IN THE SUPREME COURT OF THE UNITED STATES

NO. _____

OCTOBER TERM, 2019

JOSE ZAMUDIO-SILVA,

Petitioner,

- v -

UNITED STATES OF AMERICA,

Respondent.

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

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Question Presented

When considering guidelines rulings, should appellate courts review the decision to depart from the guideline range in the same way as other guidelines decisions as eight circuits have held, or should the review of sentencing departures be folded into substantive reasonableness review as the Ninth Circuit found below?

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:

List of Directly Related Proceedings

1. United States District Court for the Southern District of California, *United States v. Zamudio-Silva*, No. 18-cr-04731-LAB. The district court entered the judgment and commitment on February 22, 2019. *See* Appendix C.

2. United States Court of Appeals for the Ninth Circuit, *United States v. Zamudio-Silva*, No. 19 50059. *See* Appendix A. The Ninth Circuit entered judgment on April 23, 2020, and denied a petition for rehearing and suggestion for rehearing en banc, on June 3, 2020. *See* Appendix B.

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Petitioner, Jose Zamudio-Silva, asks for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit entered April 23, 2020.

Opinion Below

The decision of the court of appeals, *United States v. Zamudio-Silva*, No. 19-50059, 2020 U.S. App. LEXIS 13098 (9th Cir. Apr. 23, 2020), appearing at Appendix A to this petition, was not published.

Jurisdiction

The Ninth Circuit denied a timely petition for rehearing and suggestion for rehearing en banc on June 3, 2020.[1] This petition is being filed within 90 days. The Court has jurisdiction under 28 U.S.C. § 1254(1).

Involved Federal Law

Zamudio-Silva's right to a parsimonious sentence is found in 18 U.S.C. Section 3553. *See* Appendix D. Zamudio-Silva's right to appellate review of the guideline decisions is found in 18 U.S.C. Section 3742(a):

> (a) Appeal by a defendant. A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—
>
> (1) was imposed in violation of law;
> (2) was imposed as a result of an incorrect application of the sentencing guidelines; or
> (3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) [18 USCS § 3563(b)(6) or (b)(11)] than the maximum established in the guideline range; or
> (4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

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[1] *United States v. Zamudio-Silva*, 2020 U.S. App. LEXIS 17485 (9th Cir. Cal., June 3, 2020), attached in Appendix A.

Statement of the Case

Jose Zamudio-Silva illegally entered the United States in the Southern District of California. He was offered and accepted a fast track plea agreement which obligated the United States to seek a two-level downward departure from the sentencing guideline range. The district court declined to award the fast track reduction because of Zamudio-Silva's history of illegal entries into the United States, and because Zamudio-Silva had received the fast track benefit before. The district court then imposed a mid-range sentence which allowed Zamudio-Silva to appeal. The total sentence imposed on Zamudio-Silva was twelve months and one day, with a six-month consecutive sentence for a probation violation. Zamudio-Silva has completed his custodial term.

Zamudio-Silva appealed to the Ninth Circuit on the grounds that the district court that rejected the departure is acting inconsistently with the requirements of the fast track program. *See, e.g., United States v. Rosales-Gonzales*, 801 F.3d 1177, 1184 (9th Cir. 2015). The current version of Guideline Section 2L1.2(b)(1)(A) specifically punishes defendants for having a prior illegal entry conviction. The enhancement "fully accounts" for the prior illegal entry. *United States v. Calozza*, 125 F.3d 687, 691 (9th Cir. 1997). Thus, it was a guideline error for the district court to use this same fact to deny the bought-and-paid-for fast track departure from the guideline range.

The Ninth Circuit found that the district court's rejection of the fast track departure was based upon more than just Zamudio-Silva's prior illegal entry conviction and that the other factors cited by the district court were sufficient to justify the rejection:

> We reject that argument because the district court properly considered Zamudio-Silva's prior conviction under USSG § 2L1.2 and properly considered that conviction as part of its decision to deny the § 5K3.1 departure. The district court did not rely solely on the prior conviction to deny the "fast track" departure. Instead, the court rejected the "fast track" departure based on Zamudio-Silva's criminal history, prior deportations, and his numerous other informal removals from the United States. The district court also found that the "speed with which" Zamudio-Silva returned to the United States after the court had previously granted him a "fast-track departure," and after Zamudio-Silva had promised not to return, supported the sentence as a deterrent to Zamudio-Silva committing "the same felony." The district court did not abuse its discretion by considering Zamudio-Silva's "past criminal and immigration history" when denying the "fast track" departure. *See Rosales-Gonzales*, 801 F.3d at 1184 (stating that under § 3553(a), the district court may consider defendant's immigration and criminal history to determine whether to grant fast-track reduction and to determine the proper sentence). Thus, the record reflects that the district court properly considered Zamudio-Silva's arguments for a "fast track" departure and the § 3553(a) factors. The within-Guidelines sentence of twelve months' imprisonment was substantively reasonable.[2]

The Ninth Circuit's analysis was based on the overall substantive reasonableness of the sentence, and did not consider the fundamental issue of whether the Sentencing Guideline Section 2L1.2 now "fully accounts" for the

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[2] *United States v. Zamudio-Silva*, No. 19-50059, 2020 U.S. App. LEXIS 13098, at *5-7 (9th Cir. Apr. 23, 2020).

existence of the prior illegal entry. *United States v. Naves*, 252 F.3d 1166, 1168 (11th Cir. 2001) ("'Impermissible double counting occurs only when one part of the Guidelines is applied to increase a defendant's punishment on account of a kind of harm that has already been fully accounted for by application of another part of the Guidelines.' *United States v. Rodriguez-Matos*, 188 F.3d at 1309 (quoting *United States v. Alexander*, 48 F.3d 1477, 1492 (9th Cir. 1995)) (citation and internal quotation marks omitted).")

Reasons to Grant the Writ

Supreme Court Rule 10 identifies a circuit split on an important issue of law as being grounds for certiorari review:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter;

In *United States v. Mohamed*, 459 F.3d 424 (9th Cir 2006), the Ninth Circuit held it duplicative to review a decision to depart from a correctly calculated sentencing guideline range because the reviewing court performs essentially that same task when considering the substantive reasonableness of the sentence: "[t]he discretion that the district court judge employs in determining a reasonable sentence will necessarily take into consideration many of the factors enumerated in Section 5K of the Sentencing Guidelines, but to require two exercises – one to calculate what departure would be allowable under the old mandatory scheme and

then to go through much the same exercise to arrive at a reasonable sentence – is redundant." *Mohamed*, 459 F.3d at 986-87. *Mohamed* focused on the issue of prejudice from the foul, stating that "even if a district court judge were to misapply a departure, this error would still be subject to harmless error review." *Id.* at 987. "Presumably, this court would then review the sentence for reasonableness to determine whether the improper departure was harmless. If we were to declare the sentence reasonable, then the erroneous departure would be harmless." *Id.* at 987. Thus, *Mohamed* concluded that "review of the so-called departure would have little or no independent value." *Id.* at 987.

As cited in numerical order, most of the other circuits to consider the issue have disagreed with *Mohamed* and held that "departures" are independently subject to appellate review. *See, e.g.*, *United States v. Selioutsky*, 409 F.3d 114, 118 (2d Cir. 2005); *United States v. Jackson*, 467 F.3d 834, 838-39 (3d Cir. 2006); *United States v. Moreland*, 437 F.3d 424, 433 (4th Cir. 2006); *United States v. Gutierrez-Hernandez*, 581 F.3d 251, 255-56 (5th Cir. 2009); *United States v. McBride*, 434 F.3d 470, 476-77 (6th Cir. 2006); *United States v. Hawk Wing*, 433 F.3d 622, 631 (8th Cir. 2006); *United States v. Sierra-Castillo*, 405 F.3d 932, 936 n.2 (10th Cir. 2005); *United States v. Jordi*, 418 F.3d 1212, 1215 (11th Cir. 2005). The Seventh Circuit agrees with the Ninth Circuit's view. *United States v. Pankow*, 884 F.3d 785, 792 n.9 (7th Cir. 2018).

First, what *Mohamed* sees as an irrelevant redundancy does allow for a type of error correction that substantive reasonableness review misses. Sometimes, legal context is necessary to evaluate a departure. *United States v. Taylor*, 499 F.3d 94, 99 (1st Cir. 2007) (stating basis of disagreement with *Mohamed*). Sometimes judges are not allowed to deny a defendant his bought and paid for fast track departure. *United States v. Rosales-Gonzales*, 801 F.3d 1177, 1184 (9th Cir. 2015) (district court errs if it denies fast track as part of a blanket policy). The procedural rejection of a departure can be wrong and that is something not captured by substantive reasonableness review.

Second, this Court's recent plain error cases show that the Court believes each and every guideline step is important down to the smallest of guideline errors. *See Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1910 (2018) (miscalculating criminal history by double counting a misdemeanor conviction warranted a plain error reversal); *Molina-Martinez v. United States*, 136 S. Ct. 1338 (2016) (unanimous reversal on plain error review of one level miscalculation of criminal history). Third, *Mohamed*'s skipping of the departure review step not only deviates from the majority view on what is supposed to be a uniform, national system,[3] it ignores the central principle of the guidelines which is that the properly calculated guideline range is "not only the starting point for most federal sentencing

[3] *See, e.g., Gall v. United States*, 552 U.S. 38, 70, 128 S. Ct. 586, 608 (2007) (noting "Congress' direction to establish uniform national sentencing policies. . ..")

proceedings but also the lodestar." *Molina-Martinez v. United States*, 136 S. Ct. at 1346.

Mohamed is premised on the assumption that there is really no difference between reviewing the propriety of a departure versus the overall substantive reasonableness of the sentence. The First Circuit explained the flaw with that approach for certain types of departure requests which can only be evaluated within their legal context. *United States v. Taylor*, 499 F.3d 94, 99 (1st Cir. 2007). *Taylor* was concerned about the granting of a downward departure in the context of the Sentencing Commissions's nonbinding policy statements and found that the reviewing court had to consider those policies independently:

> Thus, we think that where a party challenges a sentence as unreasonable because a district court has misconstrued a Sentencing Commission policy statement, appellate review should consist of determining whether a district court has correctly interpreted the policy statement and whether it has reasonably applied the policy statement to the facts of the case. Once we have determined that a district court has complied with its statutory obligation to correctly consider the Sentencing Commission policy statements, appellate review of the ultimate sentence, including the weighing of those policy statements against the other § 3553(a) factors, should be for "reasonableness." *Booker*, 543 U.S. at 261.[4]

United States v. Taylor, 499 F.3d at 99.

Taylor demonstrates the inherent flaw in *Mohamed*'s approach and how it creates a class of irremediable guideline violations. Nothing would stop a district

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[4] *United States v. Booker*, 543 U.S. 220, 262, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005).

judge from simply dispensing with this whole departure business and issuing sentences based solely on 18 U.S.C. Section 3553. If *Mohamed* controls, then this hypothetical district judge would save a lot time in not dealing with departure requests, and courts would be unable to intervene with a reversal since they could never reach the question since the sentences were reasonable under Section 3553.

This Court's decision in *Molina-Martinez* demonstrates that the two main underpinnings of *Mohamed* are wrong. The first rationale – that the ultimate Guidelines determination is inconsequential because the sentencing judge can always impose what he or she wants based on reasonableness – is simply not the way sentencing practice has unfolded during the decade after *Booker* and *Mohamed* were decided. "The [Sentencing] Commission's statistics demonstrate the real and pervasive effect the Guidelines have on sentencing." *Molina-Martinez*, 136 S. Ct. at 1346. "The sources confirm that the Guidelines are not only the starting point for most federal sentencing proceedings but also the lodestar. . . . In the usual case, then, the systemic function of the selected Guidelines will affect the sentence." *Id.* Thus, the Supreme Court has repeatedly stated that "[e]ven if the sentencing judge sees a reason to vary from the Guidelines, if the judge uses the sentencing range as the beginning point to explain the decision to deviate from it, then the Guidelines are in a real sense the basis for the sentence." *Id.* at 1345 (quoting *Peugh v. United States*, 133 S. Ct. 2072, 2083 (2013)).

The second *Mohamed* rationale – harmless error analysis makes review of departures unnecessary – is also undermined by *Molina-Martinez*. *Mohamed* viewed harmless error analysis with reasonableness review, since if the sentence is reasonable, it does not matter how it was determined. But in explaining prejudice in *Molina-Martinez*, even under plain error review, this Court rejected such an approach. "In most cases a defendant who has shown that the district court mistakenly deemed applicable an incorrect, higher Guidelines range has demonstrated a reasonable probability of a different outcome." *Molina-Martinez*, 136 S. Ct. at 1346. "Where . . . the record is silent as to what the district court might have done had it considered the correct Guidelines range, the court's reliance on an incorrect range in most instances will suffice to show an effect on the defendant's substantial rights." *Id.* at 1347. This analysis cannot be squared with the view that the reasonableness of the sentence controls. If reasonableness controlled, *Molina-Martinez* should have come out the other way.

Finally, Zamudio-Silva's case shows why the proper calculation of the guideline is necessary. In affirming Zamudio-Silva's conviction, the Ninth Circuit noted that it was within the guideline range without observing that the whole argument rests on whether the guideline range was correctly calculated. *United States v. Zamudio-Silva*, 2020 U.S. App. LEXIS 13098, *7 (9th Cir. Cal. April 23, 2020) ("The within-Guidelines sentence of twelve months' imprisonment was substantively reasonable.")

Conclusion

Were Zamudio-Silva in eight other circuits, the reviewing court would have considered his "fully accounted" for argument in deciding whether fast track was properly denied. Because that majority rule is the correct one and because it could save Zamudio-Silva some incarceration should he ever return to the United States, he asks that the Court grant his petition for certiorari.

Respectfully submitted,

Dated: July 16, 2020

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