

No. 17-5532

**In the
Supreme Court of the United States**

JOSE PENA-TRUJILLO,
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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

May a district court increase a criminal defendant's sentence based on unsupported assertions in the Presentence Report (PSR) prepared by the Office of Probation where the defendant timely objected to the assertions?

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REASONS FOR GRANTING THE WRIT

I. THE GOVERNMENT'S BRIEF IN OPPOSITION DOES NOT CHALLENGE THE IMPORTANCE OF THE QUESTION PRESENTED OR THE FACT THAT THE DECISION IN THE INSTANT MATTER IS IN CONFLICT WITH THE DECISIONS OF SISTER CIRCUITS .

The government's Brief in Opposition (BIO) does not challenge the importance of the question posed in Mr. Peña-Trujillo's petition for certiorari nor does it deny that the decision in this matter is in conflict with the decisions of sister Circuits. Rather, the government's BIO attempts to shift this Court's attention from the question actually presented, and based on its reframed question, requests a denial of Mr. Peña-Trujillo's petition for certiorari.

The question as originally framed by Mr. Peña-Trujillo compels the grant of his petition for certiorari because the issue at hand affects the manner in which all criminal defendants are sentenced and because there is a conflict on the issue among the Circuits. In this regard, the First through Fourth, Ninth and Seventh Circuits take one position on the issue whereas the Eighth, Tenth and D.C. Circuits hold differently . See BIO at

pp. 10-11.

The question presented in Mr. Peña-Trujillo's certiorari petition is "May a district court increase a criminal defendant's sentence based on unsupported assertions in the Presentence Report (PSR) prepared by the Office of Probation where the defendant timely objected to the assertions?" Pet. at p. 1. The heart of Mr. Peña-Trujillo's question presented requires a determination of the evidence necessary to support assertions made in a presentence report. The government reframes petitioner's question presented and in so doing ignores the focus of the question. BIO at p. I. In this regard, the government's question presented fails to ask this Court to determine the nature and type of evidence required to support statements made in a PSR.¹

The government, in its BIO, refashions the arguments made in Mr. Peña-Trujillo's petition for a writ of certiorari in other significant ways.

¹ The government incorrectly reframes the question presented as "Whether the district court violated due process by relying on factual information in the Presentence Investigation Report about petitioner's state parole status to add two points to petitioner's criminal history score under Sentencing Guidelines § 4A1.1(d), where the Probation Office explained that it had confirmed the information with the relevant state agencies and petitioner did not contest the information's correctness." BIO at p. I.

In its BIO, the government incorrectly reframes Mr. Peña-Trujillo's argument when it states, "Petitioner contends (Pet. 13-20) that the district court violated due process by relying on factual information in the PSR regarding his criminal history." BIO at p. 6. In his petition for a writ of certiorari, Mr. Peña-Trujillo explains that the district court violated his due process rights by failing to acquire and present to the district court documentary evidence that could support the assertion that he was on parole at the time of the instant violation. Pet. at p. 15. Thus, Mr. Peña-Trujillo's argument is fundamentally different from that claimed by the government.

The government next attempts to divert this Court's attention from the issue at hand by repeatedly referencing the statements made in the PSR and as "facts." BIO at 11, 13, 15. In so doing, the government continues to ignore that Probation failed to support the assertions made in the PSR with any evidence. The government makes the circular argument that Probation's assertions made in the PSR are adequately supported because Probation says so in the PSR. In other words, Probation attempted to support its unsupported statements with more

unsupported statements. ER 149-150. The PSR did not include undisputed facts. Rather, it made conclusions without support. Contrary to the question presented by the government, this is the crux of Mr. Peña-Trujillo's petition.

In its BIO, the government argues at length the propriety of the district court's decision rather than whether the issue presented is an important one about which there is conflict. BIO at pp. 6-8, 10. Clearly, Mr. Peña-Trujillo's position is that the Court of Appeals' decision in this matter was incorrect. However, the correctness of the decision is not determinative of this Court's decision to grant the instant petition for a writ of certiorari. As stated in U.S. Sup. Ct. R. 10(a), a compelling reason for the grant of a petition for certiorari exists where “. . . a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter. . . .” (See *Braxton v. United States*, 500 U.S. 344, 347(1991) holding that a principal purpose for which the United States Supreme Court uses certiorari jurisdiction is to resolve conflicts among Circuit Courts of Appeals and state courts concerning the meaning of provisions of federal

law.) As the government's BIO demonstrates, the question Mr. Peña-Trujillo presents meets both the criteria of importance and conflict.

The government admits there is a conflict between the decision in the instant matter and relevant decisions of the Eighth Circuit. BIO at 6-7. In fact, the government's BIO amplifies the conflict among the circuits by noting that the D.C. Circuit also follows Eighth Circuit holdings on the issue Mr. Peña-Trujillo presents to this Court. BIO at p. 11. Further, the government contends that the Eighth, Tenth and D.C. Circuits' holdings are in conflict, not only with the decision in the instant matter, but also with relevant case law in the First through Fourth and Seventh Circuits. BIO at pp. 10-11.

In addition to highlighting the conflict that exists among the Circuits, the government's BIO demonstrates the importance of Mr. Peña-Trujillo's question presented. In its BIO, the government provides an extensive list of defendants who have requested certiorari on this same issue as the one now before this Court. BIO at 12. This lengthy list is testimony to the significance of Mr. Peña-Trujillo's question presented.

Although the government's BIO demonstrates the need for a grant of

the instant petition, the depth and breadth of defendants affected by the issue raised establishes the importance of the question presented. In this regard, a determination of the evidence a district court needs to sentence a criminal defendant is fundamental to all criminal proceedings.

The government claims that the question presented in this petition "...does not squarely present . . . [the] issue because petitioner did not dispute the accuracy of the factual statement that he was on parole at the time of reentry." BIO at 7. This statement is in correct. Under Mr. Peña-Trujillo's question presented, the issue is: What evidence must the government present to meet its burden of proving factors enhancing a defendant's sentence? See *United States v. Romero-Rendon*, 220 F.3d 1159, 1160 (9th Cir. 2000), citing *United States v. Torres*, 81 F.3d 900, 903 (9th Cir. 1996); *United States v. Newman*, 912 F.2d 1119, 1122 (9th Cir. 1990).

Because Mr. Peña-Trujillo timely objected to the PSR's assertion that he was on parole at the time of reentry, on the ground that there was no evidence in the record to support it, the facts of this case very squarely present the issue at hand. ER 47. In any event, by objecting to the

statement in the PSR regarding his parole status, Mr. Peña-Trujillo did dispute that information.

The government implies that this Court's denial of earlier petitions requesting certiorari on the same issue as that presented by Mr. Peña-Trujillo requires a denial of the instant petition. Such is not the case. Review on a writ of certiorari to this Court is not a matter of right, but one of judicial discretion. U.S. Sup. Ct. R. 10. Simply because this Court chose not to exercise its discretion in earlier matters does not support a denial of the instant petition. Earlier petitions could have been denied for a variety of reasons. Perhaps the facts of the earlier cases did not lend themselves to a determination of the question at hand. Perhaps the issue was not ripe for review. Neither of these factors are present in this case. The nature of the evidence on which a district court may enhance a defendant's sentence is fundamental to every criminal sentencing. As discussed, the facts of this matter very neatly fit within the question presented. Also, because of the number of Circuits that have now addressed the issue, it is ripe for review.

The issue raised in Mr. Peña-Trujillo's petition for a writ of certiorari

is one of fundamental importance. The conflict that exists among the various Circuits demands a grant of his petition for a writ of certiorari.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: December 19, 2017

Respectfully submitted,



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