No. __-_____

IN THE

Supreme Court of the United States

MANUEL DE JESUS DEL CID BRAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

A district court may not consider retribution when deciding whether to impose a term of supervised release. *See Concepcion v. United States*, 142 S. Ct. 2389, 2400 (2022). Instead, supervised release is intended "for those, and only those, who need[] it." *Cornell Johnson v. United States*, 529 U.S. 694, 709 (2000).

Consistent with those opinions, and after careful study, the Sentencing Commission in 2011 recommended that district courts *not* impose a term of supervised release on a person who would likely be deported. U.S.S.G. § 5D1.1(c). But, Sentencing Commission datafiles show, district courts still, ordinarily *do* impose such terms, especially in the Fourth and Ninth Circuits.

In this case, the district court imposed supervised release even though it and the parties agreed that imprisonment would not deter Mr. Del Cid Bran from returning to the United States, given the corroborated and uncontradicted death threats from gangs in El Salvador he and his family had received. But it still imposed a term of supervised release to be able to "give [Mr. Del Cid Bran] a harsher sentence" when he returns to the United States. Therefore, the question presented is:

> Does a district court abuse its discretion under 18 U.S.C. § 3583 by imposing a term of supervised release on a deportable noncitizen purely in order to impose "a harsher sentence" in the future?

PARTIES TO THE PROCEEDINGS

All parties appear in the caption of the case on the cover page.

RELATED CASES

(1) *United States v. Manuel De Jesus Del Cid Bran*, No. 22-4370, 2023 WL 3734985 (4th Cir. 2023)

(2) *United States v. Manuel De Jesus Del Cid Bran*, 3:22CR00031-DJN (E.D.Va.).

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PETITION FOR WRIT OF CERTIORARI

Manuel Del Cid Bran respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals appears at pages 1a to 9a of the appendix to the petition and is available at *United States v. Manuel Del Cid Bran*, 2023 WL 3734985 (4th Cir. 2023) (per curiam, unpublished).

JURISDICTION

The district court in the Eastern District of Virginia had jurisdiction under 18 U.S.C. § 3231. The Fourth Circuit had jurisdiction under 28 U.S.C. § 1291. That court issued its opinion and judgment on March 31, 2023. Petitioner's Appendix ("Pet. App'x.") 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 18, United States Code § 3583 provides, in relevant part:

(a) In General.—

> The court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment[.]

[. . .]

(c) Factors To Be Considered in Including a Term of Supervised Release.—

> The court, in determining whether to include a term of supervised release, and, if a term of supervised release is to be included, in determining the length of the term and the conditions of supervised release, shall consider the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7).

Title 18, United State Code § 3553(a) provides, in relevant part:

> (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) [. . .]
>
> (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 amendments 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) [. . .]
>
> (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 provide restitution to any victims of the offense.

STATEMENT OF THE CASE

Mr. Del Cid is from Guatemala. C.A.J.A 120. He grew up in a good home, with parents who loved him; but the family was poor, and he sometimes did not have enough food or clothing. C.A.J.A 137. When he was 17 years old, he first came to the United States to look for a better life, and immediately came to Virginia. C.A.J.A 137. Eventually he found a partner here, and his two oldest children were born here. C.A.J.A 138. Immigration officers found him in jail after a DUI arrest in 2011, and he was deported back to Guatemala. Mr. Del Cid spent several years there, eventually married, and had three children there. He came back to the United States to find work and was deported a second time in 2018. C.A.J.A 46.

After his last deportation to Guatemala, he began receiving demands from Los Pelones, a criminal gang in Guatemala. C.A.J.A 65-72 (extortion letters and translations); C.A.J.A137 (PSR); C.A.J.A 99 (district court finding); C.A.J.A 83 (government conceding that purpose of return in part "to avoid gang violence"). They targeted Mr. Del Cid because they knew he worked in the United States and thought he could pay 20,000 quetzales to start (about $2,500), then 1,000 quetzales (about $125) per month thereafter. C.A.J.A 66. If he did not, he and his children would be killed, according to the demands he received. C.A.J.A 67 ("Prepare yourself with either the money or to see your first child be killed fucker."). Manuel Del Cid did not want to see his children murdered, but he could only make 60 quetzal a day in Guatemala. C.A.J.A 137. So he came back to the United States where he could earn enough money to prevent his children from being murdered. *Id*. Since his arrest here, he has been unable to pay any money, and his wife and children are now in

hiding. *Id*. The last note from Los Pelones came after he had left for America: "We know that you ran off to the north and that your family is fleeing but let me tell you that upon return I assure you you will regret not paying. I simply make it clear that when you return, we will pick you up and cut you into pieces, you and your fucking family." C.A.J.A 68.

Mr. Del Cid was arrested in Richmond and charged with illegal reentry after he was found in state custody. C.A.J.A 6 (criminal complaint). He waived indictment, C.A.J.A 15, and pled guilty to an information charging him with a violation of 8 U.S.C. § 1326. C.A.J.A 14 (information); C.A.J.A 16-42 (transcript of plea colloquy); C.A.J.A 43-48 (statement of facts).

The PSR, C.A.J.A 119, was prepared, and calculated an undisputed guideline range of 24 to 30 months' imprisonment, with no supervised release. C.A.J.A 140-41. The parties filed their positions with respect to sentencing; Mr. Del Cid recommended a sentence of 24 months, at the low end of the guidelines. C.A.J.A 56 (defense position on sentencing). The government, on the other hand, recommended the high end of the guidelines at 30 months, with no supervised release. C.A.J.A 50 (government position on sentencing). Before the hearing, the district court gave notice that it contemplated an upward variance, expressing its concern that Mr. Del Cid "constitutes a continuing danger to the community" in light of his criminal history and recidivism. C.A.J.A 77.

The convictions that concerned the court were Mr. Del Cid's DUI convictions, of which he had four over the past twenty years. His most recent was in 2021, and

he received a sentence of two months of active incarceration. C.A.J.A 132-33. Prior to that was a conviction for DUI and failing to report an accident with damage in 2011, for which he received two months of active time for the DUI, and 12 months for failing to report an accident. C.A.J.A 132. Going back further, Mr. Del Cid had two misdemeanor DUIs, 17 and 20 years ago, for which he received sentences of 5 days' jail and a license suspension with no jail, respectively. C.A.J.A 128-129. In addition, Mr. Del Cid had a 2003 arrest and charge for "Hit and Run, Personal Injury or Attended Property" but without any allegation of DUI or alcohol involvement. C.A.J.A 129.

At sentencing, the agreed upon guideline range was 24 to 30 months. C.A.J.A 80. Both Mr. Del Cid and the government requested within-guidelines sentences, at the low end and high end, respectively. The district court briefly acknowledged Mr. Del Cid's poverty and his and his family's terrorization by the gang. C.A.J.A 87, 96. It also downplayed the relevance of Mr. Del Cid's immigration history as such. C.A.J.A 94 ("It is not the recidivism on the illegal reentry.").

Instead, the district court focused its questions and comments on the need to protect the public. C.A.J.A 85-86. It predicted based on his criminal history that Mr. Del Cid was going to "kill somebody sooner or later behind the wheel" and said it did not want to be "the guy that allows him out to put him in that position to do that." C.A.J.A 86. The district court noted that "the likelihood of . . . ultimately striking somebody is really high." C.A.J.A 90.

In addition to its concern with the protection of the public, the Court noted its view that imprisonment would provide Mr. Del Cid a chance to "sober up". C.A.J.A.96;[1] C.A.J.A. 86 ("The longer he is in custody the more likely he is to sober up[.]"). Ultimately, the district court said that the statutory maximum of ten years "would not be unreasonable," C.A.J.A 96. But it imposed a sentence of 50 months. C.A.J.A 101 (oral pronouncement); C.A.J.A 106-7 (judgment).

Regarding supervised release, the parties jointly recommended, under U.S.S.G. § 5D1.1(c) that the district court not impose supervised release. The district court disagreed, and provided this explanation for its imposition of supervised release:

> [Defense Counsel]: [. . .] I don't think there's any need for any supervision to follow whatever sentence Your Honor gives.
>
> The Court: No, because – I am going to do that. Because if he comes back, I'm going to give him an even harsher sentence.
>
> [Defense Counsel]: Right.
>
> The Court: That's exactly why I'm going to do it, so –
>
> [Defense Counsel]: I was trying to head off that –
>
> [Defense Counsel]: I know what you're doing. I'm just telling you, that's why I'm going to do it.
>
> [Defense Counsel]: -- thought process.

[1] "C.A.J.A." refers to the joint appendix filed in the court of appeals. See Joint Appendix, United States v. Del Cid Bran, No. 22-4370, Doc. 16 (filed Oct. 3, 2022); Doc. 17 (filed Oct. 3, 2022).

> Well, then, Judge –
>
> The Court: That tells me what you already know and I already know. He's going to come back and he's going to do the same conduct. And I'm not willing to risk the safety of the community when his record, since age 18, is telling me exactly what's going to happen. They're going to remove him whenever he gets out of custody. He's going to go back for a little bit, then he's going to want to make money. He's going to come back here, and he's going to drink, and he's going to drive, and, ultimately, something bad is going to happen. That's what's driving my view of the need for a variance. It is not the recidivism on the illegal reentry. I'm actually quite sympathetic, I think you know that, on the poverty issue.

App'x. 4a-5a. Therefore, the district court imposed the statutory maximum of 3 years of supervised release. C.A.J.A 102 (oral pronouncement); C.A.J.A 108 (judgment).

On appeal, Mr. Del Cid Bran argued that the district court's imposition of imprisonment for him to "sober up" violated *Tapia v. United States*, 564 U.S. 319, 321 (2011) (sentencing court may not "impos[e] or lengthen[] a prison term in order to promote . . . rehabilitation"). The Fourth Circuit rejected that argument. Pet. App'x. 1a.

Mr. Del Cid Bran also argued, relevant here, that the imposition of supervised release was an abuse of discretion because the district court considered retribution in violation of 18 U.S.C. § 3583(c) when it imposed supervised release to be able to give Mr. Del Cid Bran "a harsher sentence" when he returns. Pet. App'x. 4a. The Fourth

Circuit rejected this argument as well. It characterized the district court's remark as "a warning about the uncontroversial reality that repeat offenders often serve longer sentences" and affirmed the imposition of supervised release "given the deferential abuse of discretion standard." Pet. App'x. 2a.

I. The Question Presented is Important, Because the Common Practice of Imposing Supervised Release on Noncitizens Likely to be Deported is a Waste of Resources, Misapplication of the Supervised Release Statute, and Imposed Differentially by Geography

The prevalent practice, reflected in objective sentencing data, of imposing supervised release terms on noncitizens likely to be deported, is at odds with this Court's characterization of supervised release as nonpunitive, and is a waste of court and prison resources, requiring thousands of court appearances, attorney appointments, and resulting in centuries of prison time imposed every year. Worse, its imposition is geographically lopsided, with district courts in the Ninth Circuit and Fourth Circuits imposing supervised release on deportable noncitizens in 84% and 72% of cases; while the Tenth and Seventh Circuits come in at a sparing 35% and 31%, respectively. This case is a prototypical example of that practice. Therefore this Court should grant certiorari to decide whether imposition of supervised release on a deportable noncitizen in order to "give him an even harsher sentence" on return is an abuse of discretion. Pet. App'x. 4a.

Supervised Release is Still Imposed on Deportable Defendants Who Cannot be Supervised or Assisted in A Majority of Cases

Supervised release is not meant to be punitive. Instead, it is meant to give district courts discretion "to provide postrelease supervision for those, and only those, who need[] it." *Cornell Johnson v. United States*, 529 U.S. 694, 709 (2000). In imposing a term of supervised release, district courts are forbidden from considering retributive sentencing factors – the need to promote respect for the law, provide just punishment, and reflect the seriousness of the offense. *Concepcion v. United States*, 142 S. Ct. 2389, 2400 (2022) ("[I]n determining whether to include a term of supervised release, and the length of any such term, Congress has expressly precluded district courts from considering the need for retribution.") (citing 18 U.S.C. § 3583(c)); *Tapia v. United States*, 564 U.S. 319, 326 (2011) ("[A] court may *not* take account of retribution (the first purpose listed in § 3553(a)(2) when imposing a term of supervised release.") (emphasis in original) (citing 18 U.S.C. § 3583(c)).

Deportable noncitizens, as a class, cannot be supervised. They are excluded from opportunities for reductions in imprisonment provided to U.S. citizen inmates, *see* 18 U.S.C. § 3632(d)(4)(B)(iii), and once released from imprisonment and deported, necessarily cannot be provided either supervision or assistance by a U.S. Probation officers located in the United States.

This is why the U.S. Sentencing Commission, in 2011, amended U.S.S.G. § 5D1.1(c) to recommend that district courts "ordinarily should *not* impose a term of supervised release" if the defendant "likely will be deported after

imprisonment." *Id*. (emphasis added). This recommendation is consistent with this Court's understanding that supervised release should be "allocate[d] . . . to those releasees who needed it most." *Johnson*, 529 U.S. at 709. And it's consistent with the principle that supervised release imposition should not be punitive. *See Tapia*, 546 U.S. at 326; *Concepcion*, 142 S. Ct. at 2400; *United States v. Zamudio*, 718 F.3d 989, 991 (7th Cir. 2013) (imposition of supervised release on deportable noncitizens "a questionable practice" in light of U.S.S.G. § 5D1.1(c)).

But data released by the Sentencing Commission paints a picture of daily sentencing practice at odds with this understanding, and exemplified by the district court's imposition of supervised release in this case. Instead of "ordinarily" not imposing supervised release on deportable noncitizens, district courts routinely impose, in most cases, a term of supervised release where, by definition, the defendant cannot be supervised after release. Overall, supervised release is imposed in 57% of all illegal entry and reentry prosecutions, where the defendant is necessarily a noncitizen and either previously removed or subject to removal. *See* 8 U.S.C. §§ 1325 (illegal entry by alien); 1326(a) (illegal reentry); 8 U.S.C. § 1182(a)(6)(A)(i) (inadmissibility for "illegal entrants"); 8 U.S.C. § 1182(a)(9) (inadmissibility for "aliens previously removed").

More troubling, the practice of routinely imposing supervised release against the Sentencing Commission's recommendation varies wildly by circuit. In the Ninth (84%) and Fourth Circuits (72%), imposition of supervised release is nearly routine. In the Seventh (35%) and Tenth Circuits (31%), it is imposed more sparingly.

FY 2017-2021 Sentencings Under USSG § 2L1.2[2]					
Circuit	Total	No SR Imposed	No SR Imposed (percent)	SR Imposed	**SR Imposed (%)**
9th	18,449	2,910	16%	15,539	**84%**
DC	6	1	17%	5	**83%**
4th	1,753	498	28%	1,255	**72%**
1st	874	280	32%	594	**68%**
11th	3,954	1,311	33%	2,643	**67%**
3d	737	321	44%	416	**56%**
6th	1,807	789	44%	1,018	**56%**
2d	767	337	44%	430	**56%**
5th	42,932	20,081	47%	22,851	**53%**
8th	1,698	960	57%	738	**43%**
7th	575	375	65%	200	**35%**
10th	13,880	9,564	69%	4,316	**31%**
Total:	87432	37427	43%	**50,005**	**57%**

More limited data on revocations against deportable noncitizens (necessarily at least in part for reentry), shows that this practice has a high cost. Revocations of supervised release against deportable noncitizens between fiscal years 2015 and 2018 resulted in at least 5,547 months of imprisonment imposed.[3] That's 462.25 man-years

[2] Source: United States Sentencing Commission Datafiles: *Individual Offender Datafiles*, Fiscal Years 2017-2021 (https://www.ussc.gov/research/datafiles/commission-datafiles) (Aug 29, 2023); Filters applied: GDLINEHI = 2L1.2; Variables listed: MONCIR (Circuit) and SUPREL (number of months of supervised release ordered).

[3] Source: United States Sentencing Commission Datafiles: Report Datafiles: *Federal Probation and Supervised Release Violations* (2020) and *Individual Offender Datafiles*, Fiscal Years 2015-2018 (https://www.ussc.gov/research/datafiles/commission-datafiles) (Aug. 29, 2023); Filter applied: GDLINEHI = 2L1.2 in *Individual Offenders* FY 2015-18, *Violations* database then filtered for matching USSCID unique case identifiers, resulting in subset of illegal entry/reentry (2L1.2) defendants subjected to revocation of supervised release. Fiscal Years 2015-18 were chosen due to more overlap, because the violation datafile is limited to FY 2013-2017.

of imprisonment – over a century of prison time imposed every year on average, as a lower bound.

And these centuries of imprisonment were imposed across 1,063 cases which, assuming at least an initial appearance and a final revocation hearing, *see* Fed. R. Crim. P. 32.1(a), (b)(2), required 2,126 court hearings, 1,063 attorney appointments, not to mention jail visits by Federal Public Defenders and CJA counsel, and costs to the U.S. Marshals of pretrial detention. *See* Fed. R. Crim. P. 32.1(a)(6) (presumption of detention at supervised release revocation stage). Even these estimates appear to be the lower threshold. Other analyses of the Sentencing Commission's datafiles estimate that 30% of all felony supervised release violations were supervised release revocations applied to previously deported noncitizens, on top of new illegal reentry sentences. *See* Jacob Schuman, *Criminal Violations*, 108 Va. L. Rev. 1817, 1879 (2022); *see id*. at 1871 (noting that noncitizens who return are inevitably subjected to higher Grade B violations because illegal reentry is a felony); U.S.S.G. § 7B1.1(a)(2).

Put tersely, the imposition of "supervised" release on deportable noncitizens is unjustified by the § 3583(a) factors and this Court's admonitions; and its routine use by district courts is wasteful, redundant, and needlessly punitive.

II. This Case is a Clean Vehicle to Resolve the Issues Raised

This case is the proper vehicle to address this problem. The district court's reasoning, in imposing supervised release, was not to provide Mr. Del Cid Bran with services to aid his reentry into society; it was explicitly in order to "give him a harsher

sentence" *when* he returns to the United States after being deported, which the district court found was inevitable. Pet. App'x. 4a-5a.

True, the Fourth Circuit characterized the district court's statements as a warning that "repeat offenders often serve longer sentences." Pet. App'x. 2a. But this is no obstacle, for two reasons. First, this Court reviews the record independently, and the district court's statement that it intended supervised release to reserve the power to "give [Mr. Del Cid Bran] a harsher sentence" when he returns to the United States, is clear. Pet. App'x. 4a. This Court decides each case "as it appears upon the record." *Russell v. Southard*, 53 U.S. 139, 159 (1851). Second, and more importantly, the Fourth Circuit's reasoning begs the question. The Fourth Circuit acknowledged that it is improper for a district court to consider retribution; its resolution assumes but does not explain how threatening "a harsher sentence" for recidivism is not retributive. Pet. App'x. 5a.

The issue here was fairly raised in district court and on appeal. The district court's statement explaining its reason for imposing supervised release is explicit and clear. This case therefore presents an uncomplicated vehicle for deciding whether the imposition of supervised release on a deportable noncitizen, in order later to impose "a harsher sentence," is an abuse of discretion.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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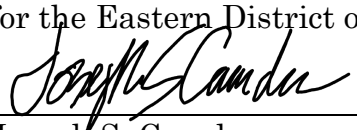

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