

NO. _____

**IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2020**

**LUIS TORRES-MARQUEZ,
PETITIONER,**

-vs-

**UNITED STATES OF AMERICA,
RESPONDENT.**

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

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QUESTION PRESENTED FOR REVIEW

For purposes of applying the abuse of discretion standard and presumption of reasonableness on appellate review of a within guidelines sentence, does *Gall v. United States*¹ mandate reviewing courts to first determine whether the sentencing court *meaningfully* exercised its discretion in applying the guidelines, instead of mechanically going through the process?

¹ *Gall v. United States*, 552 U.S. 38 (2007).

PARTIES TO THE PROCEEDING

Petitioner Luis Torres-Marquez was the defendant in the district court proceedings and petitioner in the court of appeal proceedings on direct appeal. Respondent United States of America was the plaintiff in the district court proceedings and appellee in the court of appeals proceedings on direct appeal.

RELATED CASES

United States of America v. Luis Torres-Marquez
19-50234; D.C. No. 19CR00877-BAS

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

Petitioner, Luis Torres-Marquez, respectfully prays that a *Writ of Certiorari* issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on May 13, 2020.

**I.
OPINION BELOW**

On May 13, 2020, the Court of Appeals for the Ninth Circuit issued its Memorandum opinion affirming the district court's sentence and judgment of conviction.

The Ninth Circuit found that the district court's failure to *meaningfully* exercise its discretion, to use nationality as a factor, and to fail to faithfully follow the express dictates of 18 U.S.C. Section 3553(a) was, nevertheless, proper. The

lower court's ruling was entered after it morphed the actual fundamental issue presented by Petitioner and held that the resulting aggravated sentence was "substantively reasonable in light of the 18 U.S.C. § 3553(a) sentencing factors and the totality of the circumstances...." *Memorandum Opinion*, p. 2. A copy of the Memorandum Opinion is attached as App. 1.

On June 4, 2020, the Ninth Circuit issued its formal mandate. App. 3.

II. JURISDICTION

On May 13, 2020, the Ninth Circuit entered its memorandum opinion affirming the district court's judgment, denying Torres-Marquez's constitutional challenges. On June 4, 2020, the Ninth Circuit issued its formal mandate. Jurisdiction of this Court is invoked under Title 28 U.S.C. §§ 1651(a) and 1254(1).

III. CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE

United States Constitution, Fifth Amendment:

"No person shall ... be deprived of life, liberty or property without due process of law...."

IV. STATEMENT OF THE CASE

The general facts and process of this routine 8 U.S.C. §1326(a)(b) – unlawfully being found in the U.S. without permission after being deported – case are straightforward. Once Torres-Marquez was arraigned and was appointed counsel, he quickly accepted responsibility and pleaded guilty without a plea agreement. He had suffered *dated* prior convictions for crimes other than those related to his illegal entry into the U.S. and prior deportations.

But at sentencing, the process applied by the district court was visibly mechanistic, applying every possible *advisory* enhancement, and then imposing a sentence of 77 months in prison. And along the way, the district court revealingly showed that it considered a factor that is impermissible at sentencing – Torres-Marquez’s foreign status as a “bad guest” in the U.S.²

² *Pepper v. United States*, 562 U.S. 476, 489 n. 8 (2011), where this Court noted – “Of course, sentencing courts’ discretion under § 3661 is subject to constitutional constraints. See, e.g., *United States v. Leung*, 40 F.3d 577, 586 (CA2 1994) (“*A defendant’s race or nationality may play no adverse role in the administration of justice, including at sentencing*”)” Emphasis added.

a. Torres-Marquez's Framing of the Sentencing Issue and His Sentencing Request.

Noting the non-aggravating nature of the offense for which he was to be sentenced, Torres-Marquez emphasized in his Sentencing Memorandum the following:

Mr. Torres-Marquez's motive for reoffending was expressed by him in the following manner:

TORRES stated that he was offered a job by a man in Mexicali to work as a tree trimmer in San Bernardino, California, for \$30 per hour. TORRES accepted the offer and was traveling to the U.S. to that end. TORRES expressed remorse for his decision to illegally enter the U.S. and asks the Court to "show (him) consideration" so he can quickly return to his family in Tijuana, Mexico. TORRES also stated he will not illegally enter the U.S. in the future.

PSR, page 3. In contrast to the \$30.00 per hour lure waiting for him here in the U.S., Mr. Torres-Marquez was at that time earning only \$50.00 dollars *per week* working in Mexico. He candidly asked the undersigned to explain to the Court that it was next to impossible for him to have resisted such promised wages in the U.S. at a time when he saw his children desperately in need of the basics to eat and also for even the minimal of school supplies.

Sentencing Memorandum, Page 2, lines 17-27; page 3, lines 1-4. [E.R. 19-20]³

³ "E.R." refers to the record provided to the Ninth Circuit court.

Importantly, Torres-Marquez expanded on his motive for returning to the U.S. illegally:

He adds that, though it had been only a short time since his last release, Mr. Torres-Marquez had spent that time with his wife, Guillermina, and with his three children - Juan Carlos, Alfredo, and Ulises. And even though he found work immediately as a horse trainer in Mexico earning \$50.00 per week, Mr. Torres-Marquez still found it hard to provide his children the basics and with the uniforms and basic school supplies they needed. Knowing one job would not be enough to provide for his family; he took a second at the Panasonic factory in Tijuana earning \$50.00 per week. But even that was not enough.

Id., at page 3, lines 4-13.

Torres-Marquez concludes his statement regarding motive as follows:

Mr. Torres-Marquez said it was heartbreaking not to have the means to provide his children the essentials. He also stated that it was demeaning for him to ask his siblings for money in order to have enough to afford his rent and utility payments.

He asks the Court to see that it is not disrespect for the law nor that he has not “learned his lesson” for which he reoffends. It is also not that he is thumbing his nose up at the U.S. judicial system. Those motivators for him are political luxuries he can’t entertain. He reoffends out of sheer economic necessity.

Id. at lines 13-21. He went on to note at pages 3-4 of this Sentencing Memorandum that the Probation Officer had documented in the PSR how:

In speaking with TORRES' wife, Guillermina Martinez, she corroborated the information provided by TORRES in the presentence interview. She also noted that TORRES was the sole provider for their household, and since his arrest, she has taken on two jobs to provide for their family. She also noted that their children miss TORRES, and she described him as a "great father" and a "responsible man."

Significantly, the Government offered no facts to dispute that Mr. Torres-Marquez was again trying to enter the United States unlawfully out of *financial desperation*.

At the sentencing hearing, Mr. Torres-Marquez then addressed the Court and the following colloquy ensued:

THE DEFENDANT: First of all, I want to apologize for being here in this country because I shouldn't be here. And secondly, I don't want to return here. I want to pay my dues here, and I want to return because my children are the ones suffering right now.

THE COURT: So, Mr. Torres, I count you spent 21 months in custody, 24 months in custody, 41 months in custody, and each time you turn around and came right back.

Tell me, what exactly are you doing for your family sitting in custody? You can't help them while you're sitting in custody, and you've spent the past ten years in custody, really, if you count the state court convictions.

THE DEFENDANT: That's right. I want to start a new life, and that's why I don't want to spend any more time in jail.

THE COURT: Mr. Torres, *I don't believe you. I don't believe that you won't come back again because this is -*

- surely, you've heard this speech before. You've got 24 deportations.

Id. at page 5 of Transcript of Sentencing Hearing, emphasis added. [E.R. 30]

Imposing a 77-month sentence, the court articulated the following reasons:

THE COURT: Mr. Torres-Marquez, your base offense level is an 8. I will *increase that four points* under 2L1.2(b)(1)(A). I'll *increase that eight points* under (b)(2)(B), and *I'll increase that four points* under (b)(3)(D).

That all has to do *with your prior record* and all of your prior convictions.

I do find you've accepted responsibility for what you did, so I will deduct three points, but your Criminal History Category is a VI. That makes your guideline range 77 to 96 months.

It doesn't give me great pleasure to impose this sentence, Mr. Torres-Marquez, but I think the low end or 77 months is the only sentence that is sufficient in this case *given your criminal record.*

It would be one thing if you just returned to the United States repeatedly illegally for financial reasons, but before we started this yo-yo of sending you back and getting convicted for illegally entering the United States, *you were a bad guest to begin with.* You have numerous state court convictions for theft and drugs, and I do find that a 77-month sentence is sufficient but not greater than necessary in this case, and I will impose three years of supervised release.

You cannot return to the United States illegally unless you

want to end up spending the rest of your life in custody. The only condition of supervised release will be that you not return to the United States illegally.

Id. at pp 6-7, emphasis added. [E.R. 31-32] The Court did not acknowledge that Torres-Marquez had indeed offered reason for having reentered the United States illegally - because of “financial reasons.” And then, the district court gave total weight to Torres-Marquez’s dated criminal convictions, and no weight at all to the other § 3553(a) factors provided by him, and those provided by the Probation Officer in the Presentence Report. This case is a classic example of how the Guidelines, that are, by mandate and law only “advisory,” but which in practice become mandatory and determinative when applied in the front lines of “routine” sentencing.⁴

V. **REASON FOR ALLOWANCE OF THE WRIT**

In *Gall v. United States*, 552 U.S. 38, 51 (2007) this Court established the procedure sentencing courts must *reasonably* implement when they *meaningfully* exercise their discretion in determining the appropriate punishment under the

⁴ See, Retired U.S. District Judge Nancy Gertner, *Judicial Discretion in Federal Sentencing Real or Imagined*.
http://www.nancygertner.com/sites/default/files/Judicial%20Discretion%20in%20Federal%20Sentencing%20--%20Real%20of%20Imagined%3F%20FSR2803_03_Gertner.pdf

advisory Guidelines and *meaningfully* consider the 18 U.S.C. Section 3553 *mandatory* factors. There, this Court specifically noted:

Regardless of whether the sentence imposed is inside or outside the Guidelines range, the appellate court must review the sentence under an abuse-of-discretion standard. ***It must first*** ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, ***treating the Guidelines as mandatory, failing to consider the § 3553(a) factors***, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence--including an explanation for any deviation from the Guidelines range.

Emphasis added. This Court needs to provide more guidance to district and appellate courts that mechanistically apply the “advisory” Guidelines. On the front lines of quotidian sentencings in federal courts around the nation, it has become palpable that the Guidelines are applied deterministically to *a priori* determine the final outcome of a sentence, rendering the 3553(a) factors simply a formulistic litany.⁵

Torres-Marquez brings to the Court a palpable failure by the appellate court to even notice that the district court never really applied at sentencing the *well-*

⁵ Mark W. Bennett, Confronting Cognitive “Anchoring Effect” and “Blind Spot” Biases In Federal Sentencing: a Modest Solution For Reforming a Fundamental Flaw, 104 J. Crim. L. & Criminology 489 (2014). <https://scholarlycommons.law.northwestern.edu/jclc/vol104/iss3/1> ;

reasoned judgment required by § 3553 and by this Court. The appellate court ignored the district court's *irrationally* rejecting a central defense mitigation factor and expressly contradicted itself. Thus, the 77-month "within-guidelines sentence" for a routine Title 8 U.S.C. Section 1326 was imposed in an irrational manner, violating the well-reasoned judgment required by § 3553. *Gall* at 59. This case also illustrates how, even after district courts have been instructed for years to apply the advisory U.S. Sentencing Guidelines as the first step in the process, the reality is that the Guidelines are still routinely applied mechanistically to determine at the outset the final sentence.

In *Gall*, this Court ended its reversal of the reviewing court there by noting: "On abuse-of-discretion review, the Court of Appeals should have given due deference to the District Court's *reasoned and reasonable decision* that the § 3553(a) factors, *on the whole*, justified the sentence. Accordingly, the judgment of the Court of Appeals is reversed." *Id.* at 59, emphasis added.

VI.

For Purposes Of Applying The Abuse Of Discretion Standard And Presumption Of Reasonableness On Appellate Review Of A Within Guidelines Sentence, *Gall V. United States* Mandates Reviewing Courts To First Determine Whether The Sentencing Court *Meaningfully* Exercised Its Discretion In Applying The Guidelines, Instead Of Mechanistically Going Through The Process.

As the district court here went through the mechanics of identifying the applicable *advisory* Guidelines, the court said this: "***It would be one thing if you just returned to the United States repeated illegally for financial reasons***, but before we started this yo-yo of sending you back and getting convicted for illegally entering the United States, ***you were a bad guest to begin with.***" Emphasis added. *See, United States v. Odachyan, 749 F.3d 798, 804-05 (9th Cir. 2014)* (Reinhardt, J., concurring) (explaining that a district court judge's statement indicating the judge considered the defendant to be part of a group of immigrants that "prey on this government's institutions" was adverse to § 3553(a)'s requirement of an individualized determination at sentencing).

Expressly, the district court here had already identified that Torres-Marquez, a Mexican national, was "a bad guest" in the United States.

The district court then proceeded mechanistically to apply each and every enhancement available in this transparent manner:

THE COURT: Mr. Torres-Marquez, your base offense level is an 8. I will ***increase that four points*** under 2L1.2(b)(1)(A). I'll ***increase that eight points*** under (b)(2)(B), and ***I'll increase that four points*** under (b)(3)(D).

Emphasis added. But in its Memorandum Opinion, the Ninth Circuit failed to notice the mechanistic application of the Guidelines by the district court, and even

went further and changed the actual issue raised by Torres-Marquez. In his appeal, Torres-Marquez framed his issue as this:

The Court violated *the very letter and spirit of § 3553(a)(1)* when it imposed a harsh 77-month sentence, when the Court failed to *meaningfully consider the other significant mitigating factors*. Instead, the Court focused almost entirely upon Mr. Torres-Marquez’s dated prior criminal record. The Court’s superficial enumeration of the § 3553(a)(1) factors in its *perfunctory sentencing procedure was unreasonable* because the Court expressly said to Torres-Marquez - “It would be one thing if you just returned to the United States repeated illegally *for financial reasons...*” But the undisputed facts before the sentencing court showed that it was *precisely* because of “financial reasons” that Mr. Torres-Marquez “returned to the United States repeatedly illegally”

Emphasis added. Though this was the framed issue for the Ninth Circuit, the court’s Memorandum Opinion saw it differently.

“Torres-Marquez”, the lower court noted, “contends that the sentence is substantively unreasonable because the court did not give adequate weight to his argument that his offense behavior was motivated by economic desperation, and gave too much weight to his dated criminal history.” Memorandum Opinion at page 2. The appellate court then proceeded, in turn, to mechanistically apply the abuse of discretion standard. Admittedly, a correct exercise of discretion had the district court done just that. But the district court did not simply weigh *all* the factors and then weighed one more than the others.

The district court here did not *meaningfully* consider at all any of the non-aggravated factors. Nor did it give fealty to the letter and spirit of 3553(a) in the predetermined process of sentencing under the *advisory* Guidelines. *See, Chavez-Meza v. United States*, 138 S. Ct. 1959, 1965-66 (2018) where this court noted:

At the original sentencing, the judge “must adequately explain the chosen sentence to allow for meaningful appellate review [citation omitted]; see also *Rita* [v. United States], 551 U. S., at 356, 127 S. Ct. 2456, 168 L. Ed. 2d 203, 217 (“The sentencing judge should set forth enough to satisfy the appellate court that he has considered the parties’ arguments **and has a reasoned basis** for exercising his own legal decisionmaking [sic] authority”). Just how much of an explanation this requires, however, depends, as we have said, upon the circumstances of the particular case. *Id.*, at 356-357, 127 S. Ct. 2456, 168 L. Ed. 2d 203, 217-218. In some cases, it may be sufficient for purposes of appellate review that the judge simply relied upon the record, **while making clear that he or she has considered the parties’ arguments and taken account of the §3553(a) factors, among others**. But in other cases, more explanation may be necessary (depending, perhaps, upon the legal arguments raised at sentencing, see *id.*, at 357, 127 S. Ct. 2456, 168 L. Ed. 2d 203, 218).

Emphasis added.

For these reasons, this Court must grant review.

CONCLUSION

For the foregoing reasons, Torrez-Marquez respectfully requests this Court issue a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully Submitted,

Dated: August 11, 2020

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