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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

NO. \_\_\_\_\_

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ARMANDO CASTILLO VALERIO,

Petitioner,

-vs.-

United States of America,

Respondent.

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Petition for Writ of Certiorari to  
the United States Court of Appeals  
for the Eighth Circuit

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**QUESTION PRESENTED**

- I. WHETHER THIS COURT SHOULD RESOLVE THE SPLIT AMONG THE CIRCUITS REGARDING WHETHER A DISTRICT COURT'S DENIAL OF A MOTION FOR DOWNWARD DEPARTURE IS REVIEWABLE AND, IF SO, THE APPROPRIATE STANDARD TO APPLY FOR SUCH REVIEW?**

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## **PETITION FOR WRIT OF CERTIORARI**

The Petitioner, Armando Castillo Valerio, respectfully prays that a writ of certiorari issue to review the Opinion and Judgment of the United States Court of Appeals for the Eighth Circuit in this matter.

### **OPINION BELOW**

On April 27, 2018, the Eighth Circuit Court of Appeals entered its Opinion and Judgment, Add. 1, affirming the January 31, 2017, Judgment of the United States District Court for the Northern District of Iowa imposing a sentence of imprisonment of 262 months, and other consequences, upon Mr. Valerio.

### **JURISDICTION**

The Eighth Circuit's jurisdiction was based on 28 U.S.C. § 1291. Jurisdiction of this court is invoked under 28 U.S.C. § 1254(1). The Eighth Circuit filed its Opinion and Judgment on April 27, 2018. A timely Petition for Rehearing or Rehearing *En Banc* was filed, and denied on June 1, 2018. This Petition for Writ of Certiorari is timely filed within ninety days of the Eighth Circuit's filing of its Order denying Rehearing *En Banc*.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

(a) A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence –

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(2) was imposed as a result of an incorrect application of the sentencing guidelines;

18 U.S.C. § 3742(a)(2)

## STATEMENT OF THE CASE

The issue presented is whether a Circuit Court of Appeals has the authority to review a District Court's refusal to grant a Motion for Downward Departure under the United States Sentencing Guidelines. The Eighth Circuit, contrary to the positions of several other Circuits, concluded that it does not have such authority.

The District Court denied Mr. Valerio's Motion for Downward Departure under U.S.S.G. § 4A1.1, n. 4. That provision permits a downward departure when one or more of the defendant's predicate offenses for Career Offender is a misdemeanor under state law. The District Court found that Mr. Valerio had three Career Offender predicate offenses. The District Court's conclusion was erroneous with

respect to Mr. Valerio's conviction for Interference with Official Acts Causing Bodily Injury. That offense can be committed without the use of physical force against the person of another. Further, two of the three convictions are misdemeanors under Iowa state law and, thus, fall within the U.S.S.G. § 4A1.1, n. 4. Because the District Court denied the downward departure, in part, based on its erroneous conclusion that Mr. Valerio had three, rather than two, predicate offenses, the District Court's denial was based on a legally and factually incorrect premise.

The Eighth Circuit has held in several cases that the denial of a motion for downward departure is unreviewable. *See, e.g., United State v. Bryant*, 606 F.3d 912, 919 (8<sup>th</sup> Cir. 2010). The panel deferred to that case law and the Eighth Circuit declined to grant Rehearing *En Banc*. That prior case law of the Eighth Circuit is no longer valid in light of the Supreme Court's decisions in *Booker*, *Gall* and *Rita*. The Eighth Circuit, however, refused to revisit its position in light of those cases and the changing position of other Circuits. After *Booker*, seven Circuits now permit some form of review of the denial of a Motion for Downward Departure.

## REASONS FOR GRANTING THE WRIT

Certiorari is properly granted as the Eighth Circuit's decision is in conflict with decisions from several other Circuits and is in conflict with decisions of this Court. Supreme Court Rule 10(a). Further, the Eighth Circuit "has decided an important question of federal law that has not been, but should be settled by this Court." Supreme Court Rule 10(c).

In particular, almost all of the Circuits have now addressed the question of whether the denial of a Motion for Downward Departure is reviewable on appeal. Seven Circuits have concluded that they may review such a denial, and five Circuits have concluded that they lack the authority to do so. Of the seven Circuits that allow review, there are four different views as to the appropriate standard of review to be applied. As the Circuits are extensively fractured on these issues, it is appropriate for this Court to grant certiorari to resolve whether the Circuit Courts of Appeals have authority to review the denial of a motion for downward departure and, if so, the appropriate standard to be applied. Downward departure motions are made, and denied, in numerous cases in a wide variety of circumstances. It is highly important and desirable for the Circuits to uniformly review those denials and to apply the same standard of review. Only the Supreme

Court of the United States can resolve these questions to achieve uniformity of application.

**I. THE EIGHTH CIRCUIT'S POSITION THAT REFUSAL TO GRANT A DOWNWARD DEPARTURE IS UNREVIEWABLE IS NO LONGER SUSTAINABLE IN LIGHT OF THIS COURT'S DECISIONS IN *BOOKER*, *GALL*, AND *RITA* AND IS IN CONFLICT WITH OTHER CIRCUITS**

**A. Background**

Mr. Valerio was convicted, after a jury trial, of Conspiracy to Distribute Methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), and 846. (DCD 110 – Jury Verdict; DCD 153 – Judgment).<sup>1</sup> Mr. Valerio was sentenced to 262 months of imprisonment, a term of supervised release of five years with various conditions, and a special assessment of \$100. (DCD 153 – Judgment).

The PSIR concluded that Mr. Valerio was a Career Offender. (PSIR ¶ 31). Four offenses were noted as predicate offenses. First, a 1997 conviction for Extortion (PSIR ¶ 45). After the Government did

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<sup>1</sup>“DCD” refers to the District Court’s Docket. *See United States v. Valerio*, N.D. Iowa No. 6:15-cr-02050-002. “PSIR” refers to the Final Presentence Investigation Report (DCD 137). “Sent. Hrg. Tr.” refers to the transcript of the sentencing hearing held on January 30, 2017 (DCD 161).

not assert that this offense qualified (Gov't Sentencing Brief at 14-18 (DCD 145-1), the District Court did not consider this offense as a Career Offender predicate.

Mr. Valerio conceded that his convictions of Possession with Intent to Distribute (PSIR ¶ 47) and Assault. (PSIR ¶ 51) qualified. (Def. Sentencing Brief at 11, 14-16 (DCD 146-1)); (Sent. Tr. 10-11).

The parties disputed whether Mr. Valerio's conviction for Interference with Official Acts Causing Bodily Injury qualified. (PSIR ¶ 50). Mr. Valerio objected to use of this offense. (Def. Sentencing Brief at 11-14 (DCD 146-1)); (Sent. Tr. 11-12, 13-14). Documents relating to this conviction were offered as Government Sentencing Exhibit 1. (DCD 145-2). The District Court found this offense to be a Career Offender predicate offense. (Sent. Tr. 14).

Accordingly, the District Court found that Mr. Valerio had three prior offenses that qualified as Career Offender predicate offenses and applied the Career Offender adjustment. (Sent. Tr. 14-15). As Mr. Valerio conceded that two of the offenses qualified, Career Offender was properly scored under the Guidelines. However, Mr. Valerio asserted that a downward departure pursuant to U.S.S.G. § 4B1.1, n. 4 should be granted as two of the three offenses were misdemeanors under state

law. (Def. Sentencing Brief at 16-18 (DCD 146-1)); (Sent. Tr. 16). The District Court declined to depart downwards, reasoning that “I do agree that it is important to look at a defendant's entire criminal history in deciding whether this downward departure might apply and the seriousness of the offense, as the application note indicates. And in doing so, I've given the severe criminal history that Mr Valerio has accumulated and the seriousness of the offense, along with the fact that I found a total of three, not just two, career offender predicate offenses.” (Sent. Tr. 21-22).

Thus, with the Career Offender enhancement, Mr. Valerio's total offense level was 37, with a Criminal History Category of VI, for an advisory Guidelines range of 360 months to life. (Sent. Tr. 46). The District Court then turned to Mr. Valerio's Motion for Variance. The District Court granted the variance for various reasons unrelated to the Motion for Downward Departure and varied downwards to impose a sentence of 262 months imprisonment. (Sent. Tr. 46-53).

The panel of the Eighth Circuit determined that it could not review the denial of Mr. Valerio's Motion for Downward departure based on prior Eighth Circuit precedent. Add. 4 at fn. 2. Mr. Valerio sought Rehearing *En Banc* from the Eighth Circuit, which was denied. Add. 6.

B. The Basis for The Eighth Circuit's Position that It Cannot Review a Downward Departure is No Longer Legally Supportable and Is In Conflict With Other Circuits

The Eighth Circuit explained the basis for its position that a District Court's denial of a request for a downward departure is unreviewable (absence certain special circumstances not present in this case) in *United States v. Frokjer*, 415 F.3d 865 (8<sup>th</sup> Cir. 2005):

With respect to her sentence, Frokjer argues that the district court abused its discretion by failing to recognize that it had authority to depart downward from the otherwise applicable sentencing guideline range when imposing sentence. Prior to *United States v. Booker*, [543 U.S. 220], 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), we held in the context of the former mandatory guideline system that "[a] district court's refusal to grant a downward departure is generally unreviewable on appeal, unless the district court had an unconstitutional motive or erroneously believed that it was without authority to grant the departure."

*United States v. Gonzalez-Lopez*, 335 F.3d 793, 799 (8th Cir.2003). This holding was grounded in our interpretation of 18 U.S.C. §§ 3742(a) and (b), which provide that a defendant may appeal an upward departure and the government may appeal a downward departure. *United States v. Riza*, 267 F.3d 757, 758-59 (8th Cir.2001); *see also Koon v. United States*, 518 U.S. 81, 96, 116 S.Ct. 2035, 135 L.Ed.2d 392 (1996).

After Booker, the district courts continue to determine whether a defendant should be granted a

traditional downward departure under the rubric of the now-advisory guideline scheme, *see United States v. Haack*, 403 F.3d 997, 1003 (8th Cir.2005), and we see no reason why *Booker*—which left intact §§ 3742(a) and (b)—should alter our rule that a district court's discretionary decision not to depart downward is unreviewable.

*Frokjer*, 415 F.3d at 874-75.

The original source of the Eighth Circuit's view that a denial of a downward departure is unreviewable is *Koon v. United States*, 518 U.S. 81 (1996). In *Koon*, the United States Supreme Court stated, with little analysis, that "Before the Guidelines system, a federal criminal sentence within statutory limits was, for all practical purposes, not reviewable on appeal. *Dorszynski v. United States*, 418 U. S. 424, 431 (1974) (reiterating "the general proposition that once it is determined that a sentence is within the limitations set forth in the statute under which it is imposed, appellate review is at an end"); *United States v. Tucker*, 404 U. S. 443, 447 (1972) (same). The Act altered this scheme in favor of a limited appellate jurisdiction to review federal sentences. 18 U. S. C. Section(s) 3742. Among other things, it allows a defendant to appeal an upward departure and the Government to appeal a downward one. Section(s) 3742(a), (b)." *Koon*, 518 U.S. at 96.

The Eighth Circuit, however, has not fully considered the effects of

*Booker* or considered the effects of *Gall v. United States*, 552 U.S. 38 (2007), and *Rita v. United States*, 551 U.S. 338 (2007). Further, *Booker* did not have occasion to address 18 U.S.C. §§ 3742(a) and (b). Those sections were enacted at a time when the Sentencing Guidelines were mandatory. The Guidelines are now advisory. Additionally, 18 U.S.C. § 3742(a)(2) permits a defendant to assert on appeal that the sentence “was imposed as a result of an incorrect application of the sentencing guidelines.” That is broad enough to encompass a downward departure. In fact, the Eighth Circuit reviews the denial of a downward variance for abuse of discretion and substantive reasonableness of the resulting sentence, *see, e.g., United States v. Jackson*, 852 F.3d 764, 777 (8th Cir. 2017), which is no different.

Further, as a result of *Booker*, *Gall*, and *Rita*, the Eighth Circuit now generally reviews sentencing decisions differently:

On appeal, “[w]e review for clear error the district court's findings of fact and apply de novo review to the district court's interpretation and application of the Guidelines.” *United States v. Woods*, 670 F.3d 883, 886 (8th Cir. 2012) (quoting *United States v. Spikes*, 543 F.3d 1021, 1023 (8th Cir. 2008)). We “must first ensure that the district court committed no significant procedural error.” *United States v. Feemster*, 572 F.3d 455, 461 (8th Cir. 2009) (quoting *Gall v. United States*, 552 U.S. 38, 51, 128 S.Ct. 586, 597, 169 L.Ed.2d 445 (2007) ). “A failure to properly calculate the advisory

Guidelines range is a significant procedural error, and a non-harmless error in calculating the guidelines range requires a remand for resentencing.” *Spikes*, 543 F.3d 1021, 1023 (8th Cir. 2008) (internal quotation marks and citation omitted).

*United States v. Wardlow*, 830 F.3d 817, 822 (8th Cir. 2016).

However, the Eighth Circuit has failed and refused to extend this analysis to the denial of a motion for a downward departure and has incorrectly maintained that it has no authority to review a District Court's denial of a motion for downward departure.

Following *Booker*, the other Circuits have split on whether and how to handle appellate review of denials of downward departures.

The First Circuit has expressly concluded that, after *Booker*, it has jurisdiction to review the denial of a downward departure for reasonableness and abuse of discretion and reversed its prior holdings that it lacked jurisdiction. *See United States v. Anonymous Defendant*, 629 F.3d 68 (1st Cir. 2010). The Seventh Circuit reached a similar conclusion in *United States v. Boscarino*, 437 F.3d 634, 637 (7th Cir. 2006). The D.C. Circuit has also concluded that reasonableness review is available after *Booker*. *See United States v. Olivares*, 473 F.3d 1224 (D.C. Cir. 2006).

The Tenth Circuit has expressly concluded that it has jurisdiction to review the denial of a downward departure for legal error. *See United States v. Sierra-Castillo*, 405 F.3d 932 (10th Cir. 2005).

The Fourth Circuit reviews non-frivolous arguments for downward departure. *See United States v. Blue*, 877 F.3d 513, 517 (4th Cir. 2017) (reversing sentence for failing to consider four of six arguments made for downward departure).

The Ninth Circuit reviews the denial of a downward departure as part of its substantive reasonableness analysis. *See United States v. Kaplan*, 839 F.3d 795, 804 (9th Cir. 2016); *United States v. Vasquez-Cruz*, 692 F.3d 1001, 1005 (9th Cir. 2012). The Sixth Circuit also appears to follow this approach. *See United States v. Heath*, 525 F.3d 451, 459 (6th Cir. 2008). The Second, Third, Fifth and Eleventh Circuits, like the Eighth, maintain that they lack jurisdiction to review a sentencing court's refusal to grant a downward unless the district court erroneously believed that it lacked the authority to depart. *United States v. Stinson*, 465 F.3d 113, 114 (2d Cir. 2006); *United States v. Rodriguez*, 855 F.3d 526, 532 (3d Cir. 2017); *United States v. Alaniz*, 726 F.3d 586,

627 (5th Cir. 2013); *United States v. Dudley*, 463 F.3d 1221, 1228 (11th Cir. 2006).

Thus, seven Circuits now provide some level of review of a district court's denial of a motion for downward departure, while five do not. Thus, as almost all of the Circuits have addressed this issue and come to differing results, this issue is now ripe for decision by this Court.

## CONCLUSION

Accordingly, this Court should grant *certiorari* to address whether a Circuit Court of Appeals has the authority to review a District Court's decision to deny a downward departure. This Court should also, given the differences in the Circuits regarding the scope and nature of such review, decide the proper standard to be applied by a Circuit Court in conducting review of the denial of a motion for downward departure. Counsel leaves discussion of that issue for the merits brief. Following determination that a Circuit Court has the authority to conduct a review and the provision of guidance regarding the proper standard, this matter should be remanded to the Eighth Circuit for the purpose of reviewing the District Court's denial of Mr. Valerio's Motion for

Downward Departure under the appropriate standard.

Respectfully Submitted,

/s/ Michael K. Lahammer

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ATTORNEY FOR PETITIONER  
ARMANDO CASTILLO VALERIO

**CERTIFICATE OF FILING**

I hereby certify that on the 29<sup>th</sup> day of August, 2018, I did file this Petition for Writ of Certiorari by causing an original and ten (10) copies thereof to be delivered, via first class United States mail, postage paid, to Clerk, Supreme Court of the United States, 1 First Street N.E., Washington, D.C. 20543.

/s/ Michael K. Lahammer

Michael K. Lahammer

## **CERTIFICATE OF SERVICE**

I hereby certify that on the 29<sup>th</sup> day of August, 2018, I served this Petition for Writ of Certiorari by causing one copy thereof to be delivered via first class United States mail, postage paid to Lisa C. Williams, Assistant United States Attorney, United States Attorneys' Office, Northern District of Iowa, 111 Seventh Avenue SE, Box 1, Cedar Rapids, IA 52401, and by causing one copy thereof to be delivered via first class United States mail, postage paid to Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Ave., N.W., Washington, D.C. 20530-0001.

I further certify that on the 29<sup>th</sup> day of August, 2018, a copy of this Petition for Writ of Certiorari was forwarded to Petitioner Armando Castillo Valerio via first class United States mail, postage paid, to Armando Castillo Valerio, Register No. 14950-029 FCI Forrest City Medium, PO Box 3000 Forrest City AR 72336.

/s/ Michael K. Lahammer  
Michael K. Lahammer