

No. _____

In the
Supreme Court of the United States

Javier Lopez-Garcia,

Petitioner,

v.

United States of America,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether review for reasonableness in federal sentencing requires a separate, more deferential, standard of review for credibility determinations than it does for other questions of fact?

PARTIES TO THE PROCEEDING

Petitioner is Javier Lopez-Garcia, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Javier Lopez-Garcia seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The district court's judgment and sentence is attached as Appendix A. The opinion of the Court of Appeals is located within the Federal Appendix at *United States v. Lopez-Garcia*, 799 Fed. Appx. 257 (5th Cir. March 30, 2020)(unpublished). It is reprinted in Appendix B to this Petition.

JURISDICTION

The panel opinion and judgment of the Fifth Circuit were entered on March 30, 2020. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

This Petition involves 18 U.S.C. § 3742, which states:

(a) Appeal by a Defendant.—A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—
(1) was imposed in violation of law;
(2) was imposed as a result of an incorrect application of the sentencing guidelines; or
(3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) [1] than the maximum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

(b) Appeal by the Government.—The Government may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

(1) was imposed in violation of law;
(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is less than the sentence specified in the applicable guideline range to the extent that the sentence includes a lesser fine or term of imprisonment, probation, or supervised release than the minimum established in the guideline range, or includes a less limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) 1 than the minimum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

The Government may not further prosecute such appeal without the personal approval of the Attorney General, the Solicitor General, or a deputy solicitor general designated by the Solicitor General.

(c) Plea Agreements.—In the case of a plea agreement that includes a specific sentence under rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure—

(1) a defendant may not file a notice of appeal under paragraph (3) or (4) of subsection (a) unless the sentence imposed is greater than the sentence set forth in such agreement; and

(2) the Government may not file a notice of appeal under paragraph (3) or (4) of subsection (b) unless the sentence imposed is less than the sentence set forth in such agreement.

(d) Record on Review.—If a notice of appeal is filed in the district court pursuant to subsection (a) or (b), the clerk shall certify to the court of appeals—

(1) that portion of the record in the case that is designated as pertinent by either of the parties;

(2) the presentence report; and

(3) the information submitted during the sentencing proceeding.

(e) Consideration.—Upon review of the record, the court of appeals shall determine whether the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is outside the applicable guideline range, and

(A) the district court failed to provide the written statement of reasons required by section 3553(c);

(B) the sentence departs from the applicable guideline range based on a factor that—

(i) does not advance the objectives set forth in section 3553(a)(2); or

(ii) is not authorized under section 3553(b); or

(iii) is not justified by the facts of the case; or

(C) the sentence departs to an unreasonable degree from the applicable guidelines range, having regard for the factors to be considered in imposing a sentence, as set forth in section 3553(a) of this title and the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or

(4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and, except with respect to determinations under subsection (3)(A) or (3)(B), shall give due deference to the district court's application of the guidelines to the facts. With respect to determinations under subsection (3)(A) or (3)(B), the court of appeals shall review de novo the district court's application of the guidelines to the facts.

(f) Decision and Disposition.—If the court of appeals determines that—

(1) the sentence was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(2) the sentence is outside the applicable guideline range and the district court failed to provide the required statement of reasons in the order of judgment and commitment, or the departure is based on an impermissible factor, or is to an unreasonable degree, or the sentence was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable, it shall state specific reasons for its conclusions and—

(A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate, subject to subsection (g);

(B) if it determines that the sentence is too low and the appeal has been filed under subsection (b), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate, subject to subsection (g);

(3) the sentence is not described in paragraph (1) or (2), it shall affirm the sentence.

(g) Sentencing Upon Remand.—A district court to which a case is remanded pursuant to subsection (f)(1) or (f)(2) shall resentence a defendant in accordance with section 3553 and with such instructions as may have been given by the court of appeals, except that—

(1) In determining the range referred to in subsection 3553(a)(4), the court shall apply the guidelines issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, and that were in effect on the date of the previous sentencing of the defendant prior to the appeal, together with any amendments thereto by any act of Congress that was in effect on such date; and

(2) The court shall not impose a sentence outside the applicable guidelines range except upon a ground that—

(A) was specifically and affirmatively included in the written statement of reasons required by section 3553(c) in connection with the previous sentencing of the defendant prior to the appeal; and

(B) was held by the court of appeals, in remanding the case, to be a permissible ground of departure.

(h) Application to a Sentence by a Magistrate Judge.—

An appeal of an otherwise final sentence imposed by a United States magistrate judge may be taken to a judge of the district court, and this section shall apply (except for the requirement of approval by the Attorney General or the Solicitor General in the case of a Government appeal) as though the appeal were to a court of appeals from a sentence imposed by a district court.

(i) Guideline Not Expressed as a Range.—

For the purpose of this section, the term “guideline range” includes a guideline range having the same upper and lower limits.

(j) Definitions.—For purposes of this section—

(1) a factor is a “permissible” ground of departure if it—

(A) advances the objectives set forth in section 3553(a)(2); and

(B) is authorized under section 3553(b); and

(C) is justified by the facts of the case; and

(2) a factor is an “impermissible” ground of departure if it is not a permissible factor within the meaning of subsection (j)(1).

STATEMENT OF THE CASE

A. District court proceedings

Petitioner Javier Lopez-Garcia received double his Guideline range, largely because the district court believed that he intentionally collided with the car of an arresting officer in an attempt to flee arrest. *See* (ROA.104-107). During an extended colloquy with the district court, he explained that he was merely trying to avoid a head-on collision with another officer's vehicle, not trying to flee. *See* (ROA.93-95). The scant record did not provide adequate information to find his intent to flee or initiate this collision.

Mr. Lopez-Garcia pleaded guilty to one count of entering the country after having been removed. *See* (ROA.22-25). A Presentence Report (PSR) found a Guideline range of 24-30 months imprisonment. *See* (ROA.140). It also noted a collection of old convictions that did not receive criminal history points, including four for evading arrest. *See* (ROA.130-134).

During allocution, Petitioner told the judge that he re-entered the country because his parents were dying, and that he stayed to be with his common-law wife. *See* (ROA.92-93). Because he told the court that he was "not what [he] used to be," (ROA.92), the court began cross-examining him about the circumstances of his arrest, *see* (ROA.93-96).

During this lengthy exchange, Petitioner repeatedly told the judge that he put his car into reverse to avoid a head-on collision with the officer's car in front of him. *See* (ROA.93-96). He said that "the first thing [he] thought" was that the officers were

there to respond to his neighbors' domestic disturbance, and that he wasn't trying to flee. *See* (ROA.93-94).

The court asked the government whether any agents were present. *See* (ROA.95). They were not, so it consulted two reports of the arresting officers. *See* (ROA.96-98). These reports said that the officers surveilled Petitioner before arresting him. *See* (ROA.114, 121). They turned on their lights and surrounded him when he got into his car, but he put the car into reverse and collided with an officer behind him. *See* (ROA.114, 121). Petitioner then stopped his car, and submitted to arrest without further incident. *See* (ROA.114, 121). On this basis, the reports concluded that he had deliberately initiated the collision in order to flee. *See* (ROA.114, 121).

The court believed that these reports disproved Petitioner's account of the collision, and found that he had actually tried to flee. *See* (ROA.97). The defense introduced pictures of the officer's dented car, but the court said that the minor damage depicted "really does not help your position at all." (ROA.98).

The court relied on this finding in its explanation of the sentence, and imposed sixty months imprisonment, twice the Guideline range. *See* (ROA.104-107).

B. Appellate proceedings

Petitioner appealed, contending that the district court erred in concluding that he intended to evade arrest. He noted that the sources relied upon by the district court made conclusory assertions about Mr. Lopez-Garcia's mental state. Further, he argued the physical facts – a police car headed directly toward Petitioner when he

went into reverse, only minor damage to the police car, an immediate surrender following the collision – tended to confirm his account that he was merely trying to avoid collision, not to flee.

The court of appeals affirmed. In doing so, it relied on circuit precedent that provides for heightened deference to a sentencing court's credibility determinations:

We review the district court's factual findings for clear error. *See United States v. Davis*, 754 F.3d 278, 284 (5th Cir. 2014). "A factual finding is not clearly erroneous if it is plausible in light of the record as a whole." *Id.* We give particular deference to credibility determinations in sentencing hearings. *Id.* at 285 (citation omitted). Here, the district court's conclusion that Lopez-Garcia attempted to evade arrest by reversing his van into one of the vehicles of the arresting agents was supported by ICE and DHS records describing the circumstances of the collision.

The district court also questioned Lopez-Garcia at sentencing about his contention that he moved his van in order to avoid another approaching law-enforcement vehicle. In light of all the evidence, including the testimony, the district court found that Lopez-Garcia was attempting to evade arrest.

Considering the same evidence, we conclude Lopez-Garcia has not shown that the district court clearly erred.

[Appendix B, at 2].

REASONS FOR GRANTING THIS PETITION

The courts of appeals disagree about whether credibility determinations at sentencing enjoy greater deference than other factual issues at sentencing. The view of the court below contradicts the precedent of this Court and invites grave, substantial injustice, including wrongful incarceration.

The due process clause requires that criminal defendants be sentenced on the basis of reasonably reliable evidence. Due process requires that hearsay bear some minimal indicia of reliability in order to be considered at sentencing. *See United States v. Baylin*, 696 F.2d 1030, 1040 (3d Cir.1982); *United States v. Reme*, 738 F.2d 1156, 1167 (11th Cir. 1984); *United States v. Johnson*, 648 F.3d 273, 277–78 (5th Cir. 2011); *United States v. Moncivas*, 492 F.3d 652 (6th Cir. 2007); *United States v. Petty*, 982 F.2d 1365, 1370 (9th Cir.), *amended*, 992 F.2d 1015 (9th Cir. 1993). That requirement is implemented by the Sentencing Commission in USSG §6A1.3, which demands that sentencing evidence bear sufficient indicia of reliability to support its probable accuracy. *See* USSG §6A1.3.

Congress provided appellate review to enforce these requirements. Specifically, it authorized appeal from sentences imposed “in violation of law,” or “as a result of an incorrect application of the sentencing guidelines.” 18 U.S.C. §3742(a). The statute authorizing appeal also commanded that “[t]he court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses.” 18 U.S.C. §3742(e).

This provision regarding credibility determinations appears in 18 U.S.C. §3742(e), a statute held inoperative in *United States v. Booker*, 544 U.S. 220, 261 (2005). In its place, this Court recognized a general standard of review for reasonableness, which encompasses review of factual findings for clear error. *See Booker*, 544 U.S. at 261. The Court's explanations for this standard, however, have never commanded any special deference to a district court's credibility determinations. *See Gall v. United States*, 552 U.S. 39, 50-51 (2007); *Rita v. United States*, 551 U.S. 338, 347-351 (2007).

In resolving the instant case, the court below nonetheless applied a standard of heightened deference for factual determinations that involve credibility determinations. *See* [Appendix B, at 2][“We give particular deference to credibility determinations in sentencing hearings.”]. This statement is directly traceable to pre-*Booker* authorities that effectively hold credibility determinations off-limits on appeal. *See* [Appendix B, at 2][citing *United States v. Davis*, 754 F.3d 278, 285 (5th Cir. 2014)]; *see Davis*, 754 F.3d at 285 (citing *United States v. Sotelo*, 97 F.3d 782, 799 (5th Cir. 1996), for the proposition that credibility “determinations in sentencing hearings are peculiarly within the province of the trier-of-fact.”). Indeed, the foundation of this line of authority appears to foreclose review of credibility determinations in nearly categorical terms, holding that “[c]redibility determinations are peculiarly within the province of the trier-of-fact, and *we will not disturb the sentencing judge's findings.*” *United States v. Sarasti*, 869 F.2d 805, 807 (5th Cir. 1989)(emphasis added); *see also Sotelo*, 97 F.3d at 799 (citing *Sarasti*).

The Fourth and Eighth circuits concur in this nearly categorical prohibition on credibility review. Both have held, even after *Booker*, that “[w]itness credibility is quintessentially a judgment call and *virtually unassailable* on appeal.” *United States v. Bolden*, 596 F.3d 976, 982 (8th Cir.2010)(emphasis added); *accord United States v. Waller*, 616 F. App'x 628, 629 (4th Cir. 2015)(unpublished)(supervised release case).

This view conflicts with the approach of the Third, Sixth, Seventh, Ninth and Tenth Circuits, both before and after *Booker*. The Ninth Circuit considers the credibility of declarants in deciding whether the defendant was sentenced on the basis of adequately reliable evidence. *See United States v. McGowan*, 668 F.3d 601, 606–08 (9th Cir. 2012). The Third Circuit likewise expressly considers the “credibility” of hearsay declarants in applying USSG §6A1.3. *See United States v. Barfield*, 348 F. App'x 743, 744–45 (3d Cir. 2009)(unpublished) (“Factors bearing on the reliability of hearsay testimony include the declarant's memory, perception, and *credibility*, and the presence of corroborating (or conflicting) evidence.”)(emphasis added).

The difference in standards has concrete meaning for the way that review is conducted, and for the outcome of cases. The Sixth Circuit has obliged district courts to treat co-defendant information at sentencing with “special suspicion.” *United States v. Hunt*, 487 F.3d 347, 352 (6th Cir. 2007). Similarly, the Ninth Circuit has found that a jailhouse informant was not sufficiently credible to support a higher sentence. *See McGowan*, 668 F.3d at 606–08. And the Third, Sixth, Seventh, and Tenth Circuits have vacated sentences supported by information from informants

addicted to drugs, finding for themselves that such witnesses simply weren't credible. *See United States v. Miele*, 989 F.2d 659, 666-667 (3rd Cir. 1993); *United States v. Robison*, 904 F.2d 365, 371-72 (6th Cir. 1990); *United States v. McEntire*, 153 F.3d 424 (7th Cir. 1998); *United States v. Beler*, 20 F.3d 1428, 1433 (7th Cir. 1994); *United States v. Richards*, 27 F.3d 465 (10th Cir. 1994). These cases represent direct review of the credibility of sentencing witness by appellate courts. They are therefore not consistent with the view of the court below, or of the Fourth and Eighth Circuits.

The view of the court below, and of the Fourth and Eighth Circuits is inconsistent with both the operative statutes and this Court's precedent. Notably, the court below expressly grounded its standard of heightened deference for credibility determinations in the "due regard" language of 18 U.S.C. §3742(e). *See United States v. Silva*, 9 F.3d 103 (5th Cir. 1993); *United States v. Maseratti*, 1 F.3d 330, 339 (5th Cir. 1993). But this Court rendered that language inoperative in *Booker* when it expressly severed and excised §3742(e)(4). The court below simply hasn't reevaluated its precedent in light of this change in the statutory regime.

This Court has recognized that district courts "sees and hears the evidence, *makes credibility determinations*, has full knowledge of the facts and gains insights not conveyed by the record." *Gall*, 552 U.S. at 51 (2007)(emphasis added). But it has never held that credibility determinations enjoy more deference than other factual determinations in conducting reasonableness review. *See Gall*, 552 U.S. at 50. Rather, it has set forth a single uniform standard of clear error for factual questions that affect the sentence. *See id.*

Needless to say, the issue is of immense importance. It is potentially implicated in every criminal case with a contested sentencing issue of any kind. Further, extreme deference to the credibility determinations of district courts creates a grave risk of substantive injustice – that is, sentencing defendants for conduct they did not commit. It merits this Court’s attention.

Finally, the present case is an outstanding vehicle to address the issue. The court in the present case rejected the defendant’s first hand testimony, denying an intent to evade arrest, in favor of hearsay reports from absent witnesses that made conclusory assertions about the defendant’s mental state. The defendant’s account was supported by the undisputed facts. He said that he put the car in reverse because a police car was coming right at him, and the report acknowledged that such was the state of affairs. The light damage to the vehicle behind him, and his immediate surrender after the collision, supported his view. In the absence of the Fifth Circuit’s extreme deference to credibility determinations, the sentence would be a prime candidate for vacatur.

CONCLUSION

Petitioner respectfully submits that this Court should grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted this 27th day of August, 2020.

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