

No. 20-

IN THE
Supreme Court of the United States

ALEJANDRO DE LA TORRE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

JAMES SCOTT SULLIVAN
LAW OFFICES OF J. SCOTT SULLIVAN
22211 I.H. 10 WEST, SUITE 1206
SAN ANTONIO, TEXAS 78257
(210) 722-2807

QUESTION PRESENTED FOR REVIEW

Whether the decision of the United States Court of Appeals for the Fifth Circuit (“Fifth Circuit”)—which affirmed the District Court’s denial of Mr. De La Torre’s motion to downward depart—conflicts with decision of this Court, as well as other Circuits, on an important matter and thus a compelling reason is presented in support of discretionary review.

PARTIES TO THE PROCEEDING

The parties to the proceeding are listed in the caption:

Alejandro De La Torre:	Petitioner (Defendant-Appellant in the lower Courts)
United States of America:	Respondent (Plaintiff-Appellee in the lower Courts)

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW.....	i
PARTIES TO THE PROCEEDING.....	ii
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES.....	iv-v
CITATIONS TO OPINIONS AND RELEVANT ORDERS.....	1
GROUND FOR JURISDICTION.....	1-2
CONSTITUTIONAL PROVISIONS.....	2
STATEMENT OF THE CASE.....	2-7
ARGUMENT AMPLIFYING REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.....	7-16
CONCLUSION.....	16

INDEX TO APPENDIX

APPENDIX A	Decision of the United States Court of Appeals for the Fifth Circuit denying relief on direct appeal.
APPENDIX B	Judgment in a Criminal Case issued by the United States District Court for the Southern District of Texas, McAllen Division.

TABLE OF AUTHORITIES

CASES:

<i>Booker v. United States</i> , 542 U.S. 220, 261 (2005).....	11, 12
<i>Gall v. United States</i> , 552 U.S. 38, 51 (2007).....	10, 11, 12
<i>Kimbrough v. United States</i> , 552 U.S. 85, 108-10 (2007).....	10, 11, 14
<i>Nelson v. United States</i> , 555 U.S. 350, 352 (2009).....	12
<i>Peugh v. United States</i> , 569 U.S. 530, 537 (2013).....	14
<i>Rita v. United States</i> , 551 U.S. 338, 364 (2007).....	10, 11
<i>United States v. Acosta</i> , 619 F. App'x 403, 404 (5th Cir. 2015).....	10
<i>United States v. Alaniz</i> , 726 F.3d 586, 618-19 (5th Cir. 2013).....	10
<i>United States v. Anonymous Defendant</i> , 629 F.3d 68, 74 (1st Cir. 2010).....	12
<i>United States v. Buenrostro</i> , 868 F.2d 135, 136-37 (5th Cir. 1989), <i>cert. denied</i> , 495 U.S. 923 (1990).....	9
<i>United States v. Carrasco-De-Jesús</i> , 589 F.3d 22, 26 (1st Cir. 2009).....	12
<i>United States v. Fernández</i> , 443 F.3d 19, 26 (2d Cir. 2006).....	12
<i>United States v. Longstreet</i> , 603 F.3d 273, 275-76 (5th Cir. 2010).....	10
<i>United States v. McBride</i> , 434 F.3d 470, 477 (6th Cir. 2006).....	12
<i>United States v. Mondragon-Santiago</i> , 564 F.3d 357, 363-64 (5th Cir. 2009).....	15
<i>United States v. Plouffe</i> , 445 F.3d 1126, 1130 (9th Cir. 2006).....	12
<i>United States v. Rodriguez</i> , 406 F.3d 1261, 1273 (11th Cir. 2005).....	11
<i>United States v. Vaughn</i> , 433 F.3d 917, 923-24 (7th Cir. 2006).....	12

CONSTITUTIONAL PROVISIONS:

U.S. CONST. amend V.....	2
U.S. CONST. amend VI.....	2

STATUTES:

18 U.S.C. § 924(a)(1)(A).....	4
18 U.S.C. § 3553(a).....	11, 15
28 U.S.C. § 1254.....	1

UNITED STATES SENTENCING GUIDELINES:

U.S.S.G. § 2K2.1(a).....	4
U.S.S.G. 2K2.1(a)(4)(B).....	34
U.S.S.G. § 2K2.1(a)(4)(B)(i)(I).....	4
U.S.S.G. § 2K2.1(a)(4)(B)(i)(III).....	4
U.S.S.G. § 2K2.1(b)(1)(C).....	4
U.S.S.G. § 2K2.1(b)(5).....	4
U.S.S.G. § 5K2.0(a)(3).....	5, 7, 14

PETITION FOR WRIT OF CERTIORARI

Petitioner, ALEJANDRO DE LA TORRE, requests this Court grant this petition and issue a Writ of Certiorari to review the decision of the Fifth Circuit. Mr. De La Torre argued to the Fifth Circuit that the District Court committed reversible error by denying a request for a downward departure. The Fifth Circuit affirmed the denial because the Court lacked jurisdiction to review the decision. Mr. De La Torres respectfully submits the Fifth Circuit reversibly erred by holding it lacked jurisdiction to review the denial of the request for a downward departure. Therefore, the sentence imposed must be vacated and this matter reversed and remanded for resentencing.

REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE

From the Federal Courts:

The Order of the United States Court of Appeals for the Fifth Circuit appears at Appendix A, is reported at *United States v. Alejandro De La Torre*, Fifth Circuit No. 20-40062 (5th Cir. Sept. 23, 2020), and is reported but unpublished at 822 F. App'x 306 (5th Cir. 2020).

The Judgment in a Criminal Case of the United States District Court for the Southern District of Texas, McAllen Division, appears at Appendix B to this petition and is unreported.

From the State Courts:

None.

GROUND FOR JURISDICTION

This Petition arises from a direct appeal which granted final and full judgment against Mr. De La Torre. This action is on a criminal prosecution initiated by the Government. Mr. De La Torre pleaded guilty to making a false statement or representation

with respect to information required to be kept in firearms records. The District Court denied a request for a downward departure. A copy of the Judgment appears at Appendix B. The denial of the request was the sole issue on appeal. The Fifth Circuit rejected the argument and ruled that the Appellate Court lacked jurisdiction to review the denial of the request for the downward departure. A copy of the decision appears at Appendix A. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS

U.S. CONST. Amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. Amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in this favor; and to have Assistance of Counsel for his defense.

STATEMENT OF THE CASE

Overview:

Alejandro De La Torre pleaded guilty to one count of making a false statement or representation on records required to be kept by licensed firearms dealers. ROA.16-17, 28.

There was a plea agreement, which provided that Mr. De La Torre would plead guilty to the single count charged in the Indictment. ROA.123-24. The plea agreement also provided that Mr. De La Torre would receive a 2-level reduction for his acceptance of responsibility. ROA.123-24. That was the full extent of the agreement.

The Guilty Plea Hearing:

The District Court accepted Mr. De La Torre's guilty plea on November 1, 2019. ROA.107. During his guilty plea allocation, Mr. De La Torre admitted the following facts were true and correct as recited by counsel for the Government:

On or about May 21st, 2019, Alejandro De La Torre purchased a Glock Model 42 .380 auto in caliber pistol and a Glock Model 19 nine-millimeter Luger in caliber pistol from a federally licensed firearm dealer located in Pharr, Texas, by making a false statement and representation.

On said occasion De La Torre executed a Department of Justice Bureau of Alcohol, tobacco, Firearms, and Explosives Form 4473 Firearms Transaction Record to the effect that he was the actual buyer of the firearms, whereas, in truth and in fact, he was acquiring the firearms on behalf of another person. De La Torre gave a statement indicating that he had purchased the firearms on behalf of an unidentified individual in Mexico. De La Torre also indicated that he knew that the firearms were going to Mexico. He stated he was paid a fee for every weapon purchased. De La Torre acquired a total of 26 firearms in this manner.

ROA.105.

The Presentence Investigation Report:

A United States Probation Officer prepared and filed a revised Presentence Investigation Report ("PSR" or "the report"). ROA.127-143. The Probation Officer began the PSR calculations with a base offense level of 20 under U.S.S.G. § 2K2.1(a)(4)(B). ROA.134. To this end, the PSR provides:

Base Offense Level: The guideline for a violation of 18 U.S.C. § 924(a)(1)(A) is found under U.S.S.G. § 2K2.1(a). In this case, pursuant to U.S.S.G. § 2K2.1(a)(4)(B)(i)(I), the offense involved the purchase of a semiautomatic firearm capable of accepting a large capacity magazine. Additionally, pursuant to U.S.S.G. § 2K2.1(a)(4)(B)(i)(III), the defendant was convicted under 18 U.S.C. § 924(a)(1)(A) and committed the offense with the knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person. Therefore, the base offense level is established at 20 in accordance with U.S.S.G. 2K2.1(a)(4)(B).

ROA.134.

The Probation Officer next added 6 levels under U.S.S.G. § 2K2.1(b)(5) because “from December 2016 to June 2019, the defendant purchased 26 firearms, one of which was a semiautomatic rifle capable of accepting a large capacity magazine.” ROA.134. Four (4) more levels were added under U.S.S.G. § 2K2.1(b)(1)(C) based on the Officer’s conclusion that “the defendant engaged in the trafficking of firearms.” ROA.134-35. Finally, the Officer deducted 2 levels for acceptance of responsibility. ROA.135. Thus, the Probation Officer claimed the total offense level was 28. ROA.135. There were no criminal history points and, therefore, Mr. De La Torre was assigned a criminal history score of 1. ROA.135.

All of this resulted in an initial calculation of Mr. De La Torre’s Guidelines range of punishment to be 78 to 87 months in the custody of the Bureau of Prisons. ROA.139. However, because the statutory maximum was 60 months in prison, the Guidelines punishment was also limited to 60 months in BOP custody. ROA.139 (citing 18 U.S.C. § 924(a)(1)(A)).

Objections to the PSR

Mr. De La Torre filed objections to the PSR. ROA.125. Relevant to this petition, his second objection provided that:

Mr. De La Torre has indicated that the firearms he purchased were sold to law-abiding citizens who used them for their own protection in Mexico. There is no evidence to indicate that this was not the case. Additionally, all but one of the firearms were pistols. The firearm which was not was a .22 caliber rifle. While it was capable of accepting a high capacity magazine, it is a small caliber weapon. The defendant believes that these are mitigating factors which the court should consider when setting punishment in his case, and that the court should depart downward under U.S.S.G. § 5K2.0(a)(3).

ROA.125.

The Probation Officer responded to this objection and argued:

While the defendant indicated that the firearms he purchased in the United States were for law abiding citizens of Mexico, whom he reported were going to utilize said weapons for their protection, there is no information or supporting documentation to substantiate his claim. Additionally, the .22 caliber rifle that is capable of accepting a large capacity magazine may be a small caliber weapon, but such can still cause death or serious bodily injury to another, especially if such is placed in the wrong hands, i.e., a member of a drug cartel. Thus, it does not appear that the aforementioned factors are significantly mitigating to warrant a downward departure pursuant to U.S.S.G. § 5K2.0(a)(3). Nonetheless, the decision for a downward departure pursuant to the aforementioned policy statement is left to the discretion of the Honorable Court.

ROA.144.

Sentencing:

Mr. De La Torre was sentenced on January 16, 2020. ROA.115. At the start of the hearing, “the government moved for the third [acceptance] point off” and the Court concluded that “this drops [Mr. De La Torre] to a Level 27.” ROA.117.

Prior to the imposition of sentence, Mr. De La Torre's attorney noted the following information for the Court's consideration:

- * Mr. De La Torre was a United States citizen who was born in McAllen, but lived in Mexico most of his life;
- * He came to America in 2016, started working in fast food restaurants and lived at the Salvation Army;
- * Mr. De La Torre worked his way up to "a job in the pipeline";
- * He had an extensive family which was supportive; and
- * Mr. De La Torre bought the firearms for people who were law abiding citizens and who wanted the guns for their own protection

ROA.118.

Mr. De La Torre then addressed the Court. He stated:

Well, first of all, your Honor, I want to apologize for the mistake that I made. I did not think of the consequences. It has deprived me of my freedom, so I definitely am not going to do this ever again, because I believe enjoying your freedom is the best in life. And, so, I hope you give me some consideration with my sentence. And I have tried to do good things while in prison, I wrote a book, and I studied, and now I have no other option but to—but to focus in my future.

ROA.119.

At that point, the Government addressed the Court. The prosecutor said: "We'd just like to ask the Court to consider that he did self-admit to buying and smuggling 30 to 40 [firearms] instead of the 26 that we had forms for." ROA.119-20. This led the Government to ask the Court "to consider that and the guideline sentence." ROA.120.

At that time, the Judge observed:

Yeah, I mean, he's way above the statutory max. So, and I didn't see him as a role adjustment. He was the buyer and he was the smuggler.

I mean, there's just—I didn't really see anyplace—where I could legitimately make findings in his favor.

ROA.120.

The Court next determined that Mr. De La Torre was a Level 27, with a range of punishment of 70 to 87 months in prison. ROA.120. However, the Court duly concluded that Mr. De La Torre's Guidelines range was 60 months in custody, which was also the statutory maximum sentence. ROA.120. The Judge therefore sentenced Mr. De La Torre to a prison term of 60 months in the custody of the BOP.

The Fifth Circuit Appeal

Mr. De La Torre argued to the Fifth Circuit that the District Court reversibly erred by denying his request for a downward departure pursuant to U.S.S.G. § 5K2.0(a)(3). (Appendix A, page 1). The Fifth Circuit affirmed the District Court and held “we lack jurisdiction to review the district court's denial of the motion for a downward departure.” (Exhibit A, page 2). Mr. De La Torre now files this Petition for Writ of Certiorari from that decision.

ARGUMENT AMPLIFYING REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

I.

The Government's Position

On direct appeal to the Fifth Circuit, the Government argued the Appellate Court had no jurisdiction to review the District Court's denial of Mr. De La Torre's request for a downward departure. (Government's Brief, pages 26-28). To this end, the Government cited ten cases in which the Fifth Circuit “held that the Court does not have jurisdiction to review

the denial of a downward departure” unless the District Court had a mistaken belief it lacked authority to do so. (Government’s Brief, pages 26-28). Indeed, the Government cited the names of the Judges who were on the panel for each decision. (Government’s Brief, pages 26-28). The listed decisions were from the last three years. (Government’s Brief, pages 26-28). The prosecution added: “Mr. De La Torres cites no cases from the Supreme Court or from this Court [referring to the Fifth Circuit] holding that the Court had jurisdiction to review the denial of a downward departure unless the denial was based on the District Court’s mistaken belief that it lacked the authority to depart.” (Government’s Brief, page 28).

The Fifth Circuit endorsed this Rule of Law without explanation. (Appendix A, pages 1-2). Therefore, the Fifth Circuit affirmed because it lacked jurisdiction to consider whether the District Court erred by denying the motion. *See* (Appendix A, page 2).

II. The Argument Below

A. Introduction

With respect to the Rule of Law on this issue, Mr. De La Torre acknowledged to the Fifth Circuit that this “no jurisdiction” conclusion was in fact the Fifth Circuit’s longtime Rule of Law. (Opening Brief, pages 9-17). Based on this observation, Mr. De La Torre argued this Court’s stare decisis on how Appellate Courts review federal sentences establishes that there is jurisdiction to consider the validity of the denial. (Opening Brief, pages 9-17). Neither the Fifth Circuit nor the Government addressed these arguments, and thus these assertions are now made again to this Court in support of the requested relief.

Mr. De La Torre argued to the Fifth Circuit this jurisdictional bar is no longer valid. (Opening Brief, pages 10-17). He reviewed the judicial history of this rule and recent United States Supreme Court law to support this argument. (Opening Brief, pages 10-17). Mr. De La Torre used the judicial history of the rule, which holds that a defendant cannot seek review of the denial of a request for a downward departure, to trace its origins back to legal precedent which has been overruled by this Court. (Opening Brief, pages 10-17). He established the cases cited by the Government could be traced back to 1989. (Opening Brief,, pages 10-11). In *United States v. Hatchett*, 923 F.2d 369, 372 (5th Cir. 1991), this Court again stated “[t]his court will not review a district court’s refusal to depart from the guidelines, unless the refusal was in violation of the law.” In fact, this Court exercised jurisdiction in *Hatchett* and remanded for resentencing because the District Court based the denial of the requested downward departure on Mr. Hatchett’s socioeconomic status. *Id.* at 372-76.

The crucial explanation of the law applied in *Hatchett* was distinctly noted:

Because the sentences fall within the applicable guideline ranges, the issue is whether the sentences were imposed in violation of the law or as a result of an incorrect application of the Guidelines.

Id. at 373 (citing *United States v. Buenrostro*, 868 F.2d 135, 136-37 (5th Cir. 1989), *cert. denied*, 495 U.S. 923 (1990)). In *Buenrostro*, the Fifth Circuit had again reiterated that “[a] claim that the district court refused to depart from the guidelines and imposed a lawful sentence provides no grounds for relief.” 868 F.2d at 139.

Supreme Court Precedent

Mr. De La Torre submits, as he did below, this rule has been overruled or superceded by the United States Supreme Court's rulings on how the Guidelines are implemented and reviewed by the Supreme Court since 2007. As discussed below, counsel submits the denial of the request for a downward departure in this case is reviewable as established by this Court.

As a general rule, rather than imposing strict lines of "no review" of certain Guidelines sentences, this Court has developed a straightforward formula to prevent constitutionally infirm and inconsistent sentencing outcomes. To this end, the Guideline range must first be determined. *Kimbrough v. United States*, 552 U.S. 85, 108-10 (2007); *Gall v. United States*, 552 U.S. 38, 51 (2007); *Rita v. United States*, 551 U.S. 338, 364 (2007). The various rules for determining the Guideline range to be applied by the District Court and how this Appellate Court reviews those findings and conclusions have been discussed by this Circuit on numerous occasions. *See e.g., United States v. Acosta*, 619 F. App'x 403, 404 (5th Cir. 2015); *United States v. Alaniz*, 726 F.3d 586, 618-19 (5th Cir. 2013); *United States v. Longstreet*, 603 F.3d 273, 275-76 (5th Cir. 2010). This process is important because, although the Fifth Circuit presumes sentences within the Guideline range are reasonable, the reasonableness of the sentence is the next consideration for sentencing. *Gall*, 552 U.S. at 51; *Rita*, 551 U.S. at 364.

Therefore, after consulting and considering the Guidelines, the sentencing Judge must impose a "reasonable" sentence. *Gall*, 552 U.S. at 51. It should be noted at this

juncture that, in light of so much emphasis on the continued viability of the Guidelines, Sentencing Judges are nonetheless required by the Sixth Amendment to refrain from treating the Guidelines as mandatory whether out of “ignorance, negligence . . . defiance” or for any other reason. *United States v. Rodriguez*, 406 F.3d 1261, 1273 (11th Cir. 2005). The final step in the analysis is for the Court to verify that the sentence is reasonable. *Gall*, 552 U.S. at 51.

All of this established that this Court has determined that the Sentencing Guidelines are not mandatory. *Booker v. United States*, 542 U.S. 220, 224 (2005). Hence, as of 2005, the Guidelines are no longer binding and the Sentencing Court must consider all the 18 U.S.C. § 3553(a) factors to individualize sentences. *Id.* at 259-60, 264-65.

In 2007, this Court again clarified the new rules the Guidelines play at sentencing and on review. As noted above, the Guidelines are the starting point and the initial sentencing benchmark. *Gall*, 552 U.S. at 49. Hence, the District Court cannot presume a Guideline range is reasonable and must always explain the basis for the chosen sentence. *Id.* at 50.

The Circuit Courts are instructed to review cases for reasonableness under an abuse of discretion standard. *Id.* at 51. While the Circuit Courts are permitted to presume a within-the-Guidelines sentence is reasonable, *Rita*, 551 U.S. at 347, treating the Guidelines as mandatory is error. *Gall*, 543 U.S. at 261-64. Indeed, this Court explained that “a district court’s decision to vary from the advisory guidelines may attract greatest respect when “such action is based on the unique facts of the case.” *Kimbrough*, 552 U.S. at 109.

In 2009, this Court opted to return to the issue of whether the guidelines were mandatory. In a per curiam opinion, this Court again declared that “the guidelines are not only not mandatory on sentencing courts; they are also not to be presumed reasonable.” *Nelson v. United States*, 555 U.S. 350, 352 (2009) (emphasis added). Hence, this Court has continued to remind the lower Courts that the Guidelines cannot be treated as mandatory. Respectfully, by using a jurisdictional bar to avoid this very type of review, the Fifth Circuit applying the Guidelines as mandatory in violation of this Court’s precedent.

Decisions From Other Circuits

In 2010, the First Circuit Court of Appeals addressed this “no review” by appellate courts rule on denials of downward departures. In *United States v. Anonymous Defendant*, 629 F.3d 68, 73-74 (1st Cir. 2010), the First Circuit noted that *Booker* had mandated the review of sentences which adhered to the Guidelines or varied from the Guidelines range. (citing *Booker*, 543 U.S. at 245). The First Circuit went on to cite four other Circuits and agreed that a virtual “gamut of sentences” were reviewable by the Courts. *Id.* at 74. The First Circuit explained;

Review for reasonableness is functionally equivalent to review for abuse of discretion. *United States v. Carrasco-De-Jesús*, 589 F.3d 22, 26 (1st Cir. 2009) (citing *Gall*, 552 U.S. at 51). This review encompasses virtually the entire gamut of sentences imposed under the advisory guidelines, including sentences shaped by discretionary departure decisions. See *United States v. Fernández*, 443 F.3d 19, 26 (2d Cir. 2006); *United States v. McBride*, 434 F.3d 470, 477 (6th Cir. 2006); *United States v. Vaughn*, 433 F.3d 917, 923-24 (7th Cir. 2006); see also *United States v. Plouffe*, 445 F.3d 1126, 1130 (9th Cir. 2006) (explaining in an analogous context that “prior precedent restricting jurisdiction made sense when the Guidelines were considered mandatory,” but that it makes no sense “to so restrict jurisdiction on appeal now that the Guidelines must be viewed . . . as merely advisory”).

Id. (full citation added & emphasis added). Thus, the Court determined “either a discretionary refusal to depart or a departure whose extend is contested” would be subject to review on appeal. *Id.* at 74. Significantly, the First Circuit based its decision on an evaluation of *Booker* and the United States Supreme Court’s development of the review of federal court sentencing procedures. Therefore, this is an additional reason the Fifth Circuit should have reviewed the denial of the requested downward departure and the resulting sentence in this case. More importantly, this also establishes that there is a split in the Circuits which sets forth a compelling reason for this Court to conduct a further review.

D. Conclusion

Given that the Fifth Circuit has declined to follow this Court’s stare decisis and the split in the Circuits created by the Fifth Circuit’s numerous decisions on this issue, Mr. De La Torre respectfully submits the refusal in this case of the District Court to grant the defendant’s request for a downward departure is reviewable under the sentencing framework set forth above and mandated by this Court. Furthermore, in this context, this Court has explained that a review of the sentencing decision must be undertaken and any alleged jurisdictional bar is contrary to this Court’s mandate. Indeed, the fact that the Government cited ten cases within the past three years issued by the Fifth Circuit where this Rule of Law was applied only shows how important it is that this issue be resolved. Therefore, Mr. De La Torre respectfully submits that this Court should grant this petition and address the split in the Circuits and the application of this Court’s stare decisis.

II.
Evaluating the Denial of the Requested Downward Departure

The request for a downward departure in this case was presented to the District Court and is therefore evaluated for abuse of discretion. As this Court has explained “on appeal, the district court’s sentence is reviewed for reasonableness under an abuse of discretion standard.” *Peugh v. United States*, 569 U.S. 530, 537 (2013). While this Court can presume reasonableness, it must “take into account the totality of the circumstances, including the extent of any variance from the guideline range.” *Id.* This “permits the court to tailor the sentence in light of other statutory concerns as well.” *Id.* (citing *Kimbrough*, 552 U.S. at 101.

Respectfully, the totality of the circumstances in this establishes the sentence was procedurally and substantively unreasonable. Mr. De La Torre’s objections indicated that it was undisputed that the firearms he purchased were for law abiding citizens in Mexico who needed guns for their own protection. ROA.125. With the exception of one small .22 caliber rifle, which was capable of accepting a high capacity magazine, all of the guns were pistols. ROA.125. These were the core reasons for the downward departure request under U.S.S.G. § 5K2.0(a)(3). ROA.125. In this regard, the Probation Officer’s conclusion that “these guns were placed in the hands of members of drug cartels,” ROA.144, is contrary to the record and not a valid basis for denying the downward departure.

At sentencing, Mr. De La Torre’s lawyer re-urged this evidence for the downward departure. ROA.118. Defense counsel also noted Mr. De La Torre did not have a lot of money and that he lived at the Salvation Army when he resided in this country. ROA.118.

Moreover, Mr. De La Torre addressed the Court and apologized for his conduct. ROA.119. He reported that he had studied, written a book, and would focus on his future. ROA.119. Hence, Mr. De La Torre asked the Court for some consideration with his sentence. ROA.119.

At that point the Court addressed the various programs available to Mr. De La Torre in the Bureau of Prisons and on supervision. ROA.119. The Judge said that he did not “see” a role adjustment and thus determined that he could not legitimately make findings in Mr. De La Torre’s favor. ROA.120. The Judge noted the Guideline range was correctly calculated at 60 months, and sentenced Mr. De La Torre to serve 60 months in the custody of the Bureau of Prisons. ROA.120. There was no discussion of: (1) the 18 U.S.C. § 3553(a) factors; (2) the basis for the clear denial of the requested downward departure; or (3) why the Court rejected, or how the Court considered, Mr. De La Torre’s factual assertions in the objections.

Even a sentence which is within the Guidelines must be supported with more than a bare recitation of the Guideline calculation. *United States v. Mondragon-Santiago*, 564 F.3d 357, 363-64 (5th Cir. 2009). A bare recitation that the Guideline calculation was 60 months is what happened in this case. Furthermore, the Court did not reference the 18 U.S.C. § 3553(a) factors as a basis for the sentence or the denial of a departure. Therefore, this case must be remanded for resentencing.

The sentence, and denial of the request for a downward departure, were also not substantively reasonable. As noted above, the ruling was not specifically justified by the

District Court. Indeed, ultimately the Guidelines calculation simply brought the range of punishment to a fixed-sentence of 60 months. In this regard, further consideration and justification for the sentence was needed because 60 months was the statutory maximum, not the statutory minimum. Under the above-discussed sentencing framework, and in light of the objections in this case, the District Court's automatic decision to use the statutory maximum must be reversed. Hence, this is another reason pursuant to which Mr. De La Torre respectfully requests that this Court grant this petition.

CONCLUSION

For the reasons set forth above, Mr. De La Torre respectfully submits, on the important issue of federal sentencing concerns and given the split in the Circuits, compelling reasons are presented in support of discretionary review by this Honorable Court.

WHEREFORE, PREMISES CONSIDERED, Petitioner, ALEJANDRO DE LA TORRE, respectfully requests that this Honorable Court grant this Petition and issue a Writ of Certiorari and review the decision of the United States Court of Appeals for the Fifth Circuit which affirmed the decision of the District Court to deny the request for a downward departure. Mr. De La Torre also respectfully requests any further relief to which he may be entitled under the law and in equity.

Respectfully Submitted,

James Scott Sullivan
JAMES SCOTT SULLIVAN
LAW OFFICES OF J. SCOTT SULLIVAN
22211 I.H. 10 WEST, SUITE 1206
SAN ANTONIO, TEXAS 78257
(210) 722-2807