

No. _____

In the Supreme Court of the United States

PEDRO RAMIREZ-URBINA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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QUESTION PRESENTED FOR REVIEW

Pedro Ramirez-Urbina agreed to guide Lopez-Vasquez through the desert in furtherance of Lopez-Vasquez's attempt to enter the United States illegally. Despite Ramirez-Urbina's best attempts to save him, Lopez-Vasquez died of unknown causes. The medical examiner who testified at trial said he could not conclude whether the trek through the desert contributed to the death. Despite being acquitted at trial of responsibility for the death, Ramirez-Urbina's sentence for transporting Lopez-Vasquez was enhanced because a death resulted.

This case presents two issues for review:

Whether the Fifth or Sixth Amendments prohibit conduct for which Ramirez was acquitted—committing an alien-smuggling offense that resulted in a death—to be used to enhance his sentence for smuggling aliens.

and

Whether the government proved the proper level of causation (strict, but-for, or proximate) by the proper standard (preponderance of or clear and convincing evidence) when it found that Ramirez-Urbina was legally responsible for Lopez-Vasquez's death, the cause of which was unknown.

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PETITION FOR WRIT OF CERTIORARI

Pedro Ramirez-Urbina asks that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on May 24, 2023.

PARTIES TO THE PROCEEDING

The caption of the case names all the parties to the proceedings in the court below.

OPINION BELOW

The unpublished opinion of the court of appeals is appended to this petition.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the court of appeals were entered on May 24, 2023. This petition is filed within 90 days after entry of judgment. *See* Supreme Court Rule 13.1. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the U.S. Constitution provides, in pertinent part, that “no person shall be ... deprived of ... liberty ... without due process of law.” U.S. Const. amend. V.

The Sixth Amendment to the U.S. Constitution provides, in relevant part, that “in all criminal prosecutions, the accused shall enjoy the right to a ... trial, by an impartial jury” U.S. Const. amend. VI.

STATEMENT OF THE CASE

Petitioner Pedro Ramirez-Urbina was found guilty of conspiring to transport and transporting illegally present aliens after a jury trial, violations of 8 U.S.C. § 1324; the jury acquitted him of enhancements for both counts alleging that a person died as a result of his conduct.¹

At trial, Ramirez-Urbina contested only whether he was legally responsible for Lopez-Vasquez’s death—he stipulated that he had guided a group of illegally-present aliens through the desert with the hope of aiding their transportation further into the interior. The government sought to prove that Jose Lopez-Vasquez’s death resulted from Ramirez-Urbina’s decision to guide him through the desert during the heat of a West Texas summer.

The problem: the autopsy could not determine a cause of Lopez-Vasquez’s death. The medical examiner testified that it was

¹ The district court exercised jurisdiction under 18 U.S.C. § 3231.

possible that Lopez-Vasquez would have died if Lopez-Vasquez were at his home in Mexico and he could not conclude, from his examination, whether Lopez-Vasquez's trek through the desert contributed to his death.

The only other evidence pointing to Ramirez-Urbina's culpability for the death was that the conditions in the area that they hiked were hot and dry, that people would normally have brought a lot of water for such a trek, and that the group led by Ramirez-Urbina at one point ran out of water, causing Ramirez-Urbina to go find additional water and bring it back to the ailing Lopez-Vasquez. In sum, Ramirez-Urbina guided Lopez-Vasquez through "a precarious position," but no evidence showed that the precarious position caused Lopez-Vasquez's death. *Appendix.*

Accordingly, the jury answered a special interrogatory for both counts one and two that, "no," a person did not die "as a result of the conduct."

Because Ramirez-Urbina had been found guilty of conspiring to transport and transporting illegally present aliens, his case proceeded to sentencing. The probation officer prepared a presentence investigation report. The probation officer enhanced Ramirez-Urbina's offense level by ten levels because a death resulted from his

offense. That enhancement increased his recommended sentence from 18-24 months to 51-71 months.

Ramirez-Urbina objected to the enhancement. At sentencing, Ramirez-Urbina introduced evidence from two witnesses that Lopez-Vasquez did not die from heat or dehydration during his trek through the desert. First, the district court heard the live testimony of Sheriff Ronny Dodson. The Sheriff testified that he was very experienced in finding people who had died while hiking through the desert. Those people typically exhibit certain signs—stripping off their clothes and writhing on the ground—that Dodson did not observe in photographs of Lopez-Vasquez's body. Second, counsel for Ramirez-Urbina proffered that he had interviewed one of the surviving members of the group—Pedro Zavala Chavez—who had stated that he had illegally-crossed through the desert multiple times, this trip was similar to prior journeys, and that from his observations of Lopez-Vasquez he did not believe that Lopez-Vasquez's death resulted from heat or dehydration.

The government did not put on additional evidence about the cause of Lopez-Vasquez's death. The district court overruled the

objection and sentenced Ramirez-Urbina to the top of the recommended sentence: 71 months' imprisonment. Ramirez-Urbina appealed.

On appeal, as he had done below, Ramirez-Urbina argued that the government had not proven by a preponderance of the evidence that Lopez-Vasquez's death resulted from the offense; that sentencing based on acquitted conduct violated the due process clause; that the government should have been required to prove that Ramirez-Urbina's conduct was a proximate as opposed to a but-for cause; and that the district court should have required 'clear and convincing' proof of causation. The Fifth Circuit briefly engaged with the only argument that was not foreclosed by its prior opinions: that the evidence was insufficient to show by a preponderance that Lopez-Vasquez's death resulted from the offense. The Fifth Circuit held that the district court did not clearly err because "[w]hile the autopsy results were inconclusive, Lopez-Vasquez would not have been lost in the Texas desert for four days in the summer without sufficient water but from Ramirez-Urbina's actions in smuggling him into the United States through the desert. Simply stated, Ramirez-Urbina was fully responsible

for placing Lopez-Vasquez in a precarious position where subsequent but-for causes ultimately took his life." *Appendix.*

REASONS FOR GRANTING CERT

Ramirez-Urbina agreed, at the behest of Lopez-Vasquez, to guide him through the desert with the aim of illegally entering the United States. When Lopez-Vasquez ailed, Ramirez-Urbina did everything possible to help him. Though Lopez-Vasquez passed away, the cause of his death is unknown. A jury acquitted Ramirez-Urbina of legal liability for Lopez-Vasquez's death. Nonetheless, the district court tripled, and the Fifth Circuit affirmed, Ramirez-Urbina's recommended sentence for transporting illegally present aliens because Ramirez-Urbina was a but-for cause of Lopez-Vasquez's death. Those decisions contradict the Fifth and Sixth Amendments as well as this Court's causation holdings.

The courts relied on a sentencing enhancement that requires a 10-level increase for someone convicted of transporting an unlawful alien when "any person died." U.S.S.G. §2L1.1(b)(7)(D).

Ramirez-Urbina's sentence was tripled because he was found responsible for a death, in direct opposition to the jury's verdict. His sentence violated his Fifth and Sixth Amendment rights.

As Justice Sotomayor recently explained, many jurists have reasonably raised "important questions" about "the use of acquitted conduct to increase a defendant's Sentencing Guidelines range

and sentence.” *McClinton v. United States*, 600 U.S. ____ (2023) (Sotomayor, J., respecting denial of certiorari). Namely, whether acquitted-conduct sentencing is compatible with “the fairness and perceived fairness of the criminal justice system.” *Id.* (citing *Jones v. United States*, 574 U.S. 948, 949-950 (2014) (Scalia, J., joined by Thomas and Ginsburg, JJ., dissenting from denial of certiorari); *United States v. Bell*, 808 F.3d 926, 928 (D.C. Cir. 2015) (Kavanaugh, J., concurring in denial of reh’g en banc); *United States v. Sabillon-Umana*, 772 F.3d 1328, 1331 (10th Cir. 2014) (Gorsuch, J.); *United States v. Watts*, 519 U.S. 148, 170 (1997) (Kennedy, J., dissenting)).

As Justice Sotomayor elucidates, there are many compelling concerns with the use of acquitted-conduct sentencing. Acquittals “have long been ‘accorded special weight,’ distinguishing them from conduct that was never charged and passed upon by a jury. *Id.* (quoting *United States v. DiFrancesco*, 449 U.S. 117, 129 (1980)). This is because “even though a jury’s specific reasons for an acquittal will typically be unknown, the jury has formally and finally determined that the defendant will not be held criminally culpable for the conduct at issue. So far as the criminal justice sys-

tem is concerned, the defendant ‘has been set free or judicially discharged from an accusation; released from a charge or *suspicion* of guilt.’” *Id.* (quoting *State v. Marley*, 321 N.C. 415, 424 (1988)).

Further, acquitted-conduct sentencing undermines the right to a trial by jury. “Even defendants with strong cases may understandably choose not to exercise their right to a jury trial when they learn that even if they are acquitted, the State can get another shot at sentencing.” *Id.* “Finally, acquitted-conduct sentencing also raises questions about the public’s perception that justice is being done, a concern that is vital to the legitimacy of the criminal justice system. Various jurists have observed that the woman on the street would be quite taken aback to learn about this practice. *Id.* (citing *United States v. Canania*, 532 F.3d 764, 778 (8th Cir. 2008) (Bright, J., concurring)).

In declining to take up this issue, it appears that at least some members of this Court are waiting to see what the Sentencing Commission does. *Id.* (“The Sentencing Commission, which is responsible for the Sentencing Guidelines, has announced that it will resolve questions around acquitted-conduct sentencing in the coming year.”).

There, the Court was referring to Preliminary Proposed Amendments to the Sentencing Guidelines published on January 12, 2023. *See* U.S. Sentencing Commission, *Proposed Amendments to the Sentencing Guidelines (Preliminary), Proposed Amendment: Acquitted Conduct* 13-14 (Jan. 12, 2023), <https://bit.ly/3QOA350> (Preliminary Proposed Amendments).

The Preliminary Proposed Amendments would provide that acquitted conduct “generally shall not be considered relevant conduct for purposes of determining the guideline range.” Preliminary Proposed Amendments 13-14 (emphasis added). However, the proposal would allow judges to consider acquitted conduct when “determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted.” *Id.* at 14.

The proposal is insufficient. First, there are strong arguments suggesting the Commission lacks “authority to decree that information which would otherwise justify enhancement of the sentence … may not be considered … if it pertains to acquitted conduct.” *United States v. Watts*, 519 U.S. 148, 158 (1997) (Scalia, J., concurring). Attempting to solve this issue through an amendment does not allay those concerns.

Second, the proposal does not sufficiently limit judges to resolve the constitutional questions. With the proposed amendments, judges will still rely on acquitted conduct to increase sentences so long as they state, beforehand, that they find an upward departure justified by their determination—by a preponderance of the evidence—that the defendant engaged in the acquitted conduct. The proposal, thus, does nothing to prevent judges from “gut[ting] the role of the jury in preserving individual liberty and preventing oppression by the government” and, unless made retroactive, does nothing to offer relief to Ramirez-Urbina and the hundreds of similarly situated defendants. *United States v. Brown*, 892 F.3d 385, 408 (D.C. Cir. 2018) (Millett, J., concurring).

Third, even if the Commission adopts the amendment, this Court will still have to address acquitted conduct sentencing in the context of sentences imposed by state courts.

The concerns with acquitted-conduct sentencing are particularly applicable here. Ramirez-Urbina’s sentence was indisputably based on acquitted-conduct. He went to trial explicitly for the sole purpose of contesting whether he was legally responsible for

Lopez-Vasquez's death. The evidence showed that he did everything he could to save Lopez-Vasquez. The jury found he had not caused the death.

Ramirez-Urbina challenged the acquitted-conduct at every stage of the litigation, and both courts addressed and rejected his arguments.

The Fifth Circuit applied an understanding of legal causation fundamentally at odds with this Court's prior holdings, finding Ramirez-Urbina's conduct a but-for cause of a death, the ultimate cause of which was unknown.

The courts enhanced Ramirez-Urbina's sentence, relying on a sentencing enhancement that requires a 10-level increase for someone convicted of transporting an unlawful alien when "any person died." U.S.S.G. §2L1.1(b)(7)(D). This enhancement is the subject of multiple circuit splits that this Court should also resolve. The Circuits are split, first, over the type of causation required by the enhancement (strict liability, but-for, or proximate), second, over the level of evidence required (preponderance of, or clear and convincing, evidence), and third, with the Fifth Circuit's most recent opinion, whether but-for causation may be established when the ultimate cause is unknown.

The type of causation is the most entrenched split. As noted by the First Circuit, “the courts of appeals have expressed widely divergent views about the type of causal connection, if any, that is necessary to trigger an enhancement under section 2L1.1(b)(7)(D).” *United States v. Ortiz-Carrasco*, 863 F.3d 1, 3 (1st Cir. 2017). The First Circuit then summarized the split: the Tenth Circuit imposes no causation requirement; the Fifth Circuit requires but-for causation; the Eighth Circuit uses a proximate causation like standard and the Eleventh Circuit adopts a similar, foreseeability-based standard. *Id.* at 3-4 (citing *United States v. Cardena-Garcia*, 362 F.3d 663, 666 (10th Cir. 2004), *United States v. Ramos-Delgado*, 763 F.3d 398, 401-02 (5th Cir. 2014), *United States v. Flores-Flores*, 356 F.3d 861, 863 (8th Cir. 2004), *United States v. Zaldivar*, 615 F.3d 1346, 1350-51 (11th Cir. 2010)).

The level of proof required is also the cause of a split. This enhancement caused a dramatic increase in Ramirez-Urbina’s recommended sentence, from 18-24 to 51-71 months. The Ninth Circuit has long held that some sentencing facts may need to be proven by clear and convincing evidence. *United States v. Loinch*, 23 F.4th 881, 910-11 (9th Cir. 2022). The Ninth Circuit applies a multi-factor test, but the “real action” is in whether the increase in

the number of offense level is four or less and whether the length of the enhanced sentence more than doubles the Guideline sentence. Because the death enhancement increased the offense level by ten and more than tripled Ramirez-Urbina’s Guideline range, the Ninth Circuit’s test would mandate it be proved by clear and convincing evidence. *See United States v. Mezas de Jesus*, 217 F.3d 638, 643 (9th Cir. 2000). Here, the Fifth Circuit required only a preponderance of the evidence.

Finally, the Fifth Circuit has now held that but-for causation may be shown when the ultimate cause is unknown, splitting with this Court’s prior holdings. This Court most recently explained “but-for causation” in *Burrage v. United States*. 571 U.S. 204 (2014). In *Burrage*, this Court addressed an identically worded sentencing enhancement; it imposed a greater sentencing term when “death or serious bodily injury results from the use of” drugs distributed by the defendant. *Id.* at 209 (citing 21 U.S.C. § 841(b)(1)(A)-(C)). This Court found that the ordinary meaning of “results from” requires “proof that the harm would not have occurred in the absence of—that is, but-for—the defendant’s conduct.” *Id.* at 211 (internal quotations omitted).

The “conduct is the cause of a result if it is an antecedent but for which the result in question would not have occurred.” *Id.* In *Burrage*, the defendant had distributed heroin to a person who died after taking the heroin as well as another drug, and “[n]o expert was prepared to say that [the person] would have died from the heroin use alone.” *Id.* at 215. This Court found the drug distributed by the defendant was not a but-for cause of the victim’s death. *Id.* at 218-19.

Here, identically, no expert was prepared to say Lopez-Vasquez would have died had he not undertaken his trek through the desert. Instead, the medical expert who testified specifically said he could not conclude whether the trek through the desert even *contributed* to Lopez-Vasquez’s death. The Fifth Circuit glossed over these issues entirely, “While the autopsy results were inconclusive, Lopez-Vasquez would not have been lost in the Texas desert for four days in the summer without sufficient water but for Ramirez-Urbina’s actions in smuggling him into the United States through the desert.” *Appendix*.

Decisions by other courts, where the cause of death was known, illustrate both the problem with the Fifth Circuit’s decision and the depth of the split between the Fifth Circuit’s decision

and the holdings of this Court and others. In *Cannon v. State*, the Supreme Court of Delaware considered whether a juvenile who had engaged in dangerous behavior—fighting with another teenager in a small bathroom with tile floor and hard fixtures—could be held criminally liable for the teen’s death that resulted from a rare heart condition, something that had nothing to do with those risks. 181 A.3d 615, 617 (Del. 2018).

The only relevant difference between *Cannon* and this case is that in *Cannon* there was evidence about the cause of death. *Id.* The Supreme Court of Delaware recognized what the Fifth Circuit ignored, “even a person who creates a risk of death … is not responsible for the victim’s death unless it was her risky behavior that caused it. This second requirement—causation—requires more than just proof that the defendant’s conduct set a chain of events in motion that led to the victim’s death. ‘But-for’ causation is a necessary part of proving culpability, but that is just the start. There must also be a sufficient relationship between the nature of the risk the defendant created and the way the victim’s death transpired for the defendant to be blamed for it.” *Id.* at 620. Here, the Fifth Circuit skipped entirely that inquiry and simply assumed, though the record was explicit about the absence of the

necessary evidence, that Ramirez-Urbina's conduct was a but-for cause of Lopez-Vasquez's death.

Because the Fifth Circuit's holding—that courts may assume death results from any dangerous conduct when it occurs during that conduct—is in direct opposition to this Court's holding in *Burrage* as well as other lower courts, this Court should grant cert to align the Fifth Circuit's law on causality with this Court's.

CONCLUSION

For these reasons, Petitioner asks that this Court grant a writ of certiorari and review the judgment of the court of appeals.

s/ Shane O'Neal
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Dated: August 22, 2023