NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2021

HIDEY DIAZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Tenth Circuit err in concluding that it was barred from considering, on review for the substantive reasonableness of Mr. Diaz's sentence, the fact that his guideline range would have been markedly lower had the government acted as it routinely does in comparable cases?

STATEMENT OF RELATED CASES

United States v. Diaz, No. 18-cr-00553 (D. Colo.)
Judgment entered June 29, 2020

United States v. Diaz, No. 20-1269 (10th Cir.)
Judgment entered April 7, 2022

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PRAYER

Petitioner, Hidey Diaz, respectfully prays that a Writ of Certiorari be issued to review the opinion of the United States Court of Appeals for the Tenth Circuit that was handed down on April 7, 2022.

OPINIONS BELOW

The unpublished decision of the United States Court of Appeals for the Tenth Circuit, see United States v. Diaz, No. 20-1269, slip op. (10th Cir. Apr. 7, 2022), is found in the Appendix at A1. The oral decision of the United States District Court for the District of Colorado imposing sentence is found in the Appendix at A9.

JURISDICTION

The United States District Court for the District of Colorado had jurisdiction over this criminal action pursuant to 18 U.S.C. § 3231. The United States Court of Appeals for the Tenth Circuit had jurisdiction under 28 U.S.C. § 1291.

This Court's jurisdiction is premised upon 28 U.S.C. § 1254(1). Ninety days from the opinion issued on April 7 is July 6, so this petition is timely.

STATUTORY PROVISION INVOLVED

This petition implicates the statute for the imposition of a federal sentence, 18 U.S.C. § 3553(a), which provides as follows:

> **§ 3553. Imposition of a sentenc**
>
> **(a) Factors to be considered in imposing a sentence.** -- The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider--
>
> **(1)** the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> **(2)** the need for the sentence imposed--
>
> **(A)** to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> **(B)** to afford adequate deterrence to criminal conduct;
>
> **(C)** to protect the public from further crimes of the defendant; and
>
> **(D)** to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
>
> **(3)** the kinds of sentences available;
>
> **(4)** the kinds of sentence and the sentencing range established for--
>
> **(A)** the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines--
>
> (i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United

States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced;

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendment made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement --

(A) issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to promote restitution to any victims of the offense.

18 U.S.C. § 3553(a).

STATEMENT OF THE CASE

On November 4, 2018, Hidey Diaz, a citizen of Honduras, was arrested on a charge of first degree trespass of a dwelling in Arapahoe County, Colorado. He was immediately recognized as not being in this country lawfully. By the next day, immigration authorities found him at the local jail.

Within a month, federal prosecutors had indicted Mr. Diaz in the District of Colorado on a charge of illegal reentry after deportation, in violation of 8 U.S.C. § 1326(a). At the same time, they obtained a warrant for his arrest. But the prosecution did not serve the warrant on Mr. Diaz then. Indeed, it did nothing until the following November.

At the end of October, 2019, nearly eleven months after Mr. Diaz was charged in this case -- and without anything being done in his federal case, and with Mr. Diaz unaware that it even existed -- he pleaded guilty to the state charge. He was sentenced that same day to two years in state prison.

Once the state case was resolved, federal authorities finally moved to proceed on the charge in this case. Sixteen days after his state guilty plea and sentence, on November 13, 2019, the government filed for a writ of

habeas corpus *ad prosequendum*. The court issued the writ nine days later. By December 2, Mr. Diaz was arrested and had his initial appearance in federal court.

All of this was different from how the government was, under Tenth Circuit law, obliged to proceed and how it presumably did proceed in cases like Mr. Diaz's. The Tenth Circuit does not accept as justification for post-indictment delay the mere fact that the defendant is in custody on an unrelated state charge. With this not being an acceptable excuse for not acting in the federal case, see generally United States v. Seltzer, 595 F.3d 1170, 1177 (10th Cir. 2010), a delay like that here of about year, and for which the prosecutor was unable to provide other justification, would be presumptively prejudicial on a constitutional, speedy-trial analysis under cases like Doggett v. United States, 505 U.S. 647, 652 n.1 (1992).

The prosecutor in this case could be expected, like his colleagues throughout the Tenth Circuit, to know this common feature of circuit law. It is a principle that is potentially implicated every time an indictment is sought and returned against someone who is in custody on a pending state charge, a not-unusual situation. And the prosecutor here could be

expected to have had at the ready a justification for delay (if he in fact had one), given that there is presumed to be prejudice from his failure to have Mr. Diaz arraigned for almost a year after he secured the indictment.

Within four weeks after the prosecutor belatedly took the initial, baby step of having Mr. Diaz arraigned on December 30, 2019, Mr. Diaz filed a notice of disposition with the district court and requested a change-of-plea hearing. He pleaded guilty at a hearing held on January 23, 2000.

The fact that Mr. Diaz's state case was resolved first had very significant consequences for his advisory guideline range. The sentence he received in the state case added three points to his criminal history. This gave him thirteen criminal-history points rather than ten, and put him in Criminal History Category VI, rather than V.

The state conviction also resulted in a large increase in Mr. Diaz's offense level. The illegal-reentry guideline calls for an increase where, at any time after having first been deported, a defendant has been convicted of a felony that is not an illegal-reentry offense. U.S.S.G. § 2L1.2(b)(3)(A)-(D). The size of the increase is pegged to the length of the sentence in that

other case. With Mr. Diaz's sentence in the state case being two years, the increase was eight levels. Id., § 2L1.2(b)(3)(B).

The presentence report, relying on the state conviction, applied the increase in both offense level and criminal history. The report arrived at an adjusted offense level of 24, which, after a reduction of three levels for acceptance of responsibility, yielded a total-offense level of 21. The district court would later grant a one-level departure under U.S.S.G. § 5K3.1 because this case was resolved pursuant to an early-disposition program. This brought the offense level to 20.

With the three criminal-history points for the state conviction, Mr. Diaz was in Criminal History Category VI. At offense level 20, the advisory guideline range was 70-87 months. Id. at 37; Vol. 4 at 36.

Had this case been resolved first, Mr. Diaz's adjusted offense level would have been 16 rather than 24. With the three-level reduction for acceptance of responsibility, and the one-level, early-disposition departure, the total offense level would have been 12. And as Mr. Diaz would have been in Criminal History Category V, the advisory guideline range would have been 27-33 months.

Mr. Diaz moved for a variant sentence of thirty months based, in large part, on these facts. The motion recited that although the government indicted him in December 2018, and knew he was at a local jail in Arapahoe County, it "did not seek Mr. Diaz's arrest and appearance in federal court in this case until November 13, 2019." In the interim, he had pleaded guilty in his state case and received a two-year sentence. The post-indictment delay approaching one year, the motion continued, would be presumptively prejudicial in the constitutional, speedy-trial context.

Mr. Diaz then detailed how he was in fact prejudiced, for the purposes of his sentencing, by the delay. Were he to have had counsel on the federal charge while the state case was pending, his attorney would have advised him not to plead guilty to the state charge until after this case concluded. The prosecution of this case first would have resulted in both a lower offense level and a lower criminal-history category, and a decidedly lower guideline range. The motion sought a sentence within that lower range of thirty months.[1]

[1] The variance motion said the guideline range, in the event this case had been resolved first, would have been 24-30 months if Mr. Diaz prevailed on a pending objection to the presentence report, and 30-37

The government did not deny the factual premises of the variance motion. Nor did it deny that Mr. Diaz might have been able to obtain a disposition here before the state charges were resolved. Instead, it rejected "any suggestion" that it "improperly delayed [Mr. Diaz's] presence in federal court," stating it was "within its rights" to let the state case "resolve prior to securing his presence in federal court." As noted above, this position is flatly contrary to Tenth Circuit law. See *supra* at 5.

At sentencing, Mr. Diaz stressed the disparity that resulted in situations where there are both state and federal charges, depending on which is resolved first. For its part, the government repeated its mistaken position, as a matter of binding circuit precedent, that it was within its rights "to allow the state prosecution to go forward before securing [Mr. Diaz's] presence in federal court." That is, it again did not cite any reason that might have possibly justified the lengthy delay until it took any action on the indictment it had obtained.

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months if (as it turned out) he did not. The motion requested a sentence of 30 months, which it noted would be within both ranges. As explained in the text, Mr. Diaz's range would have been 27-33 months if he had resolved this case first. A 30-month sentence is within this range too.

The district court rejected a variance on this ground. The court's first reason for denying the variance was put in terms of a delay in indictment, which this case does not involve. The court said Mr. Diaz was "in no position to complain about when the Government indicts him given his removal and criminal history past." A11. The second reason the court gave was that what Mr. Diaz "is suggesting amounts to he should have been given an opportunity to have a guideline that the commission has determined to be wrong, whereas now he is to be sentenced under a guideline that the commission has determined to be correct." Id.

In imposing sentence, the district court considered deterrence to be important because Mr. Diaz had a history of illegal reentries, A14, and also thought there were some "community safety issues," id., citing the Arapahoe County trespass case that the government waited to be resolved before acting on the indictment in this case, id. The court also cited, as evidence of Mr. Diaz being a danger to the community, a conviction for driving while ability impaired. Id.

The court decided, though, that some variance was warranted. Id. It arrived at a sentence of 63 months, one it explained it could reach by either

of two ways. Mr. Diaz had noted that, in the plea agreement, the parties had believed his criminal history category would be V, and had argued at sentencing for why that was still appropriate. Although the court had disagreed, it considered the argument to be a reasonable one. In category V, and offense level 20, the range would be 63 to 78 months. Id. The court noted it could arrive at the same point by deducting 24 months, the term the state court imposed in the 2018 case, from the 87-month top of the guideline of 70-87 months that it used. Id.[2]

On appeal to the Tenth Circuit, Mr. Diaz argued that his sentence was substantively unreasonable. See generally United States v. Booker, 543 U.S. 220, 261-63 (2005). His argument centered on the one-year delay in his case that was -- as shown by the prosecutor's failure ever to provide *any* justification for the delay apart from the pendency of the state case, and his insistence that this alone was a valid basis for the lengthy delay -- unjustified. Mr. Diaz argued the delay caused him to receive a sentence

[2] The court did not explain why, in the first instance, it would sentence at the low end of the range for Criminal History Category V, while in its alternative scenario it would take a reduction from the top of the range in Category VI.

disproportionate to those similarly situated from him. One with his same history and offense conduct, as to whom the prosecutor did not wait for pending state charges to resolve before doing anything on a federal indictment, would have a markedly lower guideline range than his.

The Tenth Circuit upheld Mr. Diaz's sentence against the claim that it was substantively unreasonable. In doing so, the court rejected out of hand the claim of disparity based on the prosecutor not acting in accord with Tenth Circuit law. A6-7.

The court of appeals did not dispute any of the factual premises on which the argument was based. It did not deny that circuit law made it improper for the prosecutor to delay doing anything at all in this case until the state case was resolved. It did not deny that it could be taken as a given that other prosecutors follow circuit precedent on this point. It did not deny that the unjustified delay was out of the norm. It did not deny that were it not for the unjustified delay, Mr. Diaz's guideline range would have been far lower than it was. And it did not deny that those similarly situated to him would have the benefit of such a markedly lower guideline

range, as it could be assumed their prosecutors would act in conformity with clear circuit law and not unjustifiably delay the federal proceedings.

Instead, the Tenth Circuit concluded that the statutory provision that requires sentencing courts to consider the need to avoid unwarranted sentencing disparities, 18 U.S.C. § 3353(a)(6), had no role to play here. A6. The circuit court reasoned that what mattered was what Mr. Diaz's guideline range actually was in light of his Arapahoe County conviction -- which it equated to his "record" for purposes of § 3553(a)(6) -- and not what it would have been had the prosecutor not acted contrary to law. A7. It did not matter, in the Tenth Circuit's view, that other defendants similarly situated to Mr. Diaz, and whose prosecutors did follow the law, would have a lower guideline range. Id. All that mattered was the guideline ranges that actually obtained for Mr. Diaz and such other defendants.

REASONS FOR GRANTING THE WRIT

The Tenth Circuit's myopic view of the statutory directive to take into account unwarranted sentencing disparity wrongly weakens an important tool to help secure fairness and consistent treatment in sentencing.

The federal sentencing statute contains an express directive to sentencing courts to consider the need to avoid unwarranted sentencing disparities. 18 U.S.C. § 3553(a)(6). The directive influences not just sentencing in the district courts, but also appellate review of sentences. As one court of appeals has explained, the disparity consideration is "'particularly important'" to the review of sentences for substantive reasonableness "'because one of the primary purposes of appellate review of sentences is to iron out differences in order to avoid undue disparity.'" United States v. Howard (Bramwell), 28 F.4th 180, 216 (11th Cir. 2022) (quotation omitted), petition for cert. filed, No. 21-8092 (U.S. June 8, 2022).

The Tenth Circuit here wrongly cut back on this protection. It read § 3553(a)(6) in a cramped way, limiting the consideration of the "record" of the defendant and others similarly situated in § 3553(a)(6) to just criminal convictions (and their guideline effects). This approach is not required by the statutory language. And the Tenth Circuit's reading curtails the ability

of district courts to avoid unwarranted disparities in the first instance, and the ability of the court of appeals to iron out disparities that remain after sentencing and to provide a vital corrective, not only to the particular defendant, but also to the overall sentencing regime as a whole.

Although the Tenth Circuit's decision is unpublished, this case is still worthy of this Court's review. Given how central the goals of uniformity and proportionality are to the federal sentencing scheme, the seriously wrong view of the Tenth Circuit in this case should not be allowed to gain a toehold. The courts of appeals should be reminded of the significant role the consideration of unwarranted disparity plays in sentencing, and in appellate review of sentences, and that dilution of that protection will not be abided.

Promoting uniformity is a central goal of the Sentencing Reform Act of 1984. It is reflected, of course, in the guideline system itself that the Act birthed. Congress "sought a Guidelines system that would bring about greater fairness in sentencing through increased uniformity." Rita v. United States, 551 U.S. 338, 354 (2007). The very fact that the statute commands district judges to consider the sentencing guidelines, in settling

on the right sentence in the individual case, 18 U.S.C. § 3553(a)(4)(A)(i), furthers this goal, even in the advisory guideline regime. The guidelines, that is, "assist federal courts across the country in achieving uniformity and proportionality in sentencing." Rosales-Mireles v. United States, 138 S. Ct. 1897, 1908 (2018).

But the sentencing statute also contains another directive to help achieve proportional results. That one, implicated here, is more blunt. The statute requires district court to consider "the need to avoid unwarranted disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6).

Section 3553(a)(6) thus recognizes that the guidelines are not the be-all and end-all in furthering uniformity. If they were, consideration of the guidelines themselves would be enough. Section 3553(a)(6) recognizes that sometimes using the guidelines as the "starting point" and "lodestar" of sentencing selection, Molina-Martinez v. United States, 578 U.S. 189, 200 (2016), may still lead to disproportionate sentences. This is so not only because each sentencing is a "'unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment,'"

Gall v. United States, 552 U.S. 38, 52 (2007) (quotation omitted), which no system like the guidelines can be expected fully to capture. It is also because, even within their realm, the guidelines may not properly reflect the real-world realities.

This is such a case. Mr. Diaz's guideline does reflect the effect that his Arapahoe County state conviction had on both his offense level and criminal-history score. But what it misses is the fact that he would almost surely not have had that conviction had the prosecutor not unjustifiably delayed, and that others similarly situated to him, and who did not have prosecutors who failed to abide circuit precedent, would have a dramatically lower guideline range.

Given this, the use of his guideline range itself actually injects significant, and unwarranted, disparity. Mr. Diaz is in a much higher range than he would have been had his prosecutor not unreasonably delayed. And others similarly situated to him -- but whose prosecutors, as can be expected, have not unreasonably delayed -- are in a much lower range. The upshot is that, with the "real and persuasive effect the Guidelines have on sentencing," Molina-Martinez, 578 U.S. at 199, his

sentence is undoubtedly far higher than the sentences of those who are similar to him, save for the fact that their federal cases were resolved first because they were not subjected to unjustified delay.

Section 3553(a)(6) is fully capable of providing the corrective to this. The section calls for a consideration of unwarranted disparity as among those with "similar records who have been guilty of similar conduct." 18 U.S.C. § 3553(a)(6). The word "record[]" is not naturally limited only to the convictions of a defendant and his comparators. What it instead seeks to capture and compare is their real-world histories.

Indeed, if Congress had meant to limit a comparison of "records" just to a comparison of criminal convictions, it could easily have said so. It could have referred explicitly to "criminal convictions." By not taking such an approach, Congress allowed for a broader comparison of the real-world histories of the defendant and his comparators.

Properly viewed, Mr. Diaz did have a similar record to those with whom he made a comparison, both at sentencing and on appeal in urging his sentence is substantively unreasonable. He was comparing himself to those who had similar criminal pasts and who committed conduct like his

Arapahoe County trespass, and were also convicted of an immigration charge like the one to which he pleaded guilty. The only difference was the unjustified, prosecutorial delay here. It resulted in Mr. Diaz's state-court matter being resolved before his federal case -- something that would not happen with his comparators -- and ballooned his guideline range.

As this shows, in equating "record" with actual criminal convictions (and their guideline effects), the Tenth Circuit narrowed the potential use of § 3553(a)(6) as a check on disproportionate sentences. Although the court of appeals relied on what it claimed was the "plain language of the statute," A6, it did not consider why the word "record" must be so limited. It does not have to be and it should not be.

The Tenth Circuit's approach undermines a significant sentencing protection. It deserves to be corrected to ensure that it does not gain traction in the federal courts. Accordingly, this Court should accept this case for review.

CONCLUSION

This Court should grant Mr. Diaz a writ of certiorari.

Respectfully submitted,

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