No. _____

In the Supreme Court of the United States
October Term, 2020

PEDRO TIEMPO-GARCIA, 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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MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

NOW COMES Petitioner, PEDRO TIEMPO-GARCIA, by and through his undersigned attorney, and pursuant to Rule 39.1, Supreme Court Rules, and Title 18, United States Code, §3006A(d)(7), respectfully moves this Honorable Court for leave to proceed *in forma pauperis*, and to file the attached Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit without prepayment of fees. Petitioner was represented by appointed counsel under the Criminal Justice Act of 1964, as amended, in the district court and the court of appeals. Leave to proceed *in forma pauperis* was never sought in any other court.

Respectfully Submitted,

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Petitioner 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 July 23, 2020.

PARTIES TO THE PROCEEDINGS

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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QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals erred in ruling the District Court did not err in imposing an upward departure sentence.

Whether the Court of Appeals erred in ruling that the sentence imposed by the District Court was substantively reasonable.

PARTIES TO THE PROCEEDINGS

The undersigned counsel of record certifies that the persons having an interest in the outcome of this case are those listed below:

1. **Pedro Tiempo-Garcia,** Defendant-Petitioner;
2. **John F. Bash,** U.S. Attorney
3. **Joseph H. Gay, Jr.**, Assistant U.S. Attorney;
4. **Sara Ella Spears**, Assistant U.S. Attorney, who represented Plaintiff-Respondent in the District Court;
5. **Ricardo E. Calderón**, Attorney who represented Defendant-Petitioner in the District Court;
6. **Reginald Van Wade**, Attorney who represents Defendant-Petitioner in *this* Court.

This certificate is made so that the Judges of this Court may evaluate possible disqualification or recusal.

OPINION BELOW

A copy of the opinion of the United States Court of Appeals for the Fifth Circuit, *United States v.Pedro Tiempo-Garcia,* No. 19-51075, unpub. Op. (5th Cir. July 23, 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 July 23, 2020. This petition is filed within 90 days after entry of judgment. *See* Sup. Ct. R. 13.1. The Court has jurisdiction to grant certiorari under 28 U.S.C. §1254(1).

FEDERAL STATUTES INVOLVED

The texts of Title 8 U.S.C. §1326 , 18 U.S.C. §3553(a), and §4A1.3(a)(4)(B) are reproduced in Appendix B.

STATEMENT

Garcia was charged in a one-count indictment with illegal re-entry after having been previously deported, in violation of Title 8 U.S.C. §1326. On August 21, 2019, Garcia pled guilty. In the Presentence Report, the Probation Department recommended an advisory Guideline Range of 24 to 30 months imprisonment. Under U.S.S.G. §2L1.2(a), the base offense level is 8. Under U.S.S.G. §2L1.2(b)(3)(A), Garcia's July 19, 2001 conviction for Attempted Murder resulted in a 10-Level upward adjustment to his base offense level. This resulted in the Adjusted Offense Level Subtotal of 18. With a three-level reduction for Acceptance of Responsibility, the total offense level , was 15. Garcia's Criminal History Category of III, combined with the total offense level of 15 resulted in an advisory guideline range of 24 to 30 months imprisonment. Garcia requested a sentence within the applicable guideline range. The District Court denied this request and sentenced Garcia to 60 months imprisonment. Garcia did not object to the sentence. Garcia appealed. Because Garcia did not object to the sentence, review upon appeal was limited to the application of the plain-error standard of review. The Court of Appeals affirmed Garcia's conviction. In so doing, it held that the District Court did not abuse its discretion in imposing an outside-the-guideline sentence, and that, therefore the sentence was substantively reasonable.

REASONS FOR GRANTING THE WRIT

This Honorable Court Should Grant Certiorari to Decide Two Issues: (1) Whether the Court of Appeals erred in ruling the District Court did not err in imposing an upward departure sentence; (2) Whether the Court of Appeals erred in ruling that the sentence imposed by the District Court was substantively reasonable.

The District Court is required to "impose a sentence sufficient, but not greater than necessary to comply with purposes set forth in paragraph (2) …" 18 U.S.C. §3553(a).

"The Court, in determining the particular sentence to be imposed, shall consider:

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;
(2) the need for the sentence imposed:
    (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
    (B) to afford adequate deterrence to criminal conduct;
    (C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; ..." 18 U.S.C. §3553(a)(1)(2)

In fashioning a sentence to meet these goals, the courts are directed to consider a broad range of factors, including the nature and circumstances of the offense, as well as the history and characteristics of the defendant. See 18 U.S.C. §3553(a) (1)-(7). In Garcia's case, however, the 60 month sentence was greater than necessary to meet the aspirational goals of §3553(a), and, therefore, was substantively unreasonable.

Considering the specific history and characteristics of Garcia, the sentence does not appear to reflect a balanced and meaningful consideration of the competing statutory factors enumerated in 18 U.S.C. §3553.

A. The District Court Procedurally Erred In Imposing An Upward Departure

The Sentencing Guidelines permit an upward departure if the district court determines that the extent and nature of a defendant's criminal history substantially under-represents the seriousness of his criminal history or his likelihood of recidivism. Departures should be arrived at by moving incrementally down the sentencing table to the next higher offense level until an appropriate guideline range is found. In the case-at-bar, the District Court and the Fifth Circuit failed to apply any type of incremental review in the sentencing table to determine the appropriate departure. This is a substantial procedural error that requires that the sentence be vacated and remanded for re-sentencing.

B. The District Court Failed to Take an Incremental Approach in Imposing the Upward Departure.

In determining the extent of any upward departure, §4A1.3 U.S.S.G. "virtually compels the district court to follow an approach to departure that considers the guidelines grid on a step-by-step basis to explain carefully the basis for the sentence it settles upon." United States v. Lambert, 98 F.2d 658, 663 (5th Cir. 1993)(en banc). Specifically, in such cases "the court should structure the departure by moving incrementally down the sentencing table to the next higher offense level until it finds a guideline range appropriate to the case." U.S.S.G. §4A1.3(a)(4)(B).

The District Court, and the Fifth Circuit failed to do so in the case-at-bar. This failure to follow the Guideline Policy Statement's methodology for determining an upward departure was a misapplication of §4A1.3 that requires remand for re-sentencing. *See* Gutierrez-Hernandez, 581 F.3d at 254 (failure to follow

guideline methodology for determining departure is significant procedural error meriting remand) By imposing an upward departure sentence that was twice the top of the advisory guideline range, the District Court failed to ensure that the sentence it imposed was not greater than necessary to meet the sentencing goals of 18 U.S.C. §3553.

The sentence was also far greater than necessary to reflect the seriousness of Garcia's offense, which was illegal re-entry after having been previously deported. He returned to the United States to be with his common-law wife and two daughters, who pleaded with him to return because they missed and needed him. Garcia's benign motive for returning to the United States does not,of course justify his offense, but it is a factor that mitigates its seriousness. *See* United States v. Galvez-Barrios, 355 F.Supp.2d 958, 960 (E.D. Wis. 2005) (positive motive for re-entry mitigates seriousness of § 1326 offense and may weigh in favor of a below-guideline sentence).

For all these reasons, the advisory guideline range in Garcia's case adequately reflected a sentence that met the sentencing objectives of 18 U.S.C. 3553 (a)(2). By upwardly departing from that range, the District Court made a clear error which resulted in the imposition of an unreasonable sentence. Further, by not applying the incremental approach in imposing the upward departure, resulted in a clear abuse of discretion. Petitioner respectfully requests that this Honorable Court grant certiorari so that it may address these important federal questions.

CONCLUSION

For these reasons, Peña asks that this Honorable Court grant a writ of certiorari.

Respectfully submitted,

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COUNSEL OF RECORD FOR PETITIONER

No. _____

SUPREME COURT OF THE UNITED STATES

Pedro Tiempo-Garcia – PETITIONER

VS.

UNITED STATES OF AMERICA – RESPONDENT

PROOF OF SERVICE

I, Reginald Van Wade, Attorney-at-Law, do swear or declare that on this date, September 7, 2020, as required by Supreme Court Rule 29, I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR WRIT OF CEDRTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage pre-paid, or by delivery to a third-party commercial carrier for delivery within three calendar days.

The names and addresses of those served are as follows:

John F. Bash, U.S. Attorney
United States Attorney's Office,
Western District of Texas
601 NW Loop 410
Suite 600
San Antonio, Texas 78216-5597

Joseph H. Gay, Jr., Assistant U.S. Attorney
United States Attorney's Office,
Western District of Texas
601 NW Loop 410
San Antonio, Texas 78216-5597

Jeff Wall
Acting Solicitor General of the United States,
Room 5614
Department of Justice
950 Pennsylvania Ave. N.W.
Washington, D.C. 20530-0001

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

Executed on September 7, 2020.

Reginald Van Wade
Reginald Van Wade

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-51075
Summary Calendar

United States Court of Appeals
Fifth Circuit
FILED
July 23, 2020
Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

PEDRO TIEMPO-GARCIA,

Defendant-Appellant

Appeal from the United States District Court
for the Western District of Texas
USDC No. 2:19-CR-1563-1

Before CLEMENT, HIGGINSON, and ENGELHARDT, Circuit Judges.

PER CURIAM:*

Pedro Tiempo-Garcia pleaded guilty to illegal reentry after having been previously removed, in violation of 8 U.S.C. § 1326, and was sentenced above the guidelines range to 60 months of imprisonment. He complains that the variance imposed, which was double the top of the applicable guidelines range, failed to account for the nature of the offense and his personal history and

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

characteristics and was greater than necessary to achieve the sentencing goals of 18 U.S.C. § 3553(a).

This court reviews the substantive reasonableness of a sentence under a highly deferential abuse-of-discretion standard. *See Holguin-Hernandez v. United States*, 140 S. Ct. 762, 766–67 (2020); *United States v. Cisneros-Gutierrez*, 517 F.3d 751, 764 (5th Cir. 2008). A sentence is substantively unreasonable if it "does not account for a factor that should have received significant weight, it gives significant weight to an irrelevant or improper factor, or it represents a clear error of judgment in balancing the sentencing factors." *United States v. Cooks*, 589 F.3d 173, 186 (5th Cir. 2009).

To the extent that Tiempo-Garcia argues that an upward variance was unreasonable because it was based in part on his prior conviction for attempted capital murder, which was already accounted for in his guidelines calculations, the argument is not well-taken. *See United States v. Brantley*, 537 F.3d 347, 350 (5th Cir. 2008); *see also United States v. Williams*, 517 F.3d 801, 809 (5th Cir. 2008). The district court was entitled to consider and place appropriate weight on Tiempo-Garcia's criminal history, which included not only his attempted capital murder conviction but several unscored offenses, as well as at least four prior illegal entries or reentries. *See* § 3553(a)(1); *see also United States v. Fraga*, 704 F.3d 432, 440–41 (5th Cir. 2013); *Brantley*, 537 F.3d at 350. The court was similarly entitled to consider the circumstances involved in the instant offense, including that it was committed within six months of Tiempo-Garcia's release on parole from the attempted capital murder conviction. § 3553(a)(1). Tiempo-Garcia's argument that a variance was unjustified because illegal reentry is a nonviolent offense tantamount to international trespass is unpersuasive. *Cf. United States v. Juarez-Duarte*, 513 F.3d 204, 212 (5th Cir. 2008).

His assertions to the contrary notwithstanding, the record establishes that the district court considered Tiempo-Garcia's personal history and characteristics, including his reason for returning, the age of his prior attempted murder conviction, and his role in that offense. Tiempo-Garcia fails to show that the district court failed to account for a factor that warranted significant weight or that it gave undue weight to an improper factor. *See Cooks*, 589 F.3d at 186. We therefore defer to the district court's determination that the § 3553(a) factors, on the whole, warrant the variance, *see Brantley*, 537 F.3d at 349, and justify the extent of the upward variance imposed, *see United States v. Pillault*, 783 F.3d 282, 288 (5th Cir. 2015).

AFFIRMED.

APPENDIX B

8 U.S. Code § 1326 - Reentry of removed aliens

U.S. Code Notes

(a) In general Subject to subsection (b), any alien who—

(1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,

shall be fined under title 18, or imprisoned not more than 2 years, or both.

(b) Criminal penalties for reentry of certain removed aliens
Notwithstanding subsection (a), in the case of any alien described in such subsection—

(1) whose removal was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony), such alien shall be fined under title 18, imprisoned not more than 10 years, or both;

(2) whose removal was subsequent to a conviction for commission of

an aggravated felony, such alien shall be fined under such title, imprisoned not more than 20 years, or both;

(3) who has been excluded from the United States pursuant to section 1225(c) of this title because the alien was excludable under section 1182(a)(3)(B) of this title or who has been removed from the United States pursuant to the provisions of subchapter V, and who thereafter, without the permission of the Attorney General, enters the United States, or attempts to do so, shall be fined under title 18 and imprisoned for a period of 10 years, which sentence shall not run concurrently with any other sentence.[1] or

(4) who was removed from the United States pursuant to section 1231(a)(4)(B) of this title who thereafter, without the permission of the Attorney General, enters, attempts to enter, or is at any time found in, the United States (unless the Attorney General has expressly consented to such alien's reentry) shall be fined under title 18, imprisoned for not more than 10 years, or both.

For the purposes of this subsection, the term "removal" includes any agreement in which an alien stipulates to removal during (or not during) a criminal trial under either Federal or State law.

(c) REENTRY OF ALIEN DEPORTED PRIOR TO COMPLETION OF TERM OF IMPRISONMENT Any alien deported pursuant to section 1252(h)(2)[2] of this title who enters, attempts to enter, or is at any time found in, the United States (unless the Attorney General has expressly consented to such alien's reentry) shall be incarcerated for the remainder of the sentence of imprisonment which was pending at the time of deportation without any reduction for parole or supervised release. Such alien shall be subject to such other penalties relating to the reentry of deported aliens as may be available under this section or any other provision of law.

(d) LIMITATION ON COLLATERAL ATTACK ON UNDERLYING DEPORTATION ORDER In a criminal proceeding under this section, an alien may not challenge the validity of the deportation order described in subsection (a)(1) or subsection (b) unless the alien demonstrates that—

(1) the alien exhausted any administrative remedies that may have been available to seek relief against the order;

(2) the deportation proceedings at which the order was issued

improperly deprived the alien of the opportunity for judicial review; and

(3) the entry of the order was fundamentally unfair.

(June 27, 1952, ch. 477, title II, ch. 8, §276, 66 Stat. 229; Pub. L. 100-690, title VII, §7345(a), Nov. 18, 1988, 102 Stat. 4471; Pub. L. 101-649, title V, §543(b)(3), Nov. 29, 1990, 104 Stat. 5059; Pub. L. 103-322, title XIII, §130001(b), Sept. 13, 1994, 108 Stat. 2023; Pub. L. 104-132, title IV, §§401(c), 438(b), 441(a), Apr. 24, 1996, 110 Stat. 1267, 1276, 1279; Pub. L. 104-208, div. C, title III, §§305(b), 308(d)(4)(J), (e)(1)(K), (14)(A), 324(a), (b), Sept. 30, 1996, 110 Stat. 3009-606, 3009-618 to 3009-620, 3009-629.)

FAMM

THE FEDERAL SENTENCING STATUTE:
18 U.S.C. § 3553(a)

Factors To Be Considered in Imposing a Sentence.— The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

§4A1.3 - DEPARTURES BASED ON INADEQUACY OF CRIMINAL HISTORY CATEGORY (POLICY STATEMENT)

(a) Upward Departures.—

(1) Standard for Upward Departure.—If reliable information indicates that the defendant's criminal history category substantially under-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes, an upward departure may be warranted.

(2) TYPES OF INFORMATION FORMING THE BASIS FOR UPWARD DEPARTURE.—The information described in subsection (a)(1) may include information concerning the following:

(A) Prior sentence(s) not used in computing the criminal history category (*e.g.*, sentences for foreign and tribal convictions).

(B) Prior sentence(s) of substantially more than one year imposed as a result of independent crimes committed on different occasions.

(C) Prior similar misconduct established by a civil adjudication or by a failure to comply with an administrative order.

(D) Whether the defendant was pending trial or sentencing on another charge at the time of the instant offense.

(E) Prior similar adult criminal conduct not resulting in a criminal conviction.

(3) PROHIBITION.—A prior arrest record itself shall not be considered for purposes of an upward departure under this policy statement.

(4) DETERMINATION OF EXTENT OF UPWARD DEPARTURE.—

(A) IN GENERAL.—Except as provided in subdivision (B), the court shall determine the extent of a departure under this subsection by using, as a reference, the criminal history category applicable to defendants whose criminal history or likelihood to recidivate most closely resembles that of the defendant's.

(B) UPWARD DEPARTURES FROM CATEGORY VI.—In a case in which the court determines that the extent and nature of the defendant's criminal history, taken together, are sufficient to warrant an upward departure from Criminal History Category VI, the court should structure the departure by moving incrementally down the sentencing table to the next higher offense level in Criminal History Category VI until it finds a guideline range appropriate to the case.

(b) DOWNWARD DEPARTURES.—