No. _____

In the Supreme Court of the United States

LONGINO LOPEZ FLORES, IV,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit at New Orleans, Louisiana

PETITIONER'S PETITION FOR A WRIT OF CERTIORARI

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Question Presented for Review

Did the Fifth Circuit err in affirming the four level enhancement to petitioner's sentencing range for a conviction under 18 U.S.C. § 922(g)(1), which is authorized when the defendant used or possessed any firearm in connection with another felony offense, when the evidence was insufficient to support this enhancement because it only showed simultaneous presence of drugs and a firearm, and the Fifth Circuit failed to rely on its two prior opinions that refused to apply this type of enhancement, but instead relied on a Fourth Circuit opinion to affirm petitioner's sentence?

List of Parties

The names of the parties are listed in the caption of this case. The judgment in a criminal case was imposed by the Hon. Alan D. Albright, United States District Judge for the Western District of Texas, Waco Division. The panel of the United States Court of Appeals for the Fifth Circuit at New Orleans, Louisiana, which considered petitioner's appeal and issued an unpublished *per curiam* opinion, consisted of Fifth Circuit Judges Jacques L. Wiener, Jr., Don R. Willett, and Stuart Kyle Duncan.

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Opinion Below

The opinion sought to be reviewed was issued on November 5, 2024 by the

United States Court of Appeals for the Fifth Circuit sitting in New Orleans, Louisiana,

and is included in the Appendix at Tab A.

Statement of Jurisdiction

This is an appeal by petitioner Longino Lopez Flores, IV of his 63 months sentence imposed after he pleaded guilty to possessing a firearm after receiving a

felony conviction, stated in the December 18, 2023 Judgment of Conviction in a Criminal Case entered by the U.S. District Court for the Western District of Texas, Waco Division, attached as Appendix Tab B. *See also* Fifth Cir. ROA.23-50922.99-104. Petitioner contended on appeal that the four level enhancement applicable to firearms-related convictions when the defendant used or possessed a firearm in connection with another felony offense, U.S.S.G. § 2K2.1(b)(6)(B) (2021), was erroneously applied because the evidence only showed simultaneous possession of drugs and a firearm.

The Fifth Circuit affirmed petitioner's sentence on November 5, 2024. Instead of following its prior opinions in *United States v. Jeffries*, 587 F.3d 690 (5th Cir. 2009), and *United States v. Garza*, No. 22-20338 (5th Cir. 2023) (unpublished), which vacated and remanded for resentencing under similar circumstances , the Fifth Circuit relied on the Fourth Circuit's opinion in *United States v. Jenkins*, 566 F.3d 159 (4th Cir. 2009), in finding that the enhancement was properly applied.

Petitioner Lopez Flores timely filed with the Fifth Circuit both a petition for panel rehearing, and a petition for *en banc* rehearing, on November 18, 2024. Both rehearing petitions were denied on December 6, 2024. This certiorari petition will be due within 90 days after December 6, 2024, or by March 6, 2025. Sup. Ct. Rule 13.1.

Relevant Constitutional Provision, Statute and Guideline

The constitutional right to bear arms is contained in the Second Amendment of

the U.S. Constitution: "A well regulated Militia, being necessary to the security of a

free State, the right of the people to keep and bear Arms, shall not be infringed."

18 U.S.C. § 922(g)(1) provides:

(g) It shall be unlawful for any person –

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year; . . .

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

The 2021 version of the United States Sentencing Guidelines was used in

calculating petitioner's sentence. Fifth Cir. ROA.23-50922.195, ¶ 17. U.S.S.G. §

2K2.1(b)(6)(B) (2021) states:

If the defendant -

(B) used or possessed any firearm or ammunition in connection with another felony offense; or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense,

increase by 4 levels. If the resulting offense is level 18, increase to level 18.

Statement of the Case

Petitioner Longino Lopez Flores, IV seeks review of the unpublished opinion of the Fifth Circuit, Appendix Tab A, which affirmed the district court's sentence contained in the Judgment in a Criminal Case. Appendix Tab B.

Statement of Procedural History

The Fifth Circuit affirmed petitioner's sentence in its November 5, 2024 unpublished opinion, attached at Appendix Tab A. Petitioner timely filed petitions for panel rehearing and *en banc* rehearing, which were both denied on December 6, 2024.

Question Presented for Review (Restated)

Did the Fifth Circuit err in affirming the four level enhancement to petitioner's sentencing range for a conviction under 18 U.S.C. § 922(g)(1), which is authorized when the defendant used or possessed any firearm in connection with another felony offense, when the evidence was insufficient to support this enhancement because it only showed simultaneous presence of drugs and a firearm, and the Fifth Circuit failed to rely on its two prior opinions that refused to apply this type of enhancement, but instead relied on a Fourth Circuit opinion to affirm petitioner's sentence?

Argument Amplifying Reasons for Granting the Writ

Certiorari should be granted because the sentencing issue presented in this appeal is likely to recur in future criminal prosecutions. Additionally, petitioner contends that the Fifth Circuit's opinion failed to follow two prior Fifth Circuit opinions that reached the opposite conclusion as in the appeal at bar, but instead relied on a Fourth Circuit opinion to affirm the four level sentencing enhancement that was used to increase petitioner's sentence range.

Discussion of Facts Related to the Question Presented for Review: Petitioner objected to the portion of the Presentence Report which included a four level increase in offense level for using or possessing a firearm in connection with another felony offense, because the evidence did not link petitioner to the drugs found at the time of his arrest, there was no evidence on whether the drugs were methamphetamine or whether the weight stated was accurate, and there was no relationship between petitioner's firearm and the drugs found in the vehicle when petitioner was arrested. Fifth Cir. ROA.23-50922.217-218.

The U.S. Probation Office stated in its Addendum to the Presentence Report that the four level increase was imposed because petitioner was involved or committing another felony offense at the time of his arrest, and because petitioner was found in possession of methamphetamine, a felony offense under Texas state law, when he possessed the firearm charged as the offense in the Indictment. Fifth Cir. ROA.23-50922.214. The government's sentencing memorandum argued that petitioner's objection regarding the four level increase for drugs being found at the time of arrest should be overruled, since the methamphetamine was found in the same bag as the firearm, while stating the weight and purity of the substance found. Fifth Cir. ROA.23-50922.89.

Both the probation officer and the prosecutor based their arguments on simultaneous possession of drugs and a firearm to support the four level increase in offense level. But under Fifth Circuit case law and the guideline commentary notes, while mere presence of both firearms and drugs would be sufficient to support a four level increase if the underlying felony was a drug-trafficking offense, it is insufficient for that increase to apply to the felony drug possession offense that petitioner committed. The record in this appeal does not show how petitioner Lopez Flores's possession of the firearm facilitated, or had the potential to facilitate, the possession of the methamphetamine found in his vehicle. At sentencing, the district judge overruled appellant's objection, Fifth Cir. ROA.22-50922.112:13-14, and included the four level enhancement in calculating petitioner's sentence.

Petitioner appealed his sentence to the Fifth Circuit, arguing that its prior opinions in *United States v. Jeffries*, 587 F.3d 690, 692 (5th Cir. 2009), and *United States v. Garza*, No. 22-20338 (5th Cir. 2023) (unpublished), which both distinguish between drug possession offenses and drug trafficking offenses in deciding whether to apply the four level increase contained in U.S.S.G. § 2K2.1(b)(6)(B) (2021), should have resulted in a reversal of the district court's use of that four level increase in calculating petitioner's offense level, and a remand for resentencing. However, the Fifth Circuit affirmed petitioner's sentence, stating in part:

Flores contends the record is insufficient to support the enhancement. We disagree. The PSR and sentencing memorandum show that Flores stored his loaded pistol in the same case as the twenty-three grams of meth. [Footnote omitted]. Officers were also informed that, only a few nights before the arrest, shots had been fired between Flores and his brother.

From these facts, the district court could have reasonably inferred that Flores's firearm had at least "the potential" to protect his considerable meth stash. In particular, the storage of the loaded Luger in the same case as a substantial amount of meth supports the inference that the gun's presence was not a mere fortuity. *Compare Jenkins*, 566 F.3d at 164 [4th Cir. 2009] ("To say that the only evidence of facilitation in this case was the evidence of simultaneous possession implies that the presence of the firearm was the result of mere 'accident or coincidence,' which certainly was not the case." (citation omitted)), with Jeffries, 587 F.3d at 691-94 (concluding the record was too sparse to support the enhancement when officers discovered only "a single rock of crack cocaine" on the floor of a car and apart from the firearm), and United States v. Garza, No. 22-20338, 2023 WL 3918993, at *4 (5th Cir. June 9, 2023) (per curiam) (unpublished) (holding the record was insufficient to support the enhancement when it merely showed the defendant "possessed the drugs and firearm at the same time"). Accordingly, the district court did not clearly err in imposing the sentencing enhancement. [Footnote omitted].

United States v. Lopez Flores, No. 23-50922 (5th Cir. 2024) (unpublished), pdf slip op.

at 3-4, attached as Appendix Tab B. Bracketing added. Petitioner now seeks review in this Court.

<u>Why Certiorari Should be Granted</u>: Certiorari should be granted because the Fifth Circuit's opinion conflicts with its prior opinions in *Jeffries* and *Garza, supra*, and instead relies on the Fourth Circuit's opinion in *Jenkins, supra*, which affirmed Jenkins's sentence since the Presentence Report in that case, "shows that Jenkins took the revolver and cocaine onto a public street, near where a gun had recently been fired, close to midnight," and that, "These facts support the district court's conclusion that the firearm 'ha[d] the potential of facilitating' Jenkins's drug possession offense." *Jenkins*, 566 F.3d at 169. Bracketing added.

However, the Revised Presentence Report in petitioner's appeal did not discuss how petitioner Lopez Flores's possession of a firearm facilitated his drug possession Indeed, the probation officer's Addendum, responding to petitioner's offense. objection, seems to have assumed that possession of drugs and firearms at the same time was all that was necessary to support the four level increase in offense level, because the probation officer merely stated that methamphetamine and the firearm were both found in petitioner's vehicle. Fifth Cir. ROA.23-50922.214 (Response to Additionally, the government's Sentencing Memorandum Objection No. 1). responded to this objection by stating that, "The methamphetamine was found in the same bag as the firearm that is the subject of this indictment and to which the defendant pled guilty to the possession of on June 6, 2023." Fifth Cir. ROA.23-50922.89. Bold in original. The statements in both documents filed by the probation officer and the prosecutor show that the government's reliance on this four level increase were based only on the mere possession of both drugs and a firearm, and not on any alleged shooting that occurred before the arrest, which was not mentioned in either document.

"U.S.S.G. § 2K2.1 of the Sentencing Guidelines provides for a four-level enhancement to a sentence for a conviction under § 922(g)(1) where 'the defendant used or possessed any firearm . . . in connection with another felony offense."" *United States v. Jeffries*, 587 F.3d 690, 692 (5th Cir. 2009). The Fifth Circuit in *Jeffries* discussed the 2006 change to the Application Notes for that guideline, which distinguished between drug trafficking offenses and drug possession offenses, as follows:

The Application Notes now provide that "in the case of a drug trafficking" offense in which a firearm is found in close proximity to drugs, drug manufacturing materials, or drug paraphernalia"[,] the enhancement automatically applies because the Sentencing Commission has concluded that "the presence of the firearm has the potential of facilitating" these types of offenses. § 2K2.1 cmt. n. 14(B)(ii) (emphasis supplied). By contrast, for all other felony offenses that are not drug trafficking offenses (or burglary, which is separately addressed), the enhancement only applies "if the firearm . . . facilitated, or had the potential of facilitating," that offense; no presumption is made. Id. § 2K2.1 cmt. n. 14(A). The Government correctly concedes here that the "other felony offense" of drug possession is properly analyzed under Application Note 14(A), not 14(B)(ii). [Citations omitted]. Under the new comment, there can therefore be no automatic conclusion that Mr. Jeffries's possession of the firearm was "in connection with" his possession of cocaine just because the two are located in the same vehicle.

Instead, we may only affirm the district court's application of the enhancement if it is "plausible" in light of the record as a whole that Mr. Jeffries's possession of the firearm "facilitated, or had the potential of facilitating," the drug possession. [Footnote and citation omitted]. The record here is devoid of evidence that would support any finding that Mr. Jeffries's possession of the firearm "facilitated" his possession of cocaine. At best, the Government has shown only that Mr. Jeffries possessed cocaine and a firearm at the same time. Such a showing would be sufficient to satisfy the "in connection with" requirement were the other offense cited a drug trafficking offense, but it is not sufficient to satisfy the higher "facilitation" standard required since 2006 for drug possession offenses.

United States v. Jeffries, 587 F.3d 690, 692-693 (5th Cir. 2009). Underlining added. *See also United States v. Garza*, No. 22-20338 (5th Cir. 2023) (unpublished), pdf slip op. at 3-9 (discussing *Jeffries* in vacating and remanding for resentencing, since the record was insufficient to support a four level increase because the government, "merely showed that Garza possessed the drugs and the firearm at the same time[,]" pdf slip op. at 8, and holding that this sentencing error was not harmless).

Possession of both drugs and a firearm as supporting the four level increase imposed in this appeal, when the underlying felony was drug possession, is contrary to both of the Fifth Circuit's opinions in *Jeffries* and *Garza*, *supra*. The Fifth Circuit's opinion erroneously relied on a disputed statement in the Factual Basis about another shooting incident a few nights before the arrest, which contains no detail on what happened in that alleged incident, and does not show how petitioner's possession of the firearm facilitated the underlying drug possession offense. Fifth Cir. ROA.23-50922.73-74. The record in this appeal presents only the simultaneous possession of drugs and a firearm, and the evidence of a disputed earlier shooting incident with no details on what occurred. This is insufficient to show that petitioner's appeal fits into the fact pattern presented by the Fourth Circuit's Jenkins opinion, supra, especially when one reviews the wording of the Revised Presentence Report and the probation officer's response to petitioner's objection to the four level increase stated in the prior

paragraph of this petition, which both only discussed the simultaneous possession of both drugs and firearms, and ignored the alleged prior shooting incident relied on in the Fifth Circuit's opinion affirming petitioner's sentence.

If the underlying offense had been a drug-trafficking offense, simultaneous possession of both drugs and a firearm would have been sufficient to impose the four level increase. Again, the wording of the Revised Presentence Report, and the probation officer's Addendum responding to petitioner's objection, only discussed the simultaneous possession of both the drugs and a firearm, not whether there was an earlier shooting incident. The government assumed at sentencing that simultaneous possession of both drugs and a firearm was sufficient to support the four level increase, and made no effort at sentencing to show how an earlier, and disputed, shooting incident may have provided further evidence on this subject. The Fifth Circuit's opinion failed to follow its prior opinions in *Jeffries* and *Garza*, *supra*, and incorrectly relied on the Fourth Circuit's opinion in *Jenkins*, supra, in affirming petitioner's sentence which included a four level increase in offense level contained in U.S.S.G. § 2K2.1(b)(6)(B) (2021).

For these reasons, petitioner Longino Lopez Flores, IV asks this Court to grant this petition for a writ certiorari to decide this important federal issue which is likely to recur in future criminal prosecutions, request briefs on the merits to determining the merits of the case at bar, and hold that the opinion of the Fifth Circuit should be reversed or vacated, and that petitioner's sentence be reversed or vacated, and remanded for resentencing, since the four level increase in offense level contained in U.S.S.G. § 2K2.1(b)(6)(B) (2021) was erroneously applied.

Conclusion and Prayer for Relief

WHEREFORE, PREMISES CONSIDERED, petitioner LONGINO LOPEZ FLORES, IV respectfully prays that this Court grant this petition for a writ of certiorari, set this cause for oral argument and for briefing on the merits, and hold that the opinion of the Fifth Circuit should be reversed or vacated, and that petitioner's sentence be reversed or vacated, and remanded for resentencing, since the four level increase in offense level contained in U.S.S.G. § 2K2.1(b)(6)(B) (2021) was erroneously applied.

Respectfully submitted,

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Date E-Filed: February 7, 2025