No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

RODOLFO TREJO — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

ROBERTO TREJO
(Your Name)

555 GEO Drive (Reg. No. 58240-060)
(Address)

Philipsburg, PA 16866
(City, State, Zip Code)

N/A
(Phone Number)

QUESTIONS PRESENTED

I.- Whether Petitioner's Sentence Constitutes Impermissible Double Counting.

II.- Whether Petitioner's Sentence is Substantively Unreasonable Under the the Totality of the Circumstances.

III.- Whether Petitioner's Sentence Created an Unwarranted Sentencing Disparity.

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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21 U.S.C. § 841;

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Other

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____; or,
[X] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[ ] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Eighth Amendment of the United States Constitution

3

STATEMENT OF THE CASE

Petitioner, a Mexican citizen by born, traveled to the United States as a young man to work construction with his father, remaining in the country once his tourist visa expired. Eventually, Petitioner acquired a social security number to allow him to maintain employment.

Petitioner worked hard in construction, formed a wonderful home and had his children (Dillon Handy, 14 year-old, Faith Handy, 16, and Isabela Paloma, 10), pursing his American Dream. Then, Petitioner got married and once married, he applied for his permanent residence (Green Card) obtaining a work-permission and a social security number under his own name, Rodolfo Trejo Rivera. At the middle of 2010, Petitioner received his Green Card, under his own name, and became a lawful permanent resident of the Untied States. At the middle of 2011, Petitioner applied to be naturalized as an American Citizen, obtaining a Certificate of Naturalization.

However, at the end of 2011, because he lied[1] under oat when filled out the N-400 Form, the State of Ohio charged Petitioner with knowingly procuring naturalization contrary to law, a Class F5 felony. Upon a deal with the State of Ohio and forced by a defense counsel who rendered ineffective assistance, Petitioner agreed with the State to surrender his U.S. Nationality[2] in exchange of retain his Green Card, and received a sentence of 30 days in probation.

Once Petitioner withdrew his U.S. Citizenship, the State of Ohio charged him with

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1 Even though was not a "white lie," because in naturalization matter there is not "white lie," the only lie in this particular case was to deny that he did use another name. Had Petitioner admitted the he used the name of another person to get a legal job, this case would never have happened.

2 "Petitioner was improperly convicted of knowingly procuring naturalization contrary to law, based on prior false statements in applying for [his Green Card], since there was no finding that the citizen's false statement in the naturalization process that she had made no false statements to the government was not shown to be causally connected to the decision to grant naturalization, and the existence of the false statements alone did not establish that the citizen procured naturalization unlawfully. *See* Maskenjak v. United States, 582 U.S. ___, 137 S. Ct. ____, 198 L. Ed. 2D 460 (2017).

(4)

identity fraud during the application of his Green Card, offering him a non-prison sentence to plea guilty. Petitioner did plea guilty to the one charge indictment and was convicted for lie to obtain his Green Card, receiving a sentence of 36 months' supervised release. Then, once as an illegal alien, on May 10, 2013 Petitioner was deported back to Mexico by an Immigration Judge.

Once in Mexico, far form his family, basically wife and children, and due to the precariousness of his living conditions, Petitioner entered in the depths of despair and committed the error to return again illegally to the United Stated, to meet with his family, instead to ask for a Pardon to U.S. Homeland Security Department or to the Attorney General of the United States. Petitioner tried to recover his American Dream, but although he had a long history of gainful employment previously to be deported, without a Green Card he was no longer able to find job and support his family. As a result, Petitioner gave in to a one-time request to transport drugs[3] for cash.

$3\frac{1}{2}$ years after his illegal return to the United States, Petitioner was arrested and indicted in the Northern District of Ohio, charging with distribution of controlled substances in violation of 21 U.S.C. § 841 and illegal re-entry into the United States, in violation of 8 U.S.C. § 1326. After his arrest and charge, Petitioner entered a plea of guilty. The District Court subsequently issued a Notice of Possible Upward Variance, in which the court indicated it may vary upward from the U.S. Sentencing Guidelines based on information from the PSR related to Petitioner's criminal involvement, his own admission that he illegal returned to the United States while in federal supervised release, his criminal history, as well as the nature and circumstances of the offense.

3 Petitioner was not the typical drug dealer, as the Sentencing Judge erroneously found. Indeed, Petitioner was forced by his financial hardship to sell small amount of power-cocaine to a friend of him who was a drug-consumer. This friend was one who introduced Petitioner to the Government's C.I. to supply him little amounts of drug just for personal consumption. This guy was the person who dragged Petitioner to the instant case.

Before sentencing, Petitioner provided the District Court with a sentencing memorandum outlining his personal history and characteristics, along with his legal objection to an upward variance. In this memorandum, Petitioner's counsel explained that, other than illegal reentry, this was Petitioner's first criminal offense. Petitioner argued that an upward variance would constitute impermissible double counting, would create an unwarranted sentencing disparity, and was not merited under the totality of the circumstances.

At the sentencing hearing, the District Judge rejected Petitioner arguments, asserting that Petitioner was part of a criminal organization trafficking in firearms and drugs. Despite defense counsels explanation to the contrary, the sentencing judge used Petitioner's ability to sell drugs and firearms in the future as a ground for an upward variance. It should be pointed out that also the Government advocated for a Guideline sentence. Moreover, the Pre-Sentence Report (PSR) suggested a downward variance rather than an upward. Nonetheless, the sentencing judge found that Petitioner's criminal history actually under-represented the seriousness of his conduct.

The District Court also quickly dispensed with defense counsel's double-counting and disparity arguments. Instead, the judge relied on Petitioner's records, his illegal return to the country, and his conduct. As a result, the judge varied to a sentence double the advisory Guideline length – or 60 months' imprisonment. In so doing, the sentencing judge acknowledged that "there will be some disparities," but they were outweighed by "the unique circumstances of this case." (*See Sent. Tr.* Page ID 212).

Petitioner timely appeal his sentencing, raising the impermissible double counting and the unreasonableness of his sentence, as well as the unwarranted sentencing disparity. The Sixth Circuit affirmed Petitioner's sentence. Petitioner timely submits the current Petition for a Writ of Certiorati.

REASONS FOR GRANTING THE PETITION

The District Court imposed Petitioner a sentence that included impermissible double counting, which was also a substantively unreasonable sentence because the Court failed to fully consider the totality of the circumstances, as well as disregarding the creation of unwarranted sentencing disparities, in imposing an exaggerated upward variance. As a result, the District Court erred in finding the totality of the circumstances required an upward variance to double the applicable range under the advisory U.S. Sentencing Guidelines.

Then, the main reason for granting the current petition for writ of certiorati, is because the Sentencing Judge abused its discretion by varying upward to double the sentence prescribed by the U.S. Sentencing Guidelines. An abuse of discretion occurs when the Sentencing Judge "relies on clearly erroneous findings of fact, improperly applies the law, or uses an erroneous legal standard."

Moreover, the Judge's decision was far from the judicial qualities most important for sentencing. The Judge ignored the extreme importance of the mercy, as a factor for sentencing proceedings. The judges are a very special huaman being that look like God, here in the Earth, because judges impose punishment against their fellow human beings. That's why a sentencing judge must have "some understanding of the diverse frailties of humankind," "compassion," and a "generosity of spirit" when he/her renders a sentence. *The Ten Commandments for a New Jugde*[1], a wonderful manual that should be present, not over the Judge's bureau but inside his mind and heart always, was quoted by the Second Circuit to vacate another *Draconian* sentence very similar to the case at bar[2]: *"Be kind. Id we judges*

1 Edward J. Davitt, *The Ten Commandments for a New Judge*. 65 A.B.A. J. 574 (1979), *reprinted in* 82 F.R.D. 209 (1979). The Honorable Davitt was a district judge for 37 years and the American Judicature Society has named his annual award for distinguished service to justice in his honor. (Taking from Bloomberg Law Insights, Vol. 102, No. 14).

2 See United States v. Singh, No. 1611cr (Dic. 12, 2017). *Singh* is a Guyanian male who was convicted of larceny and postal theft (aggravated felony) more than 20 years ago. Between 1993 and 2014, *Singh* was also convicted of, at least, seven other larceny related offenses. He was deported to Guyana twice, and twice he returned illegally to the country.

could possess but one attribute, it should be a kind and understanding heart. The bench in on place for cruel or callous people, regardless of their other qualities and abilities."

I.- IMPERMISSIBLE DOUBLE COUNTING OF OFFENSES

This upward variance imposed by the Sentence Judge, was on basis of impermissible double counting of his offense conduct. The sentencing Judge used Petitioner's illegal re-entry case to punish Petitioner twice. The re-entry case was grouped along with the drug case, to establish the total offense level which Petitioner should have been accountable to. It does mean that Petitioner had been punished already for his re-entry criminal conduct, but the judge took into consideration, once again, Petitioner's re-entry criminal conduct as a relevant circumstance, and considering insufficient a sentence to the top of the advisory sentencing range (30 months), imposed Petitioner the double of the maximum of such sentencing range, rendering abuse of discretion. It should be pointed out that there were not two distinct "aggravating qualifies." It was the very same factor (the drug conduct) and the sentencing judge erred when used this factor twice for so Draconian sentence. The illegal re-entry while on supervision offense was already part of the punishment which Petitioner was exposed since the very beginning of his prosecution, once it resulted in an additional two point being added to his criminal history score. Petitioner was punished twice for a single aspect of his criminal conduct, thus he was punished in violation of the proportionality goals of sentencing.

"Impermissible double counting" occurs when precisely the same aspect of a defendant's conduct factors into his sentence in two separate ways. Conversely, double counting does not occur where a defendant is penalized for distinct aspects of his conduct." *See* United States v. Young, 2017 US App LEXIS 150602017 (6th Cir. 2017); *see also* United

States v. Farrow, 198 F.3d 179, 193 (6th Cir. 1999). "Impermissible double counting occurs when one part of the guidelines is applied to increase a defendant's sentence to reflect the hind of harm that has already been fully accounted for by another part of the guidelines." *See* United States v. Napoli, 179 F.3d 1, 12 n.9 (2nd Cir. 1999) (internal quotation marks omitted), cert. Denied, 145 L. Ed. 2d 1084, 120 S. Ct. 1176 (2000).

The District Courts allow double counting where it appears that Congress or the U.S. Sentencing Commission intended to attach multiple penalties to the same conduct (for instance, the use of a dangerous weapon in calculating both the base offense level and a U.S.S.G. Manual § 2A2.2(b)(2) (enhancement). The court's inquiry is thus divided in two: it first determines whether double counting occurred, after which it determines whether any such double counting was impermissible. If the double counting is impermissible, the sentence is rendered procedurally unreasonable.

Also Petitioner contended that it was improper to base the upward variance on his involvement in drug trafficking for a criminal organization [3] operating in Canton, Ohio, which was selling drugs and firearms and also that Petitioner was involved in a Mexican criminal organization[4]. Even though there was not evidence about Petitioner involvement with gangs or any other king of organization, this same conduct was also already punished by the Sentencing Guidelines calculations for the counts one to four of the indictment.

Also, to reinforce the Judge misapprehension, the Government stressed that the case at bar was the third set of felony convictions, but said nothing regarding that such two previous felony offenses were non-prison convictions and both were part of the very same

3 Petitioner was never ever been part of any illegal organization nor any gang. Petitioner has no tattoo and never even met with any gang or group. In the case at bar, Petitioner has neither co-defendant nor co-conspirator. The investigation by AFT reflected in the P.S.R., came from the information provided by the C.I., who was setting up members of some gang. However, there is no evidence, not in the slightest, that Petitioner was involved with gang or group.

4 Petitioner spent just a few months in Mexico. This does mean that Petitioner couldn't be involved with any Mexican gang or group in this country.

conduct.

In response to Petitioner's arguments regarding double counting, the Sentencing Judge concluded that it was permitted to consider all aspects of Petitioner's conduct. Because Petitioner illegally reentered the United States while on supervised release, the Sentencing Judge reasoned that the upward variance was justified and not double counting. (*See Sent. Tr.* p.192). But it's obvious, Petitioner's illegal reentry while in supervised release was already part of his punishment, because, again, it resulted in an additional two points being added to his criminal history score. As a result, Petitioner's criminal history increased, and his overall advisory sentencing range under the Guidelines increased as well. Therefore, the punishment imposed by an upward variance was impermissible double counting of Petitioner's offense conduct.

Immediately after the Sentencing Judge made these statements at sentencing, and the Government called the Court's attention regarding the previous Petitioner's felonies, Petitoiner's counsel reminded mute and left the Court misapprehend regarding the real Petitoner's criminal history. The District Court, moreover, has rested the factual determination as to Petitioner's reasons to illegally return to the country on the court's own inferences from the facts established by the PSR rather than the real Petitioner's circumstances, well explained to the Court and very well reflected in Petitioner's criminal history. So much that the PSR recommended a downward variance.

II.- PETITONER SENTENCE WAS SUBSTANTIVELY UNREASONABLE

Petitioner's sentence was, undoubtedly, substantively unreasonable because, as the record clearly reflects, the Sentencing Judge selected the sentence arbitrarily (*"...I believe is within the Guidelines or not within the guidelines,* ***but within my statutory authority.***"), *See*

Sent. Tr. p.27 (emphasis added), the Sentencing Judge also based Petitioner's sentence in impermissible double counting of his offense conduct, and gave an unreasonable amount of weight to the factor that Petitioner was also convicted in a drug case, despite that such drug case was also part of the current sentence.

For a sentence to be procedurally reasonable, the Sentencing Judge must have "properly calculated the applicable advisory Guideline range, as well as to consider the 18 U.S.C. § 3553(a) factors and adequately articulated its reasoning for imposing the particular sentence chosen." United States v.Bolds, 511 F.3d 568, 579 (6th Cir. 2007) (quoting Gall v. United States, 552 U.S. 38, 51 (2007)).

Even though the Guidelines are now merely advisory and the Sentencing Judge has the discretion to vary the Guidelines (whether above or below it), the Sentencing Judge should took into consideration that *Booker's* decision, *see* United States v. Booker, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2D 621 (2004), is a mandate in order that the sentence be "sufficient, but not greater than necessary" to satisfy the purposes of sentencing set forth in § 3553(a)(2). The greater the variance outside of the Guidelines range decide by the Sentencing Judge in the case at bar (the double of the maximum) should be reserved for and applied to circumstances which are not present in Petitioner's case. The Sentencing Judge's reasoning in imposing such greater sentence, was a plain abuse of discretion, and the explanation offered by the Judge was not enough persuasive. The greater the variance outside of the advisory Sentencing Guidelines range demands the more explanation the district court will have to provide and the more persuasive that explanation will have to be. The sentencing judge great deviation from the advisory Guidelines range should be proportionately reviewed: "the farther the judge's sentence departs from the guidelines sentence . . . the more compelling the justification based on factors in section 3553(a) must

be." *See* United States v. Davis, 458 F.3d 491, 496 (6th Cir. 2006) *See also* United States v. Poynter, 495 F.3d 349, 2007 U.S. App. LEXIS 17808, *20-22 (6th Cir. 2007) In this order, it should be noted that this Honorable Supreme Court has considered the validity of proportionality review in *Gall, supra,* stating that *Rita's* court did not undercut continued application of the proportionality principle. See Rita v. United States, 551 U.S. 127 S. Ct. 2456, 168 L. Ed. 2D 203 (2007)

This Honorable Supreme Court has held that "a substantively unreasonable penalty is illegal and must be set aside." *See* Gall v. United States, *supra.* The Court also stressed that "it unavoidably follows that any fact necessary to prevent a sentence from being substantively unreasonable-thereby exposing the defendant to the longer sentence-is an element that must be either admitted by the defendant or found by the jury. It may not be found by a judge." *See* Jones v. United States, __ U.S. __ 190 L. Ed. 2d. 279 2014 US LEXIS 6736 (2014).

Although that *Rita's* court dismissed the possibility of Sixth Amendment violations resulting from substantive reasonableness review as hypothetical[5] and not presented by the facts of the case, but for a judge-found fact, would be reversed for substantive unreasonableness. *Rita,* 551 U.S., at 353, (*Stevens, J.*, joined in part by *Ginsburg, J.,* concurring)

In the case at bar, the Sentencing Judge misapprehended Petitioner's criminal conduct to impose Petitioner a 60-month imprisonment sentence for illegal reentry which was both procedurally and substantively unreasonable. Also, the Judge decision was impermissible because was not guided by a reasonable application of the relevant conduct, as concluded the Probation Officer in the PSR, to ask the Court for a downward variance.

The Sentencing Judge's decision deviates from the standard this Honrable Supreme

5 The Sentencing Judge supported his exaggerated sentence on a hypothetical facts (gang, drug organization, firearem, and big amount of drug, etc.) which was not part of Petitioner's case.

Court has established in *James v. United States*, *supra.*, (quoting *Gall v. United States*, *supra.*), explaining that procedural error occurs in situations where, for instance, the district court miscalculated the Guidelines; treats them as mandatory; does not adequately explain the sentence imposed; does not properly consider the [Section] 3553(a) factors; bases its sentence on clearly erroneous facts; or deviates from the Guidelines without explanation.

A review for substantive reasonableness provides a backstop for cases like Petitioner's case, that, although the Circuit Court could considered procedurally correct, would nonetheless damage the administration of justice because the sentence imposed was shockingly high and unsupportable as a matter of law.

Petitioner asserts that the 60-month sentences imposed on Count One to Five were unreasonable. During the sentencing proceedings, Petitioner contended that the district court improperly relied the exaggerated upward variance on his own self-incrimination to violate his supervised release terms by returning illegally to this country while on probation supervision, because the indictment already charged Petitioner with illegal reentry to the United States and the Sentencing Guidelines calculations included the illegal reentry and for the violation to his supervised release two points were added to his criminal category.

The Totality of the Circumstances did not Justify an Upward Variance

Petitioner's case did not merit an upward variance under the totality of circumstances. In this case, the Sentencing Judge did not clearly articulate its reasons for sentencing Petitioner far from the applicable range. The Sentencing Judge did not consider Petitoner's request to be sentenced below the applicable Sentencing Guidelines, as recommended the PSR, and in not doing so the Judge specifically made mention Petitioner's "prior criminal record, his history, his return immediately after a period of probation was granted here, and

the nature and circumstances of his activities." (*See Sent. Tr.* p.193). The Sentencing Judge considered none of the factors used to support his unexpected decision. Let's see: 1) prior criminal record; Petitioner's criminal record fell from the use of the name of another person to get job, after his arrival from Mexico as an unlawful resident. Although it was a felony Class 5, Petitioner tried to correct his error and became as a lawful permanent resident obtaining his Green Card and afterward his American citizenship using his own name. However, unfortunately, Petitioner lied when filled out both applications by denying the use of the name of another person to get a job. Nevertheless, for this offenses Petitioner received a non-prison sentences; 2) Petitioner history; even though the PSR asserted that Petitioner was part of an ongoing investigation by ATF's agents over a criminal organization, the same PSR reflects Petitoner's history. Before the current offense, Petitioner have a very long history of gainful employments. During the sentencing hearing, his wife, Mrs. Trejo, a respectable American lady, explained the Court about who is her husband. Several letters were addressed to the Court from different personalities and Petitioner's relative, showing the Court the qualities of Petitioner as a human being; 3) his return immediately after a period of probation; Petitioner self-incriminated to violate his probation condition. Could be better say that his defense counsel let him self-incriminated. Had Petitioner invoked his right to silence under the Fifth Amendment during the PSR proffer session, he would have precluded the Sentencing Judge to use the probation violation to support his upward variance; 4) the nature and circumstances of his activities; Petitioner illegally returned to this country to be together with his loved family, very loved of his wife and homesick for his children. Petitioner was not the typical delinquent with a long history of drug activities and several jail visits. This is the very first time that Petitioner trod on a jail floor. Petitioner was only charged with distribution of less than one ounce three times; he was really a "rookie" in the drug business. The nature and

circumstances of Petitioner offenses did not really merit an upward variance of the double of the top of his sentencing range; this should have been undisputed[6].

The Sentencing Judge, insisting that an upward variance was merited, interrupted the allegation of defense counsel on this respect to stress that it has "to consider the impact of drug traffickers and drug dealers" in the Canton community, characterizing that Petitioner was part of a Mexican criminal organization involved in selling guns and narcotics. However, this was Petitioner's first time involved in drug and, even though the drugs involved could came from some organization, there is not evidence, not in the slightest, that Petitioner was involved in an ongoing criminal enterprise or drug organization[7]. And Petitioner was never charged nor enhanced for any conduct involved firearms[8].

Despite those clarifications, the Sentencing Judge probably was already prejudged against Petitioner, because the Judge, by returning to the irrelevant question of the firearms, considered that Petitioner's history was insufficient to send a message and further assumed that Petitioner "would continue to sell drugs and distribute drugs and possible sell guns in our community," without taking into consideration that Petitioner will be deported back to Mexico after serve his sentence. Then, the Sentencing judge imposed Petitioner an incredible upward variance to 60 months' imprisonment – twice the maximum applicable Guideline sentencing range.

This Honorable Court should make an analysis of procedural reasonableness to note that the Sentencing Judge has made several factual errors during the sentencing hearing.

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6 In fact, and this is a very important point to take into consideration, even the Probation Officer asserted in the P.S.R. that Petitioner's criminal history might substantially over-represent the seriousness of his actual criminal conduct. (*See P.S.R.* p.10).

7 Petitioner's drug transactions were not part of a drug organization. Petitioner sold drug to the very same person, assuming that this person was a drug-consumer. Petitioner was not a drug dealer or distributor, but just a seller. He bought the drug weighed and packed already, to earn a couple of dollars (less than $200) per ounce.

8 According to Petitioner, the friend who introduced him to the Government's C.I. sold or attempted to sell a firearm to the C.I., but Petitioner had nothing to do with such firearm.

The Judge implied that Petitioner was involved in a Mexican criminal organization and that he had returned to the country "as part of a gang, which is selling drugs and firearm," which was not true[9]. Also, the judge noted that Petitioner was never been legally in the United States and that his naturalization was obtained fraudulently, which is not true[10]. However, undoubtedly, these inferences did impact the Judge's analysis of Petitioner's likelihood to recidivate. Finally, and even most important, this Honorable Court should note that the Sentencing Judge's characterization of Petitioner's criminal history as being extensive was inconsistent with the factual record related to his prior convictions (*"...based upon the defendant's prior criminal record, his history...it was in my mind triggers a possible upward variance.") See Sent. Tr.* p.7. Because a sentence based on factual inaccuracies is procedurally unreasonable, this Honorable Court should determine that remand for clarification of the facts is appropriated in Petitioner's case.

III.- AN UNWARRANTED SENTENCING DISPARITY

18 U.S.C. § 3553(a)(6) mandates the District Courts to impose a sentence that "avoid[s] unwarranted sentencing disparities among defendant with similar records who have been found guilty of similar conduct." This factor concerns national disparities between defendants with similar criminal histories convicted of similar criminal conduct – not disparities between co-defendants. In this order, this Honorable Court has instructed the District Courts to apply a narrow "proportionality principle" based on § 3553(a) factors and the sentencing Guidelines advisory range. *See* Graham v. Florida, 560 U.S. 48, 59-60, 130 S. Ct. 2011, 176

9 Please *see Footnote No. 6.*

10 Petitioner came to the United States, for the very first time, as a lawful visitor with a B1/B2 Visa. Even though he remained as an unlawful permanent resident by using the name of other person to get legal job, Petitioner got his Green Card and afterward he obtained his U.S. citizenship using his own name, not by using the name of other as the Sentencing Judge erroneously stressed.

L. Ed. 2d 825 (2010). Under that principle, punishment for a crime should be "graduated and proportioned to [the] offense" but the proportionality requires "forbids only extreme sentences that are grossly disproportionate to the crime." *Id.*. Although this test is rarely met, and even though mostly of Circuit Courts, as 6th Circuit, have held that "[A] sentence within the statutory maximum set by statute does not normally constitute cruel and unusual punishment, *see* Austin v. Jackson, 213 F.3d 298, 302 (6th Cir. 2000), in Petitioner's sentence it's plainly and clearly meet and his sentence constitutes cruel and unusual punishment, taking into consideration that a reasonable expected sentence would have been below the Guideline range but Petitioner had received the double of the maximum in his sentencing range, more than the triple of his expectancy, which is an extreme sentence that is grossly disproportionate to Petitioner's first reentry and first (less than four ounce of cocaine) drug case. *See* Harmelin v. Michigan, 501 U.S. 957, 101, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991).

This Honorable Court has also held that a court "[i]s justified in punishing a recidivist more severely than it punishes a first offender," *see* Solem v. Helm, 463 U.S. 277, 296, 103 S. Ct. 3001, 77 L. Ed. 2d 637 (1983), and has also stated that '{t]he court must consider the objective criteria surrounding the sentence. This includes the gravity([11]) of the offense and harshness([12]) of the penalty, the sentence imposed on other defendants in the same jurisdiction, and the sentences imposed by other jurisdictions for the same crime." *Id.*.

Then, Petitioner argues that his sentence was imposed in violation of his constitutional rights under the Eighth Amendment because this narrow "proportionality principle" also applies to non-capital sentences. Ewing v. California, 538 U.S. 11, 20, 123 S. Ct. 1179, 155 L.

11 The current offense, as all drug offenses, was grave. But the gravity of the offense should have been reserved, for sentencing purposes, for cases involving methamphetamine, fetanyl, crack-cocaine, or heroin, the most dangerous drugs.

12 The double of the maximum (which was the triple of the expectation) and the deportation.

Ed. 2d 108 (2003).

While Petitioner could not find statistics specifically addressing defendants sentenced under the Guidelines § 2L1.2(a)(2)(D) for a prior conviction, statistics for illegal re-entry offenses under § 2L1.2 generally suggest a disparity if an upward variance is imposed, like Petitioner's case. The U.S. Sentencing Commission is expending a very large amount of resources year-by-year in statistics studies, to help the courts to avoid the unwarranted disparities in sentences. However, rather that have found these statistics as an evidence particularly persuasive, in the case at bar the Sentencing Judge, the Honorable John R. Adams, brushed aside the statistics *("if there is a disparity, as the defendant's counsel has argued, it will be driven by the unique circumstances in this case.")* Sent. Tr. p.25., concluding that disparities are **"just statistics,"** and did not take into consideration Petitioner's individual circumstances to sentence him far from beyond the national average. These statistics are available on the U.S. Sentencing Commission website (www.ussc.gov/topic/data-reports). It should be noted that while some District Court, as the Honorable Adam's court, have expressed a lack of interest in such data, it seems like the trend is in favor of such statistics being giving consideration at sentencing or on appeal proceedings. *See Alan Ellis, Law 360*, "View From The Bench on Sentencing Representation. Part I," March 1, 2016 ("Data and statistics from the court, the other federal courts in the state, the circuit and nationwide, mean 'zilch' to Judge Rakoff.")

Analyzing the nationwide statistics with respect to reentry sentencing, it should be noted that the average sentence for illegal re-entry offenders in fiscal year 2016 was 18 months, and the median sentence was 12 months. Furthermore, only 1.2 % of the sentences imposed for aggravated felony reentry had been above the Guidelines range. According to nationwide sentencing statistics, a greater majority of defendants sentenced for re-entry

offense were in a higher criminal history category than Petitioner, which necessarily should called into question the Sentencing Judge's decision to impose a sentence that was more than triple the national average. Based on these statistics, this Honorable Supreme Court should conclude that the Sentencing Judge's purported justification for so large variance in Petitioner's sentence, basically the nature and circumstances of the offense and the history and characteristics of Petitioner, as well as his Criminal History, was insufficient to support a variance of such magnitude.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Date: 6-19-18