No. _____

In the Supreme Court of the United States

October Term, 2019

FERNANDO QUINTELA-GALINDO, *PETITIONER*,

V.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS OF THE FIFTH CIRCUIT

MAUREEN SCOTT FRANCO
Federal Public Defender

JUDY FULMER MADEWELL
Assistant Federal Public Defender
Western District of Texas
727 E. César E. Chávez Blvd., B-207
San Antonio, Texas 78206-1205
(210) 472-6700
(210) 472-4454 (Fax)

Counsel of Record for Petitioner

QUESTION PRESENTED FOR REVIEW

Whether a presumption of reasonableness should be applied to a revocation sentence produced by Chapter 7 policy statements.

No. _____

In the Supreme Court of the United States

October Term, 2019

FERNANDO QUINTELA-GALINDO, Petitioner,

V.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS OF THE FIFTH CIRCUIT

Petitioner, Fernando Quintela-Galindo asks that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on August 13, 2019.

PARTIES TO THE PROCEEDING

The caption of this case names all parties to the proceeding in the court whose judgment is sought to be reviewed.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rule

United States Sentencing Guidelines

Other Authority

OPINION BELOW

A copy of the opinion of the court of appeals, *United States v. Quintela-Galindo*, Nos. 18-50957, 18-50958, unpub. op. (5th Cir. Aug. 13, 2019), is attached to this petition as Appendix A.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit were entered on August 13, 2019. This petition is filed within 90 days after entry of judgment. *See* SUP. CT. R. 13.1. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

FEDERAL STATUTE INVOLVED

The text of 18 U.S.C. § 3553(a) is reproduced in Appendix B.

UNITED STATES SENTENCING GUIDELINES INVOLVED

The policy statements guiding revocation sentences are found in Guidelines §§7B1.3 and 7B1.4, and are reproduced as Appendix C.

STATEMENT

Fernando Quintela-Galindo pleaded guilty, pursuant to a plea agreement, to a marijuana offense. At the time he committed the offense, he was on supervised release from a previous marijuana

offense. The district court revoked his supervised release and sentenced him to 24 months' imprisonment to run consecutive to the 188-month sentence imposed on the new marijuana offense.

United States Border Patrol agents on a ranch near Valentine, Texas, observed a group of people walking north. Most of them were carrying large backpacks. When the agents approached, the men admitted that they were Mexican citizens in the United States illegally. The agents searched the backpacks and discovered approximately 126 kilograms of marijuana. Quintela was one of the group. At the time, he was on supervised release for a prior 2014 marijuana conviction.

Quintela was indicted for importation and possession with intent to distribute 100 kilograms or more but less than 1000 kilograms of marijuana, in violation of 21 U.S.C. §§ 841, 852, and 960. Quintela pleaded guilty to the possession count pursuant to a plea agreement that waived his right to appeal his sentence. A probation officer prepared a presentence report for the new marijuana offense. The officer determined that Quintela was a career offender, under guideline §4B1.1(b)(2), because of his two prior marijuana convictions: 1) in 2011, Quintela was sentenced to 30 months' imprisonment; and 2) in 2014, he was sentenced to 30

months' imprisonment and six years' supervised release. The recommended Guidelines range for Quintela's new marijuana offense was 188 to 235 months' imprisonment.

Based on the new marijuana offense, the government also moved to revoke Quintela's earlier supervised release. For the revocation case, the probation officer prepared a violation worksheet. The recommended Guidelines range on the revocation was 18 to 24 months' imprisonment.

Counsel for Quintela argued that the career offender guideline overstated the seriousness of his offense and his criminal history. Counsel explained that Quintela was drawn into backpacking marijuana because he needed the money to pay the medical bills— his granddaughter had serious health problems that necessitated multiple operations. Counsel asked the district court to impose a sentence below the career offender guideline range. The district court rejected the request and sentenced Quintela to 188 months' imprisonment, the bottom of the career offender guidelines range.

The district court then turned to the revocation of Quintela's prior supervised release term. Quintela pleaded true to the alleged violations of his release conditions. The revocation guidelines range was 18 to 24 months' imprisonment. Counsel for Quintela reminded the court of the extremely long sentence of over 15 years

that had just been imposed based on the career offender guideline. Counsel asked the court to order the revocation sentence to run concurrent to the 188-month sentence. The court rejected the request and sentenced Quintela to 24 months' imprisonment to run consecutive to the 188-month sentence.

Quintela objected to the revocation sentence and appealed. On appeal, Quintela argued that the 24-month consecutive sentence was greater than necessary to meet the goals of 18 U.S.C. § 3553(a) and therefore substantively unreasonable.

The Fifth Circuit rejected Quintela's argument, holding that a revocation sentence was "reviewed under 18 U.S.C. § 3742(a)(4)'s 'plainly unreasonable' standard, which is more deferential than the reasonableness standard applicable to sentences imposed upon conviction." App. A at 2. The Court held that Quintela had "not overcome the presumption of reasonableness that applies." App. A at 2.

REASON FOR GRANTING THE WRIT

The Court should grant certiorari to decide whether an appellate presumption of reasonableness applies to a within-guideline sentence imposed under Chapter 7's policy statements.

In *Rita*, this Court approved an appellate presumption of reasonableness for within-guideline sentences. *Rita v. United States*, 551 U.S. 338, 347 (2007). The Court concluded that the "presumption reflects . . . the manner in which the [Sentencing] Commission carried out" its congressionally mandated task to develop guidelines that meet the sentencing goals of 18 U.S.C. § 3553(a). *Id.* at 347–48. In developing the guidelines, the "Commission took an 'empirical approach'" by "examin[ing] . . . 10,000 presentence reports" that reflected the past practices of sentencing judges. *Id.* at 349. Statistical analysis of these practices established the offense levels for many crimes, levels that were directly linked to the recommended imprisonment range under the guideline. U.S. SENTENCING COMM'N, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 14 (Nov. 2004) (hereinafter *Fifteen-Year Report*). A guideline produced in this manner is therefore the "product of careful study based on extensive empirical evidence derived from the review of thousands of individual sentencing decisions." *Gall v. United States*, 552 U.S. 38, 46 (2007).

Because of the Commission's methodology, the Court concluded that, for the ordinary case, it was "fair to assume that the Guidelines, insofar as practicable, reflect a rough approximation of sentences that might achieve § 3553(a)'s objectives." *Rita*, 551 U.S. at 350.

Not all guidelines share this pedigree. As the Court recognized in *Kimbrough*, some guidelines "do not exemplify the Commission's exercise of its characteristic institutional role." *Kimbrough v. United States*, 552 U.S. 85, 109 (2007). They do not take account of empirical data and national experience, but instead are driven by other factors. *See id.*; *Gall*, 552 U.S. at 46 n.2. Such guidelines are a less reliable appraisal of whether a sentence properly reflects § 3553(a)'s goals. *See Kimbrough*, 552 U.S. at 109–10. Accordingly, they are entitled to less deference by the courts. *See id.* And they are not entitled to the deference provided by an appellate presumption of reasonableness, because they lack the empirical basis that justified the presumption to begin with.

The Fifth Circuit's holding regarding the applicability of the presumption of reasonableness seems contrary to this conclusion. The court of appeals has held that, while a district court may account for a guideline's lack of empirical basis in assessing a sen-

tence, the appellate court is not required to abandon its presumption of reasonableness on that basis. *United States v. Duarte*, 569 F.3d 528, 529–30 (5th Cir. 2009); *United States v. Mondragon-Santiago*, 564 F.3d 357, 366–67 (5th Cir. 2009). This is so, the court reasoned, because "by the time an appeals court reviews a Guidelines sentence, both the Sentencing Commission and the district court have fulfilled their congressional mandate to consider the § 3553(a) factors and have arrived at the same conclusion." *Mondragon-Santiago*, 564 F.3d at 366.

The Fifth Circuit's rationale, however, appears to overlook this Court's reason for allowing a presumption in the first place. In *Rita*, the Court concluded that the alignment of the trial court's decision with the Sentencing Commission's assessment of the proper sentencing range supported a presumption. *Rita*, 551 U.S. at 347. But this conclusion was based on the "the manner in which" the Commission made its assessment—an empirical approach that involved examining court practices and refining those practices based on information, gathered from a variety of sources, confirming their efficacy. *Rita*, 551 U.S. at 347–50. This reasoning suggests that, if the Commission has not fulfilled its institutional role, then its assessment of a proper sentence is not entitled to a presumption of reasonableness.

Nevertheless, despite acknowledging that "the *Kimbrough* Court 'recognized that certain Guidelines do not take account of empirical data and national experience," the Fifth Circuit in *Duarte* refused, "absent further instruction from the [Supreme] Court, [to] read *Kimbrough* to mandate wholesale, appellate-level reconception of the role of the Guidelines and review of the methodologies of the Sentencing Commission." *Duarte*, 569 F.3d at 530. "Whatever appropriate deviations it may permit or encourage at the discretion of the district judge," *Duarte* continued, "*Kimbrough* does not force district or appellate courts into a piece-by-piece analysis of the empirical grounding behind each part of the sentencing guidelines." *Id*.

The policy statements in Chapter 7 of the Guidelines that guide revocation sentencing are not empirically based. When, in 1984, Congress directed the promulgation of a more uniform sentencing scheme, it left it to the Sentencing Commission whether to address revocation sentences in "guidelines or general policy statements." 28 U.S.C. § 994(a)(3). The Commission chose to act through policy statements. U.S.S.G. Ch.7, Pt.A (n.1). It did so, it said, to allow time to identify "any substantive or procedural issues that require further review." *Id*. It did not gather data before promulgating the policy statements. Rather, it promised to "review relevant data

and materials concerning revocation determinations under" the policy statements and promulgate guidelines "after federal judges, probation officers, practitioners, and others have the opportunity to evaluate and comment on these policy statements." *Id*.

That opportunity has not come in the 25 years since the Guidelines were adopted. Instead, the policy statements have been repromulgated, with little or no change and with no indication that the Commission has subjected them to the rigor of empirical analysis. This lack of empirical basis, or apparent input from the relevant players, is particularly disturbing with regard to the question whether revocation sentences should be imposed consecutively to the sentence for the underlying offense—as it was here. The policy statements direct that courts impose consecutive sentences. *See* U.S.S.G. §7B1.3(f) (any term imposed upon revocation "shall" be ordered to run consecutively to another term of imprisonment). Congress, however, has also spoken on the question of consecutive punishment, and it favors concurrent sentences. *See* 18 U.S.C. § 3584(a) (multiple terms of imprisonment ordered at the same time "run concurrently" unless the court or a statute requires that they run consecutively). An unsupported presumption of reasonableness to this apparent divergence from Congress's view is not consistent with the Supreme Court's reasoning in *Kimbrough*.

This Court should grant certiorari to determine whether the unmoored policy statements are entitled to a presumption of reasonableness afforded them by the court of appeals.

CONCLUSION

FOR THESE REASONS, Quintela asks this Honorable Court to grant a writ of certiorari.

Respectfully submitted.

MAUREEN SCOTT FRANCO
Federal Public Defender
Western District of Texas
727 E. César E. Chávez Blvd., B-207
San Antonio, Texas 78206
Tel.: (210) 472-6700
Fax: (210) 472-4454

s/ Judy Fulmer Madewell
JUDY FULMER MADEWELL
Assistant Federal Public Defender

Counsel of Record for Petitioner

DATED: November 12, 2019