IN THE SUPREME COURT OF THE UNITED STATES

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JOSE LOPEZ-CASTILLO,

PETITIONER,

- vs -

UNITED STATES OF AMERICA,

RESPONDENT.

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

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Question Presented for Review

I. Whether the mandatory-sentencing regime of Title 21 has been abrogated by *United States v. Booker* and its progeny.

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

Petitioner, Jose Lopez-Castillo, respectfully prays that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Opinion Below

On August 21, 2018, the Ninth Circuit entered a Memorandum affirming Petitioner's convictions and 120-month sentence for conspiracy to distribute marijuana. *United States v. Lopez-Castillo*, 735 Fed. Appx. 363, 2018 U.S. App. LEXIS 23385 (9th Cir. 2018).[1]

Jurisdiction

This Court has jurisdiction under 28 U.S.C. § 1254(1).

Constitutional Provision

U.S. Const. Amend. VI

[1] The memorandum is attached as Appendix A.

Statement of the Case

On November 3, 2015, a magistrate judge issued a complaint charging Jose Lopez-Castillo and four codefendants with possession with intent to distribute at least 50 kilograms of marijuana. On December 2, 2015, the grand jury for the District of Arizona returned an indictment charging the same defendants with conspiracy to distribute and distribution of over 1,000 kilograms of marijuana.

Lopez-Castillo pleaded guilty to both counts of the indictment on September 7, 2016. Although he pleaded guilty without a plea agreement, each of his codefendants entered into a binding agreement, which the district court accepted. For three of Lopez-Castillo's codefendants, the parties stipulated that each fell into Criminal History Category II and that each should receive the mandatory-minimum, 120-month sentence. For codefendant Cuevas-Sotelo, however, the government stipulated that: 1) he fell into Category I; 2) he qualified for "safety valve" relief from the mandatory minimum (without first conducting a debrief); and 3) he should receive an 84-month sentence.

Lopez-Castillo also fell into Criminal History Category I. Because he did not enter into a plea agreement, however, the government required him to debrief. The government then argued at sentencing that Lopez-Castillo did not qualify for safety valve because he had withheld information and had not been truthful during

his debrief.

On February 21, 2017, the district court sentenced Lopez-Castillo to the mandatory-minimum, 120-month sentence. Lopez-Castillo argued on appeal that the mandatory-sentencing regime of Title 21 had been abrogated by *United States v. Booker*. On August 21, 2018, the Ninth Circuit issued a Memorandum affirmance of Lopez-Castillos's convictions and sentence.

Summary of the Argument

The mandatory-sentencing regime of Title 21 cannot be reconciled with this Court's holdings in *United States v. Booker*, 543 U.S. 220 (2005) and its progeny, which act as a substantive limitation on the sentence that can be imposed, notwithstanding any statutory mandatory-minimum term.

Reason for Granting the Petition

I.

The mandatory-minimum sentencing scheme has been abrogated by *Booker*.

The rule of reasonableness, first articulated in *United States v. Booker*[2] and explicated in *Rita v. United States*,[3] *Gall v. United States*,[4] and *Kimbrough v. United States*,[5] acts as a substantive limitation on sentences which can be imposed on a convicted defendant. In *Kimbrough*, the Supreme Court found that the "parsimony principle" set forth in 18 U.S.C. § 3553(a) is an "overarching" mandatory principle that also establishes a substantive limitation upon the Sentencing Guidelines and any other statutory maxima by allowing only the imposition of a sentence that is "sufficient, but not greater than necessary" to comply with the purposes set forth in section 3553(a)(2).[6]

Applying only a sufficient (i.e., not greater than necessary) sentence is

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2 543 U.S. 220 (2005).

3 551 U.S. 338, 345-346 (2007).

4 552 U.S. 38, 45 (2007).

5 552 U.S. 85, 101 (2007).

6 *Kimbrough*, 552 U.S. at 101.

mandatory. And if, a mandatory-minimum sentence exceeds what is necessary to achieve the aims of section 3553(a), the sentencing court should not – indeed cannot – impose it.[7]

After *Rita,* courts must review the reasonableness of a sentence imposed by the district court by asking whether the sentence meets the "sufficient, but not greater than necessary test."[8] And this test – the heart of reasonableness review – turns on factual determinations.[9]

This case – where the district court imposed a sentence that was three years longer than the stipulated sentence of an identically-situated codefendant who was not required to debrief – is another example of a sentence that is more than sufficient or "greater than necessary." The sentence thus violates the alternative statutory maximum established by the parsimony principle.[10]

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[7] *See id.* (implicitly recognizing an alternative maximum sentence).

[8] *See generally United States v. Klups,* 514 F.3d 532 (6th Cir. 2007).

[9] *See Rita,* 551 U.S. at 368-69 (Scalia, J., concurring) (The possibility of such review ensures that "some sentences reversed as excessive will be legally authorized in later cases only because additional judge-found facts are present; and . . . some lengthy sentences will be affirmed (i.e., held lawful) only because of the presence of aggravating facts, not found by the jury, that distinguish the case from the mine-run.").

[10] *See Kimbrough,* 552 U.S. at 101; 18 U.S.C. § 3553(a)(2).

While *Gall* and *Kimbrough* did not address the interaction of the parsimony principle with other statutes dictating imposition of mandatory-minimum terms, this Court has stated that the parsimony principle is "overarching" and applies after all other sentencing statutes and considerations are first considered and applied.[11] In short, the necessary implication of *Kimbrough* is that section 3553(a) permits a district court, if it concludes that a mandatory-minimum sentence is greater than necessary, to not apply it, instead applying the "parsimonious" sentence.[12]

In *United States v. Wipf,* the Ninth Circuit Court held that § 3553(a) did not confer "discretion" to disregard mandatory-minimum sentences.[13] Lopez-Castillo submits that *Wipf* was wrongly decided and accordingly urges this Court to grant the writ.

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[11] *See Kimbrough,* 552 U.S. at 101.

[12] *See id.*

[13] 620 F.3d 1168 (9th Cir. 2010).

Conclusion

This Court should grant the petition to resolve this important question.

Respectfully submitted,

Date: November 13, 2018

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