

IN THE
SUPREME COURT OF THE UNITED STATES

No. _____

OCTOBER TERM, 2018

SALVADOR GALVAN,

Petitioner,

- vs -

UNITED STATES OF AMERICA,

Respondent.

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

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QUESTION PRESENTED FOR REVIEW

Whether, in a case involving embezzlement from a municipality, it is procedural error for a district court to consider every resident of the city a victim for purposes of its 18 U.S.C. § 3553(a) analysis, rather than considering the entity as the lone victim as mandated by USSG § 2B1.1?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED
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Petitioner 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 December 3, 2018.

JURISDICTION AND CITATION OF OPINION BELOW

On December 3, 2018, the Ninth Circuit affirmed Petitioner's conviction in an unpublished Memorandum opinion, attached as Exhibit "A" to this petition. The Ninth Circuit denied Petitioner's petition for rehearing, and suggestion for rehearing en banc, on April 16, 2019. [Ex. "B"]. This Court has jurisdiction to review the Ninth Circuit's decision pursuant to 28 U.S.C. § 1254.

GUIDELINE PROVISION AT ISSUE

USSG § 2B1.1, cmt. n.1:

"Victim" means (A) any person who sustained any part of the actual loss determined under subsection (b)(1); or (B) any individual who sustained bodily injury as a result of the offense.

USSG § 2B1.1, cmt. n.1.

INTRODUCTION

Petitioner asks this Court to grant review in the instant case to decide an important question regarding the proper application of USSG § 2B1.1, 18 U.S.C. § 3553(a), and Gall v. United States, 552 U.S. 38, 46 (2007). Petitioner pled guilty to embezzling money from the city of Compton, California. The district court varied upward from the advisory section 2B1.1 guideline range by 21 months, or thirty-five percent, based upon its finding that instead of this case having one victim (the City of Compton), it actually had tens of thousands of victims as each taxpayer in the city should be considered a victim of Petitioner's crime. Petitioner asks the Court to consider whether this illogical approach, which is directly contrary to the directive of the U.S. Sentencing Guidelines in terms of how victims should be calculated and considered at sentencing, represented procedural error.

STATEMENT OF FACTS AND CASE

This case arose after accounting irregularities were discovered in the Compton treasurer's office, where Petitioner was employed as a deputy city treasurer. [PSR 5].¹ After an audit demonstrated a discrepancy between deposit slips and cash actually deposited, Petitioner was arrested. [PSR 6]. A subsequent audit demonstrated that there was a total discrepancy of \$3.721 million between May 2010 and December 2016. Id.

Petitioner and his wife were charged with violating 18 U.S.C. § 666(a)(1)(A). In a written plea agreement, Petitioner agreed to plead guilty to embezzling the 3.7 million in missing funds, and to pay restitution in the same amount. [ER 47-48]. With respect to the Guidelines, the parties agreed to a base offense level of 6 pursuant to USSG § 2B1.1(a)(2), an increase of 18 levels for loss pursuant to USSG § 2B1.1(b)(1), and an increase of two levels for abuse of trust, pursuant to USSG § 3B1.3. [ER 48].

In the pre-sentence report, U.S. Probation found the same advisory guideline range as the parties. [PSR 8]. After applying a three-level adjustment for acceptance of responsibility, and with Petitioner in criminal history category one, the

¹ "PSR" refers to the pre-sentence report. "ER" denotes Appellant's Excerpts of Record filed in the Ninth Circuit. "CR" refers to the district court Clerk's Record.

total guideline range was 46-57 months. U.S. Probation recommended a low-end sentence of 46 months custody. [PSR Ltr. 2].

In its sentencing position brief, the government also recommended that the district court impose a sentence of 46 months custody. [CR 30]. The government acknowledged the seriousness of the crime, noting that Petitioner committed the offense from a position of trust, and that he stole a large amount of money over the course of six years. [CR 30 at 1-2]. On the other hand, the government acknowledged that Petitioner's acceptance of responsibility was "significant and deserves consideration from the Court[,] he "took ownership of his conduct and accepted the consequences," and his "willingness to identify the disposition of the proceeds was helpful to the government's investigation." Id. at 2-3. Based upon all of the facts of the case, the government recommended a low-end sentence.

The district court found that Petitioner committed a crime of greed, and that it was a breach of trust. [ER 25]. Then it discussed how it viewed the number of victims issue:

The guidelines here only account for one victim, the City of Compton. In fact, in reality, there's a multitude of victims. As was just pointed out, the City of Compton is a City of 97,000 individuals. Every Compton resident that paid some form of tax to the City was a victim. Every Compton resident that was denied a service because the funding just wasn't there was a victim. The fact that Mr.

Galvan's theft directly impacted all of those people is an aggravating circumstance not accounted for in the guidelines range. Had he stolen from them directly, he would have faced a much higher offense, level, one that would more accurately capture his culpability.

[ER 26].

The district court varied upward 21 months and imposed a sentence of 78 months, to be followed by three years of supervised release. [ER 27-28]. After the government requested clarification as to district court's guideline calculations, the district court stated that it was varying upward for the aggravating circumstances it had mentioned, including, among other reasons, that the "guidelines did not account for the true number of victims in the case." [ER 31]. Defense counsel then requested further clarification, asking the district court to "offer us reasoning behind the 78 months." [ER 32]. The district court reiterated that it was increasing the sentence because it believed that "there were a multitude of victims." Id.

On appeal, Petitioner raised multiple claims, including the argument that the district court committed procedural error when it based its section 3553(a) variance on a clearly erroneous number of victims theory. The panel rejected this claim, writing:

Contrary to Galvan's contention, the district court did not find that all Compton residents were victims for purposes of an enhancement under U.S.S.G. § 2B1.1(b)(2). Instead, the district court accepted the uncontested Guidelines calculation set forth in the Presentence Interview Report and then properly considered the broader impact of Galvan's conduct on the residents of Compton when assessing the 18 U.S.C. § 3553(a) sentencing factors as a whole. *See United States v. Christensen*, 732 F.3d 1094, 1100-01 (9th Cir. 2013)(sentencing court may conclude that the Guidelines do not sufficiently account for the harm caused by the defendant's conduct).

[Ex. "A" at 2]. The Ninth Circuit rejected Petitioner's request for panel and en banc rehearing. [Ex. "B"].

ARGUMENT

REVIEW OF THIS CASE IS NECESSARY TO CORRECT THE DISTRICT COURT'S COMMISSION OF PROCEDURAL ERROR WHEN, CONTRARY TO USSG § 2B1.1, IT ILLOGICALLY CONSIDERED EVERY RESIDENT OF THE CITY OF COMPTON TO BE A VICTIM FOR PURPOSES OF ITS 18 U.S.C. § 3553(a) ANALYSIS

A. The District Court Based Its Section 3553(a) Variance On Its Belief That The Section 2B1.1 Guideline Range Vastly Underestimated The Number Of Victims Of This Offense

In its Memorandum, the panel affirmed the district court's basis for increasing the sentence because it found it was based on the "broader impact of Galvan's conduct on the residents of Compton," and not an erroneous finding that all of the residents of Compton were victims of Appellant's misconduct. [Ex. "A" at 2]. This conclusion conflicts with the record, as the district court definitively based its section 3553(a) upward variance on, as it stated at sentencing, its conclusion that "[e]very Compton resident that paid some form of tax to the City was a victim." [ER 26].

Appellant did not argue below that the district court made any incorrect findings when calculating the advisory guideline range, as the district court adopted the jointly-recommended guidelines which properly accounted for the offense in Chapter Two. Instead, the district court focused its attention on its section 3553(a)

analysis, but did so in connection with the USSG § 2B1.1(b)(2) number of victims issue. The district court made clear during sentencing that it did not agree that, as the guidelines required, only one victim (the City of Compton) should be counted in imposing sentence. [ER 26](“The guidelines here only account for one victim, the City of Compton. In fact, in reality, there’s a multitude of victims.”). The district court did not effect its position through section 2B1.1, but it did through section 3553(a) with its substantial upward variance.

While the Ninth Circuit panel found the basis for the section 3553(a) variance to be the district court “consider[ing] the broader impact of Galvan’s conduct on the residents of Compton,” [Ex. “A” at 2], the entirety of the record shows that, more specifically than that, the district court believed that the guidelines understated the number of victims the crime involved. The district court repeatedly stated such during the proceedings. It stated that “[e]very Compton resident that paid some form of tax to the City was a victim. Every Compton resident that was denied a service because the funding just wasn’t there was a victim.” [ER 26]. It opined that: “[t]he fact that Mr. Galvan’s theft directly impacted all of those people is an aggravating circumstance not accounted for in the guidelines range. Had he stolen from them directly, he would have faced a much higher offense level, one that would more accurately capture his culpability.” Id. At the end of the hearing, when asked

to clarify why it was imposing the sentence it selected, the district court repeated that the “guidelines did not account for the true number of victims in the case[,]” and “there were a multitude of victims.” [ER 31-32]. Because the district court was clear that it was varying upward because of its belief as to the number of victims who should be accounted for in the sentence, this case squarely presents the question of whether this was a proper basis to vary upward under section 3553(a).

B. The District Court’s Basis For Increasing The Sentence Under Section 3553(a) Was Procedurally Erroneous

In imposing a sentence, the district court must explain, based on permissible considerations, how its sentence “meshe[s] with Congress’s own view of the crimes’ seriousness.” United States v. Musgrave, 761 F.3d 602, 608 (6th Cir. 2014)(quoting United States v. Peppel, 707 F.3d 627, 635 (6th Cir. 2013)). Federal sentences are reviewed for reasonableness, and only a procedurally erroneous or substantively unreasonable sentence may be set aside. See Gall v. United States, 552 U.S. 38, 46 (2007). Procedural error includes failing to calculate (or calculating incorrectly) the proper Guidelines range, treating the Guidelines as mandatory, failing to consider the factors from 18 U.S.C. § 3553(a), choosing a sentence based on clearly erroneous facts, or failing to explain a selected sentence, including any deviation from the Guidelines range. United States v. Carty, 520 F.3d 984, 993 (9th

Cir. 2008)(en banc).

USSG § 2B1.1, cmt. n.1 provides:

“Victim” means (A) any person who sustained any part of the actual loss determined under subsection (b)(1); or (B) any individual who sustained bodily injury as a result of the offense.

USSG § 2B1.1, cmt. n.1. This loss must be “pecuniary,” which means “harm that is monetary or that otherwise is measurable in money,” and “does not include emotional distress, harm to reputation, or other non-economic harm.” Id. at n.3(A)(iii).

Contrary to the plain language of section 2B1.1 which requires an actual loss when counting victims, the district court found that “[e]very Compton resident that paid some form of tax to the City,” and “[e]very Compton resident that was denied a service because the funding just wasn’t there,” represented a “victim.” [ER 26]. If this broad approach were permissible, federal sentencing guidelines would never sufficiently account for the harm in a loss involving any large organization or entity. If every taxpayer in Compton represented a victim who should be accounted for at sentencing, then every state taxpayer would be a victim in a significant theft from their state. Or every shareholder of a corporation would be a victim in a significant theft from that company. Such an approach would yield absurd results,

where defendants who stole from a large organization where no persons were directly affected would receive longer sentences than defendants who stole from a single person, likely to a much greater effect.

Had the district court increased the section 2B1.1 guideline range under its victim theory, the Ninth Circuit would have reversed such an application. See USSG § 2B1.1, cmt. n.1 (requiring victim to have sustained “actual loss”). Deciding to apply its illogical approach as a section 3553(a) variance was similarly improper. Just as unreasonable and clearly erroneous factual findings invalidate downward variances, see, e.g., United States v. Ressam, 679 F.3d 1069, 1092-93 (9th Cir. 2012)(en banc)(invalidating downward variance on basis of district court’s “unreasonably and clearly erroneous” factual findings), United States v. Pool, 474 F.3d 1127, 1129 (8th Cir. 2007)(reversing downward variance based upon effect on defendant’s business and his employees); Musgrave, 761 F.3d at 608 (reversing downward variance based on collateral consequences of conviction), upward variances likewise are invalidated if grounded upon an unreasonable or insufficient basis. See Gall, 552 U.S. at 46 (“It is . . . clear that a district judge must give serious consideration to the extent of any departure from the Guidelines and must explain his conclusion that . . . an unusually harsh sentence is appropriate in a particular case with sufficient justifications.”).

In light of the instant record which clearly demonstrates that the district court increased Petitioner's sentence because it felt that every resident of the city was a victim of this crime who needed to be accounted for at sentencing, the Court should review this case in order to decide whether this erroneous and illogical theory, which would have been rejected if applied under the Guidelines, represented procedural error under Gall.

CONCLUSION

For the above reasons, Petitioner respectfully requests that the Court grant the instant petition to review the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted,

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