

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JUAN CARLOS CELAYA-CARTAJENA PETITIONER
(Your Name)

vs.

U.S.A — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

COURT OF APPEALS FOR THE FIFTH CIRCUIT.
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

JUAN CARLOS CELAYA-CARTAJENA
(Your Name)

REEVES COUNTY DET. CENTER 3
P.O. BOX 2038, PECOS TX 79772
(Address)

PECOS, TX 79772
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

WHETHER, CARTAJENA'S SENTENCE IS GREATER THAN NECESSARY TO SATISFY THE SENTENCING GOALS IN 18 U.S.C. § 3553(a), AND THEREFORE SUBSTANTIVELY UNREASONABLE.

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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OTHER

IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☐ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was 01-17-2017.

☒ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

STATEMENT OF THE CASE

Cartajena pleaded guilty to illegal re-entering the United States after a prior removal. The advisory Guideline range for this offense was 46 to 57 months imprisonment.

The district court sentenced him to 50 months imprisonment.

Cartajena argues that the sentencing Guideline produced an unreasonable sentence in light of the sentencing factors in 18 u.s.c §3553(a).

On January 4, 2016, Border patrol agents encountered Cartajena near Hidalgo, Texas. The agents established that Cartajena was an undocumented alien who had entered the United States without permission. A records check revealed that Cartajena had previously been deported in January 2013 and that he had previously been convicted of illegal reentry and sentenced to 48 months in prison.

On January 19, 2016, a federal grand jury returned a one-count indictment charging cartajena with illegal reentry, in violation of 18 u.s.c §1326.

Cartajena pleaded guilty to that count on March 7, 2016, without benefit of a plea agreement.

The court adjudicated Cartajena guilty and ordered the preparation of a presentence investigation report (PSR).

Applying the 2015 Sentencing Guidelines, the PSR calculated Cartajena,s total offense level as 22 based on the following..

Base offense level of 8 under U.S.S.G. § 2L1.2 for a violation of 8 U.S.C. §1326

16-level increase under U.S.S.G. § 2L1.2(b)(1) because Cartajena was previously deported after a conviction for a crime of violence (aggravated robbery),

2-Level decrease under U.S.S.G. § 3E1.1(a) for acceptance of responsibility.

The PSR COMPUTED Cartajena,s criminal history score as 6, which resulted in a criminal history category of 111.

With a total offense level of 22 and a criminal history category of 111, Cartajena faced a guideline range of 51 to 63 months of imprisonment and a statutory maximum of 20 years.

Through counsel, cartajena filed written objections to PSR. First, he requested a downward departure under U.S.S.G. § 5k2.0(a)(3), arguing that the 16-level increase in his offense level was excessive. Cartajena also requested that the Government move for a third point of reduction under U.S.S.G. § 3E1.1(b) for timely acceptance of responsibility.

At sentencing on June 14, 2016, the court granted the Government,s motion for a third point for timely acceptance of responsibility, which brought Cartajena,s guideline range to 46 to 57 months in prison. The court then sentenced Cartajena to 50 months in custody and impose a \$100 mandatory special assessment.

The court did not impose a term of supervised release.

Final judgment was entered on June 30, 2016

Cartajena timely appealed. On January 17, 2017, the fifth circuit dismissed the appeal as frivolous after Cartajena,s appellate counsel filed an Anders brief.

Cartajena argues that his sentence is substantively unreasonable because the sentencing guideline calculation was flawed by an addition of unwarranted 16 point(that emanated from a 15 years o old felony charge aggravated armed robbery that occured when the accused was only 22 years old).

The court clearly based the sent^eed on the fact that the criminal history was adequate to account for his prior conviction.

Basis for objection

The court should consider whether the sentencing court committed a significant procedural error such as miscalculating the advisory guideline range.

The court should move to consider the second step which is reviewing the substantive reasonableness of the sentence imposed for an abuse of discretion.

A COURT,S JURY INSTRUCTION when constructively amended on an indictment constitutes a reversible error per se because the instruction violates a defendant,s Fifth Amendment right to tried on only on charges presented by the grand jury and creates the possibility that the defendant may have been convicted on grounds that the indictment did not alleged. United States v. Wiesman, 899, f.2d 1111, 1114 (11th cir. 1990).

A constructive to the indictment violates the Fifth Amendment by imposing the defendant, to criminal charges not made in the indictment against him.

Section of criminal Law 1156.2 specified that the court review a sentencing decision for an abuse of discretion and the fact a different sentence is appropriate is insufficient to justify reversal of the district court,s nevertheless, the court may reverse if, upon reviewing the record it has a definite and firm conviction that the district court committed a clear error of judgment in the indictment it reached upon weighing the relevant factors.

And criminal Law 1134-75, 1156.2. The court review the district court,s decision an abuse of discretion and only a procedurally erroneous or substantively unreasonable sentence will be set aside.

At this point, there is a clear error in Cartajena,s sentencing that the petitioner was in the Guidelines range of level 51 to 63 months of imprisonment. on criminal history category of 111. To receive a sentence of 50 months was an abuse of discretion by the court.

But for the 16 for base offense level for illegal reentry by an alien with a prior felony aggravated crime, the accused will not

be in a position to receive an upward adjustment to his sentencing Guideline.

The basis in which the petitioner was punished with 16 point base offense level was that he had an aggravated felony charge in the year 2000 which shouldn't have been taken into consideration by the court and the PSR BECAUSE THE statute of limitation has passed (15 years).

This error of adjusting upwardly the sentencing Guideline resulted in an erroneous sentence.

The Guideline being the starting point and initial benchmark suppose to be calculated correctly, Kimbrough, 128 S.Ct. at 514 (quoting Gall, 128 S.Ct. at 596-97 n6).-----

In this procedural challenge, the petitioner contends that the district court to properly consider his argument of using a flawed sentencing Guideline that was derived from an out of date prior criminal history point to calculate his sentence.

Also, the petitioner argues that the sentencing court failed to consider his argument for a lenient sentencing that cast his personal problem in a positive light, following from the fact that his wife was pregnant with their second child and that their daughter needed money for a medical bill. And that he had to enter illegally into the United States to support by working.

Accordingly, although it is the better practice for the district court to explain whether they accept or reject nonfrivolous arguments tethered to a relevant §3553(a) factor.

Carty, 520 F.3d at 992-93. In this case, United States v. Antonio Pedraza-Mendoza, 518 Fed Appx. 851, 2014 U.S. App. Lexis 16176 No. 14-10254.

The court of APPEALS of the Eleventh Circuit review constitutional sentencing issue de novo. see, eg,

United States v. Steed, 548 F.3d 961, 978 (11th Cir. 2008).

The court bound by prior precedent unless until it is overruled by the court sitting en banc or by the Supreme court.

United States v. Vega-Castillo, 540 F.3d 1235, 1236 (11th Cir. 2008).

The Supreme Court should consider and review the petitioner sentence imposed by the district court for reasonableness which asks whether the trial court abused its discretion.

United States v. Pugh, 515 F.3d 1179, 1189 (11th Cir. 2008).
(quotation omitted).-----

Argument And Authorities

Cartajena,s sentence is Unreasonable.

The statute governing sentencing, as modified by Booker, contains an overarching provision instructing district courts to impose a sentence sufficient, but not greater than necessary to accomplish the goals of sentencing in 18 U.S.C. § 3553(a) (2).

Kimbrough v. United States, 552 U.S. 85, 101 (2007).

Cartajena ,s 50 months sentence for illegal reentry into the United States is manifestly excessive and greater than necessary to meet these goals and is therefore unreasonable.

A. Standard Of Review

The Appellate Court is to consider the substantive unreasonableness of the sentence imposed under an abuse of discretion standard

GALL V. United States, 552 U.S. 38, 51 (2007).

B. The District Court made an error on Judgment in sentencing Cartajena to 50 month imprisonment.

The statute governing sentencing requires the district court to impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of that provision. 18 U.S.C. § 3553(a). Those purposes are:..

(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 education or vocational training, medical care, or other correctional treatment in the most effective manner.

18 U.S.C. § 3553(a) (2). In fashioning a sentence to meet these purposes, courts are directed to consider a broad range of factors, including the nature and circumstances of the offense and the history and characteristics of the defendant. see, 18 U.S.C. § 3553(a)(1)-(17).

In this case, the district court concluded that a sentence of 50 months imprisonment was required by the sentencing factors in § 3553(a).

Following from the purposes of the aforementioned sentencing factors, there is no gainsaying the fact that petitioner merely came to the United States illegally to work and help pay for his daughter's medical bill because his wife was constrained by pregnancy.

Although he knew that he was warned by the previous Judge who sentenced him previously for 48 months for the same crime, but he was only compelled to do it because of his family medical bill.

Any father or a loving husband under the same circumstances would have probably done the same.

Considering that his aggravated felony charge was more than 15 years old, he contends that the 50 months sentence for the instance case is unreasonable considering the nature of the offense.

Moreover, the court in *Apprendi v. New Jersey* asserted that any factor not charged in the indictment should be presented to the jury before it can be considered in the sentencing, but in the petitioner's case, the District court applied 16 point to the base offense level instead of 8 point for illegal re-entry because of a 15 year old aggravated felony charge that the petitioner committed when he was just 22 years old.

The District Court also failed to consider the fact that Congress and the Sentencing Commission have realized and agreed that 16 point in base offense level for illegal reentry is excessive and counts as double counting because accused almost always get punished with enhancement for the same reason.

Because of this factor, Sentencing Commission changed the law in November 1st, 2016 to 8 point instead of 16 point.

Had it been that the petitioner's counsel had filed a motion for the sentence in June 2016 to be continued after November 1st, 2016 the sentence would have had a different outcome.

Any reasonable court would have considered the new sentencing Guideline that would have taken effect on November 1st, 2016 that will ultimately benefit the petitioner.

Invariably, Cartajena would have scored lower under the sentencing Guidelines that would go into effect in November 2016 (a range of 37 to 46 months, instead).

The petitioner's sentence was problematic because the 16 point represents an increase from already too-high Guidelines range 46-to 57 months imprisonment.

The range was itself the product of a flawed guideline that has been recognized as a double jeopardy because the 16-level increase for a prior conviction is also accounted for in the defendant's criminal history calculation. see, e.g.,

United States v. Evangelista, No.08 Cr. 172-01 (RWS), 2008 WL 5057862, at *6, *7 (S.D.N.Y. Nov. 26, 2008) (imposing below-Guidelines sentence in part because of problematic development of § 2L1.2, s 16-level increase), United States v. Galvez-Barrio 355 F. Supp. 2d 958,960,961-64 (E.D. Wis.2005)

(Same), United States v. Zapata-TREVINO, 378 F. Supp. 2d 1321, 1324-25, 1326-28, 1329 (D.N.M. 2005) (Same), United States v. Santos, 406 F. Supp. 2d 320,324,327-28, 329 (S.D.N.Y. 2005) (Same). That is what occurred in Cartajena's case.

He was placed in Criminal History Category 111, based on his prior conviction, but this offense level was also increased by 16 level based on his same conviction.

Although it is sound policy to increase a defendant's based on his prior record, it is questionable whether a sentence should be increased twice on that basis.

Galvez-Barrios, 355 F Supp. 2d at 961-63. The Sentencing commission has recognized that illegal reentry guideline in the formulation that it was during the petitioner's sentencing was not effectively advancing the goals of sentencing and that's why they responded by the Amendment that substantially revises § 2L1.2.

See U.S. Sentencing Guideline for November 1st, 2016.

Therefore, the November 2016 Sentencing Guideline would have covered Cartajena's criminal history instead of being moved from a criminal 1 to a criminal History 111.

It should also be noted that within a short time of the defendant appearance in federal court, he accepted full responsibility for his conduct and agree to enter a plea of guilty.

A sentence within the November 1st 2016 Sentencing Guideline (37 to 46 months imprisonment) would have been sufficient, but not greater than necessary, to reflect the seriousness of Cartajena's offense and to provide just punishment. See 18 U.S.C. § 3553 (a) (2) (B). The district Court found that the soon-to-be effective Sentencing Guideline of November 1st, 2016 was not warranted to be considered in Cartajena's sentencing because he was not deterred by his prior conviction.

Conclusion

There was no reasonable basis to suggest that a soon-to become law of the land (November 1st, 2016 Sentencing Guideline) should not be used or even considered especially when his sentence was in June 2016.

The district court relied on a prior conviction for armed robbery that the petitioner committed 15 years ago when he was just 22 years old.

Wherefore, Appellant, Julian Carlos Celaya-Cartajena based upon the foregoing and the argument raised in this Appeal, respectfully request that Supreme court vacate, set aside his sentence and remand this matter for a re-sentencing, and for such other further remedy as the court may deem just, proper and fair.

REASONS FOR GRANTING THE PETITION

CARTAJENA'S ~~SENTENCE~~ ^{SENTENCE} OF 50 MONTHS IS MANIFESTLY
~~EXCESSIVE~~ ^{AND THEREFORE} GREATER THAN NECESSARY FOR A CRIME
OF ILLEGAL ENTRY INTO THE UNITED STATES OF
AMERICA.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JUAN CARLOS CELAYA CARTAJENA

Date: 01-13-2018