**No. _____**

IN THE

**SUPREME COURT OF THE UNITED STATES**

ROWY DE JESUS VASQUEZ,
*Petitioner*,

v.

UNITED STATES OF AMERICA,
*Respondent*.

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

# PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether the district court must have provided defendant notice for the grounds for a sentence above the range recommended by the advisory guidelines range when the district court's reasoning for a such a departure from the guidelines tracks the language under 18 U.S.C. § 3553(b)(2)(A)(i). *See* USSG §§ 1B1.1(b), 5K2.0(a)(1)(B).

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## PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Rowy De Jesus Vasquez, respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit. *See United States v. De Jesus Vasquez*, No. 17-10515, 2018 WL 5309883 (11th Cir. 2018) (Pet. App. A-1).

## OPINION BELOW

The United States Court of Appeals for the Eleventh Circuit issued its decision on October 26, 2018. The Eleventh Circuit's opinion is provided in Appendix A-1 (App. A1). The district court judgment is provided in Appendix A-2 (App. A2).

## JURISDICTION

The Eleventh Circuit issued its opinion on October 26, 2018, in acc. *See* Pet. App. A-1. The jurisdiction of this Court us invoked under 28 U.S.C. § 1254(1).

## RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The constitutional provision, statutory provision, and rules of criminal procedure involved in the case are set forth in the Appendix A-3 (App. A3).

## STATEMENT OF THE CASE

Mr. Vasquez entered a guilty plea, pursuant to a written plea agreement, as to count one of the indictment charging him with sex trafficking of a minor, in violation of 18 U.S.C. §§ 1591(a), 1591(b)(2), and (2). *See* Docs. 1, 56, 62, 93.[1] Mr. Vasquez certified and admitted to the following facts set forth in his plea agreement:

[1] At the change of plea hearing the parties acknowledged a typographical error as to the elements of count one. *See* Doc. 56 at 2 ¶ 3; Doc. 93 at 21-22. The plea

From on or about April 24, 2015, to on or about June 10, 2015, in the counties of Seminole and Orange, and in or affecting interstate commerce, the defendant, Rowy De Jesus VASQUEZ (VASQUEZ), caused a minor female (hereinafter identified as "K.C.") to engage in commercial sex acts for VASQUEZ's financial gain and profit, as charged in Count One of the Indictment, in violation of 18 U.S.C. §§ 1591(a), (b)(2), and 2.

VASQUEZ met K.C. on or about April 24, 2015, after K.C. ran away from her parents' home. K.C. was 14 years of age at the time. VASQUEZ knew or was in reckless disregard of the fact that K. C. was not yet 18 years old.

VASQUEZ provided K.C. with a white iPhone 5s . . . to communicate with potential customers and create advertisements on the Backpage[2] website for prostitution services. VASQUEZ set the prices for the sex acts and instructed K.C. not to kiss customers or let them leave marks on her body. VASQUEZ also instructed K.C. to use condoms and to avoid certain sex acts. K.C. met about 6 to 10 customers per day, and she earned about $1,000 per day. However, VASQUEZ kept all the proceeds from K. C.'s prostitution activities.

K.C. and VASQUEZ stayed at the "trap house" (VASQUEZ's temporary residence in Altamonte Springs) where K.C. engaged in sexual activity with customers obtained through the Backpage advertisements. They also stayed in hotels, where K.C. engaged in commercial sex acts.

K.C. and VASQUEZ stayed in touch regarding K.C.'s prostitution activities through the use of VASQUEZ's iPhone and the cell phone of a friend of VASQUEZ's (hereafter "Friend"), who stayed with K.C. and VASQUEZ at the trap house and hotels.

In order to rent hotel rooms, VASQUEZ asked his Friend to present his (the Friend's) identification card to the hotel attendant, but VASQUEZ paid for the rooms with cash. Hotel records show that from

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agreement was docketed twice, once at Doc. 56 and again at Doc. 62. Docket entry 62 represents the corrected version as agreed to by the parties.

[2] Backpage is a classified advertising website that offers classified listings for a wide variety of products and services including automotive, jobs listings, and real estate.

> June 9 to June 10, 2015, the Friend rented a room at the Motel 6 located at 5909 American Way, Orlando, Florida. This room was used by K.C. to engage in commercial sex acts.

Doc. 62 at 17-18. The district court accepted Mr. Vasquez's plea of guilty. Doc. 59.

The district court held sentencing on January 13, 2017. Doc. 74. During sentencing, the district court stated the following that is of particular import to the issue in Mr. De Jesus Vasquez's petition:

> You have a history of drug sales and drug use. You have a history of firearm possession. Quite frankly, you have no respect for the criminal justice system at all. The guidelines that are created by the United States Sentencing Commission are designed to cover a wide array of circumstances and, therefore, sometimes they are accurate, and sometimes they bear no relation to reality.
>
> In similar cases to this, that is, cases where there's been sexual exploitation of a minor, the sentences I've imposed have been considerably higher than the one recommended by the Government in this case.
>
> I'll give you one example. In *United States v. Rodolfo Rodriguez*, its case 16-cr-77, a case that I sentenced fairly recently. It was a 61-year-old man with no criminal history, who used the Internet to persuade young girls who were as young as 9, to send him sexually explicit videos. He had never had physical contact, but he manipulated them in this manner. I sentenced him to 300 months.
>
> I've had cases where men of various ages have reached out by Craigslist to have sex with a notional child, that is a fictitious child, ages 12, 14, and the like, where it was a law enforcement sting operation. And in those cases, the sentences typically range roughly 20 years, even when the Government's recommended half that length.
>
> The sexual exploitation of children is perhaps one of the most horrific crimes that I can personally imagine. The sentence that is imposed as a result must reflect the seriousness of that crime; otherwise, we undermine the statutory purposes of sentencing.
>
> When Congress decided what this crime entailed, it set a ten-year minimum and a maximum of life. The guidelines are the guidelines, and

> I believe in this case, under these facts, the guidelines are inadequate to reflect the seriousness of your offense conduct.
>
> There is a need for this sentence to reflect the seriousness of your offense conduct and your criminal history, which is fairly extensive for punishment to the offense. It must protect the public from further harm, and you present, in my view, a considerable risk of harm to the public. As a result, it is not my intention to follow the recommendation of the government or the sentencing guidelines in this case.
>
> Having asked the defendant why judgment should not now be pronounced and having heard the response, after letting the parties make statements on their own behalf, after hearing from witnesses and reading the various documents submitted, after reviewing the presentence report and considering the various factors set forth in Title 18 of the United States Code § 3551 and 3553, it's the judgment of the Court, the defendant, Rowy De Jesus Vasquez, is committed to the custody of Bureau of Prisons to be imprisoned for a term of 360 months.

Doc. 88 at 31-35.

Following imposition of sentence, the district court having pronounced sentence inquired as to whether counsel for the defendant or government had "any objection to the sentence or the manner in which the court pronounced it?" *Id.* at 40. Trial counsel for Mr. De Jesus Vasquez responded, "We object to the above-guideline sentence and the reasonableness of that sentence for the reasons that the Court articulated as to why you were going above the guidelines." *Id.* Mr. Vasquez timely filed his notice of appeal on January 31, 2017, *see* Doc. 78, and he remains incarcerated serving his 30-year term of imprisonment.

On appeal, Mr. De Jesus Vasquez argued that the upward "variance" in his case was actually an upward departure and that the district court had failed to provide the necessary notice to the parties under Federal Rules of Criminal Procedure 32(h). Even though the district court framed the 30-year sentence as a variance, the

court had, in fact, tracked the statutory language pursuant to 18 U.S.C. § 3553(b)(2)(A)(i). Furthermore, Section 3553(b)(2) is specifically discussed under the departure guidelines. *See* USSG § 5K2.0(a)(1)(B) (Upward Departures in General). Thus, Mr. De Jesus Vazquez argued that the district court was required by Rule 32(h) to notify the parties of its intent to depart upwards, here more than double Mr. De Jesus Vasquez's advisory guidelines range of 151 to 188 months' imprisonment. Doc. 88 at 17.

This Court has said that notice of an upward departure by the lower court to the parties in advance is "essential to assuring procedural fairness" at sentencing. *Irizarry v. United States*, 553 U.S. 708, 722 (2008) (Breyer, J. *dissenting*) (citing *Burns v. United States*, 501 U.S. 129, 138 (1991)).

Thus, the court effectively made an upward departure without notice to the parties, especially Mr. De Jesus Vasquez, as required by Rule 32(h) and remand and resentencing are needed.

## REASONS FOR GRANTING THE WRIT

### II. This Court should grant review to determine whether the district court erred in failing to provide Rule 32(h) notice before imposing a sentence that was more than 15 years greater than the agreed upon guideline range by the parties pursuant to a plea agreement.

The district court erred by sentencing Mr. De Jesus Vasquez more than 15 years above the Guidelines range without providing reasonable notice to the parties for such grounds warranting such an extreme departure from the advisory guidelines range. As explained in the dissent in *Irizarry v. United States*, 553 U.S. 708, 722

(2008) (Breyer, J. *dissenting*) (citing *Burns v. United States*, 501 U.S. 129, 138 (1991)), the text and purposes of Rule 32, the proper functioning of the adversarial process, and serious due process concerns compel the conclusion that a district court must provide reasonable notice to a defendant before imposing a sentence greater than that suggested by the Guidelines. Nothing in this Court's decision in *United States v. Booker,* 543 U.S. 220 (2005), nor *Irizarry* should alter that analysis. The expansion of the sentencing courts discretion via *Booker* made the requirement of reasonable notice *more* rather than less important to the full and fair adversarial process of sentencing. Especially here, where Mr. De Jesus Vasquez was convicted under 18 U.S.C. § 1591 and was sentenced based on factors the district court articulated under 18 U.S.C. § 3553(b), where the statute specifically contemplates a scenario where the guidelines range is not sufficient and the lower court may *depart upwards*.

### A. Rule 32 Mandates that a Sentencing Court Must Provide Notice to the Parties in Advance, if the Court Intends to Consider a Sentence above the Advisory Guidelines Range for Reasons Not Addressed by Either Party Nor the Presentence Report

In *Irizarry*, this Court considered whether a district court was authorized to depart from the Guidelines range without first notifying the parties that it intended to depart, when the lower court inevitable framed the higher sentence imposed as a variance, and outside the grasp of Rule 32(h) protection. There, the government had not requested a departure before the hearing, and the PSR stated that "petitioners criminal history category might not adequately reflect his. . . past. . . ." *Irizarry*, 553 U.S. at 710. This Court held that a " '[d]eparture' is a term of art under the Guidelines

and refers only to non-Guidelines sentences imposed under the framework set out in the Guidelines"; in contrast, a "variance" refers to a non-Guidelines sentence outside the Guidelines framework. *Id.* at 714. *Irizarry*'s holding construed the term "departure" under Rule 32(h). *See Pepper v. United States*, 562 U.S. 476, 498 (2011).

The authority to make a departure from the Sentencing Guidelines must be exercised in conformity with the statutory standard, and in accord with the policy statements that the Sentencing Commission has issued to guide the exercise of departure discretion. *United States v. Carrasco*, 313 F.3d 750, 754-56 (2d Cir. 2002).

In Mr. De Jesus Vasquez's case, the district court's imposition of sentence was in conformity with criminal statute, 18 U.S.C. § 1591, for which he had plead guilty, and in conformity with the statutory standard, 18 U.S.C. § 3553(b)(2)(A). Specifically, when the lower court explained, "When Congress decided what this crime entailed, it set a ten-year minimum and a maximum of life. The guidelines are the guidelines, and I believe in this case, under these facts, *the guidelines are inadequate to reflect the seriousness of your offense conduct*." Doc. 88 at 33 (emphasis added).

Though, the district court stated it was imposing an upward variance, more than doubling Mr. De Jesus Vasquez's advisory guideline range, the district court had articulated an upward departure based on the criminal statute and statutory standard. What's more, under USSG § 5K2.0. the guidelines specifically reference when the court may depart upwards from the applicable guideline range if–

> (B) in the case of child crimes and sexual offenses, the court finds, pursuant to **18 U.S.C. § 3553(b)(2)(A)(i)**, **that there exists an aggravating circumstance**,

of a kind, or to a degree, **not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that**, in order to advance the objectives set forth in 18 U.S.C. § 3553(a)(2), should result in a sentence different from that described.

(2) DEPARTURES BASED ON CIRCUMSTANCES OF A KIND NOT ADEQUATELY TAKEN INTO CONSIDERATION.—

(A) IDENTIFIED CIRCUMSTANCES.—This subpart (**Chapter Five, Part K, Subpart 2 (Other Grounds for Departure**)) identifies some of the circumstances that the Commission may have not adequately taken into consideration in determining the applicable guideline range (*e.g.*, as a specific offense characteristic or other adjustment**). If any such circumstance is present in the case and has not adequately been taken into consideration in determining the applicable guideline range, a departure consistent with 18 U.S.C. § 3553(b) and the provisions of this subpart may be warranted**.

(B) UNIDENTIFIED CIRCUMSTANCES.—**A departure may be warranted in the exceptional case in which there is present a circumstance that the Commission has not identified in the guidelines but that nevertheless is relevant to determining the appropriate sentence**.

(3) DEPARTURES BASED ON CIRCUMSTANCES PRESENT TO A DEGREE NOT ADEQUATELY TAKEN INTO CONSIDERATION.—**A departure may be warranted in an exceptional case, even though the circumstance that forms the basis for the departure is taken into consideration in determining the guideline range**, if the court determines that such circumstance is present in the offense to a degree substantially in excess of, or substantially below, that which ordinarily is involved in that kind of offense.

USSG § 5K2.0(1)(B)–(3) (emphasis added).

A plain reading of the sentencing transcript reveals that the district court determined that the circumstances involving Mr. De Jesus Vasquez and the child crimes were of a nature that were, in the courts opinion, not properly accounted for by Congress, nor the Commission. Thus, the district court articulated what was, in

effect, an upward departure that required reasonable notice to both parties. More so, whereas here, the parties had a valid plea agreement, a contract where the Government had agreed to a recommendation to a sentence within the advisory guideline range, and the PSR had not identified the reasons the district court had become focused on in order for the parties to be on notice to anticipate such an extreme departure from the guidelines.

### B. The District Court Failed to Provide Notice Before Imposing an Above-Guidelines Sentence Requiring a New Sentencing Hearing

At sentencing the district court explained to Mr. Vasquez that the court "tr[ies] to be as transparent and open as [the court] can in this process." *See* Doc. 88 at 29. If the district courts intent was to be as transparent as it could, then a notice under Fed. R. Crim. P. 32(h) would have been the most translucent for the parties.

The purpose behind this rule is to promote focused, adversarial resolution of the legal and factual issues relevant to formulating a guideline sentence. With proper notice, defendants are able to marshal evidence with which to contest facts supporting a proposed upward departure. *United States v. Valentine*, 21 F.3d 395, 398 (11th Cir. 1994); *see also United States v. Dixon*, 71 F.3d 380, 384 (11th Cir. 1995) (concluding that information in Part E of the PSI gave reasonable notice that the criminal history might serve as a ground for an upward departure.).

While a sentencing court is not obligated to give notice of a "variance", it is required to give notice of an upward departure based on a defendant's criminal history under Rule 32. Rule 32(h) provides that "[b]efore the court may depart from

the applicable sentencing range on a ground not identified . . . either in the presentence report or in a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating such a departure." *Irizarry*, 553 U.S. at 708. Because this alleged "variance" was, in effect, an upward departure based on criminal history, Mr. De Jesus Vasquez has shown that remand is necessary because he was not afforded notice of such a departure.

Mr. De Jesus Vasquez recognizes that notice is not required for a true variance made pursuant to 18 U.S.C. § 3553(a) factors. *Irizarry*, 553 U.S. at 715. (holding that advance notice under Rule 32(h) is not required for a variance, but recognizing that "[s]ound practice dictates that judges in all cases should make sure that the information provided to the parties in advance of the hearing, and in the hearing itself, has given them an adequate opportunity to confront and debate the relevant issues").

Indeed, the district court walked through the § 3553(a) factors in determining whether Mr. Vasquez's offense conduct and guideline range under USSG § 2G1.3, was adequate as to the "kind of sentence and sentencing ranges established for – the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines." 18 U.S.C. § 3553(a)(4).

However, the court determined that the § 3553(a)(4) analysis was, in effect, inadequate. *See* Doc. 88 at 33, 34. Because this case involved a sexual offense against a child and because the district court made findings as to the inadequacy of the Sentencing Commissions design of the guidelines as applied to this case, the district

courts sentencing analysis should have shifted to 18 U.S.C. § 3553(b)(2).

Section 3553(b)(2) states in relevant part:

> **(2) Child crimes and sexual offenses.—**
>
> **(A) Sentencing.**— In sentencing a defendant convicted of an offense under . . . *section 1591* . . . the court shall impose a sentence of the kind, and within the range, referred to in subsection [§ 3553](a)(4) *unless*—
>
> > **(i)** the court finds that there *exists an aggravating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence greater than that described.*

18 U.S.C. § 3553(b)(2)(A)(i) (emphasis added).

Indeed, Mr. De Jesus Vasquez was convicted under § 1591 and the Sentencing Commission had a mechanism where, as here, when the district court is dissatisfied with the applicable guidelines range and intends on deviating from the applicable range, it may do so under USSG § 5K2.0.

Furthermore, the commentary to § 5K2.0 states "subsection (a)(2) authorizes the court to *depart* if there exists . . . an aggravating circumstance in a case under 18 U.S.C. § 3553(b)(2)(A)(i), of a kind not adequately taken into consideration in the guidelines. *See* USSG § 5K2.0, comment. (n.3(A)) (emphasis added).

Even though the district court did not announce that the deviation was a departure, or even mention § 3553(b), or § 5K2.0, its reliance on the aggravating factors and findings as to the inadequacy of the guidelines demonstrates the district court's adherence to the provisions under § 3553(b) and § 5K2.0. Thus, the district court, in effect, applied a departure and not a variance *See United States v. Ghertler*,

605 F.3d 1256, 1262 (11th Cir. 2010) ("A sentencing court is not required to incant the specific language used in the guidelines, or articulate its consideration of each individual [statutory] factor, so long as the record reflects the court's consideration of many of those [statutory] factors.") (internal quotations and citations omitted).

Second, the imposition of the upward deviation was in-part based off of Mr. De Jesus Vasquez's past criminal history. The guidelines specifically envision that a departure may be appropriate if a defendant's criminal history understates the seriousness of the defendant's prior record. *See* USSG § 4A1.3. The guidelines permit the district court to consider as grounds for a criminal history departure under § 4A1.3, outdated convictions that are dissimilar, but serious. *United States v. Brown*, 51 F.3d 233, 234 (11th Cir. 1995); *see also United States v. McKinley*, 732 F.3d 1291, 1298 (11th Cir. 2013).

Nevertheless, the district court could have relied on criminal history factors in considering a deviation from the guidelines, which would have required the court to give notice of an upward departure based on a defendant's criminal history under Rule 32. Rule 32(h) provides that "[b]efore the court may depart from the applicable sentencing range on a ground not identified . . . either in the presentence report or in a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating such a departure." *Irizarry,* 553 U.S. 708 (2008) (recognizing that "[s]ound practice dictates that judges in all cases should make sure that the information provided to the parties in advance of the hearing, and in the hearing itself, has given them an adequate opportunity to confront and debate the relevant

issues"). Mr. De Jesus Vasquez had no warning or notice as would have been required under Rule 32. Indeed, within the plea agreement the Government agreed to recommend a guideline range sentence, United States Probation did not identify any factors warranting a departure or variance, and the district court relied on factors that were not identified or addressed by any of the parties in any presentencing pleadings. *See* Doc. 62 at 5; PSR ¶ 126.

Thus, the court effectively made an upward departure without notice to the Mr. Vasquez as required under Rule 32(h). To rule otherwise and allow for district courts to make upward deviations without notice based on aggravating factors that are adequately taken into account by the Sentencing Commission, the guidelines, or the criminal history would render the notice requirements under Rule 32 meaningless.

Given the district court's errors, individually and collectively, there is a reasonable probability of a different sentence had the district court not erred. Indeed, had the district court given the parties the proper notice, would have allowed Mr. De Jesus Vasquez the opportunity to properly mount a defense against the district court's concerns of firearm possession, criminal history that was not accounted for in his criminal history score, and the inadequacy of the guidelines in his case. Thus, there is a reasonable probability that the court would have imposed a lower sentence. Mr. De Jesus Vasquez therefore respectfully requests that the judgment of the court of appeals should be reversed and remanded for further proceedings.

## CONCLUSION

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

Respectfully submitted,

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## APPENDIX