

IN THE SUPREME COURT OF THE UNITED STATES

NO. _____

OCTOBER TERM, 2019

RAMON DELGADO, AKA Ramon Delgado-Pina,

Petitioner,

- v -

UNITED STATES OF AMERICA,

Respondent.

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

David J. Zugman
Burcham & Zugman
402 West Broadway, Suite 1130
San Diego, CA 92101
Tel: (619) 699-5931
Email: dzugman@gmail.com
Attorney for Delgado

Questions Presented

First, was it unconstitutionally vague to ask Petitioner in a security clearance questionnaire to name the foreign nationals with whom Petitioner had a close and continuing relationship bonded by affection, influence, common interests and obligations without further defining those terms?

Second, *Witte v. United States*, 515 U.S. 389, 115 S. Ct. 2199 (1995), and *United States v. Watts*, 519 U.S. 148, 117 S. Ct. 633 (1997), allow district courts to punish defendants for uncharged conduct that aggravates the manner of commission of the offense of conviction; do they allow a district court to aggravate the sentence even when the prior criminal conduct has nothing to do with the manner of the commission of the instant offense?

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:

List of Directly Related Proceedings

1. United States District Court for the Southern District of California, *United States v. Delgado*, No. 18cr1005-LAB. The district court entered the judgment and commitment on October 26, 2018. *See* Appendix C.
2. United States Court of Appeals for the Ninth Circuit, *United States v. Delgado*, No. 18-50397. *See* Appendix A. The Ninth Circuit entered judgment on January 9, 2020, and denied a petition for rehearing and suggestion for rehearing en banc, on February 18, 2020. *See* Appendix B.

Table of Contents

Opinion Below	1
Jurisdiction	1
Involved Federal Law	1
Statement of the Case	1
Reasons to Grant the Writ	3
1. The Vagueness Issue	4
2. Punishing for unrelated conduct	6
Conclusion	9
Appendix A: Ninth Circuit's <i>Decision in United States v. Delgado</i>	10
Appendix B: Order Denying Petition for Rehearing	16
Appendix C: Judgment and Commitment	18
Appendix D: Involved Federal Law	23
Certificate of Compliance	27
Proof of Service	28

Table of Authorities

Federal Cases

<i>Connally v. General Construction Company</i> , 269 U.S. 385, 46 Southern Ct. 126 (1926)	4
<i>Gall v. United States</i> , 552 U.S. 38, 128 S. Ct. 586, 169 L. Ed. 2d 445 (2007)	3
<i>Grayned v. City of Rockford</i> , 408 U.S. 104, 92 S. Ct. 2294 (1972).....	4
<i>Witte v. United States</i> , 515 U.S. 389, 115 S. Ct. 2199 (1995)	3, 6
<i>United States v. Allen</i> , 488 F.3d 1244 (10th Cir. 2007)	6, 7
<i>United States v. Delgado</i> , Number 18-50397, 2020 U.S. App. LEXIS 4960 (9th Cir. Feb. 18, 2020).....	1, 3
<i>United States v. Stubbs</i> , 279 F.3d 402 (6th Cir. 2002).....	7
<i>United States v. Washington</i> , 549 F.3d 905 (3d Cir. 2008)	5
<i>United States v. Watts</i> , 519 U.S. 148, 117 S. Ct. 633 (1997)	3, 6

Federal Statutes

18 U.S.C. § 3553	3
18 U.S.C. § 3553(a)	6
18 U.S.C. § 924(c).....	7
18 U.S.C. § 924(o).....	7
18 U.S.C. § 3553	1
28 U.S.C. § 1254(1).....	1

Federal Sentencing Guidelines

U.S.S.G. § 1B1.3(a)(1)(A)	3
---------------------------------	---

IN THE SUPREME COURT OF THE UNITED STATES

NO. _____

OCTOBER TERM, 2019

RAMON DELGADO, AKA Ramon Delgado-Pina,

Petitioner,

- v -

UNITED STATES OF AMERICA,

Respondent.

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

Petitioner, Ramon Delgado, asks for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit entered January 9, 2020.

Opinion Below

The decision of the court of appeals, *United States v. Delgado*, No. 18-50397, 2020 U.S. App. LEXIS 4960 (9th Cir. Feb. 18, 2020), appears at Appendix A to this petition and is unpublished.

Jurisdiction

The Ninth Circuit denied a timely petition for rehearing and suggestion for

rehearing en banc on February 18, 2020.¹ This petition is being filed within 90 days. The Court has jurisdiction under 28 U.S.C. § 1254(1).

Involved Federal Law

United States Constitution, Amendments Five and Six:

Amendment 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 offense 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.

Amendment 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 the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

18 U.S.C. Section 3553 is attached in Appendix D.

Statement of the Case

Ramon Delgado was a Border Patrol Agent tried and convicted of making a false statement by failing to list two foreign nationals with whom Delgado had continuing and

¹ *United States v. Delgado*, No. 18-50397, 2020 U.S. App. LEXIS 4960 (9th Cir. Feb. 18, 2020), attached in Appendix A.

close contact in a relationship bonded by affection and mutual obligation. One of the foreign nationals testified against Delgado at trial (and would eventually receive a substantial assistance reduction to her federal drug trafficking sentence for her efforts) and laid out the government's case showing that Delgado had vacationed with the foreign nationals, was godfather to their child, and was a comadre to their family.

At trial, Delgado's defense was that the question which is the basis of his false statement conviction was unconstitutionally vague as it provided no gauge for deciding which relationships would qualify as one as being both close and continuing, and bonded by affection and obligation such as to require inclusion. The jury convicted Delgado of making a false statement by failing to name these two foreign nationals.

The sentencing guidelines came in at a zero to six month range for this twice-deployed to Fallujah veteran, but the district court granted a government motion for an upward variance because of Delgado's participation in the drug trafficking activities of these foreign nationals. Delgado objected that the drug trafficking activities were both disputed and not relevant conduct to the offense of conviction and cited *United States v. Washington*, 549 F.3d 905, 920 (3d Cir. 2008), for the proposition that a crime and a false statement during the investigation of a crime are not relevant conduct to one another. The district court sidestepped this issue by disregarding the guidelines and sentencing Delgado as a variance.

Delgado argued to the Ninth Circuit that while uncharged and acquitted conduct can be punished, it is because of how it aggravates the target offense; here, the

uncharged conduct was not even relevant conduct to the false statement offense. The district court is simply not allowed to punish Delgado for other crimes that it believes that Delgado committed. The law permits the district court to punish Delgado for the uncharged conduct if, and only if, it relates to the offense of conviction, the false statement.

The Ninth Circuit dodged the issue by finding that the district court sentenced appropriately:

We reject Delgado's argument that the district court abused its discretion by considering his uncharged conduct that Delgado asserts was not "relevant conduct" to his offense. This factor, which a district court uses to determine the Sentencing Guidelines range, *see U.S.S.G. § 1B1.3(a)(1)(A)*, is inapplicable here because the district court did not impose a Guidelines sentence. Delgado's above-Guidelines sentence is substantively reasonable in light of the 18 U.S.C. § 3553 factors and the totality of the circumstances, including the seriousness of Delgado's offense and the need for deterrence. *See Gall v. United States*, 552 U.S. 38, 51, 128 S. Ct. 586, 169 L. Ed. 2d 445 (2007). Thus, the district court did not abuse its discretion in imposing Delgado's sentence.

United States v. Delgado, No. 18-50397, 2020 U.S. App. LEXIS 997, at *4 (9th Cir. Jan. 9, 2020).

Reasons to Grant the Writ

Supreme Court Rule 10 gives the standards for deciding when certiorari is appropriate and focuses on whether the case presents a conflict of law which should be resolved by this Court. There are two principles at issue in this case.

1. The Vagueness Issue

The question asked of Delgado was to list all foreign nationals that in the last seven years that Delgado had a close and continuing contact in a relationship bonded by affection and obligation. Nowhere is Delgado told what makes a relationship close or continuing, or what level of emotional depth must be met for it to be bonded by affection and obligation. This question is subjective on both sides which allows for unfair and discriminatory enforcement. *See Grayned v. City of Rockford*, 408 U.S. 104, 108-09, 92 S. Ct. 2294, 2298-99 (1972) (ambiguous questions allow for arbitrary and discriminatory enforcement and delegate the basic policy question of what is meant by “close and continuing” or “mutual affection and obligation” to the judgement of “policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.”)

Delgado relies on this Court’s decision in *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 393, 46 S. Ct. 126, 128 (1926), which found that

The dividing line between what is lawful and unlawful cannot be left to conjecture. The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. A criminal statute cannot rest upon an uncertain foundation. The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another.

Here, Delgado has been convicted of failing to include these two foreign nationals

as people that he had close or continuing contact with or with whom he shared mutual affection and obligation. It is akin to asking Delgado to list his closest friends or the people that he loves. It is irreducibly subjective.

2. Punishing for unrelated conduct

The crime that Delgado was convicted of – failing to tell the government about his contact with these two foreign nationals – carried with it a zero to six month guideline range and the district court said that if this were the ordinary case, the sentence would have been probation. But because the two foreign nationals were drug traffickers that Delgado had consorted with and aided, the district court believed that a two-year sentence was appropriate.

Delgado objected to the sentence on the grounds that the drug trafficking activities were not relevant conduct to his offense and relied on *United States v. Washington*, 549 F.3d at 920.² The district court did not specifically engage the relevancy objection of Delgado. Instead, the district court said the information gave context to the conviction. Delgado's point, however, was that the district court's

² “The offense of conviction before Judge Dalzell was the violation of § 1001. Counterfeiting was not ‘relevant conduct’ for that offense. The actions taken in the commission of the counterfeiting did not occur ‘during the commission’ of the false statements, or in an ‘attempt [] to avoid detection or responsibility’ for the false statements. *Id.* A defendant’s subsequent acts may result in additional criminal charges, as Washington’s did, but that does not render the original offense relevant conduct for the later charges. Simply because a defendant tries to frustrate the judicial process does not make the crime for which he was originally indicted relevant conduct for future prosecutions. The fact that Washington would not have needed to lie if he had not been arrested for counterfeiting does not make the counterfeiting relevant conduct for the lying.”

sentencing authority for punishing bad acts was limited to whatever harm the false statement offense caused; other bad acts could only be punished insomuch as they were relevant conduct to Delgado's false statement offense.

Delgado's argument is based on *Witte v. United States*, 515 U.S. 389, 115 S. Ct. 2199 (1995), and *United States v. Watts*, 519 U.S. 148, 117 S. Ct. 633 (1997), which allows punishment for uncharged, acquitted, or double-jeopardy barred conduct but only inasmuch as the conduct aggravates the conduct underlying the count of conviction.

The Tenth Circuit has accepted the principle that the only bad acts that a district court has the authority to punish are those which are related to the offense of conviction. *See United States v. Allen*, 488 F.3d 1244 (10th Cir. 2007). Relying on *Watts* and *Witte* as well as 18 U.S.C. § 3553(a)'s definition of the offense, *Allen* holds that the relatedness principle prevents a district court from punishing a defendant on unrelated criminal conduct.

The process by which the United States obtained the two-year sentence on Mr. Delgado is a circumvention of the jury trial process. The United States moved pretrial to *preclude* drug trafficking evidence from being presented to the jury (to which Mr. Delgado objected) but then called witnesses at sentencing to testify about Delgado's participation in drug trafficking. And the district court found that without the drug trafficking allegations, the sentence would have been what the defense had recommended, but that because of the need to deter Delgado and others from the temptations of drug trafficking, the district court imposed two years.

Were Delgado in the 10th Circuit, the *Allen* case would have prevented the district court from aggravating the sentence for unrelated conduct. The Sixth Circuit would also find the punishment of conduct different and separate from that alleged in the indictment. *See United States v. Stubbs*, 279 F.3d 402, 410 (6th Cir. 2002). *Stubbs* finding it plain error to sentence a defendant under Sentencing Guideline Section 2K2.1(c) and sentence a defendant convicted of 18 U.S.C. Section 924(o), machine gun possession, as if he were convicted of using a firearm during a crime of violence under 18 U.S.C. Section 924(c). *Stubbs* reversed for plain error with pointed criticism:

There is no question that our criminal justice system is sorely lacking in the procedural safeguards mandated by the Constitution when a defendant can be charged with one crime and sentenced for another. Inasmuch as an error of this magnitude, an error which runs contrary to the administration of justice and the fundamental constitutional principles of due process and the Sixth Amendment right to notice, substantially and adversely affects the integrity of the judicial process, we are compelled to correct it.

279 F.3d at 410.

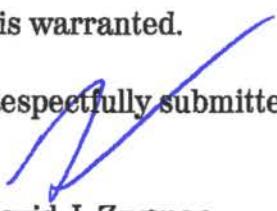
The Fifth Circuit applied this offense-connection requirement to a child pornography sentence and reversed on plain error in *United States v. Randall*, 924 F.3d 790 (5th Cir. 2019), even though the acts were child sex offenses because that alone did not make them relevant conduct to the offense and therefore punishable.

The law should only permit the punishment of Delgado's crimes inasmuch as they relate to his false statement offense. In this case, the false statement offense was not relevant to the drug trafficking activities. The district court should not have had any power to punish Delgado for them.

Conclusion

Delgado's sentence was based on constitutionally vague question and his punishment was based on unrelated bad acts. Delgado's case provides the Court a unique vehicle to clarify the fundamental connection between the offense of conviction and the punishment imposed. A writ of certiorari is warranted.

Respectfully submitted,


David J. Zugman
Burcham & Zugman
402 West Broadway, Suite 1130
San Diego, CA 92101
Tel: (619) 699-5931
Email: dzugman@gmail.com
Attorney for Delgado

Dated: March 11, 2020