No. _____

In The

Supreme Court of the United States

URBANO TORRES-GILES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court's precedent precludes the use of clearly erroneous facts to influence a criminal defendant's sentence. Here, the district court assumed the petitioner made a prior promise to not return to the United States but never confirmed that assumption with evidence.

This petition asks the Court to resolve a circuit split on what test should be used to define a clearly erroneous fact in the sentencing context. Specifically, should that test take into account whether the challenged fact is *reliable*?

RELATED PROCEEDINGS

United States v. Torres-Giles, 19-CR-7180-LAB (S.D. Cal. 2019)

United States v. Torres-Giles, 19-CR-2782-LAB (S.D. Cal. 2019)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Urbano Torres-Giles respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The panel decision of the court of appeals is available as a published decision at *United States v. Torres-Giles*, 80 F.4th 934 (9th Cir. 2023), and reprinted in the Appendix to the Petition at Appendix A ("App. A").

JURISDICTIONAL STATEMENT

The panel decision of the court of appeals was issued on August 31, 2023. App. A 1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The Fifth Amendment to the United States Constitution provides,

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

INTRODUCTION

As a matter of due process, a criminal defendant has the right to be sentenced based upon reliable facts. *See United States v. Tucker*, 404 US 443, 447 (1972); *Townsend v. Burke*, 334 US 736, 741 (1948). Although *Tucker* and *Townsend* dealt with the use of unreliable prior convictions, this Court has not limited the requirement for reliable sentencing facts to criminal history.

Moreover, the circuit courts have applied the principles of *Tucker* and *Townsend* to a wide variety of sentencing circumstances. For instance, they have reversed sentences based on "clearly erroneous" facts relating to immigration history (*United States v. Valle*, 940 F.3d 473, 478 (9th Cir. 2019)), rehabilitation (*United States v. Adams*, 873 F.3d 512, 515-16 (6th Cir. 2017)), and motivation to reenter the U.S. *United States v. Corona-Gonzalez*, 628 F.3d 336, 342-43 (7th Cir. 2010).

There is, however, a clear divergence between how the circuit courts define a clearly erroneous fact for sentencing purposes. The Ninth Circuit asks whether information was "reliable" only in the context of a claim that the district court mistakenly considered criminal history, as in *Tucker* and *Townsend*. In other sentencing contexts, however, the Ninth Circuit asks whether the information was "(1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record." *Valle*, 940 F. 3d at 478. In contrast, the Sixth and Eleventh circuits ask whether the information was *unreliable* in every context, affording criminal defendants a wider (and constitutionally correct) due process protection against the use of clearly erroneous facts.

Here, petitioner was deprived his due process right to be sentenced based only on reliable information because the Ninth Circuit's test is improperly limited. The district court assumed petitioner had promised that he would not return to the U.S. during a prior sentencing hearing. Despite the fact that it did not have a transcript of the hearing, the court returned repeatedly to this illusory "promise" in

sentencing petitioner. After petitioner challenged the use of that clearly erroneous fact on appeal, the Ninth Circuit cited the "illogical, implausible, or without support in the record" test and held that it was supported by the record in light of (1) counsel's uncertain recollection of the prior sentencing hearing, and (2) the district court's general "practice of allowing defendants to speak at sentencing". App. A 12.

Although subtle, the distinction between these two tests for defining a clearly erroneous fact at sentencing is meaningful and should be resolved. Given the reality that a vast majority of federal criminal cases result in a guilty plea, the sentencing procedure is the most crucial stage in the federal criminal process. The definition of what may be used in that process, therefore, must be uniform. Petitioner therefore respectfully requests the Court grant this petition for certiorari.

STATEMENT OF THE CASE

A. Factual Background

Like many people who come to the U.S. from Mexico at a young age, petitioner Urbano Torres-Giles developed a life here, which made it difficult to remain in Mexico after he was deported. For that reason, petitioner has an immigration and criminal history that includes several reentries to the U.S. After he was deported in March 2019, petitioner returned to his hometown in Mexico but found the level of violence made working unfeasible. Moreover, his elderly mother was in poor health and required medical treatment the family could not afford. Petitioner returned to the U.S. in June 2019, was arrested, and was sentenced to

twenty-one months, plus a twelve-month consecutive sentence for violating supervised release.

While in custody, petitioner's mother passed away. At the same time, his sister was "wasting away" from diabetes complications. After release, petitioner attempted to work in Mexico and send money to his sister but he was not even making enough to support himself. He returned to the U.S. in January 2020 by jumping over the border fence. He was arrested and charged again in federal court with attempted entry after deportation, in violation of 8 U.S.C. 1326. Petitioner pled guilty pursuant to a plea agreement that also contemplated his two outstanding supervised release cases.

B. Procedural History

1. Although petitioner's sentencing hearing included the proceedings for his "new" case (the subject of this petition) and for his two supervised release cases, the exchanges cited here pertained only to his "new" case. Following comments from defense counsel regarding petitioner's motivation for returning, the district court immediately turned to whether petitioner had promised to not renter the U.S. at the previous sentencing hearing:

The Court: You represented this fellow the last time, right?

Attorney Doyle: Yes, Your Honor.

The Court: Did you take a look at the sentencing transcript from last time?

Attorney Doyle: I did not take a look at the transcript, but I certainly remember most of it.

The Court: What did he tell me about whether he would remain out of the United States? Because he had been convicted multiple times of

coming into the United States illegally before he was sentenced last time. What do you recall him telling me about whether he would remain out?

Attorney Doyle: I believe the Court inquired as to that, and Mr. Torres said that -- I don't know his exact words, but he would certainly do his best to remain out of the country.

App. A 6-7. The court did not attempt to find the transcript of the prior sentencing hearing. Instead, the court doubled-down on relying on counsel's uncertain recollection of what was said at that proceeding:

The Court: So that was known, that was discussed, and I sought from him an assurance that he would stay out, and he gave me that assurance?

Attorney Doyle: That's my recollection. I don't have the transcript in front of me.

The Court: Yeah. Of course, the guidelines are advisory, and one of the important factors under 3553 in some cases, and I think this is one, is deterrence.

The supposed promise from petitioner became a central theme of the hearing, with the court later returning to whether petitioner said he would not return, stating, "Well, do you remember telling me words to that effect last time, that you would not come back again? Do you remember saying that to me when you were here before in 2019?" Petitioner, however, consistently maintained throughout the hearing that he had appeared via videoconference during the prior hearing and that he had not been able to address the court at all, let alone make a promise to not return, countering, "Actually I don't. It was a video call. I didn't say anything." *See* App. A 8-9.

The court did not explore whether Petitioner's memory was correct by retrieving the transcript or otherwise developing the facts. Instead, the court returned to counsel's uncertain comments: "And his counsel recalls, although he doesn't, that he promised me he wouldn't come back and, yet, here he is . . . ." The court denied a jointly-requested "fast-track" departure and sentenced petitioner to twenty-seven months – six months above the high-end guidelines range contemplated by the plea agreement. App. A 8. Near the conclusion of the sentencing, the court made clear that the assumed promise was a centerpiece of its decision, remarking, "Mr. Torres, I'm not going to elicit a promise from you this time because your word has proved not to be really good. You promised me last time you wouldn't come back and, yet, you did." App. A 20.

2. Petitioner appealed his sentence based on two grounds. Relevant to this petition, petitioner argued that the sentence should be vacated because the district court relied on a supposed "fact" – a promise to not return made at a prior sentencing hearing – to influence its sentencing analysis, which resulted in a higher sentence. *See* App. A 3. Petitioner noted that despite his protestations that he never made such a promise, the district court ran roughshod over that statement and chose to rely exclusively on its own recollection and the equivocal recollection of counsel. While the court could have obtained a transcript of the prior hearing, it did not do so. Petitioner argued that reliance on such unreliable facts constituted the use of clearly erroneous information and deprived him of the due process rights afforded to criminal defendants at sentencing. App. A 11-14.

In a published opinion, the Ninth Circuit affirmed the sentence. App. A 1. The court first cited the "illogical, implausible, or without support in the record" test before holding that (1) the district court's finding that petitioner had made a promise to not return was supported by the record, and (2) the prior promise "played virtually no role in the district court's sentence." App. A 12. As to the specific support in the record, the Ninth Circuit held that the combination of (1) defense counsel's comments, and (2) the district court's normal practice to allow defendants to speak during sentencing, was sufficient to establish the prior promise finding was not clearly erroneous. App. A 12-13.

In a dissenting opinion, one panel member stated that the court should have reversed petitioner's sentence because the "promise" factor was mere speculation. App. A 15-20. The dissenting judge noted that "the district judge may have had insights and intuition about petitioner's prior statements, but he did not have the transcripts from the earlier hearings, nor the confirmed facts." App. A 17. In other words, although there might be some assertion of fact in the record, that assertion should not be relied upon if it is not supported by real evidence. The dissenting judge concluded, "A sentencing court cannot enhance a criminal sentence through a credibility contest of unsworn statements; by crediting its own speculation over the defendant's version of the facts. A judge's insights and intuition are not enough." App. A 19.

REASONS FOR GRANTING THE WRIT

A. There is a Circuit Split on the Definition of Clearly Erroneous Facts in the Sentencing Context.

Dating back to *Townsend v. Burke*, 334 U.S. 736 (1948), this Court has protected the due process right of criminal defendants to be sentenced based only on reliable facts. In *Townsend*, the state court sentenced the petitioner based partly on a belief that he had previously been convicted for a theft offense. *Id.* at 740. In reality, the theft charge had been dismissed. This Court reversed the sentence, holding, "[T]his prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue." *Id.* at 741.

Later, in *United States v. Tucker,* 404 US 443 (1972), this Court affirmed the appeals court's order for resentencing because the district court considered criminal history facts that were inaccurate. This Court held that the sentence was based "at least in part upon misinformation of constitutional magnitude." *Id.* at 447; *see also Gall v. United States*, 128 S.Ct. 586, 597 (2007) (the appeals court "must first ensure that the district court committed no significant procedural error, such as . . . selecting a sentence based on clearly erroneous facts . . . .").

While *Townsend* and *Tucker* addressed the use of inaccurate criminal history information, this Court has not limited the prohibition on using untrue facts to that specific scenario and there would be no logical reason to do so. Moreover, rather than limit the scope of *Townsend* and *Tucker*, the circuit courts have made clear that district courts may not rely on inaccurate facts in *any* sentencing context. *See United States v. Corona-Gonzalez*, 628 F.3d 336 (7th Cir. 2010); s*ee also United*

States v. Adams, 873 F. 3d 512, 519 (6th Cir. 2017) (reversing sentence due to district court's reliance on pseudo-scientific research regarding brain chemistry of addicts). In *Corona-Gonzalez*, the defendant appealed his sentence for drug distribution after the district court assumed – without evidence – that the defendant had reentered the U.S. in order to deal drugs. 628 F.3d at 340. The Seventh Circuit reversed the sentence, holding that there was "nothing in the record to support the district court's statements" regarding the defendant's immigration history as it related to distributing drugs and that the court's assumption was clearly erroneous. *Id.* at 343.

Although the circuit courts prohibit district courts from considering clearly erroneous facts in the sentencing analysis, the test for determining what is clearly erroneous is not uniform among the circuits.

1. The Ninth Circuit focuses on whether information is "false or unreliable" when the challenged information relates to criminal history. *See United States v. Hill*, 915 F.3d 669, 674 (9th Cir. 2019); *Farrow v. United States*, 580 F.2d 1339, 1359 (9th Cir. 1978). In *Farrow*, the defendant petitioned the appeals court for habeas relief, arguing the district court improperly considered prior convictions that were rendered invalid by *Gideon v. Wainwright*, 372 U.S. 335 (1963). 580 F.2d at 1344. After discussing the applicable Supreme Court and circuit precedent, the court stated, "The clear teaching of *Townsend* and *Weston* is that a sentence will be vacated on appeal if the challenged information is (1) false or unreliable, and (2) demonstrably made the basis for the sentence." 580 F.2d at 1359.

In *Hill*, the defendant argued that his sentence had been tainted by the district court's mistaken belief that his prior convictions would have rendered him eligible for an enhancement under the Armed Career Criminal Act when that was not the case. 915 F.3d at 672-73. Again, in a sentencing case that centered on a question of criminal history, the Ninth Circuit set forth a test that asked whether the information was "false or unreliable." *Id.* at 674 ("The Fifth Amendment guarantee of due process is violated when a court, in sentencing a defendant, relies on information that is materially false or unreliable.").

2. The Ninth Circuit, however, does not ask whether information is unreliable in situations not involving criminal history. Instead, the Ninth Circuit employs the "illogical, implausible, or without support" test. *See United States v. Valle*, 940 F. 3d 473 (9th Cir. 2019); *United States v. Gasca-Ruiz*, 852 F.3d 1167 (9th Cir. 2017).

In *Valle*, the defendant objected when the district court included a sentencing enhancement based on an assumption that he had remained in the U.S. from 2004, rather than from 2017. *Id.* at 477-78. The Ninth Circuit first stated that "[a] finding of fact is clearly erroneous if it is '(1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record.' " *Id.* at 478 (quoting *United States v. Hinkson*, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc)). The court reversed, concluding that "[t]he district court's factual finding that [petitioner] was in the United States continuously from his 2004 arrest until his 2017 arrest is unsupported by any direct evidence in the record."

The Ninth Circuit therefore has two separate tests for determining whether clearly erroneous facts were used at sentencing. The first test includes the question of whether information was "reliable" and is used only in the context of considering a defendant's criminal history. The second test used for all remaining sentencing facts eschews reliability and instead focuses on whether the facts are illogical, implausible, or without support in the record.

3. The Sixth and Eleventh circuit tests for clearly erroneous facts consider the reliability of a fact regardless of whether it is a fact of criminal history. *See United States v. Adams*, 873 F.3d 512, 517-18 (6th Cir. 2017); *United States v. Jimenez*, 605 F.3d 415, 420 (6th Cir. 2010); *United States v. Ghertler*, 605 F.3d 1256, 1269 (11th Cir. 2010).

In *Adams*, a case involving sentencing following a supervised release violation, the government told the court that studies showed the human brain needs eighteen months to "reset" after developing an addiction. 873 F.3d at 519. The court then sentenced the defendant to eighteen months. On appeal, the Sixth Circuit first set forth its test for determining whether the district court relied on erroneous facts: " '[T]he defendant must establish that the challenged evidence is materially false or unreliable, and that such false or unreliable information actually served as the basis for the sentence' in order to prove a due-process violation." *Id.* at 517 (quoting *United States v. Robinson*, 898 F.2d 1111, 1116 (6th Cir. 1990)). The Sixth Circuit vacated the sentence in light of the district court's reliance on the government's brain "reset" statements, holding, "[t]his information is unreliable because it is an

unsubstantiated assertion that has the veneer of accuracy due to its supposed status as a product of scientific research." *Id.* 520.

The Eleventh Circuit also focuses on reliability of facts for all sentencing questions. In *Ghertler*, when considering whether a "position of trust" sentencing enhancement was supported, the Eleventh Circuit first cited to circuit precedent and noted that "[a] defendant has a due process right . . . not to be sentenced based on false or unreliable information." 605 F.3d at 1269. The court then cited verbatim the test used above from the Sixth Circuit. *See id.*

The Sixth and Eleventh circuits therefore focus on the reliability of a disputed fact at sentencing to determine whether it was erroneous.

B. The Difference Between these Tests is Meaningful.

While the Ninth Circuit's "illogical, implausible, or without support" test may appear at first to naturally include a "reliability" test, the definition of those words – as well as the facts of this very case – demonstrate that is not the reality.

The Merriam-Webster dictionary defines "illogical" as "not observing the principles of logic." *Illogical*, MERRIAM-WEBSTER DICTIONARY, *available at https://tinyurl.com/2j4jpdb6* (updated Oct. 17, 2023). Under the facts of this case, it could not be said that the district court's assumption that petitioner had made a promise to not return was illogical. Indeed, most defendants tell the sentencing court they will not return when asked that question. Moreover, it likely was the court's general practice to allow defendants to speak and to ask that question. The

mere fact that something is not illogical, however, does not automatically imbue it with reliability.

Meriam-Webster defines "implausible" as "provoking disbelief." *Implausible*, MERRIAM-WEBSTER DICTIONARY, *available at https://www.merriam-webster.com/dictionary/implausible* (updated Oct. 17, 2023). Again, the district court's assumption that petitioner would have promised him he would not return does not necessarily provoke disbelief. In fact, the assumption would appear reasonable were it not for the complete lack of tangible evidence that such a promise occurred and petitioner's unequivocal statements to the contrary.

Lastly, it is entirely possible for an assumption to have some degree of support in the record and at the same time be unreliable when all of the facts are considered. Indeed, the appeals court here held that the district court did not rely on erroneous information because (1) defense counsel said he thought petitioner had made a promise, and (2) the district court had a practice of allowing defendants to speak at sentencing. *See* App. A 12-13. It is not entirely unreasonable to read those two facts as being sources of support for the court's assumption of a promise. When viewed against the background of defense counsel's very uncertain recollection, however, those sources become less reliable. They then become demonstrably unreliable when juxtaposed against petitioner's adamant statement that he not only never made the promise but was not permitted to speak at all during the prior sentencing because it was conducted over video.

The two tests being used by these circuits are not the same in words or in spirit. Except in cases involving questions of criminal history, the Ninth Circuit wholly fails to ask whether a fact is reliable – resting its analysis on questions that have no connection with reliability.

C. A Test that Includes a Reliability Analysis is Necessary to Ensure Due Process.

As revealed by the facts of this case, a test that leaves out the question of reliability and supplants that question with other, less salient questions, sets the stage for a deprivation of due process rights. The district court here decided petitioner's sentence based largely on the fact that it assumed petitioner had made a promise to not return. That assumption was not based on any actual evidence in the record.

Instead of asking whether the assumption of a promise was reliable, however, the Ninth Circuit first asked whether it was illogical or implausible, which, as noted above, it was not. The court then hung its holding on a view that defense counsel's uncertain comments about the prior hearing were sufficient "support in the record" regarding the promise. The court never questioned whether that "support" itself was reliable.

Had petitioner's case been heard in the Sixth or Eleventh circuits, those courts would have focused on whether (1) counsel's equivocations could be considered reliable, and then (2) whether an assumption based on unreliable support can itself be reliable. Of course, an assumption based on unreliable facts

must also fall. That is the only test that puts in practice the due process procedures set forth in the *Towsend* and *Tucker* line of cases.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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