

NO. _____

OCTOBER TERM, 2020

IN THE SUPREME COURT OF THE UNITED STATES

JASON SCOTT PEDRO, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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(a) The Question Presented for Review Expressed in the Terms and Circumstances of the Case.

This Court has made it clear that the Sentencing Guidelines are the “starting point and the initial benchmark” in federal sentencing proceedings. *Gall v. United States*, 552 U.S. 38, 49 (2007). Furthermore, “[e]ven if the sentencing judge sees a reason to vary from the Guidelines, ‘if the judge uses the sentencing range as the beginning point to explain the decision to deviate from it, *then the Guidelines are in a real sense the basis for the sentence.*’” *Peugh v. United States*, 569 U.S. 530, 542 (2013), quoting *Freeman v. United States*, 564 U.S. 522, 529 (2011).

Contrary to holdings in the Fourth, Ninth, and Eleventh Circuits, the Tenth Circuit held in this case that a significant procedural error was harmless even though the sentencing judge used the statutory maximum as the baseline for sentencing.

Can a significant procedural error be deemed harmless when the sentencing judge uses the statutory maximum as the baseline for imposition of sentence?

(b) List of all Parties to the Proceeding

The caption of the case accurately reflects all parties to the proceeding before this Court.

(c) Table of Contents and Table of Authorities

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None.

(d) Reference to the Official and Unofficial Reports of any Opinions

United States v. Pedro, No. 19-6175, slip op., 2020 WL 7238384 (10th Cir. filed Dec. 9, 2020).

(e) Concise Statement of Grounds on which the Jurisdiction of the Court is Invoked.

(i) Date of judgment sought to be reviewed.

The Order and Judgment of which review is sought was filed December 9, 2020.

(ii) Date of any order respecting rehearing.

Rehearing was not sought;

(iii) Cross Petition.

Not applicable;

(iv) Statutory Provision Believed to Confer Jurisdiction.

Pursuant Title 28, United States Code, §1254(1), any party to a criminal case may seek review by petitioning for a writ of certiorari after rendition of judgment by a court of appeals.

(v) The provisions of Supreme Court Rule 29.4(b) and (c) are inapposite in this case. The United States is a party to this action and service is being effected in accordance with Supreme Court Rule 29.4(a).

(f) The Constitutional Provisions, Statutes and Rules which the Case Involves.

(1) Constitutional Provisions:

None.

(2) Statutes Involved:

None.

(3) Rules Involved:

Rule 52, Fed.R.Crim.P., Harmless and Plain Error

(a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

(b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

(g) Concise Statement of the Case.

Basis of Jurisdiction in Court of First Instance

This Petition seeks review of a judgment entered by a United States Court of Appeals. The jurisdiction of the district court below was based originally on an alleged violation of the laws of the United States. The United States District Court for the Western District of Oklahoma has original jurisdiction over offenses against the laws of the United States which occur in that district. 18 U.S.C. §3231.

Facts Material to Consideration of Question Presented

On February 7, 2019, a Clinton, Oklahoma police officer observed a vehicle Jason Scott Pedro was driving weave in and out of the right lane, nearly driving up onto a curb. The officer conducted a traffic stop and made contact with Mr. Pedro. The officer was familiar with Mr. Pedro from past contacts and was aware Mr. Pedro had a suspended driver license. Mr. Pedro was arrested.

The officer conducted an inventory search of the vehicle. The officer recovered from the center console five, thirty round black aluminum, rifle magazines loaded and ready for use along with a S.O.T.A. Arms lower receiver for an AR-15 style rifle. Mr. Pedro was charged with a violation of 18 U.S.C. §922(g)(1), being a convicted felon in possession of a firearm. The Indictment identified the firearm Mr. Pedro possessed as “a S.O.T.A. Arms, Model SA15, “multi” caliber lower receiver . . .” .

Mr. Pedro plead guilty to possessing the lower receiver. A Presentence Report was ordered. The Presentence Report provided an advisory sentencing guidelines offense level calculation. In calculating the offense level, the Presentence Report specified a base offense level of 20 because the defendant was a prohibited person and the offense involved a semiautomatic firearm capable of accepting a large capacity magazine. USSG §2K2.1(a)(4)(B). The Presentence Report provided an advisory

guideline range of imprisonment of 51 to 63 months. This range was calculated using a total offense level of 17 and a criminal history category of VI.¹

Mr. Pedro objected to the large capacity magazine base offense level enhancement. Mr. Pedro argued that at the time of the offense, the lower receiver was physically incapable of having a magazine attached to it. Moreover, to be functional and capable of firing, the receiver would need numerous additional parts: for example, a trigger, hammer, slide, barrel. Also, an AR-15 requires the upper receiver as well as the lower receiver to be functional.

If the receiver involved in the instant offense was determined not to be a firearm capable of accepting a large capacity magazine, Mr. Pedro's base offense level would have been 14. USSG §2K2.1(a)(6)(A). After the adjustment for acceptance or responsibility, the total offense level would have been 12. The advisory sentencing guidelines range for an offense level of 12 and a criminal history category of VI would be 30 to 37 months' imprisonment.

The government produced the lower receiver at sentencing. Upon receipt of the receiver, the district court remarked "That's it?" and requested further explanation. The government called as a witness Jared Lowe, a Special Agent with the Bureau of

¹ The base offense level of 20 was reduced by three levels to 17 pursuant the reduction for acceptance of responsibility. The Criminal History Category calculation concluding Mr. Pedro was in a Criminal History Category VI was not disputed.

Alcohol, Tobacco, Firearms and Explosives. Agent Lowe described the receiver as follows:

The item is a lower receiver for an AR-style rifle, which the lower receiver houses the trigger mechanism, as well as the hammer, which would work on the upper receiver, so it's a two-part firearm.

There's a lower part, which holds a hammer, trigger housing. There's an upper part, which holds a barrel, a bolt, a charging handle, a firing pin, things of that nature.

So the lower portion of the firearm where your hand is, Your Honor, is where the magazine would insert.

With the -- I refer to it as the guts of the gun, which are the inner workings on the lower receiver, there would be a trigger, there would be numerous springs, there would be a magazine release, a magazine catch, a hammer, things of that nature.

So once that is mated with an upper receiver, the magazine would then be inserted, it would lock into place, which the bolt would move and move ammunition from the magazine into the chamber of the firearm for the firing pin to strike and fire, if that makes sense.

Agent Lowe testified the receiver could be "readily converted to expel a projectile" with the proper parts. But, in its current state a magazine would not attach to the receiver. On cross-examination Agent Lowe reviewed Defendant's Sentencing Exhibit 1 that detailed the numerous parts that must be added to the lower receiver to make it functional and which were not present in this case.

Agent Lowe testified further that even if the numerous missing pieces were to be added to the lower receiver, that would constitute only one component of a

functioning firearm. To make a functioning firearm “[y]ou would need to add an upper assembly, which would include a barrel, a bolt, a firing pin, a charging handle, just to name a few [parts].”

The district court overruled Mr. Pedro’s objection to the semiautomatic firearm capable of accepting a large capacity magazine enhancement.

I will overrule the objection. It obviously meets the definition of a firearm. It also has ability to receive a -- high-capacity magazines. And I don’t see any conceptual distinction between this and the [*United States v. Davis*, 668 F.3d 576 (8th Cir. 2012)] case, so I will overrule that objection.

Mr. Pedro’s advisory sentencing guideline range of imprisonment was determined to be 51 months to 63 months.

The Presentence Report identified Mr. Pedro’s criminal history as a factor that may warrant a departure from the applicable sentencing guideline range. Mr. Pedro’s juvenile delinquency history, adult criminal history, inability to comply with community supervision, and pending felony cases were cited as facts in support of an upward departure. Mr. Pedro addressed the Presentence Report’s suggestion of an upward departure or variance in his Sentencing Memorandum.

Mr. Pedro cited the sentencing guidelines requirements that a criminal history category “substantially under-represent the seriousness of the defendant’s criminal history or the likelihood that the defendant will commit other crimes” before a

departure is warranted. USSG §4A1.3(a). Mr. Pedro argued his criminal history did not meet the threshold for an upward departure.

At sentencing Mr. Pedro supplemented his argument that neither an upward variance nor an upward departure was warranted, citing the fact many of his convictions were misdemeanors and nearly one-third of his 28 criminal history points were the result of those misdemeanor convictions. Moreover, Mr. Pedro pointed out the most recent felony involving violence was from 2013 and none of his pending cases involved allegations of violence.

Mr. Pedro also submitted arguments for a downward variance or departure based on the ground the advisory sentencing guideline range overstated the seriousness of the offense. As it concerns Mr. Pedro's history and characteristics, he argued that treating his substance abuse and mental health in a community setting would be more cost effective than prison and lessen the risk to the public in the long run.

The district court advised it was departing upward from the sentencing guideline range of imprisonment based on Mr. Pedro's criminal history and imposed a sentence of 84 months. The district court cited the number of Mr. Pedro's criminal convictions, the number of criminal history points, and "[y]our history includes drugs, violence, and guns and there can't be a more incendiary combination."

The Statement of Reasons differed from the Court's pronouncement at sentencing that it was departing from the guidelines. Instead, the Statement of Reasons reflected a variance from the advisory guidelines. In the Statement of Reasons, boxes were checked indicating the reasons for a variance included “[t]he nature and circumstances of the offense,” “[t]he history and characteristics of the defendant,” and “[t]o protect the public from further crimes of the defendant.” The district court added:

In varying above the advisory guideline range, the court considered the defendant's significant criminal history, as well as his history of drug use, violence, and gun possession. An upward variance was deemed necessary to protect the public from further crimes of the defendant.

No further explanation for a variance based on the nature and circumstances of the offense or the history and characteristic of the defendant was provided in the Statement of Reasons. Mr. Pedro appealed.

The Tenth Circuit did not decide if the district court committed procedural error in the computation of advisory sentencing guidelines by applying the base offense level associated with a semiautomatic firearm capable of accepting a large capacity firearm. Instead, the Tenth Circuit stated:

For the sake of argument, we may assume that the district court erred in applying the enhancement. Even with this assumption, however, the error would have been harmless because the court cogently and thoroughly explained that it would have imposed the same sentence irrespective of the enhancement.

Pedro, slip op. at 4. The Tenth Circuit determined the error in computing the advisory sentencing guidelines was “harmless” in spite of the fact the district court based “the sentence on the statutory maximum and credit for the guilty plea.” *Id.*

(h) Direct and Concise Arguments Amplifying the Reasons Relied on for the Allowance of the Writ.

The district court committed procedural error in the computation of the advisory sentencing guidelines. The Tenth Circuit compounded the error by deeming the error “harmless” and by sanctioning the use of the statutory maximum as the baseline for the district court’s sentencing decision. By sanctioning the use of the statutory maximum as the beginning point for the district court’s sentencing decision, the Tenth Circuit’s decision conflicts with those of the Fourth, Ninth, and Eleventh Circuit Courts of Appeals.

The Sentencing Guidelines embody the objectives of sentencing identified by Congress in the Sentencing Reform Act of 1984. These are the same objectives the Court must consider in imposing sentence within the framework of 18 U.S.C. §3553(a). *Molina-Martinez v. United States*, 136 S.Ct. 1338, 1342 (2016). Against this backdrop, this Court has made it clear the guidelines are the “starting point and initial . . . benchmark.” *Gall v. United States*, 552 U.S. 38, 49 (2007). In *Molina-Martinez* this Court described the Guidelines as “the lodestar” for most federal sentencing proceedings. *Id.* at 1346.

In *Peugh v. United States*, this Court described the Guidelines as “the framework for sentencing” (569 U.S. at 542) and “anchor both the district court’s discretion and the appellate review process . . .” (569 U.S. at 549). As it concerned variances from the Guidelines, this Court stated in *Peugh* the “[e]ven if the sentencing judge sees a reason to vary from the Guidelines, ‘if the judge uses the sentencing range as the beginning point to explain the decision to deviate from it, *then the Guidelines are in a real sense the basis for the sentence.*’” *Id.* at 542, quoting *Freeman v. United States*, 564 U.S. 522, 529 (2011).

In the instant case, the Tenth Circuit acknowledged that erroneous application of a Guideline enhancement ordinarily requires reversal. *Pedro*, slip op. at 3, citing *Molina-Martinez*, 136 S.Ct. at 1346. However, it went on to recognize that erroneous application of an enhancement can sometimes be harmless. *Id.*, citing *United States v. Gieswein*, 887 F.3d 1054, 1061 (10th Cir. 2018). Mr. Pedro submits that a Guideline calculation can never be deemed harmless if the district court procedurally errs and uses the statutory maximum as the baseline for its sentencing decision. Other Circuit Courts of Appeal have held such.

The Fourth Circuit Court of Appeals found reversible plain error when the district court “used the aggregate of the statutory maximum prison term applicable to count 3 and the statutory minimum term applicable to count 3 as the starting point and

the initial benchmark for its sentencing decision.” *United States v. Cason*, 823 Fed.Appx. 154, 156 (4th Cir. 2020), *citing United States v. Abu Ali*, 528 F.3d 210, 262 (4th Cir. 2008) (reversible error when district court used the statutory requirement to avoid unwarranted sentence disparity “to qualitatively locate the sentence it deemed appropriate.”)

Rather than assess whether the § 3553(a) factors warranted a sentence below, within, or above the Guidelines range, the district court assessed where within the aggregated statutory range Cason’s sentence should fall based on those factors. This was plain error.

Cason, Id.

The Ninth Circuit Court of Appeals found reversible procedural error when the district court used the statute of conviction’s “statutory maximum – and not the Guidelines – as the baseline for sentencing.” *United States v. Kwon Woo Sung*, 704 Fed.Appx. 669, 670 (9th Cir. 2017), *citing United States v. Burgum*, 633 F.3d 810, 813 (9th Cir. 2011) (“Had the district court used the statutory maximum rather than the guidelines range as the baseline for sentencing, it would have been reversible error.”).

The district court repeatedly stated that its “initial thought was to sentence the defendant to ten years’ imprisonment.” Further, it explained that it had “thrown out the sentencing guidelines,” and was “sentencing [Sung] under the statute.” Accordingly, because the district court did not use the Guidelines as the baseline for sentencing, it committed reversible procedural error.

Sung, Id.

The Eleventh Circuit Court of Appeals found plain error warranting reversal when the district court “used the statutory maximum sentence of 20 years’ imprisonment as the ‘starting point’ for fashioning” the sentence. *United States v. Vazquez*, 775 Fed.Appx. 660, 661 (11th Cir. 2019).

The Tenth Circuit Court of Appeals’ decision in the instant case is in conflict with decisions of the Fourth, Ninth, and Eleventh Circuit Courts of Appeal that require reversal when the district court anchors its sentencing decision on the statutory maximum rather than the Sentencing Guideline range. Moreover, the Tenth Circuit’s decision to sanction the district court’s erroneous use of the statutory maximum to guide its sentencing decision cannot stand in light of this Court’s precedents in *Gall v. United States*, 552 U.S. 38, 49 (2007) (Guidelines are the “starting point and the initial benchmark”), *Peugh v. United States*, 133 S.Ct. 2072 (2013), and *Molina-Martinez v. United States*, 136 S.Ct. 1338 (2016).

(i) Appendix.

(i) Opinion delivered upon the rendering of judgment by the court where decision is sought to be reviewed:

United States v. Pedro, No. 19-6175, slip op., 2020 WL 7238384 (10th Cir. filed December 9, 2020).

- (ii) Any other opinions rendered in the case necessary to ascertain the grounds of judgment:
 - None;
- (iii) Any order on rehearing:
 - None;
- (iv) Judgment sought to be reviewed entered on date other than opinion referenced in (i):
 - None;
- (v) Material required by Rule 14.1(f) or 14.1(g)(i):
 - None;
- (vi) Other appended materials:
 - None.

CONCLUSION

For the foregoing reasons, Mr. Jason Scott Pedro respectfully requests a Writ of Certiorari issue to review the Order and Judgment filed December 9, 2020, of the United States Court of Appeals for the Tenth Circuit in Case Number 19-6175.

Respectfully submitted,



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