No. _____

In the Supreme Court of the United States

October Term, 2020

ELIER ISAI MARQUEZ-GONZALEZ, *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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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Elier Isai Marquez-Gonzalez 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 August 19, 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.

RELATED PROCEEDINGS

All proceedings directly related to the case are as follows:

- *United States v. Marquez-Gonzalez*, No. 4-19-CR-0558-DC (W.D. Tex. Jan. 7, 2020) (judgment)

- *United States v. Marquez-Gonzalez*, No. 4-19-CR-0632-DC (W.D. Tex. Jan. 6, 2020) (revocation order)
- *United States v. Marquez-Gonzalez*, Nos. 20-50013 & 20-50027 (5th Cir. Aug. 19, 2020) (unpublished opinion)

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OPINION BELOW

A copy of the opinion of the court of appeals, *United States v. Marquez-Gonzalez*, Nos. 20-50013 & 20-50027, unpub. op. (5th Cir. Aug. 19, 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 August 19, 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

Elier Isai Marquez-Gonzalez, a 27-year-old Mexican citizen, came to the United States one month after his eight-year-old daughter had surgery to remove a brain tumor. The surgery left her bedridden and unable to move her arms and legs. He hoped to earn money to help pay for her physical therapy, but U.S. Border Patrol agents found Marquez and charged him with illegal reentry. *See* 8 U.S.C. § 1326. Marquez pleaded guilty without a plea agreement.

The presentence report, which the district court adopted without change, calculated his total offense level as 10. That included a base offense level of eight, a four-level enhancement for a prior illegal reentry conviction, and a two-level reduction for his acceptance of responsibility. *See* U.S.S.G. §2L1.2(a), (b)(1)(A); §3E1.1. Marquez had seven criminal history points stemming from one illegal entry and two illegal reentry convictions. For his most recent illegal reentry offense, in 2018, he had been sentenced to six months' imprisonment and one year of supervised release. The advisory Guidelines range for the instant offense was 15 to 21 months.

At the sentencing hearing, defense counsel explained Marquez made the desperate decision to come to the United States to be able to pay for his bedridden daughter's physical therapy. Counsel

asked the district court to consider the reasons for Marquez's entry, and that Marquez had received prior sentences much lower than the Guidelines range for the instant offense. The government asked for a Guidelines sentence.

The district court did not depart from the recommended sentence, and, without explanation, sentenced Marquez to 21 months' imprisonment—the top of the advisory Guidelines range. The court also revoked the term of supervised release imposed in a prior illegal reentry case and sentenced Marquez to 11 months' imprisonment to run consecutively to the illegal-reentry sentence. Marquez objected to both sentences as greater than necessary under 18 U.S.C. § 3553(a) .

On appeal, Marquez argued that the 21-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.

Marquez 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 Marquez 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 reviewing 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_stuy_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 Marquez'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. Marquez's case is an appropriate vehicle to address this important issue.

Before the pandemic, illegal reentry was 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 Marquez'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 Marquez'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). Marquez's three criminal convictions increased his offense level by four levels and resulted

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[3] *See* TRAC-Immigration, Immigration Prosecutions for 2019 (Oct. 31, 2019), https://tracfed.syr.edu/results/9x705dbb47e5a0.html; TRAC-Immigration, Major Swings in Immigration Criminal Prosecutions during Trump Administration (Dec. 18, 2020), https://trac.syr.edu/immigration/reports/633/.

[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.*

in seven criminal history points. *See* §2L1.2(b)(1)(A); §4A1.1(b), (c), (d). For those convictions, he was sentenced to imprisonment of 30 days, a total of five months, and six months, respectively. In aggregate, he was sentenced to 12 months' imprisonment—less than the Guidelines range in this case.

The criminal history score overrepresented Marquez's dangerousness, and the district court should have accounted for this overrepresentation when it chose a sentence, particularly in light of the mitigating circumstances of his reentry. Instead, the court exacerbated it by imposing a sentence at the top of the Guidelines range despite circumstances that made such a sentence unreasonable. With the additional 11 months' imprisonment from his revocation proceeding, Marquez will serve 32 months' imprisonment—four times the total eight months he received for his last reentry and revocation. The significantly higher Guidelines range shocked Marquez, and the sentence at the top of that range is inconsistent with § 3553(a).

The sentence was also unreasonable because it failed to account for the mitigating circumstances of Marquez's reentry.[7] *See* 18 U.S.C. § 3553(a)(1). Marquez came to the United States one month after his eight-year-old daughter had surgery to remove a brain tumor. The surgery left her bedridden and unable to move her arms and legs. He hoped to earn money to help pay for her physical therapy. 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 Marquez at the top of the advisory Guidelines range. Had the court of appeals reviewed Marquez's sentence for reasonableness, rather than with a presumption of reasonableness, the result would have been different.

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[7] *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).

CONCLUSION

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

Respectfully submitted.

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