

No. _____

In the
Supreme Court of the United States

JOSE ESTRADA-CORRALES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent,

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Should this Court grant *certiorari*, vacate the judgment, and remand in light of *Chavez-Meza v. United States*, __U.S.__, 138 S.Ct. 1959 (June 18, 2018), an authority that post-dated the opinion below?

PARTIES TO THE PROCEEDING

Petitioner is Jose Estrada-Corrales, defendant-appellant below.

Respondent is the United States of America, plaintiff-appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jose Estrada-Corrales respectfully seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The district court's sentencing decision was documented in a written judgment, reprinted as Appendix A. The opinion of the court of appeals was unreported, and is reprinted as Appendix B.

JURISDICTION

The judgment of the court of appeals was entered on May 10, 2018. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTE INVOLVED

18 U.S.C. §3553(a) provides, in pertinent part:

(a) **Factors to be considered in imposing a sentence.** The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider –

(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) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines –

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines 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); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(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) any pertinent policy statement –

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement 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); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

- (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

1. Proceedings in the trial court

Petitioner Jose Estrada-Corrales was indicted on one count of illegally re-entering the country. *See* (ROA.7).¹ He pleaded guilty without waiving appeal. *See* (ROA.29-30). The Presentence Report (PSR) found a Guideline sentencing range of 37-46 months imprisonment. *See* (ROA.124).

At sentencing, defense counsel urged the district court to consider the defendant's early arrival in the United States at age nine, and lack of connection to Mexico. *See* (ROA.101-102). After the defendant's presentation, the court imposed a sentence at the high end of the Guidelines, 46 months. (ROA.103). It stated that it had considered 18 U.S.C. §3553, and that it considered primarily conduct in the factual resume. *See* (ROA.102-103). Its only explanation for the sentence was that it "believe[d] this is the appropriate sentence, given all of the fact and circumstances, and that this sentence is sufficient, but not greater than necessary, to comply with the statutory purposes it of sentencing." (ROA.104). It did not specifically explain why the defendant's ties to the United States did not merit a lesser term of imprisonment. *See* (ROA.104).

2. The appeal

Petitioner appealed, contending that the district court had committed procedural error by failing to reference Petitioner's arguments for leniency. Although acknowledging that defense counsel had failed to object to the district court's explanation, he nonetheless

¹ Record citations are included in hopes they are of use to the government in answering the Petition or to the Court in evaluating it.

maintained that it was unnecessary to lodge a separate objection to a district court's failure to acknowledge a defendant's arguments for a lesser sentence criminal sentence,. Presentation of those arguments, he argued, themselves asked for a response. He also contended that he should succeed even on plain error.

The court of appeals explicitly applied the plain error doctrine, and rejected the argument on two grounds that stemmed directly from that standard of review. *See* [Appendix B, at p.2]. Specifically, it held that the explanation was not so deficient as to constitute plain error. *See* [Appendix B, at p.2]. And it held that Petitioner had failed to show an effect on his substantial rights. *See* [Appendix B, at p.2]. This Court's opinion in *Chavez-Meza v. United States*, ___ U.S. ___, 138 S.Ct. 1959 (June 18, 2018), followed that opinion by more than a month, well after the expiration of any deadline for a Petition for Rehearing.

REASONS FOR GRANTING THE PETITION

- I. This Court should grant *certiorari*, vacate the judgment, and remand in light of *Chavez-Meza v. United States*, __ U.S. __, 138 S.Ct. 1959 (June 18, 2018), an authority that post-dated the opinion below.**

Prior to *United States v. Booker*, 543 U.S. 220 (2005), federal sentences were in most cases determined by application of sentencing Guidelines. *See* 18 U.S.C. §3553(b)(1). In most cases, then, the rationale for the district court's selection of sentence was elucidated by its formal rulings on Guideline objections. *See* Fed. R. Crim. P. 32(i)(B). *Booker*, however, rendered the Guidelines advisory, and substituted the open-ended factors of 18 U.S.C. §3553(a). *See Booker*, 543 U.S. at 259. It follows that after *Booker*, a district court's formal selection of a Guideline range will not fully explain its choice of sentence. This Court has emphasized that explanation of a defendant's sentence is an essential component of a system of advisory Guidelines.

It stressed in *Rita v. United States*, 551 U.S. 338 (2007) that:

The sentencing judge should set forth enough to satisfy the appellate court that he has considered the parties' arguments and has a reasoned basis for exercising his own legal decision making authority. *See, e.g., United States v. Taylor*, 487 U.S. 326, 336-337, 108 S. Ct. 2413, 101 L. Ed. 2d 297 (1988). Nonetheless, when a judge decides simply to apply the Guidelines to a particular case, doing so will not necessarily require lengthy explanation. Circumstances may well make clear that the judge rests his decision upon the Commission's own reasoning that the Guidelines sentence is a proper sentence (in terms of § 3553(a) and other congressional mandates) in the typical case, and that the judge has found that the case before him is typical. Unless a party contests the Guidelines sentence generally under § 3553(a) -- that is, argues that the Guidelines reflect an unsound judgment, or, for example, that they do not generally treat certain defendant characteristics in the proper way--or argues for departure, the judge normally need say no more. Cf. § 3553(c)(2) (2000 ed., Supp. IV). (Although, often at sentencing a judge will speak at length to a defendant, and this practice may indeed serve a salutary purpose.)

Rita v. United States, 551 U.S. 338, 356-357 (2007).

Indeed, it noted two particular circumstances where more extensive explanation for the sentence will be required. Such explanation is necessary when the sentence falls outside the Guideline range, or when the court rejects non-frivolous arguments for a sentence outside the range:

Where the defendant or prosecutor presents nonfrivolous reasons for imposing a different sentence, however, the judge will normally go further and explain why he has rejected those arguments. Sometimes the circumstances will call for a brief explanation; sometimes they will call for a lengthier explanation. Where the judge imposes a sentence outside the Guidelines, the judge will explain why he has done so.

Rita, 551 U.S. at 356-357.

Chavez-Meza v. United States, __U.S.__, 138 S.Ct. 1959 (2018), applied the requirement of sentence explanation to reductions under 18 U.S.C. §3582(c). In *Chavez-Meza*, the district court reduced a drug defendant's sentence to the middle of his reduced Guidelines, following a retroactive Guideline Amendment. *See Chavez-Meza*, 138 S.Ct. at 1964. The court did so on a pre-printed form, which Chavez-Meza argued to be inadequate. *See id.* This Court held that reviewing courts could look to the explanation provided at the original sentencing to determine the basis for the sentence ultimately imposed. *See id.* at 1965. Finding that original explanation adequate, this Court affirmed the sentence. *See id.*

Two aspects of the opinion, however, offer potential benefit to Petitioner here. First, this Court offered plenary review of the defendant's failure-to-explain claim, even though there is no evidence that Chavez-Meza ever objected to the procedural reasonableness of the sentence. *See id.*; *see also United States v. Chavez-Meza*, 854 F.3d 655 (10th Cir. 2017); Brief

for the Petitioner in *Chavez-Meza v. United States*, No. 17-5639, 2018 WL 1709088, at *3-6 (Filed March 26, 2018)(detailing the case’s factual background); Brief for the Respondent in *Chavez-Meza v. United States*, No. 17-5639, 2018 WL 1709089, at *2-8 (Filed March 28, 2018)(same). In the case at bar, the Fifth Circuit held that such claims could be reviewed only for plain error in the absence of explicit objection. *See* [Appx. B, at p.2]. That position is refuted by this Court’s treatment of the claim in *Chavez-Meza*, which comports with well reasoned decisions of the Fourth and Seventh Circuits. *See United States v. Lynn*, 592 F.3d 572, 578 (4th Cir. 2010)(“By drawing arguments from § 3553 for a sentence different than the one ultimately imposed, an aggrieved party sufficiently alerts the district court of its responsibility to render an individualized explanation addressing those arguments, and thus preserves its claim.”); *United States v. Cunningham*, 429 F.3d 673, 675-680 (7th Cir. 2005)(Posner, J.)(offering plenary review, and relief, to a district court’s failure to address a defendant’s arguments in mitigation). Notably, the court below did not state that the result would be the same under plenary review. *See* [Appx. B, at p.2]. Rather, its stated rationale stemmed entirely from the requisites of the plain error standard: the absence of **plain** error, and the failure of the defendant to carry **his burden** of showing a different outcome. *See* [Appx. B, at p.2].

Second, this Court in *Chavez-Meza* explained that courts of appeal may order limited remands to obtain fuller explanation of the sentence “even when there is little evidence in the record affirmatively showing that the sentencing judge failed to consider the § 3553(a) factors.” *Chavez-Meza*, 138 S.Ct. at 1965. The court below has never used this procedure to rectify a potential deficiency in the explanation for the sentence. Rather, it has simply held

that an incomplete explanation must be affirmed when the defendant cannot meet all four prongs of the plain error standard on the record below. *See United States v. Mondragon-Santiago*, 564 F.3d 357, 361-365 (5th Cir. 2009). This is accordingly a new tool in failure-to-explain cases, which became available after the decision below.

This Court “regularly hold(s) cases that involve the same issue as a case on which certiorari has been granted and plenary review is being conducted in order that (if appropriate) they may be ‘GVR’d’ when the case is decided.” *Lawrence v. Chater*, 516 U.S. 163, 181 (1996)(Scalia, J., dissenting). Ultimately, GVR is appropriate if the decision “reveal(s) a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation...” *Lawrence*, 516 U.S. at 167.

Chavez-Meza meets this standard. This Court held that more extensive explanation may be necessary when the parties offer non-frivolous reasons for a sentence outside the range. That proposition was reaffirmed in *Chavez-Meza* itself. *See Chavez-Meza*, 138 S.Ct. at 1965 (citing *Rita*, 551 U.S. at 357). The reasons offered by Petitioner in district court were hardly frivolous. Counsel urged the court to consider his ties to the United States, including his arrival at the age of nine. *See* (ROA.101-102). This is explicitly recognized by the Sentencing Commission as an appropriate basis for leniency. *See* USSG §2L1.2, comment. (n. 9). Yet the district court did not address this argument for a lesser sentence of imprisonment. Rather, it stated that it was considering 18 U.S.C. §3553, and that its sentence was no greater than necessary to accomplish these purposes. *See* (ROA.103-104).

Accordingly, the explanation in this case fell at the border of adequacy. In the absence of a plain error standard – dispensed with by *Chavez-Meza* – Petitioner was reasonably likely to prevail. And even if the standard of review in *Chavez-Meza* may be ignored, the district court’s treatment of the issue was sparse enough to justify the limited remand authorized in *Chavez-Meza*.

CONCLUSION

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

Respectfully submitted this 8th day of August, 2018.

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