

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

URIEL GOMEZ-SAAVEDRA – PETITIONER

v.

UNITED STATES OF AMERICA – RESPONDENT

PETITION FOR WRIT OF CERTIORARI

FROM THE UNITED STATES COURT
OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

1. The mandatory five year minimum under which Mr. Gomez-Saavedra was sentenced is unconstitutional and contravenes 18 U.S.C. 3661 and 3553(a) because, as applied, it limits the discretion of the trial court to consider other factors in giving a lower sentence. We urge that under Rule 10, of the Rules of the United States Supreme Court, a compelling reason exists for granting this writ because 5th Circuit law on judicial discretion if sentencing does not comply with United States Supreme Court precedent.

LIST OF PARTIES

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:

1. Uriel Gomez Saavedra, Defendant-Appellant.
2. United States of America, Plaintiff-Appellee.
3. Counsel for Plaintiff-Appellee:
United States Attorney Kenneth Magidson; and Assistant United States Attorneys Angel Castro (in district court), and Carmen Castillo Mitchell (on appeal).
4. Counsel for Defendant-Appellant:
Valerie Marie Martinez Garcia, Sandra Zamora Zayas and Ricardo Marcos Adobbati (in district court), and Ed Stapleton (on appeal).

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IN THE
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PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at Appendix A to this petition and is unpublished.

The opinion of the United States District Court appears at Appendix B to this petition and is unpublished.

JURISDICTION

The date on which the United States Court of Appeals decided Mr. Gomez-Saavedra case was April 2, 2018.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date May 8, 2018, and a copy of the order denying rehearing appears at Appendix C.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves issues pursuant to 5th Amendment, 6th Amendment and 18 U.S.C. 3559.

STATEMENT OF THE CASE

A. The offenses and plea.

Mr. Gomez-Saavedra, a citizen of Mexico, was charged on July 21, 2016 by the Federal Grand Jury in Brownsville, Texas. Mr. Gomez-Saavedra was charged with the following:

COUNT 1: Did knowingly and intentionally possess with intent to distribute a quantity more than one hundred (100) kilograms of marihuana, a Schedule I controlled substance. In violation of Title 21, USC, Sec. 846, 841(a)(1) and 841(b)(1)(B).

COUNT 2: Did knowingly and intentionally possess with intent to distribute a quantity more than one hundred (100) kilograms, that is, approximately 291.6 kilograms (or 641.52 pounds) of marihuana, a Schedule I controlled substance. In violation of Title 21, USC, Sec. 841(a)(1) and 841(b)(1)(B), and Title 18, USC, Sec. 2.

On September 15, 2016 Mr. Gomez-Saavedra entered his plea of not guilty. On October 13, 2016, Mr. Gomez-Saavedra was re-arraigned before United States District Judge Ignacio Torteya and plead guilty to count 2.

A. Statement of Facts

On July 21, 2016 Mr. Gomez-Saavedra was found in Hidalgo, Texas in possession of 291.6 kilograms, or 641.52 pounds of marijuana, by Border Patrol agents who happened to see him driving a vehicle away from the Rio Grande River. Border Patrol engaged in a pursuit of the Defendant. The Defendant abandoned the vehicle and was arrested by agents in a nearby property. The Defendant gave a statement admitting that he knew the narcotics were present, and he was going to be paid for transporting narcotics in the United States. The Defendant knowingly possessed the narcotics with intent to distribute them to another person within the

United States. Upon questioning by the court, Mr. Gomez-Saavedra stated that these facts were true.

B. Sentencing

On June 13, 2016, Mr. Gomez-Saavedra was sentenced to 60 months in the custody of the Bureau of Prisons, followed by a four-year term of supervised release. The court did not impose a fine and granted the government's motion to remit the special assessment.

C. Appeal

Mr. Gomez-Saavedra timely filed his appeal to the United States Court of Appeals for the Fifth Circuit and affirmed the District Courts judgment.

REASONS FOR GRANTING THE PETITION

The law of sentencing and the Sixth Amendment mandate that sentencing judge be allowed to "exercise a wide discretion,". Supreme Court decisions reject both Guidelines and statutes to the extent they run afoul of this principle. The sentencing judge was constrained by Fifth Circuit law requiring he apply a mandatory minimum sentence. This law violates the Sixth Amendment and conflicts with sentencing statutes that are intended to guide the sentencing judge. As applied, that is with the restriction that the sentencing judge may not grant a variance, except within two narrow statutory exceptions-safety valve and substantial assistance--this mandatory minimum violates the duty of the judge to exercise wide discretion. We urge, as applied, the constraint upon the sentencing judge to give Mr. Gomez-Saavedra a minimum of sixty months violates the Sixth Amendment and the statutory

sentencing mandates of 18 U.S.C. Sec. 3661 and 3553(a).

The mandatory five year minimum under which Mr. Gomez-Saavedra was sentenced is unconstitutional and contravenes 18 U.S.C. 3661 and 3553(a) because, as applied, it limits the discretion of the trial court to consider other factors in giving a lower sentence.

Mandatory minimum sentences, in other contexts, have recently come under review. *Johnson v. United States*, 576 U.S. 2551 (2015); *Welch v. United States*, 578 U.S.____ (2016) . In *Johnson*, the Supreme Court considers the application to a mandatory minimum of fifteen years for a felon with a firearm who has earlier convictions for “violent felonies” and reviews *stare decisis* in that context: “This Court's cases make plain that even decisions rendered after full adversarial presentation may have to yield to the lessons of subsequent experience. See, e.g. *United States v. Dixon*, 509 U.S. 688, 711 (1993); *Payne*, 501 U.S., at 828 (1991)....Although it is a vital rule of judicial self-government, *stare decisis* does not matter for its own sake. It matters because it promotes the evenhanded, predictable and consistent development of legal principles. *Johnson* at 14-15.

The Supreme Court also recently gave the trial court authority to assess concurrent one day sentences on felonies when considering the impact of a thirty-year mandatory minimum on the sentence. Differently put, the trial court was allowed to vary from the Guideline ranges, so it could take into consideration the mandatory minimum. *Dean v. United States*, 581 U.S. ____ (2017). The Supreme Court notes: “Sentencing courts have long enjoyed discretion in the sort of information they may

consider when setting an appropriate sentence.” Citing *Pepper v. United States*, 562 U.S. 476, 487-489 (2011). *Id.* p. 3. The principle central to *Pepper* is that sentencing judges must be able to “exercise a wide discretion,” and, “It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human filings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue. Underlying this tradition is the principle that the punishment should fit the offender and not merely the crime. (citations omitted)” *Pepper* at 9. The Court stated the limitation in sentence “conflicts with longstanding principles of sentencing law and contravenes Congress” directives in Sections 3661 and 3553(a)” *Pepper* 14-15.

Discretion of the sentencing court to depart from mandatory sentences is protected by the Sixth Amendment. *United States v. Booker*, 543 U.S. 220 (2005). The sentencing judge discretion is codified by 18 U.S.C. 3661 and 3553(a). *Pepper* 14-15. The mandatory minimum provision of 21 U.S. Code Section 841(b)(1)(B) of five years purports to limit the discretion of the sentencing court, with two exceptions, safety valve, 18 U.S.C. 3553(f) and substantial assistance. 18 U.S.C. Sec. 3553(e). Because of his criminal history, Mr. Gomez-Saavedra did not qualify for the safety valve. ROA. 200. The record does not reflect whether he had the ability to provide substantial assistance. Regardless of whether Mr. Gomez-Saavedra could have provided substantial assistance, this section vests the power only with the prosecution, upon motion of the Government, depriving the sentencing judge of the discretion. Without either of these exceptions, the trial judge was required to impose the minimum

sentence. See, Doyle, *Federal Mandatory Minimum Sentences: The Safety Valve and Substantial Assistance Exceptions*, Congressional Research Service (2013); *United States v. Montes*, 602 F.3d 381 (5th Cir. 2010). We urge that extending this discretion to grant various by the sentencing judge in mandatory minimum cases is required by the Sixth Amendment and Booker and to give full application of 3661 and 3553(a).

The Fifth Circuit has previously rejected challenges to mandatory minimums, but on other grounds. In the *United States v. Rasco*, 123 F.3d 222, 226-27 (5th Cir. 1997) the court rejected a challenge to a mandatory life imprisonment made on the basis of a separation of powers theory. This reasoning was adopted in *United States v. Lopez* (5th Cir. 2012). However, neither decision considers the Sixth Amendment or the requirements of sentencing court discretion under *Booker, Pepper and Dean*.

The Fifth Circuit did consider *Booker* in rejecting a challenge to mandatory minimums in *Montes*. *Supra*. Citing *United States v. Krumnow*, 476 F.3d 294, 295-298 (5th Cir. 2007). In *Montes* the court found stated that post-*Booker* sentencing courts lack discretion to depart below relevant statutory minimums without a safety valve or substantial assistance exception. *Montes* at 386. However, the decision in *Montes* does not give a reason why mandatory minimums should be distinguished from Guidelines under *Booker*. When this position was taken in another Circuit, the reasoning was the Guidelines were not a statute: “Nothing in the reasoning of *Booker* expands the authority of a district court to sentence below a statutory minimum for it is not the Guidelines that prohibit the court from considering other factors, it is the statute.” *United States v. Williams*, 687 F.3d 283, 287 (6th Cir. 2012). We urge this

distinction is not viable under *Pepper*: not only Guidelines, but also statutes can violate the Sixth Amendment protection expressed in *Booker*. *Pepper rejects a statutory provision, 18 U.S.C. Sec. 3742(g)(2)*—“that provision did not survive our holding in *United State v. Booker* 543 U.S. 220 (2005) and we expressly invalidate it today.” *Pepper* at 2. Both *Montes* and *Krumnow* were decided before the *Pepper* decision and without the benefit of this explanation of how *Booker* should be applied. *Booker* now mandates that the Sixth Amendment creates a constitutional right for sentencing judge to “exercise a wide discretion” based on the on “the fullest information possible concerning the defendant’s life and characteristics.” *Pepper* at 1, citing *Williams v. New York*, 337 U.S. 241, 246-247 (1949). Neither guideline, nor statute may infringe upon this Sixth Amendment right.

We urge there is a prejudicial affect to Mr. Gomez-Saavedra in application of the mandatory 60 months to his sentence. The sentencing judge may have not sentenced within the guideline range even without the restriction on his ability to do so. He had sent notice of intent to depart upward and commented on the violent history. Nonetheless, because the sentencing judge was bound by the mandate of *Montes*, he was not permitted to consider the Guideline range. Mr. Gomez-Saavedra lost this opportunity and the chance of a lower sentence.

In accordance with FRAP 40(a)(2) we would show that we believe the court has overlooked the point of law urged by Appellant that sentencing law is changing to honor the discretion of the sentencing judge provided by the 6th Amendment. Especially, as developed on recent United States Supreme Court case *Johnson v.*

United States, 576 U.S. 2551 (2015), *Welch v. United States*, 578 U.S. ____ (2016) and *Dean v. United States*, 581 U.S. ____ (2017).

CONCLUSION

Mr. Gomez-Saavedra should be given another sentencing hearing without the restriction of the mandatory sixty month minimum of 21 U.S.C. Sec. 841(b)(1)(B). The sentencing judge was constrained by Fifth Circuit law requiring he apply a mandatory minimum sentence. This law violates the Sixth Amendment and conflicts with sentencing statutes that are intended to guide the sentencing judge. As applied, that is with the restriction that the sentencing judge may not grant a variance, except within two narrow statutory exceptions-safety valve and substantial assistance--this mandatory minimum violates the duty of the judge to exercise wide discretion. We urge that the application of this statute be declared unconstitutional and the case of Mr. Gomez-Saavedra be remanded for resentencing.

Respectfully submitted,

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