
NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

JUAN MANUEL PARDO-OSEGUERA,

PETITIONER,

VS.

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

RANDALL H. NUNN
Attorney at Law
P.O. Box 1525
Mineral Wells, Texas 76068
Telephone No. (940) 325-9120
rhnunn@sbcglobal.net
Attorney for Petitioner

QUESTIONS PRESENTED

A defendant in a federal criminal case, under the appropriate circumstances, is eligible for a reduction of 2 offense levels and to be sentenced without regard to any statutory minimum sentence if the court finds at sentencing that the defendant is eligible for the "safety-valve" provision set forth in 18 U.S.C. § 3553(f) and § 5C1.2 of the United States Sentencing Guidelines.

The questions presented are:

1. Where the United States Probation Officer does not include in the Presentence Report a recommendation for the application of the "safety-valve" reduction and limitation on the statutory minimum for an eligible defendant, and counsel does not object to the lack of such safety-valve reduction, is the failure to include the safety-valve reduction (a) a plain error which the district court should have corrected in its oversight of sentencing and (b) a plain error which should be corrected by the appellate court?

2. Is the failure to include a safety-valve reduction, based on the assumption that a defendant is ineligible if he has a weapons enhancement applied at sentencing, which enhancement requires the defendant to overcome the weapons possession allegation using a "clearly improbable" standard, a significant procedural error where the defendant can show his entitlement to the safety-valve under a preponderance of the evidence standard, thereby becoming entitled to the safety-valve reduction?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioner is Juan Manuel Pardo-Oseguera, defendant-appellant below. Respondent is the United States of America, plaintiff-appellee below. Petitioner is not a corporation.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO PROCEEDINGS AND RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	v
OPINION BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS AND SENTENCING GUIDELINES INVOLVED	1
STATEMENT OF THE CASE	4
I. Course of Proceedings in the District Court and Relevant Facts	
4	
II. The Fifth Circuit Opinion	6
III. The Weapons Enhancement Claim	7
IV. The Failure to Include the Safety-Valve Reduction in the PSR Claim	8
REASONS FOR GRANTING THE PETITION	9
A. The Decision Below Represents a Conflict Between Circuits on an Important and Recurring Question.....	9
B. The Question Presented Significantly Impacts the Administration of Criminal Justice.	10
C. Conflict and Uncertainty with the Application of the Safety-Valve Provision Where a Weapons Enhancement is Involved Raises an Important Question of Federal Law that Has Not Been, but Should Be, Settled by this Court	11

CONCLUSION	11
------------------	----

APPENDIX

Opinion of the Fifth Circuit Court of Appeals, Unpublished, No. 20-40517, (April 16, 2021)	Pet. App. 1a-3a.
---	------------------

TABLE OF AUTHORITIES

Cases

<i>United States v. Anderson</i> , 452 F.3d 87 (1st Cir. 2006)	8
<i>United States v. Ruiz-Arriaga</i> , 565 F.3d 280 (5th Cir. 2009)	9
<i>United States v. Bolka</i> , 355 F.3d 909 (6th Cir. 2004)	8
<i>United States v. Bolton</i> , No. 16-4078, 4th Cir., 6/7/2017	8
<i>United States v. Carillo-Ayala</i> , 713 F.3d 82 (11th Cir. 2013)	8
<i>United States v. Nelson</i> , 222 F.3d 545 (9th Cir. 2000)	8
<i>United States v. Stamps</i> , No. 20-1336, 7th Cir., 12/29/2020	8
<i>United States v. Zavalza-Rodriguez</i> , 379 F.3d 1182 (10th Cir. 2004)	8

Statutory Provisions

18 U.S.C. § 3553 (f)	1
18 U.S.C. § 3553 (a)	7
21 U.S.C. § 841(a)(1) and (b)(1)(A)	4, 5
21 U.S.C. § 846	4
28 U.S.C. § 1254(1)	1

Sentencing Guidelines

U.S.S.G. § 2D1.1 (b)(1)	3, 6, 8, 10, 11
U.S.S.G. § 3E1.1	5, 6
U.S.S.G. § 5C1.2	3, 8, 11

PETITION FOR A WRIT OF CERTIORARI

The petitioner, Juan Manuel Pardo-Oseguera, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on April 16, 2021.

OPINION BELOW

The unpublished opinion of the United States Court of Appeals for the Fifth Circuit *United States v. Juan Manuel Pardo-Oseguera*, No. 20-40517 (5th Cir., April 16, 2021), is reproduced in the Appendix. (Pet. App. 1a - 3a).

JURISDICTION

This Court has jurisdiction under Title 28, United States Code § 1254(1) to review the circuit court's decision on a writ of certiorari.

STATUTORY PROVISION AND SENTENCING GUIDELINES INVOLVED

1. This case involves Title 18, United States Code, § 3553 (f) which provides that:

(f) LIMITATION ON APPLICABILITY OF STATUTORY MINIMUM IN CERTAIN CASES.-- Not notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846), section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963), or section 70503 or 70706 of title 46, the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that --

(1) the defendant does not have --

- (A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines;
- (B) a prior 3-point offense, as determined under the sentencing guidelines; and
- (C) a prior 2-point violent offense, as determined under the sentencing guidelines;

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

2. This case also involves Sentencing Guideline § 2D1.1(b)(1) which provides:

§ 2D1.1 1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy

(a) Base Offense Level (Apply the greatest):

...

(b) Specific Offense Characteristics

(1) If a dangerous weapon (including a firearm) was possessed, increase by 2 levels.

3. This case also involves Sentencing Guideline § 5C1.2 which provides:

§ 5C1.2 Limitations on Applicability of Statutory Minimum Sentences in Certain Cases

(a) Except as provided in subsection (b), in the case of an offense under 21 U.S.C. § 841, § 844, § 846, § 960, or § 963, the court shall impose a sentence in accordance with the applicable guidelines without regard to any statutory minimum sentence, if the court finds that the defendant meets the criteria in 18 U.S.C. § 3553(f)(1)-(5) set forth below:

Criminal

History Category);

(1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines before application of subsection (b) of §4A1.3 (Departures Based on Inadequacy of

any

statutory minimum sentence, if the court finds that the defendant meets the criteria in 18 U.S.C. § 3553(f)(1)-(5) set forth below:

(1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines before application of subsection (b) of §4A1.3 (Departures Based on Inadequacy of

any

any

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. § 848; and

- (5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information shall not preclude a determination by the court that the defendant has complied with this requirement.
- (b) In the case of a defendant (1) who meets the criteria set forth in subsection (a); and (2) for whom the statutorily required minimum sentence is at least five years, the offense level applicable from Chapters Two (Offense Conduct) and Three (Adjustments) shall be not less than level **17**.

STATEMENT OF THE CASE

I. Course of Proceedings in the District Court and Relevant Facts

Petitioner was charged on April 10, 2019 in Count 1 of a three-count Superseding Indictment with a violation of 21 U.S.C. § 846, conspiracy to possess with intent to manufacture and distribute 500 grams or more of methamphetamine, in violation of 21 U.S.C. §§ 841 (a)(1) and (b)(1)(A), possession with intent to manufacture and distribute 500 grams or more of a mixture and substance containing a detectable amount of methamphetamine.

Petitioner pleaded guilty to Count 1 of the three-count Superseding Indictment, without a written plea agreement, on December 20, 2019. A sentence of 135 months was imposed on petitioner on July 23, 2020.

Offense of Conviction.

The offense of conviction was conspiracy to possess with intent to distribute a mixture containing a detectable amount of methamphetamine, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(A). Count 1 of the Second Superseding Indictment alleged that in

or about January 2015 and continuously thereafter up to and including November 15, 2018, in the Eastern District of Texas, petitioner and others, did knowingly and intentionally conspire to possess with intent to manufacture and distribute methamphetamine.

Guilty Plea.

A Factual Basis was signed by petitioner on June 11, 2019 and filed on December 20, 2019. On December 20, 2019, petitioner pleaded guilty without a written plea agreement to Count 1 of the three-count Second Superseding Indictment.

Presentence Investigation Report and Objections

The Presentence Investigation Report filed on February 19, 2020 (“PSR”) found a total offense level of 34 and a Guideline Imprisonment Range of 151 to 188 months, after applying a 2-level enhancement for possession of a dangerous weapon, a 2-level increase for the offense involving the importation of methamphetamine, a 2-level increase for maintaining a premises for the purpose of manufacturing or distributing a controlled substance, and a 2-level adjustment for acceptance of responsibility under U.S.S.G. § 3E1.1(a).

On March 6, 2020, petitioner filed his written Objections to the PSR (the “PSR Objections”), including an objection to the weapon enhancement and an objection to the enhancement for maintaining a drug premises.

On April 15, 2020, an Addendum to the PSR was filed responding to petitioner's objections to the PSR and showing the additional one-level reduction under U.S.S.G. § 3E1.1(b) provided by the Government, and a total offense level of 33 and Criminal

History Category of I, and a recommended sentence of 135 months. The revised PSR removed all references to the [petitioner] "possessing a loaded firearm."

Sentencing Hearing.

At the sentencing hearing held on May 22, 2020, the district court adopted as its fact findings and conclusions the findings and conclusions as stated in the PSR, as modified or supplemented by the Addendum to the PSR and any facts and conclusions the court found from the bench. At the sentencing hearing petitioner was sworn and testified. No agents or witnesses testified for the Government. The district court overruled petitioner's objections to the 2-level weapon enhancement and the 2-level enhancement for maintaining a drug premises. The petitioner was sentenced to 135 months.

II. The Fifth Circuit Opinion

On April 16, 2021, the Court of Appeals for the Fifth Circuit affirmed the district court's sentence. The Fifth Circuit ruled that based on a firearm found in petitioner's residence, along with a loaded magazine (not in the pistol when seized), a digital scale with methamphetamine "residue," and "wrappings" used for drugs, the district court could plausibly find that the Government met its burden in showing petitioner possessed a firearm for purposes of § 2D1.1(b)(1). The Fifth Circuit also ruled that, based on methamphetamine found on the "property" (not in the residence), alleged drug paraphernalia and a firearm found in the residence, and the residence being "sparsely furnished," the residence was being used as a "stash house" and that the district court could plausibly find that petitioner maintained a premises for the purpose of storing drugs for distribution.

The Fifth Circuit also stated that even if it were to assume, *arguendo*, that the district court erred, any error would be harmless because the district court gave "its clear and plain word" that it would have imposed the same sentence even if its guidelines calculation were incorrect, and that there was no indication that the district court was improperly influenced by an erroneous guidelines range, as it "was firm, plain, and clear in expressing [its] reasoning" that the sentence was appropriate in light of the 18 U.S.C. § 3553(a) factors. Petitioner was sentenced to 135 months of imprisonment.

III. The Weapon Enhancement Claim.

The district court's finding that petitioner possessed a firearm in connection with his drug offense was based on a legal error. At sentencing, the district judge stated "I don't think it's clearly improbable that the weapon was connected with the offense." Rather than evaluating whether the Government had shown by a preponderance of the evidence that the firearm was related to his drug offense, the district court was focused on whether the petitioner could prove that it was "clearly improbable" that the firearm was connected to his drug offense, imposing a higher burden on petitioner than is required for him to prove safety-valve eligibility by showing by a preponderance of the evidence that the firearm was not possessed "in connection with" the drug offense. The mindset of the district court in evaluating the existence of a firearm in the residence was on the "clearly improbable" standard, making the Government's allegations plausible so long as the Government's narrative seems "possible" when compared to the "clearly improbable" lodestar standard that the Government knows the defendant must meet.

On the other hand, in order to receive the safety-valve reduction of 2-levels, a

defendant must prove by a preponderance of the evidence that he satisfies each of § 5C1.2(a)'s five criteria. At least seven circuits have held that a weapons enhancement pursuant to § 2D1.1(b)(1) does not foreclose a safety-valve reduction despite § 5C1.2(a)(2)'s requirement that a defendant seeking the reduction did not possess a firearm in connection with the offense. *See, e.g., United States v. Carillo-Ayala*, 713 F.3d 82, 91 (11th Cir. 2013); *United States v. Anderson*, 452 F.3d 87, 90 (1st Cir. 2006); *United States v. Zavalza-Rodriguez*, 379 F.3d 1182, 1188 (10th Cir. 2004); *United States v. Bolka*, 355 F.3d 909, 914 (6th Cir. 2004); *United States v. Nelson*, 222 F.3d 545, 549-51 (9th Cir. 2000); *United States v. Bolton*, No. 16-4078, 4th Cir., 6/7/2017; *United States v. Stamps*, No. 20-1336, 12/29/2020.

A defendant might be unable to show that any connection between a firearm and the offense is "clearly improbable," but might be able to prove by a preponderance of the evidence that the firearm was not connected with that offense to satisfy § 5C1.2(a)(2). The "clearly improbable" standard "stacks the deck" against a criminal defendant, making it virtually impossible to overcome an allegation by the Government that the firearm possession was "in connection with" the drug offense.

IV. The Failure to Include a "Safety-Valve" Reduction in the Presentence Report Based on the Existence of the Weapons Enhancement Was Error.

At most, the district court in the instant case found only "constructive" possession of the firearm by petitioner. There was no evidence, or allegation, that petitioner ever carried the firearm, brandished it, or threatened that he had a firearm. In fact, other than moving it when he first found it in the residence which he had occupied only for a short time, he testified he never touched the firearm. Thus, petitioner effectively denied, in

testimony at sentencing and under oath, ever "actually possessing" the firearm.

With seven circuit courts saying only "active possession" precludes a defendant from receiving a safety-valve reduction, the safety-valve reduction should have been applied, or at the least explored, by the district court at sentencing. Petitioner met all requirements of the safety-valve other than the firearms possession criteria (if one assumed that any kind of possession, even "constructive" possession, precluded the safety-valve).

According to the Fifth Circuit, an error in applying, or at least considering, an apparent sentencing reduction that a defendant is arguably entitled to, is an error that may be corrected by appellate courts:

"It is well established that appellate courts may correct errors of law under a plain standard where trial counsel simply stood mute at sentencing and failed to object to the PSR. [citation] This is because a "plain"error is one that the district court, in its oversight of sentencing, should have been alert to correct."

United States v. Ruiz-Arriaga, 565 F.3d 280, 283 (5th Cir. 2009).

REASONS FOR GRANTING THE PETITION

A. The Decision Below Represents a Conflict Between Circuits on an Important and Recurring Question of National Interest.

This case presents an important and recurring question on which the lower courts are in acknowledged conflict with respect to the application of the enhancement for importation of methamphetamine. There is a clear split in the circuits on this issue. And in circuits that do not adhere to the Fifth Circuit's approach to application of the safety-valve to defendants having a weapons enhancement where no safety-valve reduction is applied, the resulting sentences for similar conduct will be less than those in

the Fifth Circuit, resulting in sentencing disparities. The safety-valve is a much-used provision in federal drug cases and similar cases will be decided with different results, leading to sentence disparities. This is a recurring issue of national importance and there is no reason to let the conflict continue. This is an ideal case for resolving an important issue that is arising with greater frequency. Resolution of the question will have a significant impact on petitioner and others in his situation.

B. The Question Presented Significantly Impacts the Administration of Criminal Justice.

1. The safety-valve provision is a frequently-used provision, since it allows for a 2-level sentence reduction and elimination of the mandatory minimum sentences in drug cases where it may be applied. The inconsistent application or reduced application in cases where it is appropriate will adversely affect the administration of federal criminal justice.

2. The Standards for Application of the Safety-Valve to Cases Where there is a Firearm Enhancement Are Not Settled in the Circuits and the Lack of Uniformity Will Lead to Sentencing Disparities.

A number of circuits have decided cases involving application of the safety-valve where there is a § 2D1.1(b)(1) enhancement for possession of a firearm in connection with a drug trafficking offense, using different approaches in some cases due to confusion as to the standards to be applied in cases where firearms enhancements are involved or where the standards of review are inconsistent. Such uneven application and lack of uniformity in the interpretation and application of the guidelines in § 2D1.1(b)(1) and § 5C1.2, in effect, create different standards of proof and results in sentencing disparities.

C. The Conflict and Uncertainty with the Application of the Safety-Valve Provision where a Weapons Enhancement is Involved is an Important Question of Federal Law that Has Not Been, but Should Be, Settled by this Court.

There is a lack of clarity and uniformity on this issue and this Court should settle this important question of federal law as to whether the safety-valve provision can be used in federal drug cases when a defendant is subject to a weapons enhancement, and, if so, what requirements must be met.

CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that the petition for writ of certiorari should be granted.

DATED: September 11, 2021

Respectfully submitted,

s/Randall H. Nunn

Randall H. Nunn
Attorney at Law
P.O. Box 1525
Mineral Wells, Texas 76068
rhnunn@sbcglobal.net
Attorney for Petitioner