

No. 19-

IN THE
Supreme Court of the United States

JOSE JORGE ESPINOZA-MENDOZA ,

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

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QUESTION PRESENTED FOR REVIEW

Petitioner, JOSE JORGE ESPINOZA-MENDOZA, pleaded guilty to, and was convicted of, the federal offense of conspiring to harbor undocumented aliens. The District Court added a sentencing enhancement to Mr. Espinoza-Mendoza's Guidelines range and sentenced him to serve a term of seventy-one months in the custody of the Bureau of Prisons. On direct appeal, Mr. Espinoza-Mendoza argued the sentencing enhancement should not have been imposed by the District Court. More specifically, Mr. Espinoza-Mendoza challenged the sentencing enhancement under U.S.S.G. § 2L1.1(b)(6) for an increase in offense levels due to an alleged foreseeable risk of death or serious bodily injury to an alien as a result of the smuggling. The United States Court of Appeals for the Fifth Circuit (sometimes referred to as "the Fifth Circuit" or "the Appellate Court") affirmed the imposition of the enhancement by the District Court.

Respectfully, the decision of the Fifth Circuit decided important federal questions in a way that conflicts with relevant decisions of this Court, as well as established rulings of other courts and the Fifth Circuit itself. As to the enhancement, in a fashion and manner which is contrary to this Court's stare decisis and the plain language of the enhancement, the Appellate Court did not require the Government to establish that Mr. Espinoza-Mendoza could reasonably foresee an actual risk of serious bodily injury or death. The Fifth Circuit further decided that the mere act of transporting a person in the trunk of a vehicle *per se* creates a substantial risk of serious bodily or death. The Court also based its decision on a case where this enhancement was not at issue and never cited by the Government in this

case. A compelling reason is thus presented in support of discretionary review by this Honorable Court. Mr. Espinoza-Mendoza therefore respectfully requests that this Honorable Court grant this Petition for Writ of Certiorari and allow this case to proceed to resentencing with the sentencing enhancement withdrawn.

PARTIES TO THE PROCEEDING

The parties to the proceeding are listed in the caption:

Jose Jorge Espinoza-Mendoza: Petitioner (Defendant-Appellant in the lower Courts)

United States of America: Respondent (Plaintiff-Appellee in the lower Courts)

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PETITION FOR WRIT OF CERTIORARI

Petitioner, JOSE JORGE ESPINOZA-MENDOZA, requests this Court grant this petition and issue a Writ of Certiorari to review the decision of the Fifth Circuit. Mr. Espinoza-Mendoza respectfully submits the District Court committed reversible error by granting a sentencing enhancement based on the creation of harm. The Fifth Circuit did not apply the correct law to the facts of this case. (Appendix A, page 2). Hence, the Appellate Court affirmed the District Court without the proper application of the sentencing enhancement. Therefore, it can only be concluded that the District Court's findings and conclusions were invalid on this point of error and that the Fifth Circuit did not apply the correct standard of review. Accordingly, the sentence imposed must be vacated and this matter reversed and remanded for resentencing without the enhancement applied to the sentence imposed in this case.

REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE

From the Federal Courts:

The Order of the United States Court of Appeals for the Fifth Circuit, *United States v. Jose Jorge Espinoza-Mendoza*, No. 18-40107 (5th Cir. Oct. 31, 2018), appears at Appendix A to this petition and is unreported.

The Judgment in a Criminal Case of the United States District Court for the Southern District of Texas, McAllen Division, appears at Appendix B to this petition and is unreported.

From the State Courts:

None.

GROUND FOR JURISDICTION

This Petition arises from a direct appeal which granted final and full judgment against Mr. Espinoza-Mendoza. This action is on a criminal prosecution initiated by the Government. Mr. Espinoza-Mendoza pleaded guilty to the offense of transporting aliens within the United States. The District Court imposed a sentencing enhancement pursuant to U.S.S.G. § 2L1.1(b)(6) for an increase in offense levels due to a foreseeable risk of death or serious bodily injury to an undocumented person as a result of the smuggling. The imposition of this enhancement is at issue in this Petition. A copy of the Judgment appears at Appendix B. Mr. Espinoza-Mendoza argued to the Fifth Circuit that the District Court committed reversible error in applying this enhancement to the facts of this case. The Fifth Circuit rejected this argument in an unpublished opinion dated October 31, 2018, and affirmed the decision of the District Court. A copy of the decision appears at Appendix A. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS

U.S. CONST. Amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. Amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in this favor; and to have Assistance of Counsel for his defense.

STATEMENT OF THE CASE

Background:

On August 29, 2017, Mr. Espinoza-Mendoza and other conspirators were indicted and charged with five counts of conspiring to harbor illegal aliens. (ROA.14-17). Mr. Espinoza-Mendoza was arrested on September 20, 2017. (ROA.23). He was detained and his case was set for trial. (ROA.46).

The Plea Agreement

The Government and Mr. Espinoza-Mendoza entered into a plea agreement. (ROA.175-76). Under the plea agreement, Mr. Espinoza-Mendoza agreed to plead guilty to Count One of the indictment. (ROA.175). The Government agreed to recommend that his offense level be decreased by 2 levels for his acceptance of responsibility, along with an additional 2 levels under U.S.S.G. § 5K3.1 for early disposition, and the dismissal of the remaining four counts of the indictment. (ROA.175).

Acceptance of the Plea Agreement

The District Court accepted Mr. Espinoza-Mendoza's plea of guilty on November 1, 2017. (ROA.106-60). At the plea hearing, the Judge explained the nature of the charges

involved in the harboring of illegal aliens. (ROA.106). The following facts were read into the record, and a related exchange took place, with regard to the case against Mr. Espinoza-Mendoza and others involved in the criminal activity:

Ms. Andrade: [the Assistant United States Attorney] On or about August 10, 2017, the defendants: Jose Jorge Espinoza-Mendoza, Paul Anthony Mansell and Alisia Magana-Yberra, together with other defendants knowingly or recklessly disregarded the fact that individuals who were aliens had come to, entered, and remained in the United States in violation of the law and they knowingly and intentionally conspired and agreed together with other persons to conceal, harbor, and shield from detection said aliens in any place, including any building or any means of transportation, in violation of the law.

With regards to Aleida Suyapa Rueda-Espinal, the difference is the conspiracy was to transport the illegal aliens from a location near Brownsville and McAllen, Texas, to another location near Houston, Texas, by means of a motor vehicle. And from the beginning—from July 12, 2016, to the present, federal agents had been conducting an investigation into an alien smuggling organization that operates in the Rio Grande Valley area by transporting aliens from stash houses in McAllen and Brownsville, Texas, transporting or coordinating the transportation from the RGV area to the Houston, Texas, area. Based on several cooperating defendants, as well as evidence found during the arrest of Jose Jorge Espinoza-Mendoza, agents discovered these defendants were part of this organization.

Ms. Rueda-Espinal was the facilitator and assisted Espinoza-Mendoza with the financial aspect of the operation and transporting the illegal aliens.

Mr. Andsell was Mr. Espinoza's roommate and helped harbor by providing food and shelter, as well as transporting agents. He was arrested at the Sarita checkpoint attempting to transport two undocumented aliens.

And Ms. Magana-Ybarra was arrested for harboring undocumented aliens in her home in Brownsville, Texas, in connection with the alien smuggling organization investigation of Mr. Espinoza-Mendoza. After Miranda, she admitted she harbored and sometimes transported undocumented aliens.

This particular alien smuggling organization is responsible for harboring aliens in stash houses in Brownsville and McAllen, Texas, as well as coordinating transportation of said aliens from the RGV (referring to the Rio

Grande Valley) area to Houston, Texas. The defendants knew and recklessly disregarded the fact that individuals who were aliens to include citizens of Mexico, Guatemala, Nicaragua, and El Salvador and noncitizens of the United States had come to, entered, and remained in the United States in violation of the law. That they harbored, concealed, or attempted to conceal from detection as well as transported and moved said aliens within the United States with the intent to further their unlawful purpose. The defendants knew the unlawful purpose of the agreement and joined in it willfully; that is, with the intent to further the unlawful purpose.

The defendant Espinoza-Mendoza furthered the unlawful purpose of the agreement by coordinating the harboring and transportation of aliens from the RGV area to Houston, Texas, area. He also harbored aliens in his house in McAllen, Texas.

The defendant Paul Anthony Mansell, furthered the unlawful purpose of the agreement by assisting Espinoza-Mendoza in the . . . harboring and transportation of undocumented aliens, again from the RGV area to the Houston, Texas area.

The defendant Alisia Magana-Ybarra furthered the unlawful purpose of the agreement by harboring aliens in her home in Brownsville, Texas.

And the defendant Aleida Suyapa Rueda-Espinal furthered the unlawful purpose of the agreement by facilitating money to and from Espinoza-Mendoza, as well as other co-conspirators knowing the money was the proceeds of the alien smuggling or transportation of aliens within the United States.

THE COURT: Okay, Mr. Espinoza, do you agree with [what] the government has stated?

DEFENDANT ESPINOZA-MENDOZA: Could I ask a question?

THE COURT: Yes, sir.

DEFENDANT ESPINOZA-MENDOZA: I never met Ms. Alisia, sorry.

THE COURT: All right, I don't think the government necessarily said that you knew her but let me ask you this way. Aside from that, do you agree with what else the government stated as far as your involvement in this offense?

DEFENDANT ESPINOZA-MENDOZA: Yes, Your Honor, but another thing, Aleida Rueda, Your Honor, she hasn't helped me with doing this job.

THE COURT: Okay, I'll come to Ms. Rueda in just a moment. On your part, this is—I know the government stated it, but on your part what the government indicates you did was that you in one manner or another did at least some of the coordination to get the individuals that were aliens that were down here in the Valley up to Houston. Do you agree with that?

DEFENDANT ESPINOZA-MENDOZA: That part is no problem. I accept it. Yes, Your Honor.

THE COURT: You admit that you understood that these individuals are getting transferred from down here in the Valley to Houston were in the country illegally?

DEFENDANT ESPINOZA-MENDOZA: Yes, Your Honor.

THE COURT: And do you admit that you are doing this by agreement with at least one other person, whether it's these defendants here or somebody else altogether?

DEFENDANT ESPINOZA-MENDOZA: Yes.

(ROA.135-38) (emphasis in bold-type in original, information in parenthesis added).

The Court accepted Mr. Espinoza-Mendoza's plea and found him guilty as charged in Count One of the indictment. (ROA.106-60). The Judge then ordered that the United States Probation Officer prepare a presentence investigation report (sometimes referred to as "the PSR"). (ROA.157, 160).

The PSR: Facts

In relevant part, the PSR summarized the facts in this case in the following fashion:

The Offense Conduct

16. The El Caballo Alien Smuggling Organization (ASO) has an established base of operation in Houston, Texas, with strong ties to the Rio Grande

Valley (RGV) of Texas. A series of events beginning on February 11, 2016, led to the investigation of **Jose Espinoza** and the El Caballo ASO. From on or about July 12, 2016, to on or about August 10, 2017, Homeland Security Investigations (HSI) in Corpus Christi, Texas, Brownsville, Texas, Harlingen, Texas, and McAllen, Texas, initiated an investigation into this ASO. This organization appeared to be coordinating with several different smuggling cells, which were operating stash houses in various cities located throughout the RGV in order to obtain undocumented aliens for the purpose of transporting them further into the United States. Once the undocumented aliens arrived at the stash house, arrangements were made to transport them through the Falfurrias and Sarita, Texas Customs and Border Patrol (CBP) Check points in various means of transportation to the greater Houston, Texas, Metropolitan area and ultimately to their final destination throughout the United States. It should be noted that in some cases, the undocumented aliens were transported unsafely and placed in risk of serious bodily injury or death. This case stems, in part, from interviews with the case agent, debriefings in related cases, material witness statements and subsequent investigations. Based on this investigation, **Jose Espinoza** and Aleida Rueda were identified as the subjects running the day t day operations of the ASO. Specifically, Aleida Rueda was in charge of the financial aspects of ASO as she was the wife of **Jose Espinoza**. Further, Paul Mansell was identified as **Jose Espinoza's** right hand man who would transport undocumented aliens from stash house to stash house, pay the caretakers and on at least one occasion, attempted to transport undocumented aliens through the check point. Alisia Magana was identified as the caretaker of one of the ASO's stash house in Brownsville, Texas, which was in deplorable condition.

17. From February 11, 2016, through September 19, 2017, approximately 102 undocumented aliens have been apprehended in related cases and in this case either at or near the CBP Checkpoints in Sarita and Falfurrias, Texas, or at stash houses located in the RGV of Texas. However, based on the extent of the investigation, it is reasonably foreseeable that the offense involved transporting and/or harboring over 100 undocumented aliens.

(ROA.181-82) (emphasis in original).

Also relevant to this appeal are two observations about the temperature in the areas of two vehicles where four aliens were found. The PSR states:

33. On August 7, 2017, Paul Mansell was arrested at the CBP Check point in Sarita, Texas, attempting to smuggle two undocumented aliens laying down in an aftermarket steel frame compartment in a Honda Pilot Sports Utility Vehicle (SUV). The temperature of the cargo area compartment was 95.3 degrees and the temperature outside during that time of the evening was 84 degrees. It was determined that the two subjects did not have legal documents to be in the United States. It should be noted that one of the undocumented aliens stated that she feared for her life while in the compartment and that it was very hot. . . .

* * * * *

44. It should be noted that in a related case, in Criminal Docket Number 2:17CR0031, Jordan Wild and Romell Scott were arrested on May 21, 2017, at the CBP check point in Falfurrias, Texas attempting to smuggle two undocumented aliens in the truck covered by a comforter blanket and a large duffle bag in a Chevrolet Malibu. The temperature reading of the trunk was 99 degrees. Both undocumented aliens hiding in the trunk were sweating profusely and appeared delirious.

(ROA.186, 188).

The PSR Calculations

The PSR sets Mr. Espinoza-Mendoza's base offense level at 12. (ROA.190). However, three subsequent enhancements increase the base offense level by 15. (ROA.190-91). There is a 2-level enhancement to the offense level which is relevant to this appeal. In this regard, the PSR repeats the observations regarding the heat in the cargo areas of two vehicles where aliens were found to be hiding:

57. Pursuant to U.S.S.G. § 2L1.1(b)(6), if the offense involved intentionally or recklessly creating a substantial risk of death or serious bodily injury to another person, increase by 2 levels. In a related case, Criminal Docket Number 2:17:CR0031, Jordan Wild and Romell Scott were arrested on May 21, 2017, at the CBP Check point in Falfurrias, Texas, Texas attempting to smuggle two undocumented aliens in the trunk covered by a comforter blanket and a large duffle bag in a Chevrolet Malibu. The temperature reading of the trunk was 99 degrees. Both undocumented aliens hiding in the trunk were sweating profusely and appeared delirious. In this case, on August 7, 2017, co-defendant Paul Mansell was arrested at the CBP Check point in Sarita, Texas, attempting to smuggle two undocumented aliens laying down in an aftermarket steel frame compartment in a Honda Pilot Sports Utility Vehicle (SUV). The temperature of the cargo area compartment was 95.3 degrees and the temperature outside during that time of the evening was 84 degrees. It should be noted that one of the undocumented aliens stated that she feared for her life while in the compartment and it was very hot. Therefore, a 2 level increase is warranted.

(ROA.190-191) (underline emphasis added).

The PSR then sets forth the calculation for Mr. Espinoza-Mendoza's criminal history level and final Guideline range of punishment. Specifically, the Probation Officer added 3 criminal history points for a DWI and a previous illegal reentry. (ROA.192-93). With the addition of these 3 points, Mr. Espinoza-Mendoza was assigned a criminal history category of II. (ROA.193). Accordingly, with an offense level of 29 and a criminal history category of II, the PSR placed Mr. Espinoza-Mendoza at a Guidelines punishment range of 97 to 121 months' imprisonment. (ROA.196).

The Sentencing Hearing

Mr. Espinoza-Mendoza was sentenced on January 11, 2018. (ROA.161). During his sentencing hearing, the District Court allowed Mr. Espinoza-Mendoza 3 points for his acceptance of responsibility and 2 points for early disposition. (ROA.164). This brought his Guidelines punishment to a range of 57 to 71 months' imprisonment. (ROA.164).

Mr. Espinoza-Mendoza made one objection to a sentencing enhancement. (ROA.164-65). His attorney argued:

Judge, there wasn't a filed objection but after reviewing it, I just want to bring to the Court's attention to line 57, page 14 of the PSI (referred to as the PSR in this brief). It references that they added two additional points because of the heat of the car. It says in one instance it was 95 degrees and another instance it was 99 degrees. One, obviously the Court is aware of the human temperature of the body is 97, around here. One of those temperatures is even in excess what the natural temperature of the body is. The other one is literally a degree and a half more and they said the people feared for their lives.

I would imagine anybody that gets in a trunk fears for their life. We would just ask the Court to take into consideration those temperatures, although obviously, somebody's going to be scared, nevertheless, they're engaged in trying to sneak across the border, everybody's in fear. I just think that those two points might be—may be an overrepresentation of what was actually happening.

(ROA.164-65). The Judge overruled the objection, and explained:

In that regard, the report indicates—not so much there was actually a trunk, it says an aftermarket steel frame compartment, which is certainly something I think is unique in that regard, but also, just obviously common sense tells us that the measurement of the temperature was after it was opened. That compartment was closed with two individuals in there and I would suspect the temperature was something other than that at the time. And it's not just a matter of the heat itself. It's a matter of being in the enclosure itself.

There's not a lot of detail regarding the nature of the aftermarket steel frame compartment, but nonetheless, I would certainly think that that in and of itself would be of concern. You know some of the factors to be considered are is there an increased risk in case of an accident? And I would certainly think that if you have someone in that type of compartment that the risk is significantly higher in case of even something that's not otherwise too major. The objection is overruled.

(ROA.165).

Pronouncement of Punishment

In pronouncing Mr. Espinoza-Mendoza's sentence, the Judge explained:

Mr. Espinoza, the Court has reviewed the information in the report. And I'll start out with what you touched on and that is that you were doing this basically is a way to provide for your mother's medical needs. And, certainly, a son who wanted to provide for a mother who has medical needs is a good thing. But obviously, it's never a good thing for somebody to take care of their financial needs by engaging in criminal conduct.

I would imagine that if you were to poll in this courtroom right now that at least 50 percent of the people would say I'd like a little bit more money to take care of my needs. Again, I would say except for the individuals that are sitting in the jury box, that the remainder of the people have not decided that criminal conduct is a way to take care of those needs. And we are just not a society who believes that it's excusable to commit crimes simply because you need money.

And in your case, Mr. Espinoza, I think the report well establishes that this was an enterprise ongoing for quite some time that you personally recruited many of these other individuals and those that you did not recruit personally were recruited on your behalf. That even if you personally were not putting people in a particular location where they were found, that you were overall responsible for the transport of these individuals. As I said, over a long period of time and a significant number of individuals here, the number you're being held accountable is over 100 and that's not being contested, but even just by the little bit information, we have here. So, there's no question that you were responsible for a large number of people being transported illegally here.

The Court does believe that a sentence within the guideline range is warranted, but the Court also does believe that a sen[tence] at the high end

of the guideline range is necessary. The number of individuals, of course, is reflected within the guideline range, but the length of time of the operation is not.

So, the Court thinks a high-end guideline range is necessary. I will sentence you to a term of 71 months in custody.

(ROA.168-70).

Conclusion of the Sentencing Hearing and Notice of Appeal

After sentence was pronounced, the Judge advised Mr. Espinoza-Mendoza that he could appeal. (ROA.170). A final judgment was entered on January 25, 2018, (ROA.73-76), and Statement of Reasons for the decision was filed. (ROA.211-14). Mr. Espinoza-Mendoza filed his notice of appeal on January 29, 2018. (ROA.77-78).

Proceedings in the Fifth Circuit

Mr. Espinoza-Mendoza argued to the Fifth Circuit “that the district court erred by enhancing his sentence pursuant to U.S.S.G. 2L1.1(b)(6) based on a finding that his offense involved a substantial risk of bodily injury.” (Appendix A, page 1). In rejecting this argument, the Appellate Court chose to rely upon a case neither of the parties had cited and limited its ruling to a single declaration. The Court explained;

The transportation of aliens in the trunk of a vehicle is specifically listed in the comments to § 2L1.1(b)(6) as the type of conduct contemplated by the Sentencing Commission in drafting the guideline provision to be “reckless conduct.” § 2L1.1, comment. (n.3); *see United States v. Mateo Garza*, 541 F.3d 290, 293-94 (5th Cir. 2008) (observing that transporting persons in a trunk or engine compartment of a vehicle *per se* creates a substantial risk of serious bodily injury or death because those areas are not designed to hold human passengers).

(Appendix A, page 2) (full citation to *Mateo Garza* case added). Thus, the judgment of the District Court was affirmed. (Appendix A, page 2).

**ARGUMENT AMPLIFYING REASONS RELIED
ON FOR ALLOWANCE OF THE WRIT**

I.
Overview

This Court in *United States v. Booker*, 534 U.S. 220 (2005), struck down the unconstitutional provisions of the Sentencing Reform Act, leaving in place what is now the governing structure for federal sentencing: under *Booker*, the absolute maximum sentence which a District Court may lawfully impose is a sentence whose length could be upheld on appeal as substantively reasonable. With reference to the “overarching” substantive standard Congress has established in the Sentencing Reform Act, a “reasonable” sentence means one which a court could fairly find to be “not greater than necessary” to further the purposes of criminal sentencing. *Kimbrough v. United States*, 552 U.S. 85, 101 (2007) (explaining goal of 18 U.S.C. § 3553(a)’s “overarching instruction [is] to impose a sentence sufficient, but not greater than necessary, to accomplish the sentencing goals advanced in § 3553(a)(2)”). Historically, the *Apprendi* rule was equally applicable: under the Sixth Amendment, the sentence which a court imposes on a defendant must not exceed the maximum sentence which is legally authorized based on those facts either admitted by the defendant or found by a jury beyond a reasonable doubt. *See Blakely v. Washington*, 542 U.S. 296, 303 (2004) (explaining how *Apprendi v. New Jersey*, 530 U.S. 466 (2000), is to be applied).

In and after *Booker*, this Honorable Court has made clear important principles of federal sentencing law. First, as the Court held in *Apprendi*, the Sixth Amendment limits the authority of a Judge to enhance or reduce a sentence based on facts not in the record. *Id.* Second, even if the District Court follows all of the decision making steps which the Sentencing Reform Act and the Rules of Criminal Procedure procedurally require, the sentence ultimately imposed must nevertheless be substantively reasonable as defined by the Act. Third, just as a sentence can be too lenient, (*i.e.*, substantively unreasonable because it is insufficient to achieve the purposes of sentencing); it can also be too harsh (*i.e.*, substantively unreasonable because it is greater than necessary to achieve those ends). Mr. Espinoza-Mendoza respectfully submits these principles compel the following conclusions: (1) any sentence imposed must comply with *Apprendi*; (2) the reasonableness review contains a substantive component; (3) a within-Guidelines sentence is nevertheless substantively unreasonable if greater than necessary to serve the purposes of sentencing; and (4) under *Apprendi*, if a sentence would be substantively unreasonable absent a fact sufficiently in the record, then that sentence violates the Sixth Amendment.

II.

The Risk of Serious Bodily Injury or Death

It has been explained that defining the contours of the enhancement for an alleged creation of a risk of death or serious bodily injury “is dependent upon carefully applying the words of the guideline in a case-specific analysis.” *United States v. Solis-Garcia*, 420 F.3d 511, 516 (5th Cir. 2005). Matters concerning the risk, if any, created as a result of certain

conduct will ultimately turn on whether it was reasonably foreseeable that the conduct did create the risk. *United States v. De Jesus-Ojeda*, 515 F.3d 437, 442-43 (5th Cir. 2008).

Mr. Espinoza-Mendoza asserted that it was not reasonably foreseeable that the conditions in the trunk of the vehicle created a risk of serious bodily injury or death. The principal issue is based on “reasonable foreseeability” of death or serious bodily injury. *De Jesus-Ojeda*, 515 F.3d at 442-43. In this regard, Mr. Espinoza-Mendoza continues to assert it was not reasonably foreseeable that the conditions in the trunk were such that they would cause death or serious bodily injury.

However, in response to this argument, the Fifth Circuit disagreed that the risk of harm must be reasonably foreseeable. *See* (Appendix A, page 2). Rather, the Court provided a novel interpretation of this Guideline. Specifically, the Appellate Court determined that the enhancement is appropriate when persons are transported in the trunk of a vehicle because such activity “*per se*” creates a substantial risk of serious bodily injury or death. (Appendix A, page 2). In other words, the Fifth Circuit has deemed reasonable foreseeability of any risk as irrelevant to whether the Guideline applies when aliens were transported in the trunk of a vehicle. (Appendix A, page 2). Respectfully, this conclusion is contrary to the Guidelines and well established judicial rulings of the Court

III.

Analyzing the “Per Se” Conclusion

The Sentencing Guideline at issue provides:

If the offense involved intentionally or recklessly creating a substantial risk of death or serious bodily injury to another person, increase by 2 levels, but if the resulting offense level is less than level 18, increase to level 18.

U.S.S.G. § 2L1.1(b)(6). Crucial to the application of this enhancement is the following note from the commentary:

Application of Subsection (b)(6).—Reckless conduct to which the adjustment from subsection (b)(6) applies includes a wide variety of conduct (*e.g.*, transporting persons in the trunk or engine compartment of a motor vehicle; carrying substantially more passengers than the rated capacity of a motor vehicle or vessel; harboring persons in a crowded, dangerous, or inhumane condition; or guiding persons through, or abandoning persons in, a dangerous or remote geographic area without adequate food, water, clothing, or protection from the elements).

U.S.S.G. § 2L1.1, comment. (n.3).

As the Government correctly points out in its brief, “in determining whether to apply the enhancement, [the] court considers five non-exhaustive factors: the availability of oxygen, exposure to temperature extremes, the aliens’ ability to communicate with the driver of the vehicle, the ability to exit the vehicle quickly, and the damage to them if an accident occurs.” (Government’s Brief, page 13). The Government then proceeds to show there is a fact-specific analysis to determine whether the enhancement applies to a given set of facts. (Government’s Brief, page 13). Clearly, there was no legal conclusion that when people are transported in the trunk the enhancement is “*per se*” applicable.

Indeed, the Government’s position in this regard was made even clearer when the prosecutor discussed the above-referenced commentary as being on the list of possible types of circumstances which trigger the enhancement. The Government explained:

The transportation of aliens in the trunk of a vehicle is specifically listed in the commentary to U.S.S.G. § 2L1.1(b)(6) as the type of [endangering] conduct contemplated by the Sentencing Commission in drafting the guideline provision.

(Government's Brief, page 17) (citing *United States v. Herrera*, 416 F. App'x 431, 432 (5th Cir. 2011)). Thus, the Government, after carefully reviewing this case, never went so far as to say there is a *per se* rule for the enhancement. *See id.* Rather, the Government argued the enhancement was "well supported" because the courts had emphasized not only the high temperature in the closed compartment and also noted the increased risk of injury if there was an accident and never argued traveling in a trunk is *per se* dangerous and would require applying the enhancement. (Government's Brief, page 11). Therefore, the Government's decision not to argue the *per se* theory to the courts makes a persuasive argument that the *per se* theory is incorrect.

Reviewing this issue as discussed by the Fifth Circuit establishes a flaw in the Court's reasoning. As noted, in reaching its conclusion that transporting persons in a trunk of a vehicle *per se* creates substantial risk of serious injury or death, the Court relied on its opinion in the *Mateo Garza* case. (Appendix A, page 2). There, the application of the enhancement was based on walking illegal aliens through South Texas brush in June. 541 F.2d at 294. Nonetheless, the Court determined that transporting a person in the trunk of a car is substantially dangerous *per se*. *Id.* To this end, the Fifth Circuit explained in *Mateo Garcia*:

Nor does the guideline at issue condone the implication of a *per se* rule. The comment to § 2L1.1(b)(6) indicates that section applies to a "wide variety of conduct," but the examples given, with one exception, require courts to look at the specifics of the situation. U.S.S.G. § 2L1.1.cmt. [3]. The only *per se* example given in the comment is the first, which covers transporting persons in a trunk or engine compartment of a vehicle. *Id.* Trunks and engine compartments are not designed to hold human passengers, so transporting someone in them is not safe. The South Texas brush, as inhospitable as it

may be, cannot be analogized to trunks and engine compartments. As the district court acknowledged, people do live there.

Id. There is no law to suggest that this Guideline has a separate *per se* category for placing someone in the trunk of a vehicle. In fact, the comment to which the Fifth Circuit directs our attention does not establish there is a *per se* rule in any regard with transporting an individual in the trunk of a car. *See id.* Indeed, the commentary merely lists five types of facts which might generally lead to such a conclusion and does not declare any of those facts to be *per se* dangerous. *See* U.S.S.G. § 2L1.1, comment. (n.3).

Similar to the above observation, is that there is no other legal authority which suggests the “trunk factor” in the commentary establishes such a *per se* rule. Counsel’s research has revealed no authority, *i.e.*, statutory, caselaw or related to the Guidelines, other than the Fifth Circuit’s ruling in *Mateo Garcia* which reaches such a conclusion. Hence, because the Court in *Mateo Garcia* could not support the *per se* conclusion, it follows there is no logical legal basis for applying such a *per se* basis for the enhancement which was affirmed in this case. Thus, it remains an issue which deserves further review on this Petition for Writ of Certiorari.

IV. Summary

Mr. Espinoza-Mendoza respectfully submits it was not reasonably foreseeable that these aliens were at risk of serious bodily injury and therefore the enhancement should not have been applied. The temperature in the trunk was below body temperature. As the above establishes, the Fifth Circuit must rely on the specific facts as opposed to a *per se* rule

on the use of trunks for transporting undocumented persons. Thus, Mr. Espinoza-Mendoza respectfully requests that this court grant this Petition and ultimately direct that this case be returned to the District Court for resentencing without the application of the enhancement.

CONCLUSION

For the reasons set forth above, Mr. Espinoza-Mendoza respectfully submits, on the important issue of federal sentencing concerns, compelling reasons are presented in support of discretionary review by this Honorable Court.

WHEREFORE, PREMISES CONSIDERED, Petitioner herein respectfully requests that this Honorable Court grant this petition and issue a Writ of Certiorari and review the decision of the United States Court of Appeals for the Fifth Circuit which affirmed the sentencing enhancement imposed by the District Court. Mr. Espinoza-Mendoza also respectfully requests any further relief to which he may be entitled under the law and in equity.

Respectfully Submitted,

A handwritten signature in blue ink, reading "James Scott Sullivan", is written over a horizontal line.

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