. Tamez admitted to knowing that the occupants were aliens present in the United States unlawfully and admitted to transporting said aliens.

During the investigation, it was determined that there was an altercation between multiple people, and during the altercation gunshots were fired. Mr. Tamez and the female driver were both shot during the altercation and the female ultimately died due to her injuries on August 6, 2019.

### The Presentence Investigation Report

In the Presentence Investigation Report (“PSR” or “Report”), the Probation Officer concluded with regard to Mr. Tamez:

**Nathan Tamez**’ role was determined to be that of a transporter of undocumented aliens. On June 27, 2019, he was contacted by the co-defendant, David Davila, who asked him to assist Natalie Pena in the transportation of two undocumented aliens, Carlos Mena and Sylviano Sanchez. After a foiled attempt to exchange the two undocumented aliens for money, a shootout ensued. As a result, **Nathan Tamez** and Natalie Pena were shot. Natalie Pena succumbed to her injuries and subsequently died. During the commission of transporting these two undocumented aliens, **Nathan Tamez** was found to be in possession of six rounds of Winchester 9mm Luger caliber ammunition. **Nathan Tamez** took affirmative steps to commit the instant federal offense by transporting two adult undocumented aliens. Therefore, he will be held accountable for the two undocumented aliens, the death of Natalie Pena and for being in possession of the six rounds of ammunition.

ROA.274-75 (emphasis in original).

### PSR Calculations

In the Report, the Probation Officer set Mr. Tamez’s Base Offense Level at 12. ROA.276. However, the Probation Officer explained that, “pursuant to U.S.S.G. § 2L1.1(b)(5)(A), if a firearm was discharged, increase by 6 levels, but if the resulting offense level is less than level 22, increase to level 22.” ROA.276. Thus, the Probation Officer set Mr.

Tamez's modified offense level at 22 because "on June 27, 2019, a firearm was discharged injuring Natalie Pena." ROA.276. Two additional levels were added pursuant to U.S.S.G. § 2L1.1(b)(6) because "the offense involved intentionally or recklessly creating a substantial risk of death for serious bodily injury to another person." ROA.276. Finally, the Probation Officer concluded:

Pursuant to U.S.S.G. 2L1.1(b)(7), if any person died or sustained bodily injury, increase the offense level according to the seriousness of the injury. In this case, Natalie Pena, Nathan Tamez and Jesus Mares were all shot. Natalie Pena succumbed to a gunshot wound, which appears to have resulted from fleeing unindicted co-conspirators. Thus, because Natalie Pena died, pursuant to [U.S.S.G.] § 2L1.1(b)(7)(D), a 10-level increase is warranted.

ROA.10. Therefore, Mr. Tamez's offense level for Count One was adjusted to 34. ROA.10.

With respect to Criminal History, the Probation Officer calculated nine points for the total Criminal History Score. ROA.279-82. Thus, Mr. Tamez's Criminal History Category was set at IV in the PSR. ROA.282.

With a Total Offense Level of 32, and a Criminal History Category of IV, Mr. Tamez's Guideline range of imprisonment was 168 to 210 months in the custody of the Bureau of Prisons ("BOP"). ROA.286. The Probation Officer added that, if the Government moved for a one level decrease for acceptance of responsibility, the Guideline range would be 155 months to 188 months imprisonment. ROA.286.

#### Mr. Tamez's Objections to the PSR

Mr. Tamez filed extensive objections to the PSR. ROA.259-67. Mr. Tamez will address those objections when they are relevant to the arguments in this Petition.

## The Sentencing Hearing

Sentencing was held on December 16, 2020. ROA.225. The Government moved for the third acceptance point and the Court granted the motion. ROA.228. Before Mr. Tamez's attorney addressed the Court, the Judge acknowledged "this one is a little bit tougher case than the last one." ROA.228.

The attorney asked to delete certain comments in his objections to the PSR. ROA.278. He clarified: "particularly on page 7 of 9 where we talk about possession of a firearm, we had stated that one the day of the incident Mr. Tamez placed ammunition in his pocket to dispose of it, and before he could dispose of it, he was recruited." ROA.278. Thus, defense counsel submitted the record should reflect the following:

I would like to withdraw any statement that he had it in his pocket to dispose of it. And we would just like the statement that he had it in his pocket earlier in the day and he had it in his pocket in the alien smuggling time. But we don't want to make any explanation as to how it got into his pocket.

ROA.278-79. There was no objection to the request and the District Judge declared "all right." ROA.229. Thus, the Court concluded that Mr. Tamez possessed a loaded magazine "but [gave] no explanation as to why he was possessing this." ROA.229.

The attorney further objected to anything in the PSR that would suggest Mr. Tamez discharged a firearm. ROA.236. At this point, the Court attempted to clarify how the shooting took place via the following exchange with defense counsel:

THE COURT: So, remind me, so Mr. Davila goes up to the other car, there's some words exchanged. Apparently, the words get more heated and then there's gunshots, somebody shoots him. So Mr. Davila takes off running. Mr. Tamez at that point--no, it was Mr. Tamez that was over at the other car.

MR. MERINO: Yes, Judge. From what I understand, Judge, Mr. Tamez. Mr. Davila didn't actually get out of his car.

THE COURT: Yeah, right.

MR. MERINO: He was giving instructions to Mr. Tamez. Basically, they were in earshot of each other, so they go ahead and take one of them over. There was a couple of aliens. And when the people that end up being the shooters say that they want both of them in the car before the money was paid, Davila ends up telling Mr. Tamez, "We don't work like that, get him out of the car."

And so when they get back in the car, that's when things heated up. And Mr. Davila, from what I understand, was shot at first—

THE COURT: Uh-huh.

MR. MERINO: —in his vehicle. And then they turned and started shooting at Mr. Tamez and Ms. Pena.

THE COURT: All right. And so then they take off and there's a subsequent chase and eventually Ms. Davila crashes the car.

MR. MERINO: Pena.

THE COURT: I'm sorry, Ms. Pena crashes the car.

MR. MERINO: Ms. Pena was shot, being that she was losing control of the car.

THE COURT: Right.

ROA.230-31.

Mr. Tamez's attorney proceeded to distinguish Mr. Tamez from Davila. ROA.231. He explained Davila "was aware of the risk here" and Ms. Pena and Mr. Tamez "were essentially doing an errand for Mr. Davila." ROA.231. Indeed, he explained, Davila "hid the danger of it all away from Mr. Tamez and Ms. Pena." ROA.232. Accordingly, defense counsel concluded, the actions and conduct of others were not foreseeable to Mr. Tamez.

ROA.232. The attorney also noted that there was no evidence that a shot was fired from the car in which Mr. Tamez was a passenger. ROA.232. He additionally pointed out that the aliens in the car believed the gunfire came from the other vehicle. ROA.232-33.

Mr. Tamez's attorney further stated: "We submit that there is no evidence to show that the ammunition in any way facilitated the offense of alien smuggling, or was intended to." ROA.238. Defense counsel concluded by arguing that, if the Court granted the ten level enhancement for discharge of a firearm, the Court should consider a downward variance based on the unique facts of the case. ROA.239-40.

The Judge stated that this was indeed "a difficult case." ROA.242. Importantly, the Judge noted that there had been a previous shootout in this case. ROA.242. He pointed out, however, that Mr. Tamez was not involved in the prior incident and, therefore, it could not easily be concluded that the use of a firearm was foreseeable in this case. ROA.242. The Judge thus made several observations about what he believed were the facts before the Court:

It appears to me that Mr. Davila hired Mr. Tamez, like he said, as a soldado, as a soldier. He was not going to send Ms. Pena in all by herself to make this exchange, as he figured probably she would get ripped. And so clearly, Mr. Davila hired Mr. Tamez to be the soldier or the muscle, the force in the transaction, and that Mr. Pena needed his help.

And also, again, Mr. Davila was there and felt he needed somebody more than just im and Ms. Pena. And again, I think that also goes to the purpose of having Mr. Tamez there was, again, to use Mr. Davila's work, to be the soldado or the soldier in this exchange.

Mr. Davila knew of the likelihood of a shootout because he had just one a few months earlier. Mr. Tamez is found with a .9 millimeter loaded magazine in his pockets. The burden of proof here is more likely than not. I

find more likely than not, Mr. Tamez had a weapon with him. During the time that Mr. Tamez fled from law enforcement and was unseen, the gun was disposed of. Again, I find that's more likely than not what happened.

Now, why Mr. Tamez never shot back, I don't know. He was shot in the elbow, he was shot in the ear, he was shot in the shoulder. Maybe they just--there were too many shots coming and he didn't have time to return fire or pull out a weapon. Sounded like there was a barrage of shots and some obviously striking and killing Ms. Pena.

But the question is, did Mr. Tamez know he was going into a shootout? Or the fact that he had a weapon with him, even if--you know, it indicates to me he knew that this was certainly a possibility and then knew his role was to be the soldado. I think that's also more likely than not the facts of what actually occurred.

ROA.243-44.

The Government argued there was a firearm involved and "obviously" it was discarded. ROA.244, 245. On the other hand, the Government made concessions which undermined its theories. Specifically, with regard to possession and discharge of a firearm by Mr. Tamez, the Government maintained:

- \* Mr. Tamez had a firearm because he could have fired out a window (despite the Government's concession that there was no evidence Mr. Tamez fired back and the Government's observation that it would be difficult to extract a loaded magazine from the pistol and then put it in his pocket while he was taking five bullets); and
- \* Mr. Tamez discarded the firearm he used and left the additional loaded magazine in his pocket (despite the prosecutor's admission: "I don't know that that's accurate").



ROA.244-45. The Government then guessed that Mr. Tamez fled the scene—with five bullet wounds—“in order to get rid of the firearm and the magazine and come back.” ROA.245. She observed that the Government believed “if he was truly just an innocent victim who just happened to be in the vehicle, then there would be no need for him to flee the scene to get rid of these items.” ROA.245-46.

However, this comment by the Government caught the Court’s concern. The District Judge said:

[W]asn’t he being shot at? I mean, he was fleeing for his own life, for his safety, for his life at this point.

ROA.246.

The Government disagreed, with the prosecutor telling the Judge that the other vehicle was gone and the shooting was over when Mr. Tamez left the scene. ROA.246. “In any event,” the prosecutor concluded, “if he was fleeing for his life, he still had the wherewithal to discard everything he had in his possession.” ROA.246. Thus, the Government claimed that Mr. Tamez fled because he was involved in a shooting where someone had died. ROA.246.

The Government concluded that, based on all the circumstances, “it was foreseeable that something like this could occur.” ROA.247. Therefore, the Government argued that Mr. Tamez “should be held for the discharge of the firearm, the risk of death or serious bodily injury, and the death of Ms. Pena.” ROA.248. Furthermore, the Government asked for a sentence of 155 to 188 months, which was the Guidelines range. ROA.248.

In response, counsel for Mr. Tamez discussed a video from the crash. ROA.249. Significantly, he pointed out that this video shows Mr. Tamez exiting Ms. Pena's vehicle without anything in his hands. ROA.249. He further pointed out that the only thing which was found in Mr. Tamez's possession was the magazine in his pocket. ROA.249. Indeed, Mr. Tamez admitted he had the magazine in his pocket. ROA.249. Thus, counsel argued:

On his behalf, Judge, I will object to any findings of plausible likely scenarios like he had a gun. We would say there was no gun found. We understand the court can surmise and believe that the weapon was thrown away, but there was no weapon found. I'm sure they could have found the weapon. So it's our position that Mr. Tamez never had a gun. If he had one, he would have shot back.

ROA.250.

Importantly, Mr. Tamez added to his attorney's comments that he ran because there was "trouble" and he had never been shot. ROA.250. Furthermore, he admitted: "To be honest, if I had a gun, I would have shot." ROA.251.

#### The Sentence Imposed by the Court

As the Court proceeded to sentencing, the Judge addressed Mr. Tamez and observed: "Maybe you came back to the car because you had five gunshot wounds to your body and you needed medical care." ROA.251. Yet, the Judge added: "perhaps the reason for the flight from the vehicle was to discard the weapon." ROA.251. Importantly, the Judge also added: "these are some gray areas of the law here" and "it's an unusual case because it doesn't fit quite within what seems like the intent perhaps of the statute." ROA.251.

The District Court set Mr. Tamez's Total Offense Level at 31, and his Criminal History Category at IV. ROA.252. This established a Guideline range of 151 months to 188 months

in the custody of the BOP. ROA.252. The Court also concluded a within-Guideline sentence satisfied the 18 U.S.C. § 3553(a) factors, and sentenced Mr. Tamez was sentenced to 151 months in prison on Count One. ROA.252. The Court denied Mr. Tamez’s request for a role reduction. ROA.253-54. In doing so, the Judge explained that Mr. Tamez was “the muscle in this transaction.” ROA.254.

### Notice of Appeal

A final judgment was entered on December 22, 2020. ROA.130-35. Mr. Tamez timely filed a notice of appeal on December 14, 2020. ROA.116-17. The issues were briefed by the Government and Mr. Tamez, and the matter was submitted to the Court.

### The Decision by the Fifth Circuit

On December 21, 2021, the Fifth Circuit affirmed the District Court’s decision imposing the enhancement for discharging a firearm. (Exhibit A, page 3). Specifically, the Fifth Circuit held that “[t]he court did not clearly err by finding Tamez was likely armed during the shooting, or, based on his armed presence as a “soldado” during the meeting at which the shooting happened, the discharge of a firearm was reasonably foreseeable to him.” *Id.* Mr. Tamez now files this Petition with this Honorable Court.

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

### **I. Standard of Review**

Before the District Court, Mr. Tamez objected to the enhancement for discharging a firearm. ROA.230, 231, 236. Hence, the standard of review on this issue was for abuse of

discretion. *United States v. Jones*, 527 Fed. App'x 335, 336-37 (5th Cir. 2013). Thus, the Appellate Courts review a District Court's interpretations of the Guidelines de novo and its factual findings for clear error. *United States v. Longstreet*, 603 F.3d 272, 275-76 (5th Cir. 2010). An argument that the District Judge "misapplied the guideline because he misunderstood the applicable legal standard" is reviewed de novo by this Court. *United States v. Reyna*, 777 F.3d 291, 294 (5th Cir. 2015). This standard requires such findings be "plausible in light of the record as a whole." *United States v. Miller*, 607 F.3d 144, 148 (5th Cir. 2010) (internal quotation omitted). The District Court must determine its factual findings by a preponderance of the relevant and sufficiently reliable evidence. *United States v. Alaniz*, 726 F.3d 586, 618-19 (5th Cir. 2013). On the other hand, as set forth above, any interpretation of a Guideline or application of a Guideline provision is reviewed *de novo*. *Longstreet*, 603 F.3d at 275-76.

## II. The Discharge of a Firearm Enhancement

### A. Generally

The discharging of a firearm enhancement is found at U.S.S.G. § 2L1.1(b)(5)(A). It provides "if a firearm was discharged, increase by 6 levels, but if the resulting offense level is less than level 22, increase to level 22." *Id.* Because Mr. Tamez was assigned a Base Offense level of 12, it was increased by 10 levels to a level 22. ROA.276. Pursuant to U.S.S.G. § 1B1.3(a)(2)(B), if Mr. Tamez did not personally discharge a firearm, he may only be held accountable for the discharge of a weapon if it was within the scope of the jointly

undertaken activity, in furtherance of that criminal activity, and reasonably foreseeable in connection with that criminal activity.

B.

Preponderance of the Evidence

As the Government explained to the Fifth Circuit, “‘sentencing facts’ must ‘be established by a preponderance of the evidence.’” (Government’s Brief, pages 24-25) (quoting *United States v. Nguyen*, 854 F.3d 276, 281 (5th Cir. 2017)). Furthermore, as the Government explained, “sentencing enhancements are upheld on appeal if they are ‘plausible in light of the record as a whole.’” (Government’s Brief, page 14) ((citing *United States v. Bazemore*, 839 F.3d 379, 387 (5th Cir. 2016))). Therefore, it was incumbent that the Fifth Circuit evaluate the whole record and then determine whether the enhancement was plausibly proven by a preponderance of the evidence.

C.

Evaluating the Whole Record Before the District Court

As an initial matter, there is no finding in the PSR that Mr. Tamez possessed a firearm. Rather, Mr. Tamez possessed a magazine. ROA.274-75. The Government did not file objections to this finding or to any lack of findings. The Government did not argue that the PSR should be amended to reflect that Mr. Tamez did indeed possess and/or discharge a firearm. Accordingly, the only adequate evidentiary basis deemed sufficiently reliable for application of the Guidelines is the finding that Mr. Tamez possessed a magazine. *See United States v. Landreneau*, 974 F.3d 443, 451 (5th Cir. 2020) (explaining that findings in

PSR which have adequate evidentiary basis are deemed sufficiently reliable for application by Courts).

Nonetheless, at sentencing, the Government attempted to show that Mr. Tamez possessed and discharged a firearm with mere guesses which had no evidentiary foundation. ROA.245-46. Indeed, the prosecutor claimed Mr. Tamez had a mystery firearm which “*probably* had its own magazine in it,” even though she added “I don’t know that that’s accurate.” ROA.245 (emphasis added). The prosecutor also claimed that a firearm was “*most likely* involved” and that “*obviously* it was discarded.” ROA.245 (emphasis added). The prosecutor then decided that Mr. Tamez “fled the scene in order to get rid of the firearm and the magazine and come back.” ROA.245.

The Government failed to explain how Mr. Tamez could develop such a thought with five bullet wounds. This is necessarily fatal to the Government’s case because no such gun was ever found. The prosecutor also stated that if Mr. Tamez were an innocent victim he would have stayed in the car bleeding from five gunshot wound after the crash, a conclusion which the District Court found highly questionable. ROA.246.

Regardless, the Government continued to attempt to put a firearm in Mr. Tamez’s hand. The prosecutor then claimed that “if he was fleeing for his life, *he still had the wherewithal to discard everything he had in his possession.*” ROA.246 (emphasis added). As noted above, there is no evidence that Mr. Tamez had the wherewithal to do anything other than run after having been shot five times, much less discard items. In any event, the prosecutor later added that because there was an earlier shooting (of which the

Court concluded it was not proven Mr. Tamez had knowledge), that Mr. Tamez “armed himself.” ROA.247-48.

Respectfully, the Government’s factual arguments in this case show it believed it needed to put a firearm in Mr. Tamez’s hands to prove this enhancement despite the evidence and undisputed PSR findings to the contrary. The Probation Officer made no such finding. The Government offered no evidence to support this conclusion.

Also of great import, the video showed nothing in Mr. Tamez’s hands as he was running from the car with five bullet wounds. ROA.249. No firearm was ever found at the scene or in the alleged area of Mr. Tamez’s run to stay alive. Hence, as this Court addresses the record as a whole in this case, it should be beyond dispute that Mr. Tamez did not have a firearm and the attempt to argue otherwise is only evidence that the Government believed it needed to show that he had a firearm to justify this sentencing enhancement.

D.  
The Government’s Argument on Appeal

On appeal to the Fifth Circuit, the Government determined the arguments it made to the District Court could not meet the evidentiary standard discussed above. In response to Mr. Tamez’s Opening Brief, the Government now alleged plausible explanation was that the enhancement applies because “it was reasonably foreseeable [to Mr. Tamez] that a violent altercation with firearms would occur.” (Government’s Brief, page 25) (citing U.S.S.G. § 1B1.3(a)(1)(B); *United States v. Alaniz*, 776 F.3d at 623). Thus, the Government conceded on appeal that it could not support its theory of personal possession by Mr. Tamez. *See* (Government’s Brief, page 25). Indeed, the Government’s one-page assertion makes no

mention of the prosecutor's arguments with unproven theories as to why or how Mr. Tamez ran with five bullet wounds to dispose of a firearm to show that he did, in fact, possess a firearm. *See* (Government's Brief, page 25).

E.

The Decision of the Fifth Circuit

The Fifth Circuit upheld the District Court's finding and conclusion on the enhancement. Specifically, the Appellate Court explained:

The court did not clearly err by finding Tamez was likely armed during the shooting, or based on his armed presence as a "soldado" during the meeting at which the shooting happened, the discharge of a firearm was reasonably foreseeable to him. *See United States v. Gutierrez-Mendez*, 757 F.3d 418, 428-29 (5th Cir. 2014) (noting reasonable foreseeability constitutes factual finding reviewed for clear error).

(Exhibit A, page 3).

Thus, the Fifth Circuit's conclusion on this enhancement initially appears to be based on alternative theories. On the one hand, the Circuit Court held there was sufficient plausible evidence that Mr. Tamez possessed a firearm and discharged that firearm. (Exhibit A, page 3). Alternatively, the Court held there was sufficient plausible evidence to believe that Mr. Tamez was armed and present at the shooting. (Exhibit A, page 3). As discussed below, both of these theories are predicated on a conclusion that Mr. Tamez possessed a firearm.

III.

The Holding is Contrary to the Jurisprudence of this Court

The Fifth Circuit's conclusion in this case is not in the alternative. Clearly, the first scenario was based on a predicate finding that Mr. Tamez was in possession of a firearm



during the shooting. (Exhibit A, page 3). The second scenario is also predicated on a finding that Mr. Tamez had a firearm. (Exhibit A, page 3). The fact that the Fifth Circuit held that the fact that Mr. Tamez had an “armed presence” at the scene is simply another way to conclude that he had a firearm. Therefore, the Fifth Circuit was in concurrence with the Government’s conclusion that the evidence was sufficient to show it was plausible by a preponderance of the evidence that Mr. Tamez had a firearm during the occurrence in question. In other words, the Fifth Circuit did not hold that it was foreseeable a firearm would be discharged even if Mr. Tamez did not have a firearm.

The Fifth Circuit’s standard of review in this case placed a burden on the defense to disprove the Government’s speculation that Mr. Tamez possessed a firearm. In other words, the Fifth Circuit has determined that such speculation was plausible. Respectfully, such burdens of proof or standards of review are not recognized by this Court. *Davis v. United States*, 140 S. Ct. 1060 (2020).

In *Davis*, this Court explained that, even if an argument was not raised in the District Court, the Appellate Court must at least review for plain error. 140 S. Ct. at 1061 (citing FED. R. CRIM. P. 52(b)). This Court observed:

[T]he Fifth Circuit refused to entertain Davis’ argument at all. The Fifth Circuit did not employ plain-error review because the court characterized Davis’ argument as raising factual issues, and under Fifth Circuit precedent, “[q]uestions of fact capable of resolution by the district court upon proper objection at sentencing can never constitute plain error.

*Id.* (quoting *United States v. Lopez*, 923 F.2d 47, 50 (5th Cir. 1991) (per curiam)). This Court further observed “[b] contrast, almost every other Court of Appeals conducts plain-

error review of un-preserved arguments, including un-preserved factual arguments. *Id.* (collecting cases). Thus, this Court concluded, there is no legal precedent “to shield any category of errors from plain-error review.” *Id.* at 1061-62.

Here, Mr. Tamez objected to the enhancement and, as discussed above, the evidence established that Mr. Tamez did not possess a firearm. In this regard, the Fifth Circuit’s application of the standard of review put the burden on Mr. Tamez to prove he did not possess a firearm. Stated another way, the Fifth Circuit’s standard of review required Mr. Tamez to provide independent proof of no possession of a firearm. Respectfully, *Davis* makes clear that there is no standard of review which requires the defendant to prove that the Government’s speculations and conclusionary assertions are without any evidentiary proof. Based on the arguments herein, Mr. Tamez asserts it was reversible error for the Fifth Circuit to affirm the imposition of the firearm enhancement and such decision conflicts with the decisions of this Court. Therefore, he respectfully requests that this Court grant this Petition so this case may proceed to further review.

### **CONCLUSION**

Mr. Tamez respectfully submits that the decision of the United States Court of Appeals for the Fifth Circuit, which affirmed the decision of the District Court adding 10-levels for the discharge of a firearm, conflicts with the decisions of this Court and calls for an exercise of this Court’s supervisory powers such that a compelling reason is presented in support of discretionary review by this Honorable Court.

WHEREFORE, PREMISES CONSIDERED, Petitioner, NATHAN LEE TAMEZ, respectfully requests that this Court grant this petition and issue a Writ of Certiorari.

Respectfully Submitted,

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