

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2021

ROBERTO PADILLA ESPINOZA,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

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

PETITION FOR WRIT OF CERTIORARI

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Issue Presented

1. The Fifth Circuit improperly approved the district court's decision to increase Petitioner's sentence based on unscored prior convictions.

Table of Contents

	Page
Issue Presented	ii
Table of Contents	iii
Table of Authorities	iv-v
Citation to Opinion Below	1
Jurisdiction	1
Sentencing Guidelines	2-3
Statement of the Case	4-7
<u>First Reason for Granting the Writ:</u> The Fifth Circuit's holding is contrary to the directives of the Sentencing Commission.	8-9
<u>Second Reason for Granting the Writ:</u> Other Circuits are also improperly allowing district courts to sentence based on unscored prior convictions.	10
Conclusion	10
Certificate of Service	11
Appendix A: Opinion of Fifth Circuit Court of Appeals	

Table of Authorities

	Page(s)
Cases	
<i>Kimbrough v. United States</i> , 552 U.S. 85 (2007).....	8
<i>Mistretta v. United States</i> , 488 U.S. 361 (1989).....	8
<i>Stinson v. United States</i> , 508 U.S. 36 (1993).....	8
<i>United States v. Duso</i> , 1993 U.S. App. LEXIS 41540 (6th Cir. 1993).....	7, 9
<i>United States v. Garcia-Sandobal</i> , 703 F.3d 1278 (11th Cir. 2013).....	9
<i>United States v. Hardeman</i> , 933 F.2d 278 (5th Cir. 1991).....	7, 9
<i>United States v. Lee</i> , 974 F.3d 670 (6th Cir. 2020).....	7
<i>United States v. Martinez</i> , 905 F.2d 251 (9th Cir. 1990).....	9
<i>United States v. Mitchell</i> , 941 F.2d 690 (8th Cir. 1991).....	9
<i>United States v. Severson</i> , 569 F.3d 683 (7th Cir. 2009).....	10
<i>United States v. Tatum</i> , 743 F. App'x 589 (6th Cir. 2018).....	6
<i>United States v. Washington</i> , 728 F. App'x 174 (4th Cir. 2018).....	10

Statutes

28 U.S.C. § 1254(1)	1
---------------------------	---

Sentencing Guidelines

U.S.S.G. § 4A1.2(c)	5, 7, 8
---------------------------	---------

U.S.S.G. § 4A1.2(c)(1)	6
------------------------------	---

U.S.S.G. § 4A1.2(c)(2)	6
------------------------------	---

U.S.S.G. § 4A1.2(e)(3)	6, 9
------------------------------	------

U.S.S.G. § 4B1.2(c)	2
---------------------------	---

U.S.S.G. § 4B1.2(e)	3
---------------------------	---

U.S.S.G. App. C, amend. 709	7
-----------------------------------	---

Other Authorities

S.Rep. No. 98-225, 98th Cong., 2d Sess. 174, <i>reprinted in</i> 1984 U.S.C.C.A.N. 3182	8
--	---

Supreme Court Rule 13.1	1
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PETITION FOR WRIT OF CERTIORARI

Petitioner Roberto Padilla Espinoza respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Citation to Opinion Below

The opinion of the United States Court of Appeals for the Fifth Circuit affirming Espinoza's conviction and sentence is styled: *United States v. Espinoza*, ___ F. App'x ___, 2022 U.S. App. LEXIS 2737 (5th Cir. 2022).

Jurisdiction

The opinion of the United States Court of Appeals for the Fifth Circuit affirming the Espinoza's conviction and sentence was announced January 31, 2022 and is attached hereto as Appendix A. Pursuant to Supreme Court Rule 13.1, this Petition has been filed within 90 days of the date of the judgment. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

Sentencing Guidelines

U.S.S.G. § 4B1.2(c) (Sentences Counted and Excluded):

Sentences for all felony offenses are counted. Sentences for misdemeanor and petty offenses are counted, except as follows:

(1) Sentences for the following prior offenses and offenses similar to them, by whatever name they are known, are counted only if (A) the sentence was a term of probation of more than one year or a term of imprisonment of at least thirty days, or (B) the prior offense was similar to the instant offense:

Careless or reckless driving
Contempt of court
Disorderly conduct or disturbing the peace
Driving without a license or with a revoked or suspended license
False information to a police officer
Gambling
Hindering or failure to obey a police officer
Insufficient funds check
Leaving the scene of an accident
Non-support
Prostitution
Resisting arrest
Trespassing

(2) Sentences for the following prior offenses and offenses similar to them, by whatever name they are known, are never counted:

Fish and game violations
Hitchhiking
Juvenile status offenses and truancy

Local ordinance violations (except those violations that are also violations under state criminal law)

Loitering

Minor traffic infractions (e.g. speeding)

Public intoxication

Vagrancy

U.S.S.G. § 4B1.2(e) (Applicable Time Period):

- (1) Any prior sentence of imprisonment exceeding one year and one month that was imposed within fifteen years of the defendant's commencement of the instant offense is counted. Also count any prior sentence of imprisonment exceeding one year and one month, whenever imposed, that resulted in the defendant being incarcerated during any part of such fifteen-year period.
- (2) Any prior sentence that was imposed within ten years of the defendant's commencement of the instant offense is counted.
- (3) Any prior sentence not within the time periods specified above is not counted.
- (4) The applicable time period for certain sentences resulting from offenses committed prior to age eighteen is governed by § 4A1.2(d)(2).

Statement of the Case

The presentence investigation report (PSR) attributed zero criminal history points to each of the following of Espinoza's prior convictions:

- 11/01/2001 (age 18) driving while license suspended; 3 days confinement and \$350 fine.
- 01/24/2002 (age 18) driving while license suspended; 10 days confinement and \$100 fine.
- 01/24/2002 (age 18) driving while license suspended; 10 days confinement.
- 01/24/2002 (age 18) driving while license expired; 10 days confinement and \$100 fine.
- 01/31/2002 (age 18) failure to stop and render aid; 10 days confinement.
- 03/03/2005 (age 21) theft of property \$50 or more but less than \$500 (razors, DVDs and bubbles); 15 days confinement.
- 10/13/2005 (age 22) evading arrest/detention; 90 days confinement, \$100 fine.
- 06/29/2006 (age 22) evading arrest/detention; 15 days confinement.
- 09/03/2007 (age 24) criminal trespass; \$500 fine;
- 04/17/2014 (age 30) driving while license invalid with a previous conviction; \$300 fine.

- 01/15/2015 (age 31) driving while license invalid; 5 days confinement.
- 02/04/2016 (age 32) unlawfully carrying a weapon; 30 days confinement.

At sentencing (at which time Espinoza was 36 years old), the district court chose to increase Espinoza's sentence within the advisory guideline range based on his unscored prior convictions:

Mr. Espinoza, the first thing that jumps out to me is there are pages and pages and pages of criminal history, *a lot of which is not counted*. So to get to the Criminal History Category VI -- which is, by the way the highest category we have[.] . . . *So you would likely be even higher were they to go higher[.] . . .* But regardless of that, there is a lot of criminal history that's not counted. . . . And so that's what jumps out at me. Wow, this is a résumé of somebody who has committed a lot of crimes -- who has been convicted of a lot of crimes. And I'll say on the charges and whatnot, some of them are juvenile, I think, maybe; but on the ones where they're not counted, *they're given zeros, as you look through there*. There are reasons that they're given zeros, and there are reasons they're not counted, *but I do consider them. So that criminal history really does impact you[.]*

Nine of Espinoza's unscored convictions (five of which occurred when Espinoza was 18 years of age) were for driving while license suspended or expired. Section 4A1.2(c) of the Guidelines, entitled "Sentences Counted and Excluded," provides that a conviction for the offense of "[d]riving without a license or with a revoked or suspended

license” is not to be counted in computing a defendant’s criminal history unless “the sentence was a term of probation of more than one year or a term of imprisonment of at least thirty days[.]” U.S.S.G. § 4A1.2(c)(1). Espinoza’s failure to stop and render aid conviction involved leaving the scene of a car accident in which he was involved. “Leaving the scene of an accident” is on the list of offenses that are generally excluded from criminal history calculations. U.S.S.G. § 4A1.2(c)(1). Espinoza’s criminal trespass conviction is also on that list. U.S.S.G. § 4A1.2(c)(1); *United States v. Tatum*, 743 F. App’x 589, 593 (6th Cir. 2018). His unlawfully carrying a weapon was unscored because it was part of the same conduct as his possession of a miscellaneous substance charge – which was scored. See U.S.S.G. § 4A1.2(c)(2).

That leaves two evading arrest/detention convictions and one theft, all misdemeanors, all of which took place more than ten years before Espinoza’s conviction herein and were therefore “stale.” See U.S.S.G. § 4A1.2(e)(3).

Espinoza argued on appeal that his sentence was substantively unreasonable in that the district court relied on an improper factor; i.e., his unscored prior convictions. More specifically, he argued that a district

court's sentencing discretion is limited by the fact that the need for deterrence is "already captured by the guidelines," citing *United States v. Lee*, 974 F.3d 670, 677 (6th Cir. 2020). He noted that the purpose of U.S.S.G. § 4A1.2(c) was "to screen out past conduct which is of such minor significance that it is not relevant to the goals of sentencing," citing *United States v. Hardeman*, 933 F.2d 278, 281 (5th Cir. 1991). The *Hardeman* opinion held: "[W]e do not believe [the defendant's prior] conviction for failure to maintain insurance has any bearing on whether [he] is likely to commit other crimes in the future." *Id.* at 283.¹

Espinoza also argued, regarding his unscored stale convictions: "The Sentencing Commission believed there were sound policy reasons for not considering stale convictions" in calculating a defendant's criminal history, citing *United States v. Duso*, 1993 U.S. App. LEXIS 41540, at *17 (6th Cir. 1993).

The Fifth Circuit held: "The district court was free to consider Espinoza's prior uncounted convictions."

¹ The Sentencing Commission relied on *Hardeman* in deciding the approach to be used in determining whether an unlisted offense is similar to an offense listed in § 4A1.2(c). U.S.S.G. App. C, amend. 709.

First Reason for Granting the Writ: The Fifth Circuit's holding is contrary to the directives of the Sentencing Commission.

The Sentencing Guidelines were enacted to eliminate the uncertainties and disparities in the former sentencing system in which judges had great discretion. *Mistretta v. United States*, 488 U.S. 361, 366 (1989). The Supreme Court has declared that the Sentencing Guidelines (including the commentary) are binding unless a particular guideline is unconstitutional or in violation of a federal statute. *Stinson v. United States*, 508 U.S. 36, 45 (1993). The Court has also declared: “[I]t is unquestioned that uniformity remains an important goal of sentencing.” *Kimbrough v. United States*, 552 U.S. 85, 107 (2007).

Congress tasked the Sentencing Commission with determining the extent to which a defendant’s criminal history should affect his sentence, including the seriousness and remoteness of prior convictions. S. Rep. No. 98-225, 98th Cong., 2d Sess. 174, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3357. The offenses described in U.S.S.G. § 4A1.2(c) have been characterized thusly:

[T]he purpose of this section of the Guidelines [is] to screen out past conduct which is of such minor significance that it is not relevant to the goals of sentencing.

United States v. Hardeman, 933 F.2d 278, 281 (5th Cir. 1991).

[T]hey are of such minor significance to the goals of sentencing . . . that inclusion would more likely distort than improve the process established by the guidelines for determining an appropriate sentence.

United States v. Martinez, 905 F.2d 251, 253 (9th Cir. 1990).

That section reflects the Sentencing Commission's conclusion that some of a defendant's prior misdemeanors and petty offenses may not be serious enough to be counted in determining the guideline range sentence.

United States v. Mitchell, 941 F.2d 690, 690 (8th Cir. 1991).

[T]he Sentencing Commission excepted in subsection (c)(2) crimes with a more indirect and attenuated threat to the public[.]

United States v. Garcia-Sandobal, 703 F.3d 1278, 1288 (11th Cir. 2013).

Section § 4A1.2(e)(3) provides:

Any prior sentence not within the time periods specified above is not counted.

This is because “[t]he Sentencing Commission believed there were sound policy reasons for not considering stale convictions” in calculating a defendant's criminal history. *United States v. Duso*, 1993 U.S. App. LEXIS 41540, at *17 (6th Cir. 1993).

Second Reason for Granting the Writ: Other Circuits are also improperly allowing district courts to sentence based on unscored prior convictions.

In *United States v. Severson*, 569 F.3d 683 (7th Cir. 2009), responding to appellant's complaint that the district court improperly counted his prior § 4A1.2(c) convictions, the Seventh Circuit held:

We can quickly dispose of this argument; the district court was not absolutely bound by the sentencing commission's judgment since the Guidelines are merely advisory.

Id. at 691. Likewise, in *United States v. Washington*, 728 F. App'x 174 (4th Cir. 2018), the Fourth Circuit held: "It was not per se unreasonable for the [district] court to consider [Defendant's] stale, unscored convictions." *Id.* at 176.

Conclusion

For the foregoing reasons, Petitioner Espinoza respectfully urges this Court to grant a writ of certiorari to review the opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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Certificate of Service

This is to certify that a true and correct copy of the above and foregoing Petition for Writ of Certiorari has this day been mailed by the U.S. Postal Service, First Class Mail, to the Solicitor General of the United States, Room 5614, Department of Justice, 10th Street and Constitution Avenue, N.W. Washington, D.C. 20530.

SIGNED this 16th day of March 2022.

/s/ John A. Kuchera
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Attorney for Petitioner Roberto Padilla Espinoza