No. _____

In The
Supreme Court of the United States

FERNANDO LOPEZ,
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

SANDRA A. EASTWOOD
Counsel of Record
LAW OFFICE OF SANDRA EASTWOOD
CJA
3636 S. Alameda Street, Suite B197
Corpus Christi, Texas 78411
(361) 688-4900
sandraeastwoodlaw@yahoo.com
Texas State Bar No. 00789274

Counsel for Petitioner

QUESTION PRESENTED

I. Whether alleged possession of a different gun 17 months after Mr. Lopez's charged felon-in-possession offense constituted relevant conduct?

II. Whether the use of a preponderance of the evidence standard in deciding to enhance Mr. Lopez's sentence violated his Fifth Amendment and Sixth Amendment rights?

III. Whether Mr. Lopez's prior Texas robbery conviction qualified as a crime of violence under § 4B1.2?

IV. Whether the use of Mr. Lopez's prior robbery conviction both to enhance his base offense level and to increase his criminal history score amounted to impermissible double counting?

———♦———

PARTIES TO THE PROCEEDING

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

———♦———

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISION

STATUTES AND RULES

SENTENCING GUIDELINES

PRAYER

Petitioner Fernando Lopez 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 13, 2023.

———————♦———————

OPINIONS BELOW

On June 13, 2023, 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

As noted, the Fifth Circuit entered its judgment on June 13, 2023. Appendix at 1. This petition is filed within 90 days after that date and thus is timely. See Sup. Ct. R. 13.1. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

———————♦———————

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

I. The Due Process Clauses of the Fifth and Fourteenth Amendments "[protect] the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 90 S.Ct. 1068 (1970).

The Fifth Amendment to the United States Constitution provides:

> No person shall be *** deprived of life, liberty, or property, without due process of law;***

U.S. Const. amend. V.

II. The Sixth Amendment guarantees a fair trial for the accused, "Chapman v. California, 386 U.S. 18 (1967).

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury ***, and to be informed of the nature and cause of the accusation; to be confronted by the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have assistance of counsel for his defense.

U.S. Const. amend. VI.

STATEMENT OF THE CASE

On December 22, 2020, a federal grand jury in the Corpus Christi Division of the Southern District of Texas returned a one-count indictment charging Defendant-Appellant Fernando Lopez with one count of Possessing a firearm, a Sig Sauer Pistol, and thirteen (13) rounds of .40 caliber ammunition while a convicted felon, in violation of 18 U.S.C. § 922(g)(1) and 924(a)(2). ROA.10-11.

On August 26, 2021, Mr. Lopez appeared before a United States District Judge and pled guilty without a plea agreement to the One Count indictment. ROA.89, 95, 100-102. During the plea colloquy, Mr. Lopez testified he was 39 years old and had taken some college hours. ROA.90. To provide a factual basis for Mr. Lopez's plea, an agreed factual stipulation

was submitted stating in October of 2019, Texas Department of Public Safety troopers conducted a traffic stop on a vehicle Lopez was driving for failure to display a front license plate. As the troopers began to approach the vehicle, they observed Lopez attempt to exit the vehicle and observed on the driver side floorboard a loaded Sig Sauer pistol that had previously been reported stolen. Lopez was arrested and a photo was found on Lopez's phone depicting the same firearm held with a tattooed hand matching that of Lopez. During the course of the investigation, it was discovered Lopez has numerous felony convictions. ROA.39-44.

The Presentence Investigation Report ("*PSR*") fixed Lopez's base offense level at 20, pursuant to U.S.S.G. § 2K2.1(a)(4), because Lopez committed the 2019 offense after sustaining a felony conviction for a crime of violence- his 2013 conviction for robbery. (ROA.135).

The PSR assessed a two-level enhancement because the firearm was stolen pursuant to 2K2.1(b)(4)(A). (ROA.133).

The PSR assessed a four-level enhancement pursuant to § 2K2.1(b)(6)(B) because Lopez allegedly used or possessed a firearm in connection with another felony offense. (ROA.133). Besides the underlying October of 2019 *Sig Sauer firearm* possession, the PSR alleged Mr. Lopez committed two other firearm offenses: 1) an assault 15 months later with an accomplice, Kristian Garcia, in which Lopez and Garcia allegedly hit the victim in the head with a .45 caliber pistol and a 9mm pistol, causing multiple contusions, a possible broken jaw and broken arm; and 2) the possession of a .45 caliber firearm (previously reported stolen in connection with an assault committed by Kristian Garcia) found in Lopez's unoccupied work truck when federal agents arrested him at his residence for the original October 2019 felon-in-possession charge 17 months later. ROA. 133-134.

The PSR awarded a three-level reduction for acceptance, resulting in a total offense level of 23 and a criminal history category of IV, which included 3 points assessed for the 2013 Texas Robbery conviction. ROA.144. The PSR calculated an advisory Guidelines imprisonment range of 70 to 87 months. ROA.144. The PSR noted that 18 U.S.C. § 924(a)(2) carries a maximum sentence of ten years. ROA.144.

Mr. Lopez filed Objections to the PSR:

1) Challenging his base offense level of 20 for having one prior crime of violence conviction for Robbery in Texas;
2) Challenging his four-level enhancement for *using or possessing any firearm or ammunition in connection with another felony*, to wit: a firearm found in his work truck to commit aggravated assault and aggravated robbery on January 9, 2021; and
3) Asking the Court to take into consideration the double counting of his Robbery conviction to increase his base offense level and to compute his criminal history category; and
4) Objecting to a preponderance of the evidence standard at sentencing.

ROA.170-175, 187, 189-196.

At sentencing on March 3, 2022, Mr. Lopez objected to his Texas Robbery conviction being used as a *crime of violence* to increase his base offense level to a 20, which was overruled by the Court as per the Fifth Circuit's findings on that issue. ROA.110.

Mr. Lopez objected to the four point enhancement for *using a firearm in connection with another felony* and the lower *preponderance of the evidence standard* at sentencing. ROA.114-118. The Trial Court discussed the gaps between the date of offense in *October of 2019*; the date another firearm ("*new firearm*") was used on *January 9, 2021* during an Aggravated Robbery; and the date the *new firearm* was found on *March 31, 2021* by Agents

when they arrested Mr. Lopez for this case.[1] ROA.121, 125. The Trial Court stated the lapse in time, or temporal proximity, could be "somewhat problematic for the Government," but it was another *felon in possession case* and the standard was preponderance of the evidence, rather than beyond a reasonable doubt, at sentencing. ROA. 121-122. The Court stated the first two factors, the degree of similarity and the regularity, weighed in favor of the Government, the facts met the relevant conduct standard, and the Court over-ruled the objection but "certainly understood" the Defense's argument. ROA.122-123.

The Court over-ruled the Defense's objection to the standard of proof. ROA.123.

The Defense asked the Court to take into consideration that the robbery was double counted. ROA.124.

After evidence presented and argument, the Court denied the request for a variance based on the nature of the offense in conjunction with the extensive criminal history, and sentenced Mr. Lopez to the low end of the guidelines at 70 months in the custody of the Bureau of Prisons, to be followed by a 3-year term of supervised release. ROA.127-128. The district court waived imposition of a fine, but the court imposed the mandatory $100 special assessment. ROA.127.

The Appeal

On March 2, 2022, Mr. Lopez filed a timely notice of appeal to the United States Court of Appeals for the Fifth Circuit. And on June 13, 2023, the Fifth Circuit affirmed the judgment of conviction and sentence. See United States v. FERNANDO LOPEZ, United States Court of Appeals, Fifth Circuit Opinion, 70 F.4th 325 (5th Cir. 2023) (Appendix). The 5th Circuit Court held that Mr. Lopez's "repeated instances of being a felon in possession of a firearm were relevant conduct, justifying" a four level enhancement for use or possession of

[1] Date of offense *October 2019*

a firearm in connection with another felony, after determining the district court thoroughly analyzed the factors for relevant conduct. The Fifth Court found the standard of *preponderance of the evidence* for sentencing enhancements did not violate Mr. Lopez's Fifth and Sixth Amendment rights, noting his ultimate sentence fell well below the 10-year statutory maximum, and such an argument was not well-taken. The Court also held that Texas robbery qualified as a crime of violence because the elements of Texas robbery substantially correspond to the basic elements of the generic offense of robbery. Finally, the Fifth Circuit found that double-counting of a prior robbery conviction both to enhance his base offense level and to increase his criminal history score was not impermissible double counting and such an argument lacked merit, since the Guidelines permitted double-counting under § 2K2.1(a).

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 PETITION

I. As to the first question presented, this Court should grant certiorari to address whether an alleged possession of a different gun 17 months after Mr. Lopez's charged felon-in-possession offense constituted relevant conduct.

The PSR assessed Mr. Lopez a 4 point enhancement under USSG § 2K2.1(b)(6)(B) for using or possessing any firearm or ammunition in connection with another felony offense. ROA. 135. PSR ¶ 20. Specifically, the PSR alleged Mr. Lopez "used the firearm found in his work truck on March 31, 2021 during and while committing the offense of aggravated assault and aggravated robbery on January 9, 2021." ROA. 135. (PSR ¶ 20).

Per Section 2K2.1(b)(6)(B) of the United States Sentencing Guidelines, if a person has used or possessed any firearm or ammunition in connection with another felony offense…, the offense level is increased by 4 levels, USSG, § 2K2.1(b)(6)(B).

Under the operative language in § 2K2.1(b)(6)(B), in order to warrant a four-level enhancement, the defendant must have possessed a firearm "in connection with" another felony. The Application Note 14 of USSG, § 2K2.1(b)(6)(B) states a firearm is possessed "*in connection with*" another felony "if the firearm ... facilitated, or had the potential of facilitating, another felony offense or another offense, respectively." The Fifth Circuit has stated this sentencing enhancement applies, for example, if the firearm "emboldened" the second offense or if it was used to protect other contraband, *United States v. Jeffries*, 587 F.3d 690 (5th Cir.2009).

It should be noted, the Fifth Circuit evaluated the word "any" in the context of § 2K2.1(c)(1) as to whether this section should be confined to the firearm a defendant is charged with possessing. In *United States v. Gonzales*, 996 F.2d 88 (5th Cir.1993), the Fifth Circuit rejected the plain meaning of "any firearm" because it did not fit with the "overall context of

section 2K2.1. The court reasoned that "any firearm" must be at least related to the one charged in the indictment. *Id.* The court pointed to the language in § 2K2.1(b)(4), which enhanced the sentence if "any firearm" was stolen, and reasoned that this can only logically be the charged firearms or it would not make sense.

The Sig Sauer found during the traffic stop on October 15, 2019, which was collected as evidence, was not the firearm alleged to have been used *in connection with another felony* in 2021. That second firearm was found in Mr. Lopez's work truck.

As applied to Mr. Lopez, the PSR's relevant conduct determination and specific offense characteristic enhancements were erroneous because Mr. Lopez's alleged possession of the *.45 caliber firearm* found in his work truck 17 months later in March of 2021, was not part of the same scheme or plan as the offense of conviction, which occurred on October 15, 2019 during a traffic stop with a female passenger. Such extraneous offense conduct was too remote in time from the offense of conviction. His alleged participation in the offenses were neither part of a common scheme or plan nor part of the same course of conduct as the instant offense. The activities not only lacked common accomplices, common victims, a common purpose, or a common *modus operandi,* but also showed no evidence of temporal proximity, similarity, or regularity. Mr. Lopez did not admit to the offenses nor was he found guilty beyond a reasonable doubt by a jury, and to enhance him with such extraneous offenses under such circumstances violated his Sixth Amendment rights.

The Fifth Circuit has held that a district court may apply guideline enhancements based on a defendant's relevant conduct, *United States v. Brummett*, 355 F.3d 343 (5th Cir. 2003), USSG, § 1B1.3. And, that a district court may consider non-adjudicated offenses (offenses for which the defendant has neither been charged nor convicted) that occur after the offense of conviction, provided they constitute "relevant conduct" under USSG, § 1B1.3, *United States v. Vital*, 68 F.3d 114 (5th Cir.1995).

Relevant conduct includes "all acts and omissions ... that were part of the same course of conduct or common scheme or plan as the offense of conviction." USSG, § 1B1.3(a)(2). Offenses are "part of the same course of conduct if they are sufficiently connected or related to each other as to warrant the conclusion that they are part of a single episode, spree, or ongoing series of offenses." USSG, § 1B1.3, cmt. n.5(B)(ii). In making a same-course-of-conduct determination, Courts look at the following three factors:

1) the degree of similarity of the offenses,

2) the regularity (repetitions) of the offenses, and

3) the time interval between the offenses." *Id*.

In evaluating the first factor- degree of similarity, the Fifth Circuit has held the court "inquire[s] whether there are distinctive similarities between the offense of conviction and the remote conduct that signal that they are part of a course of conduct rather than isolated, unrelated events that happen only to be similar in kind," *U.S. v. Rhine*, 583 F.3d 878 (5th Cir. 2009). Mr. Lopez would argue similarity in the context of felon-in-possession charges requires more than a showing of mere possession of a firearm.

In *United States v. Brummett*, 355 F.3d 343 (5th Cir. 2003), Brummett pleaded guilty to possession of one firearm stemming from police finding a pistol, shotgun and drug paraphernalia during a search of his home for a check-forging scheme. However, he was enhanced in the PSR for two additional firearms found in his possession in the nine months following his arrest- the first was found seven months later when police searched his home for a meth lab investigation and found a handgun and meth manufacturing equipment; and the second was two months after that (9 months from the indicted incident), when police discovered a rifle, meth lab, and meth in Brummett's motel room. In that case, the Fifth Circuit Court affirmed the district court's relevant-conduct finding, holding that Brummett's "pattern of behavior of possessing firearms was similar." In the *Brummett* case, the Fifth

Circuit did not explicitly find Brummett's other firearm possessions relevant only because drugs as well as guns were present at all the scenes, and it did not explicitly hold that a felon's mere possession of a firearm satisfies the similarity factor. However, in supporting its holding, the *Brummett* case cited three cases from other circuits appearing to hold that firearm possession alone satisfied similarity. *Id.* (citing *United States v. Santoro*, 159 F.3d 318 (7th Cir. 1998); *United States v. Windle*, 74 F.3d 997 (10th Cir. 1996); *United States v. Powell*, 50 F.3d 94 (1st Cir. 1995)). In *Powell*, the First Circuit explicitly stated that "the *contemporaneous, or nearly contemporaneous*, possession of uncharged firearms is, in this circuit, relevant conduct in the context of a felon-in-possession prosecution." In *United States v. Brown*, 783 Fed. Appx. 330 (5th Cir. 2019), the Fifth Circuit agreed and held that it was not clearly erroneous for the district court to find Brown's other firearm-related conduct similar because his *three separate* firearm-related offenses represented a regular pattern and unlike drug cases in which the Court has required that the allegedly similar conduct involve more than the mere presence of the same drug, felon-in-possession cases are analogically distinct because the elements of the underlying offense are simply being a convicted felon in possession of a firearm.

However, Mr. Lopez was charged in October of 2019 with possessing a *Sig Sauer firearm* in the vehicle he was driving (with a female passenger) and no other offenses, per the PSR, were alleged. ROA. 133-134. The PSR alleged Mr. Lopez committed an assault involving a 45 caliber firearm 15 months later with an alleged accomplice and a 45 caliber firearm was found in his unoccupied work truck where he was staying with his employer 17 months after the offense of conviction. ROA. 133-134. There is not a regular pattern of misconduct involving a firearm to warrant the 4 level enhancement. Nor were they contemporaneous, as contrasted with *Powell* in the 1st Circuit.

The 2nd factor- Regularity, per the Fifth Circuit, is satisfied when "there is evidence of

a regular, i.e., repeated, pattern of similar unlawful conduct directly linking the purported relevant conduct and the offense of conviction," *U.S. v. Rhine*, 583 F.3d 878 (5th Cir. 2009). In *Brown*, the Fifth Circuit held it was not clearly erroneous for the district court to conclude that Brown's three separate firearms-related offenses represented a regular pattern. Here, again, looking at the above analysis, there does not appear to be a regular pattern- the offense of conviction for Mr. Lopez involved, per the PSR, a traffic stop with a female passenger. ROA. 133-134. The later alleged offense in the PSR related to an unadjudicated felon in possession case 17 months later and referred back to an assault involving an accomplice while allegedly using a .45 caliber pistol, a 9mm pistol, a 2X4 and a baseball bat and a cell phone was stolen. ROA. 133-134.

For the 3rd factor- Temporal Proximity, the Fifth Circuit has held there is "no separate statute of limitations beyond which relevant conduct suddenly becomes irrelevant," and a defendant's prior conduct will not necessarily be "placed off limits simply because of a lapse of time," *U.S. v. Moore*, 927 F.2d 825 (5th Cir. 1991). However, the Fifth Circuit typically uses one (1) year as the benchmark for determining temporal proximity, *U.S. v. Rhine*, 583 F.3d 878 (5th Cir. 2009), *United States v. Brown*, 783 Fed. Appx. 330 (5th Cir. 2019). In *Brown*, all three of his firearm possessions occurred less than a year apart (9 months).

In Mr. Lopez's case, because the substantive offense occurred on October 15, 2019 and the new un-indicted alleged Felon in Possession for the .45 caliber firearm occurred on March 31, 2021 (over 17 months later) and the alleged assault with a .45 caliber firearm occurred in January of 2021 (over 15 months later), there is a lack of temporal proximity. ROA. 133-134.

In Mr. Lopez's case, although there may be general similarities regarding the unlawful possession of a firearm in a vehicle, there were specific differences between the alleged relevant conduct and the offense of conviction: there was no evidence presented in the PSR that the same alleged accomplice played any role in the earlier offense of conviction,

that the offenses share a common modus operandi, and there does not appear to be a common purpose linking the two offenses. Therefore, the evidence alleged in the PSR was insufficient to connect the offenses as part of a common scheme or plan. Further, the PSR failed to show the extraneous offense(s) qualified as part of the same course of conduct, as they were not sufficiently connected to or related to the offense of conviction and therefore did not warrant the conclusion they were part of a single episode, spree or ongoing series of offenses, keeping in mind such factors as the degree of similarity, the regularity of the offenses, and the time intervals between the offenses. For example, the firearms were different; the vehicles were different- in 2019, Mr. Lopez was driving a Mercedes with a female passenger; whereas in 2021, a different firearm was found in a work truck at the residence of Mr. Lopez's employer (where Mr. Lopez was staying); the "occupants" (or lack thereof) were different; and the context in which the 2021 offense allegedly occurred was different from the 2019 traffic stop. In addition, there is a 15 month delay between the Assault involving a 45 caliber firearm and the crime of conviction. ROA. 133-134.

Therefore, this enhancement was improper.

A. The Fifth Circuit's decision conflicts with decisions of other United States court of appeals

As the Sixth Circuit held in *United States v. Jackson*, 877 F.3d 231 (6th Cir. 2017), "guns have the potential to make a bad situation worse," but an enhancement under Section 2K2.1(b)(6)(B) was not warranted after Jackson pled guilty to felon in possession of a firearm and distribution of heroin. In the *Jackson* case, a CI driven by an undercover officer purchased one gram of heroin from "Dlite" AKA Jackson for $120, and after doing so, the CI told Jackson he was in a pickle and needed a pistol, Jackson at first demurred but then said he had one for $400, the CI went to the car to get $400 from the undercover officer while Jackson walked down the street to his own residence to get the gun, and they made the second

exchange. *Id.* A few days later, Jackson told the CI he had another gun for sale, the undercover officer drove the CI to Jackson, who sold the gun for $500, and after Jackson showed the CI how to use the gun, the CI advised Jackson of a potential drug customer, and Jackson followed the CI to the car where he sold a half-gram of heroin to the undercover officer for $45. *Id.* Three weeks later, a search warrant for Jackson's two properties involved in the earlier sales turned up $3,050 and a plastic spoon with heroin residue at one place, and at the other, a relative who admitted flushing a small amount of marijuana and cocaine down the toilet but had never seen Jackson with a gun, and no guns were found. *Id.* At sentencing, Jackson objected to a four-level enhancement for using or possessing a firearm in connection with another felony of distribution of heroin, arguing the guns and drugs were not connected except that Jackson sold each of them, at different times, to the CI, there was no close proximity since the drugs and guns were not next to each other and were separate transactions, even though the guns and drugs were sold by the same person around the same time. *Id.* The Sixth Circuit found Jackson's possession of firearms was merely coincidental, like finding drugs in a home under a firearm conviction, without having a clear connection to trigger the enhancement, noting that even if a defendant did not use a gun, the § 2K2.1(b)(6)(B) enhancement applies if a defendant actually or constructively possessed a gun in connection with the felony, for example if drugs are found next to a gun on a nightstand, as contrasted with Jackson, who kept his guns and drugs housed at separate locations, did not bring a gun and drugs together to either sale, and had no reason to believe that selling the drugs or gun would lead to the other; the guns were not being used to protect the drugs; and guns were not thrown in to sweeten the pot. *Id.*

Here, there is no evidence Lopez at the time he possessed the firearm in his Mercedes with his girlfriend had any intention of using that gun or another gun to allegedly bludgeon another individual on the head with a male cohort, Kristian Garcia, during a robbery for a

cell phone fifteen months later; nor that having that first gun facilitated him allegedly having a different gun in his work vehicle seventeen months later. The only similarity is mere possession of a firearm.

———♦———

II. As to the second question presented, this Court should grant certiorari to address whether the use of a preponderance of the evidence standard in deciding whether to enhance Mr. Lopez's sentence violated his Fifth Amendment and Sixth Amendment rights.

The Government should be held to a standard of "beyond a reasonable doubt," rather than "preponderance of the evidence" for any allegations and enhancements within the PSR and anything less would be a violation of Mr. Lopez's 5th Amendment right that no one shall be deprived of life, liberty or property without due process of law; the Due Process Clause of the Fourteenth Amendment; and the Sixth Amendment right to jury trial.

The preponderance standard for factual determinations at sentencing is suggested by the Guidelines themselves, *see* USSG, § 6A1.3 (Policy Statement) commentary. This Court has held that the application of the preponderance standard at sentencing generally satisfies due process, *McMillan v. Pennsylvania*, 477 U.S. 79 (1986) and *United States v. Watts*, 519 U.S. 148 (1997).

However, in *United States v. Haymond*, 139 S.Ct. (2019), this Court held that the federal statute governing revocation of supervised release, authorizing a new mandatory minimum sentence based on a judge's fact-finding by a preponderance of the evidence, violated his 5th and 6th Amendment Rights, as applied.

Since then, the Fifth Circuit has held the decision in *Haymond* only addressed the constitutionality of § 3583(k) of the supervised release statute, and the plurality opinion specifically stated that it was not expressing any view on the constitutionality of other

subsections of the statute, including and because there currently is no case law from either the Supreme Court or the 5th Circuit court extending *Haymond* to, for example, § 3583(g) revocations, *United States v. Woods*, 793 Fed.Appx. 340 (5th Cir. 2020).

During sentencing, the Court overruled Mr. Lopez's objection to the standard of proof, and found under a preponderance of the evidence standard and with sufficient indicia of reliability, there was similarity and regularity between the offenses, which were both felon in possession of a firearm offenses. ROA. 121-123. The Court acknowledged it was a different gun; took into account the lapse in time, finding temporal proximity to be lacking; and found overall the facts before the Court met the relevant conduct standard. ROA. 122. The Court denied Mr. Lopez's objection to the *firearm in connection with another felony* enhancement, but did "understand the Defense's argument in that regard." ROA.122-123.

Especially in light of the serious nature of the "*firearm in connection with another felony*" enhancement offenses, including an unadjudicated and un-charged Aggravated Robbery, which significantly increased the guideline range, the judge's fact-finding by a preponderance of the evidence violated Mr. Lopez's 5th and 6th Amendment Rights, as applied.

III. As to the third question presented, this Court should grant certiorari to address whether Mr. Lopez's prior Texas robbery conviction qualified as a crime of violence under § 4B1.2.

The PSR assessed Mr. Lopez a base offense level of 20 under USSG § 2K2.1 for having one prior felony conviction of a crime of violence, to wit: a previous conviction for Robbery on December 4, 2012 in Case Number CR-330-13-H in Hidalgo County 389th District Court. ROA. 135. (PSR ¶ 18).

The Fifth Circuit applies the categorical approach when determining whether a conviction is an enumerated offense or defined by a guidelines provision, looking to the

elements of the offense enumerated or defined by the Guideline section and comparing those with the offense of conviction, *United States v. Adair*, 16 F.4th 469 (5th Cir.2021).

Under § 2K2.1, a "crime of violence," is defined as "any offense under federal or state law, punishable by imprisonment for a term exceeding one year," that either "(1) has as an element the use, attempted use, or threatened use of physical force against the person of another" or "(2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm ... or explosive material." U.S.S.G. 4B1.2(a). §2K2.1 cmt. n.1.

Mr. Lopez would argue Texas robbery is not a crime of violence because it lacks the requisite element of the *use of force*. Per Texas Penal Code § 29.02, "a person commits the offense of Robbery if, in the course of committing theft and with intent to obtain or maintain control over the property, he 1) intentionally, knowingly or recklessly causes bodily injury to another; or 2) intentionally or knowingly threatens or places another in fear of imminent bodily injury or death." *Bodily injury* is defined as "physical pain, illness, or any impairment of physical condition," Texas Penal Code §1.07(a)(8). By contrast, *serious bodily injury*, which is not required for simple Robbery in Texas, is defined as "bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ," Texas Penal Code § 1.07(46). Arguably, simple bodily injury would not be considered *use of force*.

Further, the possible *reckless* mens rea within the Texas robbery statute, arguably, does not satisfy the use of force clause. The Fifth Court found in *United States v. Young*, 809 Fed.Appx. 203 (5th Cir. 2020), that a Louisiana Aggravated Assault offense could be committed negligently and therefore did not fall within the required mens rea for an ACCA enhancement. Although reckless is a higher mens rea, it still arguably does not fall within the mens rea required for an enumerated offense for enhancement to a 20.

The Fifth Circuit has held in *United States v. Flores-Vasquez*, 641 F.3d 667 (5th Cir. 2011) that a prior conviction which qualifies as a crime of violence enhancement under § 2L1.2,[2] would also qualify under §4B1.2, and because Texas robbery so qualifies under § 2L1.2, it also qualifies under §4B1.2, *United States v. Santiesteban-Hernandez*, 469 F.3d 376 (5th Cir. 2006), *overruled on other grounds by* *United States v. Rodriguez*, 711 F.3d 541 (5th Cir. 2013); *United States v. Adair*, 16 F.4th 469 (5th Cir. 2021), *cert. denied*, 142 S. Ct. 1215 (2022).

It should be noted, in 2019, this Court held that a pre-1999 Florida robbery conviction under § 812.13 categorically qualified as a violent felony under the Armed Career Criminal Act's ("ACCA") elements clause, *Stokeling v. U.S.*, 139 S.Ct. 544 (2019), but arguably there are conflicting robbery elements. A violent felony under ACCA must entail force that can cause physical pain or injury and Florida robbery requires only force sufficient to overcome a victim's resistance. The 9th Circuit in *United States v. Shelby*, 939 F.3d 975 (9th Cir. 2019) held that an Oregon first degree Robbery is not a violent offense for purposes of ACCA. Seven Circuit Courts have held that a Hobbs Act robbery is not a crime of violence under §4B1.2(a) because the conduct covered by a Hobbs act robbery is broader than conduct covered under §4B1.2(a)'s crime of violence. *See* *United States v. Green*, 996 F.3d 176 (4th Cir. 2021); *Bridges v. United States*, 991 F.3d 793, 800 (7th Cir. 2021); *United States v. Eason*, 953 F.3d 1184, 1194 (11th Cir. 2020); *United States v. Rodriguez*, 770 F.App'x 18, 21-22 (3d Cir.2019); *United States v. Camp*, 903 F.3d 594, 604 (6th Cir. 2018); *United States v. O'Connor*, 874 F.3d 1147, 1158 (10th Cir. 2017); *United States v. Prigan*, 8 F.4th 1115 (9th Cir. 2021).

[2] Unlawful Reentry

IV. As to the fourth question presented, this Court should grant certiorari to address whether the use of Mr. Lopez's prior robbery conviction both to enhance his base offense level and to increase his criminal history score amounted to impermissible double counting.

Applying Mr. Lopez's prior Robbery conviction to increase his base offense level to 20 and also to compute his criminal history category resulted in double counting.

The Fifth Circuit Court has held the Guidelines do not prohibit double counting except when the particular Guideline at issue expressly does so," *United States v. Luna*, 165 F.3d 316 (5th Cir. 1999); see also *United States v. Hawkins*, 69 F.3d 11 (5th Cir. 1995) ("The Sentencing Guidelines do not forbid all double counting. Double counting is prohibited only if the particular guidelines at issue specifically forbid it." (citations omitted)). In addition, Application Note 10 expressly allows usage of the *same prior felony conviction resulting in an increased base offense level* to be counted for purposes of determining the criminal history points, Application Note 10 of USSG, § 2K2.1. *See United States v. Garcia-Gonzalez*, 714 F.3d 306 (5th Cir. 2013).

The Application Instructions instruct the sentencing court to determine the base offense level independently of the criminal history category. The Application Notes further clarify: "Absent an instruction to the contrary," enhancements to the base offense level and determinations of the criminal history guidelines "are to be applied cumulatively." USSG, §1B1.1 App. Note 4(B).

Still, arguably, Mr. Lopez's prior Robbery conviction was improperly considered in determining his criminal history category because that same precise conviction had already been fully taken into account in his offense level as the predicate felony offense, Application Note 10 of USSG, § 2K2.1. In other words, the prior conviction constitutes conduct that is

"part of the instant offense" and therefore, should not have been included in his criminal history score.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Date: September 9, 2023

SANDRA A. EASTWOOD
Counsel of Record
LAW OFFICE OF SANDRA EASTWOOD
3636 S. Alameda Street, Suite B197
Corpus Christi, Texas 78411
(361) 688-4900
sandraeastwoodlaw@yahoo.com

Counsel for Petitioner

APPENDIX A- United States Court of Appeals, Fifth Circuit Opinion (June 13, 2023) 70 F.4th 325 (5th Cir. 2023)

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
June 13, 2023
Lyle W. Cayce
Clerk

No. 22-40121

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

FERNANDO LOPEZ,

Defendant—Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 2:20-CR-1442-1

Before SMITH, CLEMENT, and WILSON, *Circuit Judges*.

CORY T. WILSON, *Circuit Judge*:

Fernando Lopez pled guilty to possession of a firearm and ammunition by a felon. He now challenges his sentence on several grounds, particularly the district court's imposition of a four-level enhancement for use or possession of a firearm in connection with another felony offense. The linchpin of this case is whether Lopez's repeated instances of being a felon in possession of a firearm were relevant conduct, justifying the enhancement. The district court thoroughly analyzed the factors for relevant conduct—similarity, regularity, and temporal proximity—and concluded the evidence

weighed in favor of the Government. The district court committed no error, clear or otherwise, in its analysis. Accordingly, we affirm.

I.

In October 2019, Texas Department of Public Safety (DPS) troopers stopped Lopez while he was driving a white Mercedes. The officers observed a firearm on the driver's side floorboard of the car in plain view. The firearm was determined to be a loaded .40 caliber Sig Sauer pistol that had previously been reported stolen. Lopez was arrested but later released from state custody on bond, and no state charges have been filed in the interim. At the time, Lopez had several prior felony convictions, including a 2013 Texas conviction for robbery for which he was sentenced to five years of imprisonment.

In March 2021, Lopez was charged by federal authorities and arrested for the October 2019 offense. While making the arrest at Lopez's residence, officers searched his work vehicle and found a loaded .45 caliber Smith & Wesson pistol (which had previously been reported stolen in connection with an assault committed by a man named Kristian Garcia). Soon thereafter, a different victim reported that he had been assaulted by Lopez and Garcia in January 2021. Lopez and Garcia allegedly hit the victim in the head with their guns, described as a .45 caliber pistol (the same gun as found in Lopez's work truck) and a 9mm pistol, causing the victim multiple contusions, a possible broken jaw, and a broken arm.

Ultimately, Lopez pled guilty, without a plea agreement, to a one-count indictment charging him with possession of a firearm and ammunition by a felon, in violation of 18 U.S.C. § 922(g). The Presentence Investigation Report (PSR) fixed Lopez's base offense level at 20, pursuant to U.S.S.G. § 2K2.1(a)(4), because Lopez committed the 2019 offense after sustaining a felony conviction for a crime of violence (his 2013 Texas conviction for

robbery). The PSR assessed a two-level enhancement pursuant to § 2K2.1(b)(4)(A) because the firearm was stolen, and it added a four-level enhancement pursuant to § 2K2.1(b)(6)(B) because Lopez had used or possessed a firearm in connection with another felony offense (viz., the possession of the .45 caliber pistol found in his work truck in March 2021, as well as the January 2021 aggravated assault and battery). The PSR then awarded a three-level reduction for acceptance of responsibility. These adjustments resulted in a total offense level of 23. The PSR determined Lopez's criminal history score to be IV, which included 3 points assessed for the 2013 Texas robbery conviction. With a total offense level of 23 and a criminal history score of IV, Lopez faced a guideline range of 70 to 87 months. Lopez objected to the PSR on several grounds—most notably asserting that the four-level § 2K2.1(b)(6)(B) enhancement for using a firearm in connection with another felony offense was erroneous.

At sentencing, the district court adopted the PSR's findings and calculations. While the district court determined that a below-guidelines sentence was unwarranted based on the 18 U.S.C. § 3553(a) factors—particularly the nature of the offense and the seriousness of Lopez's criminal history—it found that a low-end sentence was appropriate. The district court then walked through the analysis for determining whether the four-level § 2K2.1(b)(6)(B) enhancement for use or possession of a firearm in connection with another felony offense applied. The district court determined the October 2019 and March 2021 firearm possessions were part of the same course of conduct via the relevant conduct standard, which required the district court to weigh three factors to determine if the two possession instances were sufficiently related: (1) the degree of similarity between the offenses, (2) the regularity of the offenses, and (3) the time interval between the offenses. Ultimately, the district court determined that the time-interval factor weighed in favor of Lopez but a preponderance of the

evidence supported the other two factors, similarity and regularity, and weighed in the Government's favor. The district court concluded that the evidence established the two firearm possessions were relevant conduct and therefore part of the same course of conduct, thus supporting use of the enhancement. The court sentenced Lopez to 70 months' imprisonment followed by a three-year term of supervised release.

Lopez timely appealed his sentence, challenging the § 2K2.1(b)(6)(B) enhancement for using a firearm in connection with another felony offense because, he argues, the district court erred in its relevant conduct analysis. He also raises a foreclosed argument that his prior Texas robbery conviction is not a crime of violence for sentencing, challenges the district court's use of the preponderance of the evidence standard, and contends the use of his robbery conviction to determine his base offense level and criminal history score amounted to impermissible double counting.

II.

This court reviews the district court's application of the Guidelines *de novo* and its factual findings for clear error. *See United States v. Brummett*, 355 F.3d 343, 344 (5th Cir. 2003) (per curiam). There is no clear error if the district court's findings are plausible in light of the record as a whole. *United States v. Serfass*, 684 F.3d 548, 550 (5th Cir. 2012). "A finding of fact is clearly erroneous only if a review of all the evidence leaves us with the definite and firm conviction that a mistake has been committed." *United States v. Rodriguez*, 630 F.3d 377, 380 (5th Cir. 2011) (per curiam) (quotation and citation omitted).

III.

A.

Lopez contends that the district court erred in applying the four-level § 2K2.1(b)(6)(B) enhancement for using a firearm in connection with another felony. According to Lopez, the enhancement should be confined to a felony committed with the *same* firearm underlying the charged offense. He concedes, though, that the enhancement can be based on relevant conduct. Still, he persists that the district court erred in finding that his 2021 possession of the .45 caliber firearm was "relevant conduct" bearing on his 2019 illegal firearms possession. This is because the two gun possessions were not part of the same course of conduct, as they were not part of a common scheme or plan. And they were too distant in time to be related, not sufficiently similar, and not part of a regular pattern of misconduct. The Government counters that the district court did not clearly err in finding that the 2021 possession constituted relevant conduct under the same-course-of-conduct test. We agree with the Government.

1.

Under § 2K2.1(b)(6)(B), the offense level for a firearms offense should be increased by four levels if the defendant "used or possessed any firearm or ammunition in connection with another felony offense[.]" A "felony offense" is "any federal, state, or local offense . . . punishable by imprisonment for a term exceeding one year, regardless of whether a criminal charge was brought, or a conviction obtained." § 2K2.1, comment. (n.14(C)). In determining whether the four-level enhancement applies, the district court must consider the relationship between the offense of conviction and the other felony offense "consistent with relevant conduct principles." § 2K2.1, comment. (n.14(E)).

Relevant conduct includes conduct that was part of "the same course of conduct" or a "common scheme or plan" as the offense of conviction. § 1B1.3(a)(2). The enhancement applies even if the firearm used for the increase is not the same firearm used in the offense. § 2K2.1, comment. (n.14(E)(ii)). Further, a "defendant need not have been convicted of, or even charged with, the other offenses for them to be considered relevant conduct for sentencing[.]" *United States v. Rhine*, 583 F.3d 878, 885 (5th Cir. 2009).

Offenses are part of a common scheme or plan if they are "substantially connected to each other by at least one common factor, such as common victims, common accomplices, common purpose, or similar modus operandi." § 1B1.3, comment. (n.5(B)(i)); *see Rhine*, 583 F.3d at 885. "Offenses that do not qualify as part of a common scheme or plan may nonetheless qualify as part of the same course of conduct if they are sufficiently connected or related to each other," *Brummett*, 355 F.3d at 345, to be deemed "part of a single episode, spree, or ongoing series of offenses," § 1B1.3, comment. (n.5(B)(ii)). The three factors for the analysis are (1) "the degree of similarity of the offenses," (2) "the regularity (repetitions) of the offenses," and (3) "the time interval between the offenses." § 1B1.3, comment. (n.5(B)(ii)); *see Rhine*, 583 F.3d at 886. A district court's findings regarding the relevant conduct factors are factual and thus reviewed for clear error. *Rhine*, 583 F.3d at 885; *Brummett*, 355 F.3d at 345.

2.

Here, the district court considered the relevant conduct factors during sentencing and determined that the degree of similarity and regularity of Lopez's conduct weighed in favor of the Government. However, the court found there was not sufficient temporal proximity and the timeline was "somewhat problematic for the Government." Because "all three factors need not weigh in favor of the Government," the court nonetheless found

that "overall . . . the facts before the [c]ourt have met the relevant conduct standard." The district court was not clearly erroneous.

Taking temporal proximity first, the Government (correctly) does not dispute that this factor cuts against it. This court typically uses one year "as the benchmark for determining temporal proximity[.]" *Rhine*, 583 F.3d at 886–87; *see also Brummett*, 355 F.3d at 345 (nine months); *United States v. Brown*, 783 F. App'x 330, 333 (5th Cir. 2019) (per curiam) (one year), *cert. denied*, 140 S. Ct. 1136 (2020); *United States v. Jessie*, 826 F. App'x 410, 411 (5th Cir. 2020) (per curiam) (ten months). Here, the record establishes that the firearm possession to which Lopez pled guilty occurred in October 2019, while the enhancement was based on a separate firearm possession in March 2021, approximately 17 months later.[1]

But temporal remoteness, alone, is not dispositive. Indeed, ingrafting a closeness-in-time requirement onto the other two factors, similarity and regularity, would essentially conflate the relevant conduct analysis into a one-factor test. Instead, similarity and regularity each get at something distinct from the timeline of the conduct at issue, as the Guidelines and our precedent make clear. *See* U.S.S.G. § 1B1.3, comment (n.5(B)(ii)) ("When one of the above factors is absent, a stronger presence of at least one of the other factors is required."); *Rhine*, 583 F.3d at 887 ("We conclude that temporal proximity is lacking, adding, however, that our conclusion does not necessarily preclude a finding of relevant conduct."). The other two factors can "overcome" a long lapse between the offense of conviction and

[1] There was another possession in January 2021: The same gun Lopez possessed in March 2021 was used in connection with the alleged January assault. The district court pegged its analysis to March, thus making the timeline 17 months. Measured from the January 2021 possession, the lapse between the offense of conviction and the subsequent possession would be 15 months, slightly closer to our one-year rule of thumb.

purported relevant conduct, so long as the factors are "authoritatively present[.]" *Rhine*, 583 F.3d at 887 (quoting *United States v. Miller*, 179 F.3d 961, 967 n.10 (5th Cir. 1999)).

As for similarity, Lopez contends that the mere commission of the offense of illegal possession of a firearm on two disconnected, temporally distant occasions is insufficient to satisfy the similarity factor. The Government responds that the offenses were similar because Lopez, a convicted felon, was twice found to be in possession of stolen, loaded pistols in his vehicle.

Generally, when evaluating similarity of relevant conduct, this court "inquire[s] whether there are distinctive similarities between the offense of conviction and the remote conduct that signal that they are part of a course of conduct rather than isolated, unrelated events that happen only to be similar in kind." *Id.* at 888. "[C]ourts must not conduct [the similarity] analysis at such a level of generality as to render it meaningless." *Id.* Much of our precedent in this area, including *Rhine*, stems from drug-related cases, in which the "mere fact that two separate offenses involve the same type of drug is generally not sufficient to support a finding of similarity." *Id.* at 888–89. But "drug cases are analogically distinct from felon-in-possession cases where the elements of the underlying offense are simply being a convicted felon in possession of a firearm." *Brown*, 783 F. App'x at 333 n.3; *see also Jessie*, 826 F. App'x at 411 (quoting *Brown*). Indeed, cases such as *Brown* and *Jessie* indicate that, in the context of a felon-in-possession offense, a felon's mere possession of a firearm satisfies the similarity factor.

Employing this reasoning, the district court readily found similarity between Lopez's offense of conviction and his other conduct:

> If we're looking at degree of similarity, I mean it's a felon in possession of a firearm. It's—the elements are looking at felon

> in possession of a firearm. Someone who had been—has a felony conviction and he has a firearm in his possession . . . that weighs in favor of the Government.

In adopting the PSR, the district court implicitly recognized other similarities: In both the October 2019 and March 2021 instances, the firearms were loaded, found in Lopez's vehicle, and had been reported stolen. We cannot say the district court clearly erred.

That brings us to regularity. Lopez asserts that the district court erred in finding regularity because there was no pattern to his actions. The regularity factor is satisfied when "there is evidence of a regular, i.e., repeated, pattern of similar unlawful conduct directly linking the purported relevant conduct and the offense of conviction." *Rhine*, 583 F.3d at 889–90. In *Brummett*, we noted that the defendant possessed firearms on "three separate occasions within a nine month period," and that his "pattern of behavior of possessing firearms was similar and regular." 355 F.3d at 345.

Lopez's timeline is admittedly more attenuated. However, the district court took that into consideration when analyzing regularity. And the court observed during sentencing that the .45 pistol found in Lopez's vehicle in March 2021 was also possessed by Lopez two months prior:

> [T]here was a gun, a different gun was used in an aggravated assault, aggravated robbery situation, January of 2021 . . . . When he was arrested, that same gun that was used in the January . . . incident, like two months before, was found in Mr. Lopez's truck. And it was loaded, as well.

The court underscored its reasoning later in the hearing:

> In terms of the regularity of the conduct . . . we're showing October of 2019, and then we have this gap. And then, even though it's a different gun, we're showing January of 2021 and then March of 2021. Different gun used than the 2019 incident, but [the] same gun used within that . . . two-month

> time period or so. So I think the [similarity and regularity] factors weigh in favor of the Government.

Ultimately, the district court's finding regarding regularity is "plausible in light of the record as a whole." *Serfass*, 684 F.3d at 550 (quotation omitted).

In sum, the district court adequately analyzed the three factors for relevant conduct and concluded that the similarity and regularity factors weighed in favor of the sentencing enhancement despite the lack of temporal proximity. We therefore cannot say the district court erred in applying the four level § 2K2.1(b)(6)(B) enhancement for Lopez's use of a firearm in connection with another felony.

B.

We next address Lopez's argument that Texas robbery is not a crime of violence for purposes of § 2K2.1 because it lacks use of force as an element. As he did in the district court, Lopez concedes that the argument is foreclosed but raises it to preserve it for possible Supreme Court review.

This court has previously held that Texas robbery qualifies as a crime of violence under § 4B1.2 and is therefore a crime of violence for purposes of § 2K2.1(a)(4)(A). *United States v. Adair*, 16 F.4th 469, 470–71 (5th Cir. 2021), *cert. denied*, 142 S. Ct. 1215 (2022) ("[T]he elements of Texas robbery substantially correspond to the basic elements of the generic offense of robbery." (internal quotation omitted)). Thus, Lopez's challenge to the application of § 2K2.1(a)(4)(A) is indeed foreclosed.

C.

Lopez similarly asserts that his sentencing enhancements, particularly the § 2K2.1(b)(6)(B) enhancement, should have been proven beyond a reasonable doubt. According to him, the district court's use of the

preponderance of the evidence standard violated his Fifth Amendment and Sixth Amendment rights. Lopez's argument is not well-taken.

A judge may find all facts relevant to the determination of a guidelines range by a preponderance of the evidence. *United States v. Setser*, 568 F.3d 482, 498 (5th Cir. 2009); *United States v. Mares*, 402 F.3d 511, 519 (5th Cir. 2005). The preponderance standard satisfies constitutional concerns even when, as here, the court is deciding whether to enhance a sentence based upon the defendant's commission of another offense. *See United States v. Watts*, 519 U.S. 148, 156 (1997); *Nichols v. United States*, 511 U.S. 738, 748 (1994). Additionally, judicial factfinding by a preponderance of the evidence does not run afoul of the defendant's constitutional rights "where the defendant's sentence ultimately falls within the statutory maximum term." *United States v. Hebert*, 813 F.3d 551, 564 (5th Cir. 2015); *Mares*, 402 F.3d at 519. Here, Lopez was sentenced to 70 months—well below the 10-year statutory maximum. The district court did not err as to this issue.

D.

Finally, Lopez contends that the use of his prior robbery conviction both to enhance his base offense level and to increase his criminal history score amounts to impermissible double counting. This argument likewise lacks merit.

The Sentencing Guidelines do not generally prohibit double counting. *See United States v. Calbat*, 266 F.3d 358, 364 (5th Cir. 2001). Indeed, the Guidelines permit the district court to consider a defendant's prior felony convictions in calculating both his offense level under § 2K2.1(a) and his criminal history category. *United States v. Hawkins*, 69 F.3d 11, 13–15 (5th Cir. 1995); *see* § 2K2.1(a)(4)(A); § 2K2.1, comment. (n.10) (instructing district courts to "use only those felony convictions that receive criminal

history points" under certain subsections). As with the foregoing issues, the district court did not err in calculating Lopez's sentence on this basis.

* * *

Lopez's sentence imposed by the district court is

AFFIRMED.