

No.
IN THE SUPREME COURT OF THE UNITED STATES
MARCH 2021 TERM

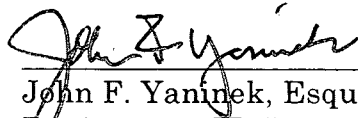
JORGE LUIS ROSA-HERNANDEZ
Petitioner

v.

UNITED STATES OF AMERICA
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES SUPREME COURT

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QUESTION PRESENTED

Whether the Third Circuit Court of Appeals erred in affirming the District Court's Decision in allowing the Government to use unrelated, uncharged misconduct in sentencing unfairly enhancing Mr. Rosa-Hernandez's sentencing guideline score to 8 levels higher?

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JORGE LUIS ROSA-HERNANDEZ respectfully petitions the Court for a Writ of Certiorari to review the Judgment of the United States Court of Appeals which affirmed the United States District Court in this case.

OPINIONS BELOW

On October 1, 2020, the United States Court of Appeals for the Third Circuit issued an Opinion. A copy of the Opinion is attached to this Petition as Appendix 1A. A copy of the Order is attached to this Petition as Appendix 2A. A copy of the Court's Order denying a rehearing *en banc* on October 27, 2020 is also attached as Appendix 3A.

JURISDICTION

A Writ of Certiorari is sought from an order of the United States Court of Appeals for the Third Circuit dated October 1, 2020 and subsequently October 27, 2020 denying Petitioner's *En Banc* Rehearing.

Jurisdiction is conferred upon this Court by 28 U.S.C. §1254(1), which grants the United States Supreme Court jurisdiction to review by Writ of Certiorari all final judgments of the Court of Appeals. Jurisdiction is also conferred upon this Court by 28 U.S.C. §1651(a) which grants the United States Supreme Court jurisdiction to issue all writs necessary or appropriate to aid of its respective jurisdiction and agreeable to the usages and principles of law.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fourteenth Amendment :

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction equal protection of the laws.

STATEMENT OF THE CASE

1. Petitioner, Jorge Luis Rosa-Hernandez, was indicted on September 19, 2018 and charged with possession of a firearm by a previously convicted felon, in violation of 18 U.S.C. §922(g)(1) and §924(a)(2)(Count I).

2. On December 27, 2018 Jorge Luis Rosa-Hernandez pled guilty to this indictment without a plea agreement.

3. The plea arose out of an accidental shooting that occurred on April 29, 2018. Rosa-Hernandez accidentally shot his four-year old daughter inside a McDonald's restaurant in York, Pennsylvania. The firearm went off inside Rosa-Hernandez's pocket, with a bullet passing through is pant leg and ricocheting off the McDonald's floor and then striking his daughter in the leg. Surveillance video captured the entire incident.

4. Jorge Luis Rosa-Hernandez's guilty plea had nothing to do with uncharged misconduct from February 2018.

5. This February 2018 uncharged misconduct became the foundation for a number of sentencing enhancements which added eight (8) points to Petitioner's offense level of his sentencing guidelines.

6. Defendant timely objected to the use of uncharged misconduct that significantly enhanced his sentence.

7. On February 12, 2018, a Confidential Informant (CI) informed law enforcement that he could purchase two firearms from a person named Christopher Cruz-Ortiz.

8. On February 18, 2018, Cruz-Ortiz called the CI and stated that he was at a residence in York with an individual who had two firearms for sale.

9. Testimony of this CI on August 28, 2019 allegedly implicated Rosa Hernandez in this firearms transaction.

10. During the August 28, 2019 hearing, Detective Nazdom testified that the two firearms related to the February 12 and 13 purchase were different than the caliber of pistol used on the April 29, 2018 in the McDonald's shooting.

11. According to Detective Nazdom, the pistol involved in the McDonald's shooting was purchased by the Defendant's wife, Blanca Patricia Rodriguez-Torres.

12. The two fire arms involved in the February transaction had nothing to do with her.

13. The District Court ruled that this February firearms transaction was "relevant conduct," which resulted in the inclusion of three sentencing enhancements increasing Petitioners offense level for sentencing eight (8) points.

14. For conduct to be considered "relevant" for sentencing purposes, it must meet the requirements of USSG §1B1.3. As for which section of §1B1.3 should apply, it is undisputed that §1B1.3(a)(2) governs.

15. For an act to qualify as relevant conduct under §1B1.3(a)(2), three conditions must be met: “(1) it must be the type of conduct described in §1B1.3(a)(1)(A) and (B) (‘all acts and omissions committed ... by the defendant’); (2) grouping would be appropriate under §3D1.2(d); and (3) it must have been ‘part of the same course of conduct or common scheme or plan’ under §1B1.3(a)(2).” *United States v. Blackmon*, 557 F.3d 113, 123 (3d Cir. 2009).

16. Clearly, the first condition is not met in the instant case. §1B1.3(a)(2) states, in full, that conduct for grouping offenses must be considered relevant when “all acts and omissions *described in subsections 1(A) and 1(B)* above were part of the same course of conduct or scheme or plan as the offense of conviction.” §1B1.3(a)(2) (emphasis added).

17. Petitioner contends that this implicates language in §1B1.3(a)(1), which requires that the conduct must have “occurred during the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for the offense,” to be considered relevant.

18. Because the instant conviction arose out of, and occurred, *weeks after*, the February gun sale, Petitioner maintains, there was no preparation for the York McDonald’s shooting involved related to the gun sale, nor could the sale have been an attempt to avoid detection or have occurred during the commission of the York McDonald’s shooting. Thus, this Court should not

consider the February gun sale as “relevant conduct” under the definition of (a)(1).

19. The District Court incorrectly accepted a flawed argument of the government by concluding that the Defendant’s wife purchased her firearm that was used in the York shooting on the same day that the February sale occurred thereby somehow linking the Defendant’s unlawful possession as being continuous following this sale.

20. However, there was actually no evidence of record that Appellant had access to the wife’s firearm continuously from when it was purchased.

21. The District Court Judge wrote, “indeed, we are further persuaded that Defendant ‘had the ability to take actual possession’ of his wife’s gun whenever he wished based on the fact that he did so when the York shooting occurred.”

22. This speculative conclusion is without any evidence in the record as to how the wife’s gun was actually stored or maintained for over two months.

23. The Third Circuit Court of Appeals upheld the District Court’s ruling regarding the inclusion of the February gun sale as relevant conduct related to the April McDonald’s shooting. This Court should rule regarding binding precedent relating to what previous incidents of uncharged

misconduct can be utilized as the same course of conduct under §1B1.3(a)(2) of the *Federal Sentencing Guidelines*.


REASON FOR GRANTING THE WRIT OF CERTIORARI

The reason for granting the Writ of Certiorari in this case is very simple: The Third Circuit Court for the United States with their affirming of the District Court's ruling on what constitutes uncharged misconduct pursuant to the Federal sentencing guidelines §1B1.3(a)(2). This is clearly a violation of Petitioner's due process rights and he requests this case be heard by this Honorable Court.

CONCLUSION

For all the reasons stated, the Petitioner, Jorge Luis Rosa-Hernandez, respectfully requests that his Petition for Writ of Certiorari be granted, and that this Court accept his case for review.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John F. Yannek", written over a horizontal line.

JOHN F. YANNEK
Counsel for Petitioner,
Jorge Luis Rosa-Hernandez

Date:

3/2/21

CERTIFICATE OF MEMBERSHIP IN BAR

I, JOHN YANINEK, counsel for Petitioner, hereby certify that I am a member of the Bar of this Court.




JOHN F. YANINEK

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion for Leave to Proceed in Forma Pauperis and Petition for Writ of Certiorari to the United States Supreme Court was mailed this 2nd day of March, 2021, to the following, via email:

Carlos D. Marchioli @usdoj.gov

Carlos D. Marchioli
US Attorney's Office – Criminal
PO Box 11754
Harrisburg, PA 17108



John F. Yaninek
Counsel for Petitioner,
Jorge Luis Rosa-Hernandez

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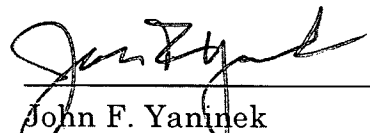
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DECLARATION PURSUANT TO RULE 29.2
OF THE RULES OF THE SUPREME COURT

I declare under penalty of perjury under the laws of the United States of America that the Petition for Writ of Certiorari of Jorge Luis Rosa-Hernandez was mailed to the Clerk's Office of the United States Supreme Court in Washington D.C., postage paid and fees paid (USC-426), First Class Mail.

DATE: 3/2/21



John F. Yaninek
Counsel for Petitioner,
Jorge Luis Rosa-Hernandez