

No. 20-

IN THE
Supreme Court of the United States

ENRIQUE A. ECHEVERRIA-BENITEZ,

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, ENRIQUE A. ECHEVERRIA-BENITEZ, was charged with and pleaded guilty to a single count of illegal reentry after removal. At the same time, Mr. Echeverria-Benitez was sentenced on a motion to revoke. The District Court imposed two consecutive sentences which totaled 36 months imprisonment.

Question #1 (18-41012)

On direct appeal, Mr. Echeverria-Benitez argued his twenty-seven month sentence for illegal reentry after removal was unreasonable. Mr. Echeverria-Benitez agreed review was for plain error because he did not present this issue to the District Court. The Government responded that this claim was without merit because Mr. Echeverria-Benitez did not show plain error on the issue of the need for a reasonable sentence. The Fifth Circuit Court of Appeals affirmed the sentence of the District Court. Mr. Echeverria-Benitez submits the decision is in need of the supervision of this Court and hence this Petition deserves further review.

Question #2 (18-41014)

On the same day as the sentencing in the above case, Mr. Echeverria-Benitez pleaded true to and was sentenced on a motion to revoke supervised release. The district Court sentenced Mr. Echeverria-Benitez to serve nine months in the custody of the Bureau of Prisons to run consecutively to the above twenty-seven month sentence on the illegal reentry. Mr. Echeverria-Benitez argued the imposition of this punishment constituted reversible error because it was imposed based on the perceived need for retribution

expressed by the District Court. The Fifth Circuit Court of Appeals ruled “an error is not plain if it requires the extension of precedent.” (Appendix A) (quoting *United States v. Vargas-Soto*, 700 F.3d 180, 182 (5th Cir. 2012)). Respectfully, this decision conflicts with the relevant decisions of this Court and hence a compelling reason is present in support of this Court’s discretionary review. Accordingly, Mr. Echeverria-Benitez contends this Petition deserves to proceed to further review.

PARTIES TO THE PROCEEDING

The parties to the proceeding are listed in the caption:

Enrique A. Echeverria-Benitez: 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, ENRIQUE A. ECHEVERRIA-BENITEZ, requests this Court grant this petition and issue a Writ of Certiorari to review the decision of the Fifth Circuit. Mr. Echeverria-Benitez respectfully submits the District Court committed reversible error by imposing an unreasonable sentence in Fifth Circuit Case Number 18-41012, and committed reversible error by basing its revocation sentence on “retributive” sentencing facts in Fifth Circuit Case Number 18-41014. Accordingly, he respectfully submits to this Court that the Fifth Circuit opinion which affirmed the District Court is in conflict with decisions of this Court and therefore cannot stand. Accordingly, he requests that this Petition be granted so this case may proceed to further review.

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. Enrique A. Echeverria-Benitez*, No. 18-41012 & No. 18-41014 (5th Cir. October 23, 2019), 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, Laredo Division, appears at Appendix B to this Petition and is unreported.

The Judgment in a Criminal Case of the United States District Court for the Southern District of Texas, Laredo Division, appears at Appendix C to the Petition and is unreported.

From the State Courts:

None.

GROUNDS FOR JURISDICTION

This Petition arises from a direct appeal which involved two final and full judgments against Mr. Echeverria-Benitez. This action is on criminal prosecutions initiated by the Government. Mr. Echeverria-Benitez pleaded guilty to a single count of illegal reentry after removal and argued his sentence was unreasonable. At sentencing on the offense, Mr. Echeverria-Benitez also pleaded true to a motion to revoke a supervised release in a separate case. He argued his revocation sentence should be set aside because it was “retributive” in nature. A copy of each judgment appears at Appendix B and Appendix C. The sentence on the motion to revoke and the unreasonable sentence are at issue in this Petition. Copies of the judgments appear at Appendix B and Appendix C. The Fifth Circuit issued an opinion dated October 23, 2019, and the Court affirmed the decisions 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

Historical Background:

In 2016, Enrique Echeverria-Benitez, an illegal alien, was sentenced in the Northern District of Alabama to serve 27 months in the custody of the Bureau of Prisons ("BOP"), followed by a 2-year-term of supervised release, based on his plea of guilty to a charge of being an illegal alien in possession of a firearm. ROA.168-71. Mr. Echeverria-Benitez was subsequently released from custody and deported to Mexico. ROA.168-71.

In 2018, while still on supervised release, Mr. Echeverria-Benitez was found in the United States near Laredo, Texas. ROA.163. The Alabama case was subsequently transferred to the Southern District of Texas and a probation officer in Laredo submitted a motion to revoke his supervised release. ROA.168-71. An arrest warrant issued, Mr. Echeverria-Benitez was again taken into custody, and a hearing on the revocation matter was held on October 17, 2018. ROA.4, 141-52. At the conclusion of the hearing, the Court revoked Mr. Echeverria-Benitez's supervised release. ROA.141-52.

At the same time, the Government brought a separate, new indictment for illegal entry after deportation. ROA.20. Mr. Echeverria-Benitez entered a plea of guilty and was sentenced at the same hearing as on the motion to revoke. ROA.83-140, 141-52.

Mr. Echeverria-Benitez was sentenced to serve an additional 9 months in the custody of the BOP based on the revocation, to run consecutively with the separate indictment filed in the Laredo Division for illegal reentry under this case number, 5:18-CR-00460. ROA.141-52. Mr. Echeverria-Benitez timely filed a notice of appeal on the revocation on October 15, 2018, and that appeal is pending before this Court.

As noted, at the same hearing on the revocation, Mr. Echeverria-Benitez was sentenced in this case. ROA.141-52. Specifically, the Court sentenced Mr. Echeverria-Benitez to serve 27 months in the custody of the Bureau of Prisons for the illegal reentry into the United States after deportation. ROA.151.

Complaint and Indictment:

On June 1, 2018, a criminal complaint was filed against Mr. Echeverria-Benitez. ROA.10. That complaint provided:

I, the complainant in this case, state that the following is true to the best of my knowledge and belief.

On or about the date(s) of May 30, 2018 in the county of Webb in the Southern District of Texas, the defendant(s) violated:

Code Section

Offense Description

8 USC 1326

A citizen of Mexico, who has previously been REMOVED or has departed the United States while an order of REMOVAL is outstanding was thereafter found in the United States near Laredo, Texas the said Defendant

having not obtained the consent of the Attorney General of the United States (prior to March 1, 2003) or of the Secretary of the Department of Homeland Security (March 1, 2003 and thereafter–Title 6, United States Code, Sections 202 and 557) for the reapplication by the said Defendant for admission into the United States.

This criminal complaint is based on these facts:

On or about May 30, 2018 the defendant Enrique A ECHEVERRIA-Benitez was apprehended near Laredo, Texas. After a brief interview it was determined that, Enrique A ECHEVERRIA-Benitez was an undocumented alien from Mexico and subsequently placed under arrest. Further investigation revealed that Enrique A ECHEVERRIA-Benitez was previously REMOVED from the United States on May 3, 2018 at Brownsville/gateway. There is no record that Enrique A ECHEVERRIA-Benitez has applied for or received permission from the Attorney General or the Secretary of Homeland Security to re-enter the United States after deportation.

ROA.10.

An indictment followed on June 10, 2018. ROA.20. That indictment charged:

On or about May 30, 2018, in the Southern District of Texas and within the jurisdiction of the Court, Defendant,

ENRIQUE A. ECHEVERRIA-BENITEZ,

an alien who had been denied admission, excluded, deported, and removed, and had departed the United States while an order of exclusion, deportation and removal was outstanding, entered, attempted to enter, and was found in the United States, having not obtained the consent of the Attorney General of the United States to reapply for admission into the United States prior to March 1 2003 and having not obtained consent from the Secretary of the Department of Homeland Security to reapply for admission into the United States on or after March 1, 2003.

ROA.20.

The Guilty Plea:

On August 3, 2018, Mr. Echeverria-Benitez entered a plea of guilty to the above indictment. ROA.83-140. There was no plea agreement. ROA.163. The following discussion took place between the Court and Mr. Echeverria-Benitez:

THE COURT: Okay. What kind of work were you doing?

DEFENDANT ECHEVERRIA-BENITEZ: In Mexico? Nothing, because I am not familiar with the place.

THE COURT: Uh-huh. Okay.

DEFENDANT ECHEVERRIA-BENITEZ: I know where my family is, but I don't know anything about Mexico. That's why I wasn't working at anything and I had just go released from prison.

THE COURT: Well, what were you doing there?

MR. ECHEVERRIA-BENITEZ: I was working at my brother's business, it was a tire shop.

THE COURT: Uh-huh. I hear you, Mr. Benitez. Well, listen to what the government is going to tell me happened in your case.

MR. DE LA ROSA: The defendant is a native and citizen of Mexico with no[] documents allowing him to enter, travel through, or remain in the United States. The defendant was most recently removed from the United States on or about May 3rd, 2018 from Brownsville, Texas.

The defendant, thereafter, was found in the United States on or about May 30th, 2018 near Laredo, Texas. The defendant has never applied for or received permission of either the United States Attorney General or Secretary of Department of Homeland Security, to re-enter the United

States or reapply for admission to the United States after his deportation or removal.

THE COURT: So, Mr. Benitez, they're telling me you're a citizen of Mexico. Is that true?

DEFENDANT ECHEVERRIA-BENITEZ: Yes.

THE COURT: And that they later found you near Laredo on May the 30th. Is that true?

DEFENDANT ECHEVERRIA-BENITEZ: Yes.

THE COURT: Do you have any permission to come back?

DEFENDANT ECHEVERRIA-BENITEZ: No.

THE COURT: Where were you headed?

DEFENDANT ECHEVERRIA-BENITEZ: Dallas, Texas.

THE COURT: Is that where you grew up?

DEFENDANT ECHEVERRIA-BENITEZ: Yes.

THE COURT: Okay. I hear you. . . .

ROA.138 (emphasis in original).

The Presentence Investigation Report:

A Presentence Investigation Report (sometimes referred to as “PSR” or “report”) was ordered. ROA.139. The report was filed on September 7, 2018. ROA.160.

The “offense conduct” provided:

7. On May 30, 2018, a United States Border Patrol agent encountered Enrique A. Echeverria-Benitez near Laredo, Texas. Subsequent to a brief interview, it was determined the defendant, a Mexican national, had unlawfully entered into the United States, from Mexico, by wading the Rio Grande River near Laredo, Texas. Upon doing so, the defendant was not inspected or admitted by an immigration officer at the port of entry as designated by the Secretary of Homeland Security.

8. An immigration inquiry confirmed Enrique A. Echeverria-Benitez was issued a Final Administrative Order of Removal under Section 238(b) of the immigration and Nationality Act, signed by an authorized official, on March 19, 2018, via the Brownsville, Texas, port of entry.
9. In addition to the aforementioned deportation, the defendant was voluntarily returned to his native country of Mexico, on November 27, 2008, via the Del Rio, Texas, port of Entry.
10. An inquiry of the defendant's criminal history reflects the defendant was previously convicted of Evading arrest/detention w/vehicle and attempted possession of a controlled substance.
11. Furthermore, on July 28, 2016, Enrique A. Echeverria-Benitez was convicted of Illegal Alien in Possession of Firearms (*felony*) in the United States District Court, Northern District of Alabama, Birmingham Division; under Cause Number 5:18CR00655-001, *formerly known as 1:16CR00127-AKK-JHE-3*. On November 8, 2016, the defendant appeared before the Honorable Abdul K. Kallon, United States District Judge, where he was sentenced to a custodial term of twenty-seven (27) months imprisonment in addition to a two (2) year term of supervised release. The defendant was thereafter deported to Mexico, on May 3, 2018, via the Brownsville, Texas, port of entry. The defendant was thereafter apprehended by United States Border Patrol on May 30, 2018, wherein he was subsequently Indicted in the instant offense. On June 14, 2018, a Petition for Warrant or Summons for Offender Under Supervision filed and a warrant for arrest was issued. A transfer of jurisdiction from the Northern District of Alabama, Birmingham Division, to the Southern District of Texas, Laredo, Texas, was completed on August 30, 2018.

ROA.163-64 (emphasis in original).

Mr. Echeverria-Benitez was assigned a base offense level of 8 pursuant to U.S.S.G.

§ 2L1.2(a), and 8 levels were added based on the following:

19. **Specific Offense Characteristics:** For the purpose of applying the following specific offense characteristics, the defendant was first ordered deported or ordered removed from the United States on March 19, 2018.

20. Pursuant to U.S.S.G. § 2L1.2(b)(2)(B), if, before the defendant was ordered deported or ordered removed from the United States for the first time, the defendant sustained a conviction for a felony offense (*other than an illegal reentry offense*) for which the sentence imposed was two years or more, increase by 8 levels. On July 28, 2016, Enrique A. Echeverria-Benitez was convicted of Illegal Alien in Possession of Firearms (*felony*) in the United States District Court, Northern District of Alabama, Birmingham Division; under Cause Number: 5:18CR00655-001, *formerly known as 1:16CR00127-AKK-JHE-3*. On November 8, 2016, the defendant appeared before the Honorable Abdul K. Kallon, United States District Judge, where he was sentenced to a custodial term of twenty-seven (27) months.

ROA.165 (emphasis in original). Finally, the probation officer decreased the offense level by 3 levels for acceptance of responsibility, and determined the Total Offense Level was 13.

ROA.165.

On the issue of criminal history, the probation officer determined that Mr. Echeverria-Benitez' criminal history resulted in a subtotal criminal history of 6. ROA.171. However, 2 points were added because:

The defendant committed the instant offense while under a two year term of supervised release under Cause Number: 5:18CR00655-001, *formerly known as 1:16CR00127-AKK-JHE-3*; therefore two points are added pursuant to U.S.S.G. § 4A1.1(d).

ROA.171. Thus, the total criminal history score was 8, which gave Mr. Echeverria-Benitez a criminal history category of IV. ROA.171.

Accordingly, based on a total offense level of 13 and a criminal history category of IV, the Guidelines range for punishment was calculated at 24 to 30 months in the custody of the Bureau of Prisons. ROA.174. The PSR also reflects that Mr. Echeverria-Benitez was not

eligible for probation. ROA.175. The probation officer did not identify any factors in support of a departure from the Guidelines. ROA.176.

The Sentencing Hearing:

Mr. Echeverria-Benitez was sentenced on the motion to revoke, as mentioned above, and this illegal reentry offense at the same time. ROA.143-46. The Court began with a general review of Mr. Echeverria-Benitez's background from the PSR:

It says here that you are 30 years old. You are a native and citizen of Mexico. You had been deported very recently, May 3, 2018, and you were back May 30, 2018. They found you here near Laredo, Texas. You said you were coming over here to look for work. You wanted to earn a fair wage for your work, trying to escape the problems that are happening over there in Mexico, the lawlessness and crime, is that you state in your Acceptance of Responsibility Statement.

So your scoring is an eight, and then you get a plus eight because of that being an alien in possession of a firearm conviction where you received 27 months. So that's a 16. After acceptance, you end up at a 13. So you're at a 13/TV though, which is 24 to 30 months.

You have a 2008 evading arrest conviction that was occurred in Dallas, so that gives you two points. The attempted possession of a controlled substance misdemeanor is a point. That's in 2011. And then, finally, that illegal alien in possession of a firearm felony in Alabama, that's the three points. So, you're still on supervised release, so there's two points that get added to that.

But it says here you have a common law relationship with a U.S. citizen. You have two children with her, and that you briefly returned to Guerrero to reunite with your mother. Your mother is over there, apparently, but that your children miss you very much and so you were trying to get back because your wife is working very hard and trying to support them. So that's the extent of this case. Like I said, it's 24 to 30 months.

ROA.143-44.

The Court then revoked Mr. Echeverria-Benitez' supervised release on the Alabama case. ROA.144-45. The Court next set out to sentence Mr. Echeverria-Benitez in both cases. ROA.145. The Judge asked him if he had anything to say. ROA.145.

At that point, Mr. Echeverria-Benitez apologized for coming back into the United States. ROA.145. He told the Court that he came back "because of my children" and that he had been here in the country working at his brother's tire shop. ROA.145-46.

The attorney for Mr. Echeverria-Benitez then addressed his client's criminal record, including previous offenses in the Alabama case. Defense counsel stated:

[T]he presentence report says that he was arrested and convicted for possession of controlled substance. And that sounds bad. When you look at the facts, we see that they're talking about .18 grams of cocaine which is less than one-fifth of one gram. It's a really small amount. Many jurisdictions wouldn't even bother with it. But that gives him criminal history points, and it's stated as possession of a controlled substance.

Then they add another one for evading arrest. And they talk, my God, he was driving very fast. He was going as fast as a hundred miles an hour. But the fact is that there was no collision. Nobody was hurt. Nobody was injured. It was really a traffic violation for speeding.

And then, of course, we have the one with a firearm, and that, of course, he didn't use the firearm to commit any crime. He didn't shoot anybody, point it at anybody, or use it at anybody. And firearms-possession of firearms is commonplace here in the U.S. Here in Texas you can possess it--possess a firearm legally in many instances.

So, the offense that give him criminal history points and that increase his level for sentencing purposes is--are rather minor I would say.

ROA.146-47.

Mr. Echeverria-Benitez's lawyer then pointed out that his client came to the United States because all of his family is here. ROA.147. He noted that Mr. Echeverria-Benitez

worked and significantly has two children in the United States. ROA.147. Hence, the attorney explained, Mr. Echeverria-Benitez is not coming over to the United States to commit any crimes. ROA.147.

The Court then sentenced Mr. Echeverria-Benitez in the newly-indicted case for being in the United States illegally. ROA.148-50. The Judge reviewed Mr. Echeverria-Benitez' criminal history and explained:

Well, I think that you are accurately scored, Mr. Echeverria, the 13/IV, which is 24 to 30 months.

The evading arrest conviction, you know, I appreciate your attorney's attempt to try and shed some—maybe a different light on the history that you have, but that one did involve speeds of a hundred miles an hour, running several red lights, almost colliding with bystander vehicles. You were the driver. There was a passenger that absconded. That's a danger to the community.

The attempted possession of the controlled substance, it's a controlled substance no matter the weight. I mean, it's an illegal narcotic. That gives you a point.

The alien in possession of the firearm case, it's not just one firearm. It's multiple. In fact, this factual recitation was very interesting. I don't know that I've ever seen anything like this, but they encountered a significant amount of weapons in this vehicle. I didn't count how many there were, but as I kept reading, there were more and more weapons, nine millimeter pistols; 15 rounds, that one was stolen; a .45 caliber pistol with one live round in the chamber, seven rounds in the magazine; black tactical vest; two metal plates; a knife; Umarex airsoft rifle; some more ammunition; a black ski mask; multi-tool flashlight; one set of tactical chain handcuffs; aerosol spray; two pairs of Mossy Oak gloves; a Smith & Wesson nine millimeter pistol with a laser; utility rope; camouflage; a machete; an empty box for SABRE Red Pepper Spray; towels; socks; access to the trunk from the backseat.

And then apparently, you indicated that you were getting paid \$50,000 for a four-day job of kidnapping—or rescuing someone who had been kidnapped by the Russians, and that you were working for this security company; that you

provide security for Hispanic business owners. And so someone's husband had been kidnapped by Russians and you were recovering a black box.

So, the facts are interesting, you know, which is neither here nor there. It's really the fact that you have a conviction for multiple weapons that were found in the vehicle that you were in along with some other people. So that—all of that is—I don't think a Criminal History Category IV is over-represented. I think it's accurately scored.

ROA.148-49. The Judge therefore sentenced Mr. Echeverria-Benitez to “27 months in custody” on the newly-indicted case.” ROA.149.

The Judge next sentenced Mr. Echeverria-Benitez to a prison term of 9 months on the revocation charge, but determined this sentence would be “consecutive to the 27 months” imposed on the illegal reentry charge. ROA.150. The Court then explained to Mr. Echeverria-Benitez:

It was only two years. The [Alabama] judge could have given you three years on that one. It was only two years. You came back right away. And you need to realize and recognize that even though your family is here and, you know, that I guess your family ties in Mexico are minimal, that you're going to have to try and figure out a way to stay over there. If you come back again, they're going to apprehend you. You have a pretty significant record. Now you've been convicted of this offense, they'll prosecute you again. And if you come back within three years, it's two sentences. It's the new case and then the revocation. So there's a need to deter you and protect the community and promote respect for the laws of this country. That's why I sentenced you the way that I did and I imposed that supervised release term.

ROA.49.

Appeal to the Fifth Circuit Court of Appeals

Mr. Echeverria-Benitez timely filed a notice of appeal on the 27-month sentence imposed in this illegal reentry case. ROA.56-57. He also filed a notice of appeal on the revocation sentence. The Fifth Circuit court of Appeals affirmed the decisions of the District

Court in a written opinion. In affirming the District Court, the Fifth Circuit noted “the Sentencing Commission’s relevant policy statements recommend that sentences involving revocation of supervised release . . . run consecutively.” (Exhibit A, page 3). The Circuit Court also noted it has permitted “consecutive sentences for illegal reentry after removal and resulting revocations of supervised release.” (Exhibit A, page 3). With respect to Mr. Echeverria-Benitez’s argument the District Court’s revocation sentence was based on retribution and should be set aside, the Fifth Circuit stated:

Echeverria-Benitez has not cited any governing authority that supports his argument that consecutive sentences for a new law violation and a resulting revocation indicate reliance on such a factor. “[A]n error is not plain if it requires the extension of precedent.” *United States v. Vargas-Soto*, 700 F.3d 180, 182 (5th Cir. 2012). Therefore, Echeverria-Benitez has not shown any error that was clear or obvious as to the factors on which the district court based his revocation sentence.

(Exhibit A, page 3). This opinion forms the basis for this Petition for Writ of Certiorari.

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

I.

Consecutive Sentences and Reasonableness

A.

Overview

This Court has developed a straightforward formula to prevent constitutionally infirm and inconsistent sentencing outcomes. To this end, the Guideline range must first be determined. *Kimbrough v. United States*, 552 U.S. 85, 108-10 (2007); *Gall v. United States*, 552 U.S. 38, 51 (2007); *Rita v. United States*, 551 U.S. 338, 364 (2007). The various rules for determining the Guideline range to be applied by the District Court, and how this

Court reviews those findings and conclusions, has been discussed by the Fifth Circuit on numerous occasions. *See e.g., United States v. Acosta*, 619 F. App'x 403, 404 (5th Cir. 2015); *United States v. Alaniz*, 726 F.3d 586, 618-19 (5th Cir. 2013); *United States v. Longstreet*, 603 F.3d 273, 275-76 (5th Cir. 2010). This process is important because, although the Fifth Circuit presumes sentences within the Guideline range are reasonable, the reasonableness of the sentence is the next consideration for sentencing. *Gall*, 552 U.S. at 51; *Rita*, 551 U.S. at 364.

Thus, after consulting and considering the Guidelines, the sentencing Judge must impose a “reasonable” sentence. *Gall*, 552 U.S. at 51. Whether a sentence is reasonable depends not only on the advisory sentencing range, but also on the numerous other factors listed under 18 U.S.C. § 3553(a), including, for example, “the need for the sentence imposed . . . to provide just punishment for the offense,” *id.* at § 3553(a)(2)(A), “to afford adequate deterrence to criminal conduct,” *id.* at § 3553(a)(2)(B), and “to protect the public from further crimes of the defendant.” *id.* at § 3553(a)(2); *see also Booker v. United States*, 542 U.S. 220, 261 (2005) (explaining that § 3553(a) “factors in turn will guide appellate courts, as they have in the past, in determining whether a sentence is unreasonable”). It should be noted at this juncture that, in light of so much emphasis on the continued viability of the Guidelines, Sentencing Judges are nonetheless required by the Sixth Amendment to refrain from treating the Guidelines as mandatory whether out of “ignorance, negligence . . . defiance” or for any other reason. *United States v. Rodriguez*, 406 F.3d 1261, 1273 (11th Cir. 2005).

In any event, the first step to determining the Guideline range is to determine an offense level. U.S.S.G. § 1B1.2(a). Basically, pursuant to the Guidelines Manual, determining the applicable Guideline begins with an initial score for the offense of conviction. This is calculated by adding points assigned to the offense of conviction, as well as any “relevant conduct” to the specifics of the offense. This number is then changed by any applicable adjustments under the Guidelines. These adjustments can include harm to a victim, the defendant’s role in the offense, and whether the defendant has cooperated or accepted responsibility. U.S.S.G. § 1B1.1(b)-(c); *see also* 18 U.S.C. § 3553(a). Finally, the Court must impose a reasonable sentence under 18 U.S.C. § 3553(a).

B.

The Sentence was Unreasonable

Respectfully, the District Court’s decision to run Mr. Echeverria-Benitez’ substantive offense sentence consecutively with the revocation sentence was unreasonable. The District Court imposed a within the Guidelines sentence for the offense but then effectively granted a sentence higher than the maximum statutory sentence for the offense by running it consecutively with the sentence on the motion to revoke. In other words, this was unreasonable because the Court ordered that Mr. Echaverria-Benitez serve two separate sentences for a single violation of the law, *i.e.*, reentry into the United States. The sentence was additionally unreasonable because Mr. Echeverria-Benitez did not violate any other law when he entered the United States. *Id.*

Mr. Echeverria-Benitez acknowledged the Fifth Circuit Court of Appeals has upheld a substantive offense sentence which is consecutive to a revocation sentence. *See e.g.*,

United States v. Hernandez-Achila, 700 F. App'x 370 (5th Cir. 2017); *United States v. Cantu-Sandoval*, 668 F. App'x 638 (5th Cir. 2016); *United States v. Watson*, 463 F. App'x 366 (5th Cir. 2012). However, those cases are distinguishable because a consecutive sentence was not imposed for two identical violations of the law.

Additionally, the District Court in this case gave no explanation for running the sentences consecutively. Accordingly, this is another basis to conclude that the Court fashioned Mr. Echeverria-Benitez's sentence in an unreasonable manner.

Moreover, the extent of the unreasonable nature of the sentence is only increased because the very basis for the revocation shows that Mr. Echeverria-Benitez did not violate any other laws of our country. Furthermore, the consecutive sentence was only available because Mr. Echeverria-Benitez returned to the United States while he was on supervision for the Alabama offense. In other words, if he had waited and not returned while he was on supervised release, the Court would not have been able to add 9 months to his sentence. Finally, the unreasonable nature of this sentence was only further established because Mr. Echeverria-Benitez returned to this country so that he could work and see his children. ROA.147. The Judge, however, seemed to fashion his sentence based on the circumstances of the Alabama case (involving the car chase and Russian operatives) for which he had already been punished and not the instant offense, as he was required to do by law. *See Gall*, 522 U.S. at 51 (explaining that sentence must be reasonable in light of circumstances of each case). But, again, the consecutive nine months could not have been added if Mr. Echeverria-Benitez had completed his supervised release.

Finally, and in terms of this Court's determination of whether to grant this Petition, Mr. Echeverria-Benitez submits the decision of the Fifth Circuit is contrary to this Court's decision in *Kimbrough v. United States*, 552 U.S. 85 2 (2007). Therefore, this provides additional support for this Court to exercise its supervisory jurisdiction over this matter. In *Kimbrough*, this Court explained:

The statute [referring to 18 U.S.C. § 3553(a)], as modified by *Booker*, contains an overarching provision instructing district courts to "impose a sentence sufficient, but not greater than necessary," to accomplish the goals of sentencing, including "to reflect the seriousness of the offense," "to promote respect for the law," "to provide just punishment for the offense," "to afford adequate deterrence to criminal conduct," and "to protect the public from further crimes of the defendant." 18 U.S.C. § 3553(a) 2000 ed. and Supp. V). The statute further provides that, in determining the appropriate sentence, the court should consider a number of factors, including "the nature and circumstances of the offense," "the history and characteristics of the defendant," "the sentencing range established" by the Guidelines, "any pertinent policy statement" issued by the Sentencing Commission pursuant to its statutory authority, and "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." *Ibid.* In sum, while the statute still requires a court to give respectful consideration to the Guidelines, *see Gall v. United States*, *ante*, 552 U.S., at 45-46, 48-49, *Booker* "permits the court to tailor the sentence in light of other statutory concerns as well," 543 U.S., at 245-46.

Id. at 102. To this end, as this Court explained in *Kimbrough*, the need to avoid "unwarranted sentence disparities" directs the District Courts not to treat the Guidelines as mandatory when imposing sentences. *Id.* at 108.

Mr. Echeverria-Benitez argues this Court should exercise its supervisory powers to prevent the District Courts' failure to avoid unwarranted sentence disparities, such as occurred in this case. While the District Court ran the two sentences consecutively because the Guidelines permit this to be done, the result was an unwarranted sentencing disparity.

As argued to the Fifth Circuit Court of Appeals, the District Court ran the two sentences consecutively despite the argument that the Court was only doing so in a case where the basis of the sentence was that Mr. Echeverria-Benitez reentered the country illegally. In this regard, the Guidelines rule allowing consecutive sentences in such circumstances resulted in a treatment of the Guidelines as mandatory and hence contrary to United States Supreme Court precedent. Accordingly, Mr. Echeverria-Benitez urges this Court to exercise its jurisdiction over this case and allow it to proceed.

II.

The Revocation Sentence

As the Fifth Circuit Court of Appeals has observed, this Court has determined that a revocation sentence cannot be based on a perceived need for retribution. *United States v. Sanchez*, 900 F.3d 678, 683 (5th Cir. 2018) (citing *Tapia v. United States*, 564 U.S. 319, 326 (2011)). Hence, this Court's precedent on retribution is undisputed and, under the circumstances of this case this court should grant this Petition and exercise its supervisory powers.

Mr. Echeverria-Benitez respectfully submits the Fifth Circuit Court of Appeals side stepped the issue when it held "Echeverria-Benitez has not cited any governing authority that supports his argument that consecutive sentences for a new law violation and a resulting revocation indicate reliance on such a factor." (Appendix A, page 3). As argued to the Appellate Court, the District Court's decision to run Mr. Echeverria-Benitez' revocation sentence consecutively with the substantive offense, which is identical to the basis for the revocation, can only be described as a sentence based on a perceived need for

retribution. Indeed, the evidence was sufficient for the Fifth Circuit Court of Appeals to conclude there existed “a dominant retributive focus” because the District Court imposed a within the Guidelines sentence for the revocation but then effectively granted a sentence higher than the maximum statutory sentence for the revocation by running it consecutively with the underlying offense which served as the basis for the revocation. *Sanchez*, 900 F.3d at 684. In other words, this was retribution because the Court ordered that Mr. Echaverria-Benitez serve two separate sentences for a single violation of the law, *i.e.*, reentry into the United States. *See id.* at 684 (declining to infer improper focus on revocation sentencing retribution because District Court “actually mentioned permissible” factors bearing on defendant’s “propensity to commit future crimes and/or threaten public safety” with deadly force). As discussed below, the revocation sentence was additionally retributive because Mr. Echeverria-Benitez did not violate any other law when he entered the United States. *Id.*

The Fifth Circuit Court of Appeals has held that retribution can be inferred from the circumstances of the sentence imposed in a particular case. *Id.* This is because the Guidelines include the Rule that retribution cannot be the dominant factor for a revocation sentence. *Id.* In fact, in light of the punitive nature of this revocation sentence, it can only be inferred as undeniable that the dominant factor for the imposition of the consecutive punishment was retribution. Specifically, stacking a sentence on the same offense that led to the revocation shows that the Judge intended that the revocation sentence reflect the serious nature of the violation of the supervised release, promote respect for the law and provide just punishment for the supervised release violation. Respectfully, this is exactly

what this Court has prohibited when sentencing a defendant on a revocation violation. *See Sanchez*, 900 F.3d at 683 (explaining that retribution can be inferred from revocation sentence based on any of above listed considerations); *see also United States v. Rivera*, 784 F.3d 1012, 1017 (5th Cir. 2015) (explaining that Appellate Court will infer “a dominant retribution focus” based on District Court’s actions in considering any of considerations listed above).

Furthermore, Mr. Echeverria-Benitez is aware the Fifth Circuit has upheld revocation sentences which run consecutively with sentences for the underlying offense leading to the revocation. *See e.g., United States v. Hernandez-Achila*, 700 F. App’x 370 (5th Cir. 2017); *United States v. Cantu-Sandoval*, 668 F. App’x 638 (5th Cir. 2016); *United States v. Watson*, 463 F. App’x 366 (5th Cir. 2012). However, in those circumstances, counsel submits those cases do not squarely stand for a consecutive sentence for two identical violations of the law.

It should be noted the District Court gave no explanation for running the sentences consecutively. Accordingly, this is another basis to conclude that the Court fashioned Mr. Echeverria-Benitez’s revocation sentence based on a perceived need for retribution, which Congress and the Fifth Circuit has disallowed. *See Sanchez*, 900 F.3d at 683 (explaining that “Congress and our caselaw plainly disallow” fashioning defendant’s revocation sentence based on “perceived need for retribution”). Hence, this Court should grant this Petition in light of the conflict with the decision of this Court in *Tapia*, 564 U.S. at 326.

CONCLUSION

For the reasons set forth above, Mr. Echeverria-Benitez 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, ENRIQUE A. ECHEVERRIA-BENITEZ, 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 sentence imposed by the District Court. Mr. Echeverria-Benitez also respectfully requests any further relief to which he may be entitled under the law and in equity.

Respectfully Submitted,



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