No. _____

In the Supreme Court of the United States

October Term, 2019

JESUS HERNANDEZ-MEDRANO, *PETITIONER*,

v.

UNITED STATES OF AMERICA

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

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QUESTION PRESENTED FOR REVIEW

Whether a presumption of reasonableness on appeal does not apply to a sentence produced by the illegal reentry guideline, §2L1.2, because that guideline lacks an empirical basis.

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Petitioner Jesus Hernandez-Medrano 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 February 27, 2020.

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.

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OPINION BELOW

A copy of the opinion of the court of appeals, *United States v. Hernandez-Medrano*, Nos. 19-50616 & 19-50617, unpub. op. (5th Cir. Feb. 27, 2020), 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 February 27, 2020. This petition is filed within 150 days after entry of judgment. *See* Sup. Ct. R. 13.1; Miscellaneous Order, 589 U.S. __ (Mar. 19, 2020). 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 GUIDELINE INVOLVED

The 2018 version of Sentencing Guideline §2L1.2 is attached to this petition as Appendix C.

STATEMENT

Jesus Hernandez-Medrano is a 32-year-old Mexican citizen who was brought to the United States when he was four years old. His aunt, whom he loves like a mother, raised him and currently lives in Texas and is in poor health. Hernandez attended school in the United States through ninth grade and then began working, primarily in the oil fields, but he also owned his own remodeling business. And he began a family. He had three children with his then common-law wife.

In 2009, when he was 22 years old, he was arrested after a traffic stop and removed to Mexico. His children were then infants and toddlers, living in the United States with their mother. He tried three times to come back to them and the country where he had lived most of his life, but he was ultimately caught, charged with criminal offenses, and removed each time.

The first illegal reentry conviction resulted in a probationary sentence but was revoked to nine months' incarceration when he crossed into the United States again. He was sentenced to 12 months' incarceration for the second illegal reentry conviction, but his supervised release was later revoked to 15 months' imprisonment. The third illegal reentry was prosecuted as a drug offense. He was caught with five others near the U.S.-Mexico border carrying backpacks of marijuana. His intent was not to traffic drugs, but he "had to bring something" to cross the border and be able to see his children. The total

weight between the six backpacks triggered the mandatory minimum sentence of 60 months' imprisonment, which is what he received. *See* 21 U.S.C. § 841(b)(1)(B)(vii).

After serving his time, Hernandez was removed to Mexico in 2017. He found work in construction and began to build a life there. He had resigned himself to living in Mexico and being a long-distance father. But then Hernandez learned that his oldest daughter, then 12 years old, was struggling with depression to the point of cutting herself. He tried to help her from Mexico, but her mother and new stepfather restricted communication and visits. Even though his girlfriend had just given birth to his daughter in Mexico, he came to the United States to try to convince the mother of his older children to allow them to visit him in Mexico, as they had done before.

In December 2018, U.S. Border Patrol agents caught Hernandez near Marfa, Texas, and he was indicted for illegally reentering the United States. Hernandez pleaded guilty to the indictment.

The presentence report calculated Hernandez's advisory Guidelines range as 57 to 71 months' imprisonment based on a total offense level of 19 and criminal history category V. His drug conviction resulted in a 10-level enhancement as well as five criminal history points. *See* U.S.S.G. §2L1.2(b)(3)(A); §4A1.1(a), (d). His two illegal

reentry convictions increased his offense level by four levels and resulted in five criminal history points. *See* U.S.S.G. §2L1.2(b)(1)(A); §4A1.1(a), (b).

At the sentencing hearing, Hernandez explained that all his attempts to return to the United States were to be with his kids. He described the powerlessness he felt being in Mexico while his oldest daughter struggled through depression without his physical presence. He tried to tell the court what his children last told him before he made the decision to come to the United States, but the court cut him off. The court acknowledged that Hernandez came to the United States because his kids want him here. But the court continued: "I can't do anything about that. And that doesn't have anything to do with what I have to do today to decide what to do with you."

The district court described Hernandez as "a U.S. citizen without the citizenship" and doubted whether this illegal reentry would be Hernandez's last. Hernandez explained that he is tired of the illegal reentries and years in jail. He added that he needs to get back to his youngest child in Mexico because "I don't want the same story to repeat itself. I don't want her to grow up without her dad as well." He described his commitment to making life work in Mexico with his U.S. citizen children visiting him there. "I've seen other people make

it in Mexico. So if they can do it, I know I can do it too. I just have to try more harder and just give it that extra step."

The district court sentenced Hernandez to 66 months' imprisonment and three years' supervised release. The court also revoked the term of supervised release imposed in the drug case and sentenced Hernandez to eight months' imprisonment consecutive to the illegal-reentry sentence. Hernandez objected to both sentences as greater than necessary under 18 U.S.C. § 3553(a).

On appeal, Hernandez argued that the 66-month sentence was substantively unreasonable. The court of appeals affirmed his sentence. App. A. In holding that the sentence was not unreasonable, it applied the circuit's rule that within-Guidelines sentences are presumptively reasonable.

REASONS FOR GRANTING THE WRIT

The Court should grant certiorari to determine whether the illegal reentry guideline deserves an appellate presumption of reasonableness.

Hernandez asks this Court to grant certiorari to determine whether, in light of the Court's opinions in *Gall v. United States*, 552 U.S. 38 (2007), and *Kimbrough v. United States*, 552 U.S. 85 (2007), the illegal reentry guideline is entitled to a presumption of reasonableness on appeal.

Contrary to the Fifth Circuit's position, a guideline that is not empirically based is not entitled to an appellate presumption of reasonableness. The illegal reentry guideline, U.S.S.G. §2L1.2, under which Hernandez was sentenced, was not based on empirical data or experience and does not satisfy the sentencing goals set forth by Congress in 18 U.S.C. § 3553(a).

A. A guideline's empirical basis legitimizes the presumption of reasonableness for within-Guidelines sentences.

This Court has held that an appellate presumption of reasonableness may be applied to a within-guideline sentence. *Rita v. United States*, 551 U.S. 338 (2007). The approval of an appellate presumption, however, is derived from the "empirical data and national experience" upon which the Sentencing Commission typically promulgates guidelines. *Kimbrough*, 552 U.S. at 109.

The Commission's "empirical" approach was a result of a compromise intended to ensure that the Guidelines effectuated Congress's sentencing goals. Congress had directed the Commission to base its sentencing ranges on the purposes identified in 18 U.S.C. § 3553(a)(2). *See* 28 U.S.C. § 991(b). When the members of the Commission could not agree on which of those purposes should predominate, they agreed to use past practice and experience as a proxy for the purposes, and this Court has since accepted that proxy. *See Rita*, 551 U.S. at 349–50; *see also* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 17–18 (1988); U.S.S.G. §1A1.1, comment. (n.3), p.s.

Certain guidelines, however, do not account for past practice and experience, and the Court has suggested that no presumption should apply to these guidelines. *Kimbrough*, 552 U.S. at 109–10. This is so because, if the Commission did not rely on empirical data—its proxy for § 3553(a)(2) purposes—there is no basis for concluding that a guideline represents a "rough approximation" of sentences that would achieve Congress's sentencing goals. *Rita*, 551 U.S. at 349–50. The Fifth Circuit has reiterated that, in re-viewing the substantive reasonableness of within-guideline sentences, it will apply the presumption of reasonableness whether the guidelines are "[e]mpirically

based or not." *United States v. Miller*, 665 F.3d 114, 121 (5th Cir. 2011) (noting disagreement with Second Circuit in approach regarding consideration of empirical basis of child pornography guideline).

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. 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. *Id.* 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.

B. Because the illegal reentry guideline is not empirically based, appellate courts should not presume a sentence within the Guidelines range to be reasonable.

The Sentencing Commission has acknowledged that, for "immigration" offenses, it has "established guideline ranges that were significantly more severe than past practice."[1] The Commission recently amended §2L1.2, but it did not base the new §2L1.2 specific offense characteristics on empirical research that indicates such enhancements better reflect sentencing practices or achieve § 3553(a) sentencing goals. *See* U.S.S.G. App. C. amend. 802 (noting the percentage of defendants with prior illegal reentry convictions and determining, without reasoning, that such convictions are "appropriately accounted for in a separate enhancement" simply because they entered illegally more than once).

Nor did the Sentencing Commission fix the problematic way guideline §2L1.2 treats a defendant's criminal history. A defendant's prior record is ordinarily accounted for by his criminal history score, calculated under Chapter 4 of the Guidelines Manual. *See United States v. Galvez-Barrios*, 355 F. Supp. 2d 958, 961 (E.D. Wis. 2005)

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[1] 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 47 (Nov. 2004), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/15-year-study/15_year_study_full.pdf.

(reviewing history and operation of guideline §2L1.2). Chapter 2 typically establishes offense levels based on a defendant's offense conduct, not his prior criminal record. *See id.* The guideline for unlawful reentry, however, gives heavy weight to a defendant's prior convictions in setting the offense level, effectively double-counting the defendant's criminal record in establishing his guideline range.[2] *Id.* at 960 (imposing below-guideline sentence when §2L1.2 double-counted prior offense); *see also United States v. Zapata-Trevino*, 378 F. Supp. 2d 1321, 1324, 1326–28 (D.N.M. 2005) (same); *United States v. Santos*, 406 F. Supp. 2d 320, 327–28 (S.D.N.Y. 2005) (same).

By deciding to double-count a defendant's criminal record—instead of tying the offense level for illegal reentry to empirical evidence—the Sentencing Commission created guideline sentence ranges for immigration offenses that are at odds with Congress's goals of proportionality and uniformity. *See* 18 U.S.C. § 3553(a)(2)(A), (a)(6). Further, the "specific offense characteristics" prescribed in §2L1.2(b) contravene the statutory mandate for the Sentencing Commission to create *categories of offenses* and guidelines based on the

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[2] This is true both for the former and current guideline §2L1.2. *See* U.S.S.G. §2L1.2(b) (Nov. 2018) (enhancing total offense level based on prior illegal entry and reentry convictions and the *length of sentences* imposed for prior criminal convictions); U.S.S.G. §2L1.2(b) (Nov. 2015) (enhancing total offense level based on the *type* of prior criminal convictions).

grade, circumstances, and the harm of the offense and then *categories of defendants* taking into consideration criminal history. *Compare* 28 U.S.C. § 994(c) *with* § 994(d). By enhancing the offense level based on past criminal conduct, §2L1.2(b) conflates the two distinct categories, increasing the offense level based on the characteristic of a defendant, not the characteristic of the offense. *See Zapata-Trevino*, 378 F. Supp. 2d at 1328; *Santos*, 406 F. Supp. 2d at 327; *Galvez-Barrios*, 355 F. Supp. 2d at 963.

The Fifth Circuit's application of an appellate presumption of reasonableness in Hernandez's case is at odds with this Court's opinions in *Rita* and *Kimbrough*. *See United States v. Mondragon-Santiago*, 564 F.3d 357, 366–67 (5th Cir. 2009) (holding that *Rita*'s rationale for permitting presumption of reasonableness holds true even when guideline lacks empirical foundation, and that *Kimbrough* "does not require discarding the presumption for sentences based on non-empirically-grounded Guidelines"). Certiorari should be granted to address this important federal question and correct the Fifth Circuit's flawed presumption of reasonableness standard.

C. Hernandez's case is an appropriate vehicle to address this important issue.

Illegal reentry continues to be the most prosecuted federal felony.[3] In fiscal year 2019, over 22,000 people were sentenced for illegal reentry.[4] Nearly half of those sentencings occurred in the Fifth Circuit, where a within-Guidelines sentence is presumed reasonable regardless of the empirical basis for guideline §2L1.2.[5] And 75% of illegal reentry defendants were sentenced within the Guidelines range.[6]

In Hernandez's case, the outcome on appeal would have been different without this presumption. The illegal reentry guideline produced a sentence range that overstated the seriousness of Hernandez's unlawful reentry offense and his dangerousness, and failed to provide just punishment for that offense, thereby undermining respect for the law. *See* 18 U.S.C. § 3553(a)(1), (a)(2)(A). His two illegal reentry convictions increased his offense level by four levels and resulted in five criminal history points. *see* §2L1.2(b)(1)(A); §4A1.1(a),

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[3] TRAC-Immigration, Immigration Prosecutions for 2019 (Oct. 31, 2019), https://tracfed.syr.edu/results/9x705dbb47e5a0.html.

[4] U.S. Sentencing Comm'n, Quick Facts: Illegal Reentry Offenses (Fiscal Year 2019) 1, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Illegal_Reentry_FY19.pdf.

[5] *Id.* at 2.

[6] *Id.*

(b). And his drug conviction resulted in a 10-level enhancement as well as five criminal history points. *See* §2L1.2(b)(3)(A); §4A1.1(a), (d).

The Sentencing Commission argues that sentence length is a reasonable proxy for the seriousness of a prior offense, but it has failed to support the §2L1.2 break points for the sentence lengths with data.[7] The 10-level enhancement, driven by the prosecutorial decision to indict Hernandez with an offense carrying a mandatory minimum based on the aggregate amount of marijuana carried by six individuals seeking to enter the United States, overstated the seriousness of Hernandez's illegal-reentry offense and dangerousness. At that time, he "had to bring something" to cross the border. His intent was not to traffic drugs but to see his children. Had the Government charged Hernandez differently, he would have been eligible for a reduction pursuant to 18 U.S.C. § 3582(c)(2) after guideline §2D1.2 was amended and may have received a sentence triggering only an eight-level enhancement for this illegal reentry. *See* U.S.S.G. §2L1.2(b)(3)(B).

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[7] *Written Statement of Marjorie Meyers, Federal Public Defender for the Southern District of Texas, on Behalf of the Federal Public and Community Defenders Before the U.S. Sentencing Commission Public Hearing on Immigration* 23 (Mar. 16, 2016), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20160316/20160316_Meyers.pdf

The district court should have accounted for this overrepresentation by imposing a sentence below the Guidelines range. Instead, the court exacerbated it by imposing a sentence near the top of the Guidelines range despite circumstances that made such a sentence unreasonable. Hernandez will now serve a longer sentence for illegally reentering without drugs than he did when he entered carrying a marijuana-filled backpack.

The sentence was also unreasonable because it failed to account for the mitigating circumstances of Hernandez's reentry.[8] *See* 18 U.S.C. § 3553(a)(1). Hernandez came to the United States to check on his daughter, convince his children's mother to let them visit him in Mexico, and return to his girlfriend and baby in Mexico. But the court told Hernandez his reason for coming "doesn't have anything to do with what I have to do today to decide what to do with you." The court also failed to credit Hernandez's intention to return to Mexico even if he had not been caught, and his commitment to staying in Mexico upon his release. At the time of his prior reentries, Hernandez did not

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[8] *See Galvez-Barrios*, 355 F. Supp. 2d at 960 (reentry for positive purpose mitigates seriousness of 1326 offense); *see also* 1 Wayne R. Lafave, SUBSTANTIVE CRIMINAL LAW 5.3(b) (2d Ed. 2003) (motives are most relevant when the trial judge sets the defendant's sentence, and it is not uncommon for a defendant to receive a minimum sentence because he was acting with good motives, or a rather high sentence because of his bad motives).

have family in Mexico to incentivize his return. Now he does. He does not want "the same story to repeat itself" and his infant daughter "to grow up without her dad as well." He plans to be there during her childhood, after his release. Such a long sentence is unnecessary to protect the American public from future crimes by him. *See* 18 U.S.C. § 3553(a)(2)(C).

Despite these important factors counseling a lesser sentence, the district court sentenced Hernandez near the top of the advisory Guidelines range. Had the court of appeals reviewed Hernandez's sentence for reasonableness, rather than with a presumption of reasonableness, the result would have been different.

CONCLUSION

FOR THESE REASONS, Hernandez asks that this Honorable Court grant a writ of certiorari.

Respectfully submitted.

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