

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2019

RAFAEL POSADAS-GONZALEZ
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent,

On Petition for Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit and
the Southern District Court of Texas

PETITION FOR WRIT OF CERTIORARI

WILLIAM L. NEALY, II
2646 South Loop Fwy W, Suite 420
Houston, Texas 77054
Telephone: (713) 228-3878
Facsimile: (713) 228-3889
COUNSEL OF RECORD
FOR PETITIONER
RAFAEL POSADAS-GONZALEZ

QUESTION PRESENTED

Whether the District Court and Court of Appeals misapplied the law under U.S.S.G § 4A1.3 and 18 U.S.C. § +3553 (a) sentencing factors in granting an upward departure against Mr. Posadas-Gonzalez and imposed a procedurally and substantively unreasonable sentence upon Mr. Posadas-Gonzalez?

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PRAAYER

The petitioner, RAFAEL POSADAS-GONZALEZ, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit issued December 16, 2019 and mandate pull date satisfied on January 7, 2020.

OPINIONS BELOW

On December 16, 2019, the United States Court of Appeals for the Fifth Circuit entered its opinion affirming the judgment of conviction and the sentence in this case. United States v. Rafael Posadas-Gonzalez, No. 19-40363 (5th Cir. December 16, 2019) (unpublished). A copy of that opinion is attached as Appendix A.

A copy of the judgment and sentence of the district court is attached as Appendix B. The district court did not issue a written opinion.

JURISDICTION

December 16, 2019, the United States Court of Appeals for the Fifth Circuit entered its opinion affirming the sentence in this case. Mandate pull date was satisfied on January 7, 2020. Jurisdiction of the Court is invoked under Section 1254(1), Title 28, United States Code.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant statutes involved are 8 U.S.C. §§ 1326(a) and 1326 (b), 18 U.S.C. § 3553(a),
and U.S.S.G. § 4A1.3.

STATEMENT OF THE CASE

Course of Proceedings

On October 30, 2018, RAFAEL POSADAS-GONZALEZ, was charged by a one-count indictment. The indictment charged that on or about October 8, 2018, in the Southern District of Texas, Defendant, RAFAEL POSADAS-GONZALEZ an alien previously denied admission, excluded, deported, and removed, was unlawfully present in the United States having been found in Hidalgo County, Texas, without having obtained consent to reapply for admission into the United States from the Attorney General of the United States and Secretary of Homeland Security, in violation of 8 U.S.C §§ 1326(a) and (b)(1). (ROA. 19-40363.14). On November 29, 2018, Mr. Posadas-Gonzalez entered a plea of guilty to the indictment. (ROA. 19-40363.71-72). There was no written plea agreement between Mr. Posadas-Gonzalez and the government, and Mr. Posadas-Gonzalez retained his appellate rights. (ROA. 19-40363.57).

The Probation Department prepared a presentence investigation report (“PSR”) in preparation for sentencing. Based on the report, Mr. Posadas-Gonzalez was assessed a total offense level of 10 and a criminal history category of III. (ROA.19-40363.121). Mr. Posadas-Gonzalez range of punishment according to the U.S.S.G. Sentencing Table was 10 to 16 months imprisonment. (ROA.19-40363.121). Also, Mr. Posadas-Gonzalez specifically objected to a Presentence Investigation Report paragraph that stated Mr. Posadas-Gonzalez criminal history category substantially under-represents the seriousness of his criminal history. (ROA.19-40363.96). Mr. Posadas-Gonzalez objection stated that his criminal history category of III was a sufficient representation of his criminal history based on United States Sentencing Guideline calculations. (ROA.19-40363.96).

On April 18, 2019, Mr. Posadas-Gonzalez was sentenced by the District Court. At the sentencing hearing, Mr. Posadas-Gonzalez's counsel objected to any upward departure under U.S.S.G. § 4A1.3 on the basis that the Sentencing guidelines adequately accounted for Mr. Posadas-Gonzalez criminal history. (ROA.19-40363.78). During the sentencing hearing, the Government acknowledged that under the sentencing guidelines that Mr. Posadas-Gonzalez had a criminal history category of III and a total offense level of 10 and that the guideline range for Mr. Posadas-Gonzalez was 10 to 16 months imprisonment, but contended that Mr. Posadas-Gonzalez criminal history was under-represented by the sentencing guidelines. (ROA.19-40363.79). The Government asked for an upward departure based on Mr. Posadas-Gonzalez prior criminal history, specifically asking for, at least, 30 months' imprisonment or a sentence in the range of 37 to 46 months. (ROA.19-40363.79). Mr. Posadas-Gonzalez's counsel responded at the hearing that Mr. Posadas-Gonzalez criminal history was already calculated within the sentencing guidelines and filed for a downward departure based on cultural assimilation as Mr. Posadas-Gonzalez lived in the United States most of his life, earned his GED in the United States, was married to an American citizen, and has no family in Mexico. (ROA.19-40363.80-82). For these reasons, Mr. Posadas-Gonzalez counsel contended that Mr. Posadas-Gonzalez should received a sentence in the guideline range determined by the Presentence Investigation report of 10 to 16 months imprisonment. (ROA.19-40363.80-82). The District Court denied Mr. Posadas-Gonzalez motion for downward departure and assessed an upward departure. (ROA.19-40363.83-84). The District Court assessed a five-level increase to a sentencing guideline range of 24 to 30 months. (ROA.19-40363.84). Mr. Posadas Gonzalez was sentenced to 30 months imprisonment. (ROA.19-40363.84-85); Also see Appendix B.

Mr. Rafael Posadas-Gonzalez timely filed his notice of appeal on April 19, 2019. (ROA.

19-40363.34). Mr. Posadas-Gonzalez was appointed counsel for that appeal pursuant to the Criminal Justice Act of 1964.¹ On December 16, 2019, the United States Court of Appeals for the Fifth Circuit affirmed Mr. Posadas-Gonzalez.’s conviction and sentence. United States v. Rafael Posadas-Gonzalez, No. 19-40363 (5th Cir. December 16, 2019) (unpublished) and mandate was issued on January 7, 2020.

¹ Criminal Justice Act of 1964, 18 U.S.C. § 3006 A (d) (6) (2000).

STATEMENT OF FACTS

On October 8, 2018, Mr. Rafael Posadas-Gonzalez attempted to enter the United States from Mexico near Pharr, Texas. (ROA.19-40363.102). When questioned, Mr. Posadas-Gonzalez admitted to illegally re-entering the United States. (ROA.19-40363.102).

On October 30, 2018, Mr. Posadas-Gonzalez was indicted on a one-count indictment. (ROA. 19-40363.14). On November 29, 2018, Mr. Posadas-Gonzalez pled guilty to the indictment. (ROA. 19-40363.71-72). The indictment reads as follows

On or about October 8, 2018, in the Southern District of Texas, Defendant, Rafael Posadas-Gonzalez, an alien previously denied admission, excluded, deported, and removed, was unlawfully present in the United States having been found in Hidalgo County, Texas, without having obtained consent to reapply for admission into the United States from the Attorney General of the United States and Secretary of Homeland Security.

In violation of Title 8, United States Code, Sections 1326(a) and (b)(1). (ROA.19-40363.14)

Petitioner timely filed appeal and challenged his guilty plea and sentencing based on whether the Court's sentence was reasonable in assessing an upward departure when applying the 18 U.S.C. Sec. 3553 (a) factors and considering a) the presentence investigation report and sentencing guidelines determined Mr. Posadas-Gonzalez sentencing guideline range to be 10 to 16 months imprisonment based on his criminal history and b) denying Mr. Posadas-Gonzalez a downward departure based on cultural assimilation and that his wife is an American citizen, he earned his GED, and he has no family in Mexico.

The United States Court of Appeal for the Fifth Circuit affirmed his sentence

nevertheless. United States v. Rafael Posadas-Gonzalez, No. 19-40363 (5th Cir. December 16, 2018) (unpublished) and mandate was issued on January 7, 2020.

**BASIS OF FEDERAL JURISDICTION IN THE
UNITED STATES DISTRICT COURT**

This is a prosecution brought by the United States alleging a violation of Title 8 U.S.C §§ 1326(a) and (b)(1).

REASON FOR GRANTING THE WRIT

- I. The Supreme Court should review this matter because the District Court and Court of Appeals misapplied the law under U.S.S.G. § 4A1.3 and 18 U.S.C. § 3553 (a) sentencing factors by assessing an upward departure upon Mr. Posadas-Gonzalez sentence, denying a downward departure of Mr. Posadas-Gonzalez sentence and imposing a procedurally and substantively unreasonable sentence upon Mr. Posadas-Gonzalez**

On October 30, 2018, Mr. Posadas-Gonzalez, was charged by a one-count indictment for illegal re-entry into the United States, in violation of 8 U.S.C. § 1326(a) and (b)(1). (ROA.19-40363.14). On November 29, 2018, RAFAEL POSADAS-GONZALEZ entered a plea of guilty to the indictment. (ROA. 19-40363.71-72).

On April 18, 2019, Mr. Posadas-Gonzalez had a sentencing hearing regarding the government's motion for an upward departure and Mr. Posadas-Gonzalez's motion for downward departure under the Sentencing Guidelines. (ROA.19-40363.76-84). According to the presentence investigation reports recommendation under the sentencing guidelines, Mr. Posadas-Gonzalez was determined to have an offense level of 10 and a Criminal History Category of III with a sentencing guideline range of 10 to 16 months. (ROA.19-40363.121). The government requested an upward departure to the sentencing range of 37 to 46 months imprisonment, contending that Mr. Posadas-Gonzalez criminal history category was under-represented based on his past criminal history. (ROA.19-40363.79-80). In the alternative, the government asked that Mr. Posadas-Gonzalez be sentenced to, at least, 30 months' imprisonment. (ROA.19-40363.80). Mr. Posadas-Gonzalez's counsel argued that the sentencing guidelines properly calculated Mr. Posadas-Gonzalez criminal history and that the government should not be able to arbitrarily increase his sentencing guideline range. Additionally, in anticipation of this argument, Mr. Posadas-Gonzalez's counsel filed a motion for downward

departure that Mr. Posadas-Gonzalez should receive a sentence based on the recommended guideline range of 10 to 16 months imprisonment, based on the 18 U.S.S.C. § 3553(a) factors. (ROA.19-40363.80-81). Counsel's argument was based on Mr. Posadas-Gonzalez's cultural assimilation: 1) he is married to an American citizen, 2) he has no family in Mexico and is an English speaker, 3) and earned his GED while living in the United States. (ROA.19-40363.80-82).

Following the arguments of counsel, the Court ultimately determined that the recommended guideline range was not sufficient to represent Mr. Posadas-Gonzalez criminal history and granted an upward departure under U.S.S.G. § 4A1.3, to an offense level of 15, placing Mr. Posadas-Gonzalez sentencing guideline range from 24-30 months imprisonment. (ROA.19-40363.80-82). The government based this departure on Mr. Posadas-Gonzalez consistent criminal history, and noted that for deterrence and a need to protect the public from future public crimes, the same conclusion would have been reached under 18 U.S.S.C. § 3553(a). (ROA.19-40363.84).

In the present case, the Supreme Court should review this matter because the District Court clearly erred in the application of the law by granting an upward departure under U.S.S.G. § 4A1.3 based on Mr. Posadas-Gonzalez criminal history and misapplied the law as it pertains to the 18 U.S.C. § 3553 (a) factors, a) when considering that Mr. Posadas-Gonzalez criminal history was properly considered under the presentence investigation report and the sentencing guidelines at offense level 10, Criminal history category III and b) when considering Mr. Posadas-Gonzalez cultural assimilation, earning a GED, marriage to an American citizen, English speaker, and lack of family connections in Mexico.

The Court is to consider the following factors in determining a proper sentence: 1) the nature and circumstances of the offense, 2) the history and characteristics of the defendant, 3) the need for the sentence imposed to reflect the seriousness of the offense, promote respect for the law, provide just punishment for the offense, afford adequate deterrence for criminal conduct, and protect the public from further crimes of defendant, 4) the need to provide defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner, 5) the kinds of sentences available, 6) the applicable Sentencing Guideline range, 7) the need to avoid unwarranted disparities among defendants with similar records who have been found guilty of similar conduct; and 8) the need to provide restitution to any victims of the offense. 18 U.S.C. § 3553(a). The Supreme Court should review this matter because the Court failed to consider the nature and circumstances of the offense, the history and characteristics of the offense, the applicable Sentencing Guideline range and because the Court failed to properly apply U.S.S.G § 4A1.3 in determining that Mr. Posadas-Gonzalez should receive an upward departure increasing his sentencing range under the guidelines.

In coming to its decision, the Court does not address the application notes regarding upward departures noted in the sentencing guidelines. The application notes addressing U.S.S.G § 4A1.3 specifically describes the following reasons for “upward departures” from the defendant’s criminal history category may be warranted: 1) a previous foreign sentence for a serious offense, 2) a prior consolidated sentence of ten years for a series of assaults, 3) fraudulent misconduct on a large scale or 4) commission of the instant offense while on bail for another serious offense. U.S.S.G § 4A1.3 Application Note 2(A). The District Court described its reasoning for applying an upward departure to Mr. Posadas-Gonzalez sentence was a consistent criminal history over a long period of time and some of his criminal history being too old to warrant criminal history

points. However, the application notes in the sentencing guidelines are clear, and none of the reasons noted in the United States Sentencing Guidelines justify an upward departure apply in Mr. Posadas-Gonzalez case. The Fifth Circuit notes a prior conviction for possession of a switch blade, DUI, and possession of various controlled substances. However, most of these crimes noted by the Court occurred in the 1990's or were dismissed. Moreover, if the sentencing guidelines determined it was not necessary to consider some of Mr. Posadas-Gonzalez criminal history because it was too old or was dismissed, then there is probably a good reason not to consider certain criminal history.

Likewise, the Court substantially increased Mr. Posadas-Gonzalez sentencing guideline range. Mr. Posadas-Gonzalez range of imprisonment was initially 10 to 16 months; however, following the Court granting an upward departure, it increased to a punishment range of 24 to 30 months. Ultimately, Mr. Posadas Gonzalez was sentenced to 30 months imprisonment by the Court. When the judge elects to give a non-Guideline sentence, he should carefully articulate the reasons he concluded that the sentence he has selected is appropriate for that Defendant. *United States v. Mares*, 402 F.3d 511,519 (5th Cir.2005). If [a judge] decides that an outside-Guideline sentence is warranted, he must consider the extent of deviation and ensure that the justification is sufficiently compelling to support the degree of the variance. We find it uncontroversial that a major departure should be supported by a more significant justification than a minor one. *Gall v. United States*, 552 U.S. 38,50 (2007). A specific explanation should have been given to explain how U.S.S.G § 4A1.3 applied to Mr. Posadas-Gonzalez upward departure. Accordingly, Mr. Posadas-Gonzalez should have received prison sentence in the 10 to 16 month range as prescribed by the United States Sentencing Guidelines and the Supreme Court should review this misapplication of the law.

The District Court erred and the Fifth Circuit Court of Appeals erred in affirming this decision in misapplying the 18 U.S.C. § 3553 (a) factors regarding the need for adequate deterrence and to reflect the seriousness of the crime. Presumably, there was no reason to assess an upward departure upon Mr. Posadas-Gonzalez criminal history because the sentencing guidelines already considered his criminal history in determining his prison term of 10 to 16 months.

When a sentence is within the sentencing advisory guidelines, it is presumed to be reasonable. Rita v. United States, 551 U.S. 338,346 (2007). While sentences within the Guidelines require “little explanation,” more is required if the parties present legitimate reasons to depart from the Guidelines: “Where the defendant or prosecutor presents nonfrivolous reasons for imposing a different sentence... the judge will normally go further and explain why he has rejected those arguments.” Rita, 127 S.Ct. at 2468. The district court’s explanation “allows for meaningful appellate review and... promotes the perception of fair sentencing.” Gall, 128 S. Ct. at 597. To show that an error affects a Defendant’s substantial rights, the defendant must show that it affected the outcome in district court: “To meet this standard the proponent of the error must demonstrate a probability ‘sufficient to undermine confidence in the outcome.’” United States v. Mondragon-Santiago, 564 F.3d 357, 364 (5th Cir. 2009). In the present case, Mr. Posadas-Gonzalez substantive rights were affected because the prison sentence that the Court determined was almost twice the maximum sentencing range that Mr. Posadas-Gonzalez would have received under the sentencing guidelines. Also, the Court describes protection of the public and deterrence as reasons for Mr. Posadas-Gonzalez upward departure; however, Mr. Posadas-Gonzalez is presumably being deported, so there is no necessity to protect the public from Mr. Posadas-Gonzalez. For these reasons, the Supreme Court should review the District Court’s

misapplication of the law and the United States Fifth Circuit's misapplication of the law in affirming the District Court's decision.

CONCLUSION

For these reasons, the petitioner, RAFAEL POSADAS-GONZALEZ, respectfully prays that this Court grant his application for a Writ of Certiorari.

Dated this ____th day of March, 2020.

Respectfully submitted,

s/ William L. Nealy, II
WILLIAM L. NEALY, II
Attorney for Petitioner,
RAFAEL POSADAS-GONZALEZ
2646 South Loop Freeway West, Suite 420
Houston, Texas 77054
Telephone: (713) 228-3878
Facsimile: (713) 228-3889

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CERTIFICATE OF SERVICE

I, WILLIAM L. NEALY, II, appointed under the Criminal Justice Act, certify that, pursuant to Rule 29.5, I served the preceding Petition for Writ of Certiorari and the accompanying Motion for Leave to Proceed in Forma Pauperis on counsel for the Respondent by enclosing a copy of these documents in an envelope, to be delivered at defense counsel's expense, by Fedex, and addressed to:

The Honorable Noel Francisco
Solicitor General of the United States
Room 5616, Department of Justice
10th and Pennsylvania Ave., N.W.
Washington, D.C. 20530

today, March ____th, 2020, and further certifies that all parties required to be served have been served.

s/ William L. Nealy, II
WILLIAM L. NEALY, II

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the petition for a writ of certiorari contains 3,210 words, excluding the parts of the petition that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Dated this ____th day of March, 2020.

s/ William L. Nealy, II
William L. Nealy, II