

No. 18-6897

**ORIGINAL**

Supreme Court, U.S.  
FILED

**NOV 16 2018**

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

VICTOR SOLORZANO TAVIA — 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 ELEVENTH CIRCUIT

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

VICTOR SOLORZANO TAVIA, Feg. Reg. No. 40434-379

(Your Name)

Great Plains Correctional Facility  
P.O. Box 400

(Address)

Hinton, OK 73047

(City, State, Zip Code)

NONE

(Phone Number)

**RECEIVED**

**NOV 23 2018**

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SUPREME COURT, U.S.

## QUESTION(S) PRESENTED

- I. Whether sentence for illegal reentry and sentence for violation of supervised release should have run concurrent to avoid double jeopardy clause where same relevant conduct resulted in conviction and sentence for illegal reentry as well as for violation of supervised release?
- II. Whether district court violated Blakely rule when court sentenced Petitioner to statutory maximum sentence of 24 months beyond guidelines sentencing range of 8 to 14 months?
- III. Whether district court abused its discretion when it sentenced Petitioner to statutory maximum (24 months) for Grade C<sup>1</sup> supervised release violation, and sentence run consecutive to illegal reentry sentence which resulted from same relevant conduct which was basis for supervised release violation?

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1. Supervised release violation due to illegal reentry would be a Grade C violation.

## LIST OF PARTIES

- ☒ 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:

## TABLE OF CONTENTS

OPINIONS BELOW.....	1
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED .....	3
STATEMENT OF THE CASE .....	4
REASONS FOR GRANTING THE WRIT .....	5-7
CONCLUSION.....	8

## INDEX TO APPENDICES

APPENDIX A	Opinion Of The Appeals Court For The 11th Circuit
APPENDIX B	
APPENDIX C	
APPENDIX D	
APPENDIX E	
APPENDIX F	

## TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
United States v. Johnson, 529 U.S. 694, 700 .....	5
Apprendi v. New Jersey, 530 U.S. 466 .....	6
Blakely v. Washington, 542 U.S. 296 .....	6

## STATUTES AND RULES

OTHER	
USSG §5G1.3 .....	6, 7
USSG §7B1.1 .....	7

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**

☒ For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix AA 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 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 August 23, 2018.

☒ 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).

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

Double Jeopardy Clause, Fifth Amendment.



## STATEMENT OF THE CASE

### A. Facts and District Court Proceedings:

Petitioner is a citizen of Michoacan, Mexico. Due to the extreme poverty in Michoacan, Petitioner came to United States on several occasion, to work. While in United States, Petitioner has not engaged in any criminal activity. Nevertheless, his entry in the United States has resulted in federal convictions for illegal reentry and deportations.

In 2015, Petitioner was convicted and sentenced in the Western District of Texas for being an immigrant that unlawfully entered the United States. After serving a custodial sentence, he was deported in June of 2016. Thereafter, a three year term of supervised release began.

In August 2017, Petitioner was arrested in Mobile, Alabama. This arrest led to his prosecution in two cases in the U.S. District Court for the Southern District of Alabama. In case no. 1:17-cr-00159-CG-MU-1, Petitioner was sentenced to 21 months for illegally entering United States, which was set to run consecutive to 24 months sentence for revocation of supervised release in the case no. 1:17-cr-222-CG-1.

### B. Appeal:

Petitioner appealed on the ground that imposition of the statutory maximum sentence was substantively unreasonable. The Court of Appeals affirmed the sentence and concluded sentence was substantively reasonable, and therefore the district court did not abuse its discretion.

## REASONS FOR GRANTING THE PETITION

### I. Consecutive Sentence for Illegal Reentry and Violation of Supervised Release Violated Double Jeopardy Clause Because Both Sentences Resulted from Same Relevant Conduct.

In *United States v. Johnson*, 529 U.S. 694, 700, 120 S. Ct. 1795, 146 L. Ed. 2d 727 (2000), Supreme Court stated "where acts of violation are criminal in nature, they may be the basis for separate prosecution, which would raise an issue of double jeopardy if the revocation of supervised release were also punished for same offense". Here act of violation was criminal in nature (illegal reentry) and Petitioner received 21 months sentence for that, so consecutive statutory maximum sentence of 24 months for supervised release violation violated double jeopardy clause.

There is expectation of finality in a sentence so post revocation sentence could not be treated as "part of the penalty for the initial offense". It is clearly evident from the fact that district court did not re-open the original criminal case from 2015 to sentence Petitioner for violation of supervised release rather court sentenced Petitioner for violation of supervised in a new criminal case (1:17-cr-222-CG-1). The court must treat constitution/laws as it is rather than creating assumptions to avoid constitutional violation.

If court would treat sentence for violation of supervised release as "part of the penalty for the initial offense" then it would basically reinstate/reopen the originally charged count, and since relevant conduct is same for reinstated charge<sup>2</sup> and new charge for illegal reentry, it would implicate double jeopardy clause.

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2. Original charge was also illegal reentry.

United States Sentencing Guideline (USSG) §5G1.3(b) requires a concurrent sentence when "a term of imprisonment resulted from another offenses that is relevant conduct to the instant offense of conviction". USSG §5G1.3(b) provides:

If subsection (a) does not apply, and a term of imprisonment resulted from another offense that is relevant conduct to the instant offense of conviction under the privosion of (a)(1), (a)(2), (a)(3) of §1B1.3 (Relevant Conduct), the sentence for instant offense shall be imposed as follows:

(2) the sentence of instant offense shall be imposed to run concurrent to the remainder of the undischarged term of imprisonment.

Therefore, district court was required to impose concurrent sentence to avoid double jeopardy.

## II. Petitioner's Sentence Violated Blakely.

Petitioner's guidelines sentence for violation of supervised release was 8 to 14 months. The statutory maximum for [Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)] purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant" Blakely, 542 U.S. at 303 (emphasis in original). Since sentencing for violation of supervised release was not full-fledge sentencing on initial offense, district court was possibly not allowed to consider any additional relevant conduct or criminal history in sentencing for violation of supervised release. Therefore, court should have sentenced Petitioner within the guidelines range of 8 to 14 months.

XIII. District Court Abused its Discretion when it Sentenced Petitioner to Consecutive Sentence and Imposed Statutory Maximum Sentence of 24 months.

USSG §7B1.1(a)(2) provides grades of supervised release violations:

Grade B Violation: Conduct constituting any other federal, state, or local offense punishable by a term of imprisonment exceeding one year.

Grade C Violation: Conduct constituting (A) a federal, state, or local offense punishable by a term of imprisonment of one year or less; or (B) a violation of any other condition of supervision.

Therefore, Petitioner's supervised release violation was a grade C violation and in worst case it could be a grade B violation since Petitioner was sentenced to 21 months sentence for illegal reentry. USSG §5G1.3(b) required a concurrent sentence when "a term of imprisonment resulted from another offenses that is relevant conduct to the instant offense of conviction".

Since supervised release violation was a lower grade violation and relevant conduct for supervised release violation was same as illegal reentry conviction and sentence, district court was required to impose concurrent sentence as mandated by USSG §5G1.3 (b). Also court was possibly not allowed to consider any additional conduct or criminal history while sentencing for violation of supervised release to sentence Petitioner beyond guidelines range. Therefore, district court abused its discretion.

## CONCLUSION

Petitioner respectfully request that this Court grant certiorari, vacate the judgment below, and remand the case, Alternatively, he prays for such relief as to which he may be justly entitled.

Respectfully Submitted,

Date: 11/15/2018

VICTOR

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