No. _____

IN THE SUPREME COURT OF THE UNITED STATES

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TOMAS RAMIREZ-CRUZ,

Petitioner,

- v -

UNITED STATES OF AMERICA,

Respondent.

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

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LIST OF PARTIES

[X] 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:

## QUESTION PRESENTED FOR REVIEW

In contrast with the Ninth Circuit, at least seven other circuits apply a standard which requires a sentencing judge provide some express treatment to a defendant's non-frivolous arguments. Petitioner raised a number of non-frivolous arguments which the sentencing judge failed to address. Should this Court should resolve the conflict among the circuits as to whether an appellate court may affirm as procedurally reasonable a sentence imposed where the record contains no indication the sentencing judge considered the defendant's non-frivolous arguments?

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IN THE SUPREME COURT OF THE UNITED STATES

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- v -

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Tomas Ramirez-Cruz, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on August 21, 2018.

## OPINION BELOW

On August 21, 2018, a panel of the Ninth Circuit issued a Memorandum decision affirming the sentence of petitioner for his conviction under 8 U.S.C. § 1326, Removed Alien Found in the United States.[1]

[1] A copy of the Memorandum is attached as Appendix A.

## JURISDICTION

The Ninth Circuit panel issued its decision rendering final judgment in this case on August 21, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS

Fifth Amendment to the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor be deprived of life, liberty, or property without due process of law . . . .

Fourteenth Amendment to the United States Constitution:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

18 U.S.C. § 3553 (set forth in Appendix B).

## STATEMENT OF THE CASE

### A. The Plea and Sentencing

On April 4, 2017, Border Patrol Agent A. Luzak arrested petitioner twenty-three miles east of the Tecate Port of Entry and a mile north of the international border. [CR 1; ER 32.][2] Petitioner admitted he was a citizen of Mexico and illegally present in the United States. [CR 1; ER 33.] The government subsequently charged petitioner in an information with a

[2] "CR" refers to the Clerk's Record, and "ER" refers to the Excerpts of Record, all of which were filed with the Court of Appeals.

violation of 8 U.S.C. § 1326 (a) and (b). [CR 11; ER 30.] On July 25, 2017, petitioner pled guilty to the information. [CR 18; ER 14, 28.] There was no plea agreement.

Prior to sentencing, the United States Probation Office ("Probation") filed a Presentence Report ("PSR")[3]. Probation recommended the following Guidelines calculations:

| | | |
|---|---|---|
| Base Offense Level | U.S.S.G. § 2L1.2(a) | 8 |
| Prior felony illegal reentry | U.S.S.G. § 2L1.2(b)(1)(A) | +4 |
| Removal after prior felony offense | U.S.S.G. § 2L1.2(b)(2)(B) | +8 |
| Adjusted Offense Level | | 20 |
| Acceptance of responsibility | U.S.S.G. § 3E1.1 | -3 |
| Total Offense Level | | 17 |

(PSR 5-6.) Probation calculated petitioner in a criminal history category VI with a resulting Guidelines range of 51 to 63 months. (PSR 13.) Probation recommended a sentence of 57 months. (PSR 15.)

The government filed a sentencing summary chart with the same Guidelines calculations as those made by Probation. [CR 24.] The government recommended a sentence of 63 months. [CR 24.] Petitioner filed a sentencing summary chart agreeing with the parties initial Guidelines calculations. [CR 26.] However, petitioner contended the court should vary or depart four levels based on the timeliness of his resolution of the case and also

[3]The PSR was filed under seal in the Ninth Circuit.

an additional four levels based on cultural assimilation. [CR 26.] The total offense level was nine with a resulting Guidelines range of 21 to 27 months. [CR 26.] Petitioner requested a sentence of time served. [CR 26.]

Petitioner's sentencing hearing took place on October 18, 2017, before the Honorable District Judge Cathy A. Bencivengo. [CR 27; ER 8.] Petitioner requested a sentence of time served based on several factors. [ER 10.] First, petitioner waived his right to a trial and pled guilty shortly after his arrest. [ER 10.] He did not at any time contest his guilt or litigate any motions in his case. [ER 10.] Second, petitioner believed his convictions were being double counted by being included in his criminal history and also his guidelines calculations and he had already served his time on his prior offenses. [ER 10.]

Finally, petitioner had a lengthy history in the United States and his motivation for returning was to provide a better life for his wife and child in Mexico. [ER 10.] Petitioner grew up with five siblings in Oaxaca, Mexico and his family struggled financially, including many times when there was not enough food for everyone. (PSR 10.) Consequently, petitioner left home at just 14 years old and came to the United States to work. (PSR 10.)

Petitioner continued working in the United States until he was ultimately deported in 2008. (PSR 11.) Petitioner lived in Oaxaca with his wife and seven month old child and worked in construction, until he decided to return to the United States for better financial opportunities in order to pay for his daughter's schooling. (PSR 5, 11.)

The government informed the court that its 63 month recommendation was based on petitioner's prior convictions, deportations, and apprehensions. [ER 11.] The court began with a calculation of the advisory Guidelines, which it calculated as follows

| | | |
|---|---|---|
| Base Offense Level | U.S.S.G. § 2L1.2(a) | 8 |
| Prior felony illegal reentry | U.S.S.G. § 2L1.2(b)(1)(A) | +4 |
| Removal after prior felony offense | U.S.S.G. § 2L1.2(b)(2)(B) | +8 |
| Adjusted Offense Level | | 20 |
| Acceptance of responsibility | U.S.S.G. § 3E1.1 | -3 |
| Total Offense Level | | 17 |

[ER 11-12.] The court found petitioner was in a criminal history category VI, with a resulting Guidelines range of 51-63 months. [ER 12.]

When considering the 3553(a) factors, the court noted petitioner received a 51 month sentence for illegal entry and also had four prior removals. [ER 12.] The court noted it was unfortunate petitioner did not accept the fast track offer and receive the additional two points and reduce his sentence. [ER 13.] The court considered the fact petitioner did not litigate any motions and pled guilty, and then imposed a low end sentence of 51 months and a $100 special assessment. [ER 13.] The court did not impose a fine or supervised release. [ER 13.]

## B. Appeal to the Ninth Circuit Court of Appeals

Petitioner appealed his sentence to the Ninth Circuit Court of Appeals. On August 21, 2018, the Court of Appeals affirmed his sentence in a memorandum decision. *United States v. Ramirez-Cruz*, 735 Fed.Appx. 345 (9th Cir. 2018). The Court of Appeals held petitioner's sentence was reasonable.

This Petition for Writ of Certiorari follows.

## SUMMARY OF ARGUMENT AND REASON TO GRANT THE WRIT

The Ninth Circuit, at odds with at least seven other circuits, applies a standard of procedural reasonableness review that does not require a sentencing judge to make any express acknowledgment of a defendant's arguments—even ones that are "undoubtedly weighty"—before imposing sentence. *See United States v. Amezcua-Vasquez*, 567 F.3d 1050, 1054 (9th Cir. 2009). The Ninth Circuit's exceptionally lax standard interferes with the proper development of federal sentencing policy by depriving the United States Sentencing Commission of the empirical data from individual sentencing proceedings that it collects, analyzes, and uses to guide the evolution of the Sentencing Guidelines. Certiorari should be granted to insure the application of a uniform national standard.

## THE COURT SHOULD RESOLVE THE CONFLICT AMONG THE CIRCUITS WHETHER *RITA* REQUIRES AT LEAST SOME EXPRESS TREATMENT ON THE RECORD OF A DEFENDANT'S NON-FRIVOLOUS SENTENCING ARGUMENTS.

The Ninth Circuit, unlike the First, Second, Third, Sixth, Seventh, Eighth, Tenth and D.C. Circuits, permits a sentence to be affirmed even where the record contains no indication the sentencing judge considered the defendant's specific, nonfrivolous arguments. The application of these conflicting standards results in different outcomes in cases such as petitioner's, which would have required remand under the more stringent test applied in the majority of the circuits. The result in the Ninth Circuit, however, not only prevented petitioner from receiving the procedural protections he was due before imposition of a 51-month custodial sentence, but also affects national sentencing policy by depriving the Sentencing Commission of the data it uses to fulfill its ongoing task of amending and editing the Sentencing Guidelines to best fit the evolving landscape of empirical evidence and national policy. Certiorari should be granted to resolve this conflict.

### A. The Ninth Circuit's Standard Is At Odds With the Rule in At Least Seven Other Circuits.

This Court made clear in *Rita v. United States,* 551 U.S. 338 (2007) that the sentencing judge has a duty to enunciate his consideration of personal characteristics under 3553(a) factors. "Where the defendant or prosecutor presents nonfrivolous reasons for imposing a different sentence, . . . the judge will normally go further and explain why he has rejected those arguments." *Rita*, 551 U.S. at 357. Although the extent of the judge's

explanation may vary, *some* explanation is required. *See id.* ("Sometimes the circumstances will call for a brief explanation; sometimes they will call for a lengthier explanation. . . . By articulating reasons, even if brief, the sentencing judge not only assures reviewing courts (and the public) that the sentencing process is a reasoned process but also helps that process evolve."). The standard applied by the Ninth Circuit, which requires no express treatment on the record at all, violates this rule. *See Amezcua-Vasquez*, 567 F.3d at 1053-54 (affirming sentence where district judge made no mention of defendant's "undoubtedly weighty" arguments about his personal history and characteristics but simply stated that he had "considered all of" the § 3553(a) factors); *United States v. Perez-Perez*, 512 F.3d 514, 516 (9th Cir. 2008) (requiring the sentencing judge to do no more than "state the reasons for the sentence imposed" affirming where sentencing process concluded "without explicit reference" to the defendant's arguments).

Application of the Ninth Circuit's standard here yielded a result that would not have been obtained in the First, Second, Third, Sixth, Seventh, Eighth, Tenth, or D.C. Circuits. The record contains no evidence the district judge properly considered any of the mitigating arguments petitioner advanced concerning his personal background under § 3553(a). Petitioner presented several arguments for lenient sentencing that cast his background in a positive light: petitioner grew up extremely poor and first came to work in the United States at the age of 14, petitioner's motivation for returning to the United States was to provide a better life for his wife and child in Mexico, petitioner quickly pled guilty and did not litigate

any motions, and petitioner believed he was being penalized twice for prior offenses which he had already served his time. [ER 10; PSR 5, 11.]

However, the sentencing judge did not fully address petitioner's arguments concerning the mitigating effect of these attributes, which were expressly raised at the hearing. At sentencing, the district judge never referenced some of petitioner's arguments. This failure cannot be reconciled with *Rita*. *See United States v. Thomas*, 498 F.3d 336, 341 (6th Cir. 2007) (Thomas's unreasonable sentence was distinguishable from Rita's because in *Rita* "the district court summarized the defendant's three arguments before rejecting them and sentencing the defendant within the Guidelines range."). Without so much as a summary, the appellate court was left "unsure as to whether the district court adequately considered and rejected [the defendant's] arguments regarding proper application of the § 3553(a) factors or whether it misconstrued, ignored, or forgot [the defendant's] arguments." *Id.* In short, the standard in the Ninth Circuit under *Amezcua-Vasquez* and *Perez-Perez* has no bite at all.

By contrast, other circuits apply a standard requiring non-frivolous defense arguments to receive at least *some* express treatment on the record to ensure procedural reasonableness. *See, e.g., United States v. Peters*, 512 F.3d 787, 78-89 (6th Cir. 2008) (reversing sentence where the district court acknowledged but did not address defendant's argument for a time served sentence or the mitigating factors listed in his "Statement of Reasons"); *United States v. Miranda*, 505 F.3d 785, 794 (7th Cir. 2007) (sentence was vacated where "[w]e cannot tell from the district court's comments whether the court made [an] individualized analysis of

Miranda's factually and legally supported sentencing arguments under section 3553(a)"); *United States v. Ausburn*, 502 F.3d 313, 328-31 & n.30 (3d Cir. 2007) (remanding where failure to articulate sentencing reasons on the record left the appellate court with "no way to review [the district court's] exercise of discretion"); *United States v. Villafuerte*, 502 F.3d 204, 210 (2d Cir. 2007) (*Rita* recognizes non-frivolous arguments "may require more discussion"); *United States v. Chettiar*, 501 F.3d 854, 861-62 (8th Cir. 2007) (remanding for further explanation of sentence, noting "a court maintains a duty to explain its reasons for the sentence imposed with some degree of specificity") (internal quotation omitted); *Thomas*, 498 F.3d at 340-41 & n.3 (remanding because the district court's "conclusory statement leaves us unsure as to whether the district court adequately considered and rejected Thomas's arguments regarding the proper application of the § 3553(a) factors or whether it misconstrued, ignored, or forgot Thomas's arguments"); *United States v. Lawson*, 494 F.3d 1046, 1058 (D.C. Cir. 2007) (remand because unclear from statement whether judge considered Guidelines in relation to other factors); *United States v. Liou*, 491 F.3d 334, 340 (6th Cir. 2007) (noting that "the better practice, post-*Rita*, is for a sentencing judge to go further and explain why he has rejected [each of the defendant's nonfrivolous] arguments") (quotation marks omitted). *Accord United States v. Rodriguez*, 527 F.3d 221, 231 (1st Cir. 2008) (vacating and remanding where "the district court . . . committed procedural error in refusing to consider the appellant's argument that he should receive a variant sentence

because of the disparity incident to the lack of a fast-track program in the District of Puerto Rico").

What these circuits (but not the Ninth Circuit) recognize is that, when faced with nonfrivolous defense arguments, a sentencing judge bears a greater burden than simply reciting *some* evaluation of the § 3553(a) factors. *See, e.g., Thomas*, 498 F.3d at 341 (vacating sentence and remanding where defense "arguments went unmentioned and unaddressed, save the general statement by the district court that it had received, read, and understood the sentencing memorandum"); *Liou*, 491 F.3d at 339-40 & n.4; *cf. Rita*, 127 S.Ct. at 2469 ("The record makes clear that the sentencing judge listened to each argument.").

Indeed, the Ninth Circuit's decision in *Amezcua-Vasquez* resolves any doubt that its procedural reasonableness law stands in direct conflict with the Third Circuit's. In *Amezcua-Vasquez*, the Ninth Circuit affirmed as procedurally reasonable a sentence where the district judge failed to discuss or even specifically mention the defendant's "weighty" arguments about his background. *See* 567 F.3d at 1053-54. Instead of addressing these arguments, the district court simply stated that he had "considered all of" the § 3553(a) factors, and singled out his prior criminal record and circumstances of the offense—not the personal history and characteristics the defendant had urged the court to consider. *Id.* at 1054. The Ninth Circuit's decision that "[n]othing more was required to comply with the procedural mandate articulated in *Rita*" squarely contradicts the Third Circuit's holding in

*United States v. Olhovsky*, 562 F.3d 530, 547 (3d Cir. 2009). *Olhovsky* held that: "It is not enough for a sentencing court to recite the § 3553(a) factors, say that counsel's arguments have been considered, and then declare a sentence." *Olhovsky*, 562 F.3d at 547. The district court in *Amezcua-Vasquez* did even less than what the Third Circuit found inadequate: it recited some of the § 3553(a) factors, mentioned some, and declared a sentence.

Procedural reasonableness in the Ninth Circuit, unlike the majority of circuits, is an exercise in the exaltation of form over function. Here, it was simply enough that the district court judge stated he had read the defendant's sentencing memorandum. Such a record would not have passed muster in any circuit requiring at least some indication that the judge was aware of the defense arguments.

### B. The Exceptionally Lax Standard of Procedural Reasonableness Applied By the Ninth Circuit Has a Crippling Effect on the Development of National Sentencing Policy.

The Ninth Circuit rule deviates from the norm developed in the other circuits since this Court's ruling in *Rita*, and violates the procedural principles set forth there and subsequently reinforced in *Kimbrough v. United States*, 552 U.S. 85 (2007), and *Gall v. United States*, 552 U.S. 38 (2007). Of greater concern to national sentencing policy, however, the Ninth Circuit's rule throws a wrench in the ongoing development of the Sentencing Guidelines. This Court's decision in *Rita* expressly contemplates participation by both sentencing judges and appellate judges in the evolution of the advisory Guidelines:

> The Commission's work is ongoing. . . . The sentencing courts, applying the Guidelines in individual cases may depart . . . . The judges will set forth their

> reasons. The Courts of Appeals will determine the reasonableness of the resulting sentence. The Commission will collect and examine the results. . . And it can revise the Guidelines accordingly.

551 U.S. at 350. Thus, only by articulating its response to the arguments made by parties can a district judge properly participate in the development of the advisory Guidelines, and only by enforcing the articulation requirement can the Courts of Appeals contribute their part. *Cf. Liou*, 491 F.3d at 339 n.4 ("[W]hile a district court's failure to address each argument head on will not lead to automatic vacatur, we will vacate a sentence if the 'context and the record' do not 'make clear' the court's reasoning.")

Where a sentencing judge makes no effort to engage or otherwise acknowledge a defendant's arguments, the Sentencing Commission is deprived of its ability to fulfill its "important institutional role." *See Kimbrough*, 552 U.S. at 108. As this Court previously recognized, the Sentencing Commission is unique in having "the capacity courts lack to base its determinations on empirical data and national experience, guided by a professional staff with appropriate expertise." *Id.* (internal quotation marks omitted). But the Commission relies on sentencing judges in each district to produce the empirical data it later analyzes. A sentencing judge's silence, however, prevents the proceeding from producing any meaningful data; upon review, the Sentencing Commission will be unable to determine whether the defendant's nonfrivolous arguments were rejected on a reasoned basis, or simply ignored or forgotten—and it will be unable to "revise the Guidelines accordingly." *See Rita*, 551 U.S. at 350. Without the necessary empirical data, which can be ensured only by appellate courts'

insistence on sufficient evidence of engagement and consideration at the district court level, the whole of federal sentencing policy is deprived of the "key role" of the Sentencing Commission, which "Congress established . . . to formulate and constantly refine national sentencing standards." *Kimbrough*, 552 U.S. at 108.

The importance of proper development of the Sentencing Guidelines obviously cannot be overstated. The Guidelines serve as a "starting point and the initial benchmark" for every individual sentenced in federal court, *Gall*, 552 U.S. at 49; its sentencing ranges are regarded as "reflect[ing] a rough approximation of sentences that might achieve § 3553(a)'s objectives," *Kimbrough*, 552 U.S. at 109, and are presumed reasonable on appeal in numerous circuits. *See, e.g., United States v. Goosby*, 523 F.3d 632, 640 (6th Cir. 2008); *United States v. Bonilla*, 524 F.3d 647, 650 (5th Cir. 2008); *United States v. Reed*, 522 F.3d 354, 362 (D.C. Cir. 2008); *United States v. Sutton*, 520 F.3d 1259, 1262 (10th Cir. 2008); *United States v. Abdullahi*, 520 F.3d 890, 893 (8th Cir. 2008); *United States v. Shannon*, 518 F.3d 494, 496 (7th Cir. 2008); *United States v. Go*, 517 F.3d 216, 218 (4th Cir. 2008). Without a uniform standard applied to the data whose input is used to formulate their evolution, the Guidelines are certain to reflect a skewed subset of national policy—if the Ninth Circuit's rule is permitted to stand, a subset that may well exclude a substantial portion of the western United States.

The approach adopted by the Ninth Circuit forges a path contrary to the procedural transparency urged by the Supreme Court in *Rita*, and in divergence from the law in other

circuits. Review by this Court is necessary to ensure the application of a uniform standard and prevent the Ninth Circuit's abdication of the appellate courts' gatekeeping function from causing further harm to the development of national sentencing policy.

## CONCLUSION

For these reasons, Petitioner asks this Court to grant this Petition for Writ of Certiorari.

Respectfully submitted,

Date: October 18, 2018

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