No. _____

In the

Supreme Court of the United States

DANIEL CHICA-GUTIERREZ,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT,

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a federal court is permitted to consider an argument that a prior state-court conviction does not satisfy a relevant federal statutory provision if accepting the argument would suggest that the defendant might have had an affirmative defense to the state prosecution.

PARTIES TO THE PROCEEDING

The parties to the proceeding are named in the caption.

DIRECTLY RELATED PROCEEDINGS

United States v. Chica-Gutierrez, No. 4:19-CR-210 (N.D. Tex.)

United States v. Chica-Gutierrez, No. 20-10070 (5th Cir.)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Daniel Chica-Gutierrez asks this Court to issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Fifth Circuit's opinion was not selected for publication in the Federal Reporter. It can be found at 833 Federal Appendix 592. It is reprinted on pages 1a–3a of the Appendix.

JURISDICTION

This Court has jurisdiction to review the Fifth Circuit's judgment under 28 U.S.C. § 1254(1). The Fifth Circuit entered judgment on January 19, 2021. On March 19, 2020, this Court extended the deadline to file certiorari to 150 days from the date of that judgment.

STATUTORY PROVISIONS INVOLVED

Title 18 of the United States Code, Section 3661 provides:

> No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

Texas Penal Code section 38.10 provides, in pertinent part:

> (a) A person lawfully released from custody, with or without bail, on condition that he subsequently appear commits an offense if he intentionally or knowingly fails to appear in accordance with the terms of his release.
>
> * * * *
>
> (c) It is a defense to prosecution under this section that the actor had a reasonable excuse for his failure to appear in accordance with the terms of his release.

U.S. Sentencing Guideline 2L1.2(b)(3) provides:

> (3) (Apply the Greatest) If, after the defendant was ordered deported or ordered removed from the United States for the first time, the defendant engaged in criminal conduct that, at any time, resulted in--
>
> (A) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was five years or more, increase by 10 levels;
>
> (B) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was two years or more, increase by 8 levels;
>
> (C) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed exceeded one year and one month, increase by 6 levels;
>
> (D) a conviction for any other felony offense (other than an illegal reentry offense), increase by 4 levels; or
>
> (E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, increase by 2 levels.

U.S.S.G. 2L1.2(b)(3) (2018).

STATEMENT

1. Petitioner Daniel Chica-Gutierrez pleaded guilty to illegal reentry after removal in violation of 8 U.S.C. § 1326. The district court imposed a severe sentence of 125 months in prison, followed by three years of supervised release. App., *infra*, 1a. The district court believed this was a within, but at the top, of the advisory guideline range. App., *infra*, 1a.

2. The severity of the sentence arose, in large measure, of Mr. Chica-Gutierrez's 2013 Texas conviction for bail-jumping. First, the conviction scored 3 criminal history points, raising his criminal history category from IV to V. 5th Cir. R.

133 ¶ 35, 135 ¶ 37.[1] Second, the district court added 8 offense levels because it concluded that the conviction and sentence for bail jumping resulted from "criminal conduct" that Mr. Chica-Gutierrez "engaged in" after his first removal. 5th Cir. R. 129–130 ¶ 19; *see* U.S.S.G. § 2L1.2(b)(3)(B). That raised his total offense level from 17 to 25. 5th Cir. R. 130 ¶¶ 19, 27. By raising his criminal history category *and* his offense level, the bail jumping conviction transformed a guideline range of 37–46 months to a substantially higher 100–125 months. 5th Cir. R. 139 ¶ 78.

3. The undisputed sequence of events leading to this conviction is important:

- **September 13, 2010:** Police arrested Mr. Chica-Gutierrez for a robbery committed earlier that day. 5th Cir. R. 131 ¶ 32.
- **September 16, 2010:** The state court releases Mr. Chica-Gutierrez on $2,500 bond. 5th Cir. R. 203; *see* 5th Cir. R. 219.
- **April 28, 2011:** Immigration officials, who have taken Mr. Chica-Gutierrez into custody, order him detained pending removal proceedings. 5th Cir. R. 232.
- **June 1, 2011:** An immigration judge enters a removal order against Mr. Chica. 5th Cir. R. 127 ¶ 6.
- **June 6, 2011:** The state court decides that Mr. Chica-Gutierrez should be held without bond. 5th Cir. R. 207. The court acknowledges, on the record, that Mr. Chica-Gutierrez is "in Federal Custody." 5th Cir. R. 207. That same day, immigration agents execute the first removal order by taking him back to Mexico. 5th Cir. R. 127 ¶ 6. He does not return until March 2012.

[1] The Presentence Investigation Report and Mr. Chica-Gutierrez's sentencing memorandum were filed under seal in the district court. Thus, this Petition cites to those documents using the 5th Circuit's Electronic Record on Appeal rather than including them within the Petition Appendix.

- **December 9, 2011:** The Texas court formally revokes Mr. Chica-Gutierrez's bond and issues a warrant for his arrest. 5th Cir. R. 208. According to the PSR,[2] the state-court indictment,[3] and the state-court judgment,[4] this is the date Mr. Chica-Gutierrez committed the bail-jumping offense.

- **March 15, 2012:** Customs and Border Patrol agents apprehend Mr. Chica-Gutierrez on the U.S. side of the border near Sierra Blanca, Texas. 5th Cir. R. 132 ¶ 8.

- **March 27, 2012:** A Texas grand jury returns an indictment for the bail-jumping offense committed December 9, 2011. 5th Cir. R. 228.

- **July 21, 2013:** After Mr. Chica-Gutierrez was convicted of an immigration offense, removed, and returned again, Texas officials finally arrest him for the bail jumping offense committed December 9, 2011. 5th Cir. R. 133 ¶ 35. He remains in custody. (5th Cir. R. 229).

- **December 27, 2013:** Mr. Chica-Gutierrez pleads guilty to bail-jumping, and the Texas court orders him to serve two years in prison. (5th Cir. R. 229). He completes that term of imprisonment on July 21, 2015, and is deported to Mexico a third time the following day. 5th Cir. R. 133 ¶ 35.

- **April 8, 2019:** Fort Worth Police arrest Mr. Chica-Gutierrez for driving while intoxicated. 5th Cir. R. 134. The next day, federal immigration officials learn that he has returned illegally. 5th Cir. R. 128 ¶ 9. They initiated the instant prosecution.

4. In the proceeding below, Mr. Chica-Gutierrez pleaded guilty to a single-count indictment charging him with illegal reentry after removal in violation of 8 U.S.C. § 1326. (5th Cir. R. 17–18; 5th Cir. R. 57–91). As noted previously, the bail-

[2] 5th Cir. R. 133 ¶ 35

[3] 5th Cir. R. 228

[4] 5th Cir. R. 229

jumping conviction and sentence dramatically increased Mr. Chica-Gutierrez's Sentencing Guideline calculations:

Base offense level	8	2L1.2(a)
Prior illegal reentry offense	+4	2L1.2(b)(1)(A)
"Before the defendant was ordered deported or ordered removed from the United States for the first time, the defendant engaged in criminal conduct that, at any time, resulted in a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was 2 years or more"	+8	2L1.2(b)(2)(B).
"After the defendant was ordered deported or ordered removed from the United States for the first time, the defendant engaged in criminal conduct that, at any time, resulted in a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was 2 years or more."	+8	2L1.2(b)(3)(B)
Acceptance of responsibility	-3	3E1.1
Total Offense Level	**25**	5th Cir. R. 129–130
Criminal History Category	V	5th Cir. R. 135
Guideline Range	100–125 months	5th Cir. R. 139

5. Without specifically objecting to the Guideline calculations, Mr. Chica-Gutierrez's defense attorney drew the district court's attention to the incongruity of enhancing his sentence for his *absence* from a U.S. courtroom which was due to his deportation to Mexico. 5th Cir. R. 177; 5th Cir. R. 103. In his allocution, Mr. Chica-Gutierrez again stressed that, at the time he posted bail in the robbery prosecution, he thought he would be released into the community while he fought those charges. 5th Cir. R. 108–109. But instead he was deported, and he "couldn't show up to court for that robbery." 5th Cir. R. 108–109. The defense requested a sentence within the range of 63–78 months. 5th Cir. R. 107. The district court decided to impose a

sentence "at the top of the guideline range"—125 months in prison, followed by three years of supervised release. 5th Cir. R. 111–112. The defense objected to the length of the sentence. 5th Cir. R. 116.

6. On appeal, Mr. Chica-Gutierrez urged the Fifth Circuit to reverse the district court's application of U.S.S.G. § 2L1.2(b)(3)(B). He did not "frame his challenge as an attack on the validity of the bail jumping conviction." Pet. App. 2a. He argued instead that the valid conviction did not arise from "criminal conduct" in which he "engaged" after the first removal. U.S.S.G. § 2L1.2(b)(3)(B). Even so, the Fifth Circuit deemed his argument "a collateral attack on the prior conviction." Pet. App. 2a (quoting *United States v. Longstreet*, 603 F.3d 273, 276 (5th Cir. 2010)). In the Fifth Circuit's view, these undisputed facts about the bail-jumping conviction *could have* supported an affirmative defense to the charge: that Mr. Chica-Gutierrez "had a reasonable excuse for his failure to appear." Pet. App. 2a (quoting Tex. Penal Code § 38.10(c)). According to the Fifth Circuit, the district court "may not entertain such an attack when applying the Guidelines at sentencing." Pet. App. 2a. This timely petition follows.

REASONS TO GRANT THE PETITION

The Fifth Circuit has improperly expanded the doctrine this Court announced in *Custis v. United States*, 511 U.S. 485 (1994). This rule led the court to ignore a persuasive argument that the district court misapplied the Sentencing Guidelines. The rule also violates Congress's clear statutory command expressed in 18 U.S.C. § 3661.

A. This Court's decision in *Custis* forbids collateral attacks on state convictions; it does not forbid consideration of undisputed facts that might have given rise to an affirmative defense.

Mr. Chica-Gutierrez never disputed the validity of his Texas bail-jumping conviction. Pet. App. 2a. He pleaded guilty to that crime and he has alleged no substantive or procedural defect that would undermine its validity.

What he has alleged are facts that mitigate his culpability for the crime, and which demonstrate that it did not result from "criminal conduct" in which he "engaged" *after* his first removal. The conviction arose from a combination of culpable actions he took *before* his first removal, and *others'* conduct both before and after that removal order. None of this is precluded by *Custis*.

Custis held that a defendant had no constitutional or statutory right to contest the validity of the prior convictions used to enhance his sentence under the Armed Career Criminal Act, 18 U.S.C. § 924(e), on any ground other than absence of counsel. 511 U.S. 490–497. Notably, the petitioner did not raise any argument that the prior dispositions failed to satisfy the relevant federal definitions; Custis acknowledged that he suffered those prior convictions and that they satisfied the ACCA's relevant definitions.

Here, Mr. Chica-Gutierrez took the exact opposite approach. He never once challenged "the validity of the bail jumping conviction." Pet. App. 2a. He focused instead on the relevant *federal* definition (Guideline 2L1.2(b)(3)(B)), and argued that he did not "engage in criminal conduct" after his prior removal. Following its prior published decision in *Longstreet*, the Fifth Circuit extended *Custis*'s prohibition on

collateral attacks to bar even arguments that *might have* given rise to an affirmative defense. Pet. App. 2a–3a. This was an incorrect application of this Court's precedent.

As *Custis* itself recognized, collateral attacks on prior predicate state convictions are not anathema within federal sentencing proceedings. Congress sometimes "intend[s] to authorize collateral attacks on prior convictions at the time of sentencing," and "it kn[ows] how to do so." *Custis*, 511 U.S. at 492 (discussing 21 U.S.C. § 851(c)); *cf.* 8 U.S.C. § 1326(d) (allowing a defendant charged with unlawful reentry to collaterally attack a removal order). So it is hard to understand why the Fifth Circuit holds that district courts *cannot* consider undisputed facts that *might have* given rise to an affirmative defense.

In fact, the district court could have embraced Mr. Chica-Gutierrez's argument without suggesting any impropriety about the bail-jumping conviction at all. When a defendant raises this defense, the *reasonableness* of his excuse "is generally a matter for the jury." *Luce v. State*, 101 S.W.3d 692, 694 (Tex. App. 2003). Unlike the federal sentencing court, the jury would not be asked to determine whether Mr. Chica-Gutierrez "engaged in criminal conduct" *after* his removal. U.S.S.G. § 2L1.2(b)(3)(B). That is the critical dispute for federal sentencing purposes; it is not even relevant to a state prosecution. The jury might very well have convicted him on the basis of culpable conduct in which he engaged *prior to* the removal order. Or the jury might have concluded that unlawful presence (which precedes most orders of removal) was not "reasonable."

B. The Fifth Circuit's *per se* rule against considering undisputed facts falling within *Custis*'s penumbra violates 18 U.S.C. § 3661.

Under binding Fifth Circuit precedent, a sentencing court "may not entertain" an argument that "would imply that the state court's finding of guilt was improper." Pet. App. 2a (quoting *Longstreet*, 603 F.3d at 276). But Congress has expressly forbidden that kind of rule: "No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.." 18 U.S.C. § 3661. Absent intervention from this Court, the Fifth Circuit will continue to bar judges from considering important Guideline and mitigation arguments that do not actually attack the validity of a prior conviction. This Court should correct the error.

C. The absence of a quorum on the Sentencing Commission warrants an exception to this Court's typical reluctance to resolve issues arising from the U.S. Sentencing Guidelines.

The Court should make an exception to its general policy of avoiding disputes about how to apply the Sentencing Guidelines. First, this case is about more than just the proper application of U.S.S.G. § 2L1.2(b)(3)(B). The problem Mr. Chica-Gutierrez raises is not merely that the district court and Fifth Circuit misapplied that Guideline; the problem is the Fifth Circuit's published, *per se* prohibition on consideration of facts that might arguably cast doubt on the propriety of a prior state conviction.

Second, even if this case were solely about the right way to apply Guideline 2L1.2, the absence of a quorum on the Sentencing Commission gives reason to grant

certiorari here, even if the Court would normally await action from the Commission itself. For most federal laws, this Court is "initially and primarily" responsible for resolving disputes. *Braxton v. United States*, 500 U.S. 344, 348 (1991). When it comes to the Sentencing Guidelines, however, this Court typically refrains from granting certiorari on the theory that Congress wanted the U.S. Sentencing Commission to resolve disputes about the interpretation of the Guidelines. *Buford v. United States*, 532 U.S. 59, 66 (2001) (discussing *Braxton*).

This Court should reconsider that reticence here because the Sentencing Commission lost its quorum in January 2019. The Commission "consists of seven voting members and, per statute, requires four members for a quorum to amend the guidelines. 28 U.S.C. §§ 991(a) (setting forth the number of members), 994(a) (requiring the vote of four members)." *United States v. Maumau*, 993 F.3d 821, 836 (10th Cir. 2021). There is no hope that a de-populated Sentencing Commission could correct the Fifth Circuit's error here.

CONCLUSION

The Court should grant the petition and set the case for decision on the merits.

Respectfully submitted,

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