

No. _____

In the Supreme Court of the United States

October Term, 2017

GUSTAVO ZAPATA-OCHOA, *PETITIONER*,

v.

UNITED STATES OF AMERICA

**PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

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QUESTION PRESENTED FOR REVIEW

Whether a sentence produced by the drug guideline, §2D1.1, is not entitled to a presumption of reasonableness on appeal.

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Petitioner Gustavo Zapata-Ochoa 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 March 5, 2018.

PARTIES TO THE PROCEEDING

The caption of this case names all parties to the proceeding in the court whose judgment is sought to be reviewed.

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW.....	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	iv
OPINION BELOW.....	1
JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.....	1
RELEVANT GUIDELINES PROVISION	1
STATEMENT	1
REASONS FOR GRANTING THE WRIT	6
The Court Should Grant Certiorari to Determine Whether the Drug Guideline Is Entitled to an Appellate Presumption of Reasonableness.	6
A. Guideline’s Empirical Basis Legitimizes the Presumption of Reasonableness for Within-Guideline Sentences.....	8
B. Because the Drug Guideline Is Not Empirically Based, a Presumption of Reasonableness Is Inapplicable.....	10
CONCLUSION.....	14
APPENDIX A <i>United States v. Zapata-Ochoa</i> , No. 17-50470, unpub. op. (5th Cir. Mar. 5, 2018)	
APPENDIX B U.S.S.G. §2D1.1	

TABLE OF AUTHORITIES

Cases

<i>Gall v. United States</i> , 552 U.S. 38 (2007)	6, 9, 10
<i>Kimbrough v. United States</i> , 552 U.S. 85 (2007)	<i>passim</i>
<i>Rita v. United States</i> , 551 U.S. 338 (2007)	<i>passim</i>
<i>United States v. Cabrera</i> , 567 F. Supp.2d 271 (D. Mass. 2008)	10
<i>United States v. Miller</i> , 665 F.3d 114 (5th Cir. 2011)	7

Statutes

18 U.S.C. § 3231	1
18 U.S.C. § 3553(a)	7, 8, 9
18 U.S.C. § 3553(a)(1)	12, 13
18 U.S.C. § 3553(a)(2)	6, 7, 10
18 U.S.C. § 3553(a)(2)(A)	10, 12
21 U.S.C. § 841	3
21 U.S.C. § 846	3
28 U.S.C. § 991(b)	6, 10
28 U.S.C. § 1254(1)	1

Rule

Supreme Court Rule 13.1	1
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United States Sentencing Guidelines

U.S.S.G. §1A1.1, comment. (n.3), p.s.	7
U.S.S.G. §2D1.1.....	i, 1
U.S.S.G. §2D1.1(b)(5).....	4
U.S.S.G. §2D1.1(c)(4)	4
U.S.S.G. §3D1.2(a)	4
U.S.S.G. §3D1.2(d)	4

Other Authorities

Stephen Breyer, <i>The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest</i> , 17 HOFSTRA L. REV. 1 (1988)	7
U.S. SENT'G COMM'N, METHAMPHETAMINE FINAL REPORT OF THE WORKING GROUP 7 (1999)	11
U.S. SENTENCING COMM'N, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 14 (Nov. 2004)	8

OPINION BELOW

A copy of the opinion of the court of appeals is attached to this petition as Appendix A.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit were entered on March 5, 2018. This petition is filed within 90 days after entry of judgment. *See* SUP. CT. R. 13.1. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

RELEVANT GUIDELINES PROVISION

Guideline §2D1.1 is attached to this petition as Appendix B.

STATEMENT

Petitioner Gustavo Zapata-Ochoa was convicted of conspiracy to possess with intent to distribute methamphetamine and possession with intent to distribute methamphetamine, and sentenced to 168 months' imprisonment. The district court exercised jurisdiction under 18 U.S.C. § 3231.

Offense. On a September evening in 2016, U.S. Border Patrol agents found Zapata near the Rio Grande River in Del Rio, Texas. He was hidden in a brushy area and had an injured leg. Nearby, the agents found a package that contained methamphetamine.

The Border Patrol agents had gone to that area because a sensor had been activated. Cameras set up in the area showed a person coming up from the river through the brush and running toward the border fence. An agent monitoring the camera advised agents in the area that someone was climbing the fence. From the camera angle, a person was seen climbing over the fence and then disappearing. When the agent zoomed out the camera, he observed a person running toward the street.

Two Border Patrol field training officers, Agent Emilio Muniz and Agent Juan Moreno, along with six trainees were nearby and responded to the call. When the Border Patrol agents arrived at the area, they split into two groups—one remained by the street and the other headed down into the brush toward the fence. Near the fence, one of the trainees discovered a package of crystal methamphetamine. A short distance away, in the brush, another trainee discovered Zapata, who had hurt his leg jumping the fence. Because Zapata was injured, he was taken by ambulance to a hospital in San Antonio.

Three days later, Zapata was interviewed at the hospital by Eagle Pass Police Officer Jose Duran, who was a task force officer with the DEA. Zapata admitted assisting a person named Victor to smuggle the drugs into the United States. On October 6, 2016,

Officer Duran conducted a second interview of Zapata at the DEA Office in Eagle Pass. This interview was videotaped. Zapata again admitted assisting Victor in smuggling the drugs, but he denied knowing it was methamphetamine or that he was doing it to get paid.

Zapata said that he knew Victor was going to be smuggling drugs and asked to go along because he wanted to go the United States to visit his daughter. Victor agreed that Zapata could come along and said, "I'll help you jump the fence and you can help me." Zapata saw the package of drugs, which Victor told him contained marijuana. They crossed the river from Mexico to the United States. When they arrived at the fence, Victor had Zapata hold the bag that contained the package of drugs while he climbed over. Once Victor was across, he told Zapata to toss the bag over the fence. Zapata tossed the bag and then started climbing the fence. At the top of the fence, he saw that the Border Patrol agents were on their way. He jumped off the fence and hurt his foot. Victor kept running, and Zapata pulled himself into the brush. Zapata had no idea why Victor had left the package behind.

Zapata was charged with conspiracy to possess with intent to distribute methamphetamine and possession with intent to distribute methamphetamine, in violation of 21 U.S.C. § 841 and 846.

He pleaded not guilty, and a jury convicted him guilty on both charges.

Sentencing. A probation officer prepared a presentence report. The two drug offenses were grouped. U.S.S.G. §3D1.2(a) & (d). Because the offenses involved 409 grams of “Ice” methamphetamine, the base offense level was 32. U.S.S.G. §2D1.1(c)(4). The officer recommended a two-level increase, under §2D1.1(b)(5), because the offense involved the importation of methamphetamine. The total offense level was 34.

Zapata had only one criminal history point. In 2007, he was convicted of misdemeanor illegal entry and sentenced to 10 days’ imprisonment. He had no other criminal history. His Criminal History Category I combined with the offense level 34 to produce a Guidelines range of 151 to 188 months’ imprisonment.

At sentencing, Zapata stressed to the district court his motive for entering the United States. He explained that his youngest daughter suffers from Jeune’s syndrome, a genetic disorder that affects the way a child’s cartilage and bones develop. Because of his daughter’s condition and her special needs, Zapata’s wife, who is a U.S. citizen, cannot work. Zapata returned to be with his family—his wife and three minor children—to support them. He reiterated what he had said during his interview with the DEA—that

he was coming to the United States to be with his family, that he was not coming to distribute drugs.

Defense counsel requested that the district court be lenient in sentencing Zapata. She focused on Zapata's unusual family circumstances—that his youngest child was “very severely disabled and needs not only a feeding tube but also a tracheal ventilator to breathe” and must be “monitored 24 hours a day.” Because of that situation, Zapata's wife is unable to work. Counsel requested a sentence at the bottom of the Guidelines range.

The district court sentenced Zapata to concurrent terms of 168 months' imprisonment. Counsel for Zapata objected to the sentence. She argued that the sentence failed to account for Zapata's lack of criminal history and his family situation. The court responded that it had considered those factors but that it had also considered Zapata's drug use.

Zapata appealed. He argued that his sentence was unreasonable because, among other things, the drug guideline was not based on empirical data and placed too great an emphasis on the type and quantity of drugs involved in the offense. The court of appeals rejected this argument, holding that Zapata had failed to rebut the presumption of reasonableness. App. A.

REASONS FOR GRANTING THE WRIT

The Court Should Grant Certiorari to Determine Whether the Drug Guideline Is Entitled to an Appellate Presumption of Reasonableness.

Zapata asks this Court to grant certiorari to determine whether, in light of the Court’s opinions in *Gall v. United States*, 552 U.S. 38 (2007), and *Kimbrough v. United States*, 552 U.S. 85 (2007), the drug guideline is entitled to a presumption of reasonableness on appeal. This Court has held that an appellate presumption of reasonableness may be applied to a within-guideline sentence, *Rita v. United States*, 551 U.S. 338 (2007), but its approval of an appellate presumption derived from the “empirical data and national experience” upon which the Sentencing Commission typically promulgates guidelines. *Kimbrough*, 552 U.S. at 109. The Commission’s “empirical” approach was a result of a compromise intended to ensure that the Guidelines effectuated Congress’s sentencing goals. Congress had directed the Commission to base its sentencing ranges on the purposes identified in 18 U.S.C. § 3553(a)(2). *See* 28 U.S.C. § 991(b). When the members of the Commission could not agree on which of those purposes should predominate, they agreed to use past practice and experience as a proxy for the purposes, and this Court has since accepted that proxy. *See Rita*, 551 U.S. at 349–50; *see also* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They*

Rest, 17 HOFSTRA L. REV. 1, 17–18 (1988); U.S.S.G. §1A1.1, comment. (n.3), p.s.

Particular guidelines, however, do not take account of data and experience, and the Court has suggested that no presumption should apply to these guidelines. *Kimbrough*, 552 U.S. at 109–10. This is so because, if the Commission did not rely on empirical data—its proxy for § 3553(a)(2) purposes—there is no basis for concluding that a guideline represents a “rough approximation” of sentences that would achieve Congress’s sentencing goals. *Rita*, 551 U.S. at 349–50. The Fifth Circuit has reiterated that, in reviewing the substantive reasonableness of within-guideline sentences, it will apply the presumption of reasonableness whether the guidelines are “[e]mpirically based or not.” *United States v. Miller*, 665 F.3d 114, 121 (5th Cir. 2011) (noting disagreement with Second Circuit in approach regarding consideration of empirical basis of child pornography guideline).

The drug guideline is not based on empirical data and does not satisfy the sentencing goals set forth by Congress in 18 U.S.C. § 3553(a). The Sentencing Commission did not rely on empirical data to assess punishment for drug offenses. The drug guideline places too great an emphasis on the type and quantity of drugs involved in the offense and not enough on other factors, such as

Zapata’s lack of criminal history and personal circumstances. And, contrary to the Fifth Circuit’s position, a guideline that is not empirically based is not entitled to an appellate presumption of reasonableness.

A. Guideline’s Empirical Basis Legitimizes the Presumption of Reasonableness for Within-Guideline Sentences.

In *Rita*, this Court permitted appellate courts to apply a presumption of reasonableness to within-guideline sentences. 551 U.S. at 347. The Court concluded that the “presumption reflects . . . the manner in which the [Sentencing] Commission carried out” its Congressionally-mandated task to develop guidelines that met the sentencing goals of 18 U.S.C. § 3553(a). *Id.* In developing the Guidelines, the “Commission took an ‘empirical approach’” by engaging in the “examination of 10,000 presentence reports” that reflected the past practices of sentencing judges. *Id.* at 349. Statistical analysis of these practices established the offense levels for many crimes, levels that were directly linked to the recommended imprisonment range under the guideline. U.S. SENT’G COMM’N, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 14 (Nov. 2004). A guideline produced in this manner is therefore the “product of careful study

based on extensive empirical evidence derived from the review of thousands of individual sentencing decisions.” *Gall*, 552 U.S. at 46. Because of the Commission’s methodology, the Court concluded that, for the ordinary case, it was “fair to assume that the Guidelines, insofar as practicable, reflect a rough approximation of sentences that might achieve § 3553(a)’s objectives.” *Rita*, 551 U.S. at 350.

Not all guidelines share this pedigree, however. As the Court recognized in *Kimbrough*, some guidelines “do not exemplify the Commission’s exercise of its characteristic institutional role.” 552 U.S. at 109. They do not take account of empirical data and national experience, but instead are driven by other factors. *Id.* at 109–10; *see also Gall*, 552 U.S. at 46 n.2. Such guidelines are a less reliable appraisal of whether a sentence properly reflects § 3553(a)’s goals. *See Kimbrough*, 552 U.S. at 109–10. Accordingly, they are entitled to less deference by the courts. *See id.* And they are not entitled to a presumption of reasonableness on appellate review, because they lack the empirical basis that justified the presumption to begin with.

B. Because the Drug Guideline Is Not Empirically Based, a Presumption of Reasonableness Is Inapplicable.

The drug guideline is not empirically based and resulted in a Guidelines range that was too high, overstating the seriousness of Zapata’s offense. *See* 18 U.S.C. § 3553(a)(2)(A). Congress charged the Sentencing Commission with the task of providing “certainty and fairness” in sentencing in order to assure that sentences meet the purposes set forth in 18 U.S.C. § 3553(a)(2). *Rita*, 551 U.S. at 348 (citing 28 U.S.C. § 991(b)). For the most part, the Commission used an empirical approach to set offense levels. *Id.* at 349–59. The drug guideline, however, falls within the category of guidelines not using the empirical approach. *Kimbrough*, 552 U.S. at 96 (Commission did not use empirical approach in setting drug sentences); *Gall*, 552 U.S. at 46 n.2 (drug guideline is a departure from empirical approach). Rather, it is driven by the view that the larger the quantity at issue, the more serious the offense; it is therefore pegged to drug weight. *Kimbrough*, 552 U.S. at 96–97; *see United States v. Cabrera*, 567 F. Supp.2d 271 (D. Mass. 2008) (varying downward because of cocaine guideline’s overemphasis on drug quantity).

In addition to being tied to weight, the drug offense levels themselves are tied to the mandatory minimums assigned by Congress, not empirical data. *Kimbrough*, at 94–97. The Commission

derived the initial drug quantity table by corresponding these statutory quantity triggers for “serious” and “major” traffickers as set forth in the 1986 Anti-Drug Abuse Act to two “cornerstone” offense levels, 26 and 32. *See* U.S. SENT’G COMM’N, METHAMPHETAMINE FINAL REPORT OF THE WORKING GROUP 7 (1999).¹ From these inflated cornerstones, the Commission set offense levels across the drug quantity table “through processes of proportionate interpolation and extrapolation.” *Id.* Thus, the drug quantity table is keyed to mandatory minimums, and mandatory minimums are subject to congressional whim.

The Guidelines range in Zapata’s case—like the drug guideline in general—was almost entirely driven by type and quantity. The type and quantity of drugs involved in Zapata’s offense was a poor measure of his culpability. This is particularly true because there is no indication that Zapata knew that his companion, Victor, was transporting methamphetamine. As Zapata explained to the authorities after his arrest, he wanted to come to the United States to visit his daughter, who was very ill. Zapata knew that Victor was going to be smuggling drugs into the United States and asked

¹ Available at http://www.ussc.gov/Research/Working_Group_Reports/Drugs/199911_Meth_Report.pdf.

if he could accompany him. Victor told Zapata that he was transporting marijuana. Victor and Zapata crossed the river from Mexico. When they arrived at the fence in the United States, Victor had Zapata hold the bag that contained the package of drugs while he climbed over. Once Victor was across, he told Zapata to throw him the bag. While Zapata was climbing over the fence, he saw Border Patrol agents arriving. Victor took off, leaving Zapata behind. Zapata fell from the fence and injured his foot. The agents found Zapata hiding in the brush. Near the fence, they found the package of methamphetamine. There was no evidence that Zapata knew the package contained methamphetamine of a high purity level. These circumstances show what a poor measure of culpability drug type and quantity can be.

The drug guideline produced a sentence range that overstated the seriousness of Zapata's offense. *See* 18 U.S.C. § 3553(a)(1), (a)(2)(A) (sentence must not be greater than necessary to reflect seriousness of offense). Zapata had only one prior conviction for illegal entry for which he was sentenced to 10 days in jail. But because of the type and quantity of drug he assisted in transporting, Zapata was sentenced to 168 months in prison. That amount of imprisonment was not necessary to deter someone who was a first time drug offender. Zapata is a hardworking family man who cares

deeply for his wife and his children. He committed the crime only because he was trying to enter the United States to be with his family. His youngest daughter suffers from Jeune's syndrome, a genetic disorder that affects the way a child's cartilage and bones develop. Because of his daughter's condition and her special needs, Zapata's wife, who is a U.S. citizen, cannot work. Zapata returned to be with his family to support them. The drug-guideline sentence failed to give sufficient weight to Zapata's personal history and characteristics. *See* § 3553(a)(1).

The Fifth Circuit's application of a presumption of reasonableness on appeal for within-guideline sentences under the drug guideline is at odds with this Court's opinions in *Rita* and *Kimbrough*. Certiorari should be granted to address this important federal question and correct the Fifth Circuit's error.

CONCLUSION

FOR THESE REASONS, Zapata asks that this Honorable Court grant a writ of certiorari, vacate the opinion of the court of appeals, and remand the case for further review.

Respectfully submitted.

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