No.

In the

Supreme Court of the United States

RAUL FLORES-VILLALVASO, Petitioner

v.

UNITED STATES, Respondent

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

Petition for Writ of Certiorari

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Questions Presented For Review

I. Whether the 8 U.S.C. § 1326 Attempted Illegal Reentry mens rea element of "specific intent" can be restated as simply "a conscious desire" with no reference at all to intention or purpose. The Ninth Circuit in this case, and the district court below it and the indictment, all substituted the phrase "conscious desire" for the mens rea of "specific intent," entirely omitting "purpose," "objective" and even "intent."

> "Thus, by reciting the specific intent element in terms of "conscious desire," the magistrate judge fulfilled her duty to inform Flores-Villalvaso of the nature of his illegal reentry charge in compliance with Rule 11(b)(1)(G)." [Emphasis added.]

United States v. Flores-Villalvaso, Nos. 20-10039, 20-10040, 2020 U.S. App. LEXIS 36371, pp.2-3 (9th Cir. Nov. 19, 2020) (memorandum opinion). Specific intent was defined to Mr. Flores-Villalvaso, both in the district court and on appeal, as nothing more than a "conscious desire."

II. Whether Mr. Flores-Villalvaso's Criminal History Category Of VI was over-represented where his entire criminal history is for the crime of being an illegal alien and whether his total consecutive sentences of 45 months for attempted illegal reentry and for a supervised release violation, which were based on such an over-represented criminal history, were "sufficient, but not greater than necessary," as required by 18 U.S.C. § 3553(A).

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United States v. Flores-Villalvaso, Nos. 20-10039, 20-10040, 2020 U.S. App. LEXIS 36371 (9th Cir. Nov. 19, 2020) (memorandum opinion).

Statement of the Basis for Jurisdiction

The order of the United States Court of Appeals for the Ninth Circuit denying Petitioner's Appeal was entered on November 19, 2020. Petitioner's motion for rehearing was denied on December 23, 2020. This Petition for Writ of Certiorari is timely filed within 90 days of that date, pursuant to Supreme Court Rule 13. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

Pursuant to Rule 29.4, service has been made on the United States Solicitor General.

Constitutional and Federal Provisions Involved

U.S. CONST. amend. 5 provides in pertinent part:

> "No person shall be … deprived of life, liberty, or property, without due process of law …"

8 U.S.C. § 1326 provides in pertinent part:

> "any alien who … enters, attempts to enter, or is at any time found in, the United States …"

18 U.S.C. § 3553(a) provides in pertinent part:

> "The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—
>
> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
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> (2) the need for the sentence imposed—
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> > (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
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> > (B) to afford adequate deterrence to criminal conduct;
> >
> > (C) to protect the public from further crimes of the defendant; and

> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner …"

Fed. Rule Crim. Proc. 11(b)(1)(G) provides in pertinent part:

> "Before the court accepts a plea of guilty or nolo contendere … the court must inform the defendant of, and determine that the defendant understands … the nature of each charge to which the defendant is pleading…"

U.S.S.G. § 4A1.3(b)(1) provides in pertinent part:

> "If reliable information indicates that the defendant's criminal history category substantially over-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes, a downward departure may be warranted."

Statement of the Case

The district court had subject matter jurisdiction pursuant to 18 U.S.C. § 3231 because the defendant was charged with a federal crime. The Ninth Circuit Court of Appeals had jurisdiction over the direct appeal pursuant to 28 U.S.C. § 1291 based on the entry of the final judgment by the district court on January 21, 2020.

Mr. Flores-Villalvaso pled guilty to the indictment in CR 19-1504-TUC-CKJ with no plea agreement. (CR 17.)

Mr. Flores -Villalvaso admitted the petition to revoke supervised release in CR 15-977-TUC-CKJ with no disposition agreement. (CR 33.)

ARGUMENT

I
Mr. Flores-Villavaso was Misinformed of the Elements of the Offense of Attempted Reentry When the Court Exchanged a "Conscious Desire" for the Element of "Specific Intent"

This decision of U.S. Court of Appeals decided an important federal question in a way that conflicts with relevant decisions of this Court. Mr. Flores-Villalvaso pled guilty to the specific intent offense of 8 U.S.C. § 1326(a) Attempted Illegal Reentry without anyone ever mentioning the *mens rea* element of specific intent. Instead, the indictment, the magistrate judge reading from the indictment at the Rule 11 colloquy and the Government all substituted the term "conscious desire" for "specific intent." The 8 U.S.C. § 1326 Attempted Illegal Reentry mens rea element of "specific intent" cannot be restated, as it was here, as simply "a conscious desire." The Rule 11 plea colloquy misstated the mens rea element of the offense to which Mr. Flores-Villalvaso pled guilty, rendering his plea involuntary and in violation of the Rule 11(b)(1)(G) requirement to insure that the defendant understands the nature of the charge to which he pled guilty.

> "On or about May 13, 2019, at or near Bisbee, in the District of Arizona, Raul Flores-Villalvaso, an alien, <u>had the conscious desire to enter</u>, and took a substantial step in attempting to enter, the United States of America after having been denied admission, excluded, deported, and removed therefrom at or near El Paso, Texas, on or about April 25, 2017, and not having

obtained the express consent of the Attorney General or the Secretary of the Department of Homeland Security to reapply for admission thereto; in violation of Title 8, United States Code, Section 1326(a), enhanced by Title 8, United States Code, Section 1326(b)(1)." [Emphasis added.]

(CR 7; EOR 2 – Indictment.)

THE COURT: Okay. Thank you.

Now, Mr. Flores, in order for you to be found guilty of Attempted Illegal Reentry, the government would have to prove that on or about May 13, 2019, at or near Bisbee, Arizona, you, an alien, had the conscious desire to enter, and took a substantial step in attempting to enter the United States after having been previously denied admission, excluded, deported, and removed therefrom, at or near El Paso, Texas, on or about April 25, 2017, and not having obtained the express consent of the U.S. Attorney General or the Secretary of Homeland Security to reapply for admission thereto.

Do you understand what the government would have to prove?

THE DEFENDANT: Yes.

THE COURT: And do you understand the charge of Attempted Illegal Reentry of Removed Alien?

THE DEFENDANT: Yes.

THE COURT: And, Mr. DeJoe, could you provide a factual basis, please.

MR. DEJOE: Yes, Your Honor.

On May 13, 2019, the defendant was found attempting to enter the United States near Bisbee, in the District of Arizona. The defendant is not a citizen or national of the United States, and he had the conscious desire to enter, and took a substantial step in attempting to enter the United States after having been

> deported through El Paso, Texas, on April 25, 2017, and attempting to return without receiving the express consent of the Attorney General or the Secretary of the Department of Homeland Security to reapply for admission to the United States.
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> THE COURT: Thank you.
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> [Emphasis added.]

(RT August 21, 2019, pp.10-11; EOR 13-14.)

Nowhere, in the indictment or in the change of plea hearing, does anyone ever mention specific intent or even any kind of intent. "Wanting" something and "specific intent" are not the same thing. With Americans convinced that the entire world wants to live here, a "conscious desire" sweeps far too broadly to function as a proxy for "specific intent."

The source of this "conscious desire" language as a proxy for "specific intent" is a direct line of cases explaining "specific intent," but explaining it in far more than a two simple words, using additional words like "purpose," "an intent to do that thing at a particular time and place," "consciously desired that result" and "specific intent to reenter free from official restraint".

> "We first outlined the elements of attempted illegal reentry in Gracidas-Ulibarry. We explained that '(1) the defendant had the purpose, i.e., conscious desire, to reenter the United States without the express consent of the Attorney General; (2) the defendant committed an overt act that was a substantial step towards reentering without that consent; (3) the defendant was

not a citizen of the United States; (4) the defendant had previously been lawfully denied admission, excluded, deported or removed from the United States; and (5) the Attorney General had not consented to the defendant's attempted reentry.' Id. at 1196. We held that the first element, conscious desire to reenter, meant that the defendant had the specific intent to reenter. Id. Five years later in Lombera-Valdovinos, we specified more precisely that conscious desire to reenter meant specific intent to reenter free from official restraint. 429 F.3d at 928. In doing so, we explained that specific intent to enter free from official restraint meant intent to go 'at large within the United States" and "mix with the population.' Id. at 929 (quoting United States v. Hernandez-Herrera, 273 F.3d 1213, 1218 (9th Cir. 2001))." [Emphasis added.]

United States v. Castillo-Mendez, 868 F.3d 830, 836 (9th Cir. 2017).

"The confusion between general and specific intent has been the catalyst for a movement to replace these categories with a hierarchy of four levels of culpable states of mind, defined with greater clarity: purpose, knowledge, recklessness and negligence. See Bailey, 444 U.S. at 404; Model Penal Code & Commentaries, supra, § 2.02, at 225-26; see also 1 LaFave & Scott, supra, § 3.4(c), at 299-300. This movement is best exemplified in the Model Penal Code, which the Supreme Court has relied upon as a 'source of guidance . . . to illuminate' the meaning of and distinctions between intent requirements. United States v. United States Gypsum Co., 438 U.S. 422, 444, 57 L. Ed. 2d 854, 98 S. Ct. 2864 (1978). In general, 'purpose' corresponds to the concept of specific intent, while 'knowledge' corresponds to general intent. See Bailey, 444 U.S. at 405; Model Penal Code & Commentaries, supra, § 2.02 cmt. at 233-34. A person who causes a result prohibited by common law or statute is said to have acted purposely if he or she consciously desired that result, whatever the likelihood of that result ensuing from his or her actions. See Bailey, 444 U.S. at 404; United States Gypsum, 438 U.S. at 444; Model Penal Code & Commentaries, supra, § 2.02, at 225." [Emphasis added.]

United States v. Gracidas-Ulibarry, 231 F.3d 1188, 1195-96 (9th Cir. 2000).

> "Few areas of criminal law pose more difficulty than the proper definition of the mens rea required for any particular crime.
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> . . .
>
> "At common law, crimes generally were classified as requiring either 'general intent' or 'specific intent.' This venerable distinction, however, has been the source of a good deal of confusion. As one treatise explained:
>
> "Sometimes 'general intent' is used in the same way as 'criminal intent' to mean the general notion of mens rea, while 'specific intent' is taken to mean the mental state required for a particular crime. Or, 'general intent' may be used to encompass all forms of the mental state requirement, while 'specific intent' is limited to the one mental state of intent. Another possibility is that 'general intent' will be used to characterize an intent to do something on an undetermined occasion, and 'specific intent' to denote an intent to do that thing at a particular time and place.' W. LaFave & A. Scott, Handbook on Criminal Law § 28, pp. 201-202 (1972) (footnotes omitted) (hereinafter LaFave & Scott).
>
> "This ambiguity has led to a movement away from the traditional dichotomy of intent and toward an alternative analysis of mens rea. See id., at 202. This new approach, exemplified in the American Law Institute's Model Penal Code, is based on two principles. First, the ambiguous and elastic term 'intent' is replaced with a hierarchy of culpable states of mind. The different levels in this hierarchy are commonly identified, in descending order 'of culpability, as purpose, knowledge, recklessness, and negligence. See LaFave & Scott 194; Model Penal Code § 2.02. Perhaps the most significant, and most esoteric, distinction drawn by this analysis is that between the mental states of 'purpose' and 'knowledge.' As we pointed out in United States v. United States Gypsum Co., 438 U.S. 422, 445 (1978), a person who causes a particular result is said to act purposefully if 'he consciously desires that result, whatever the likelihood of that result happening from his conduct,' while he is said to act knowingly if he is aware ''that that result is

practically certain to follow from his conduct, whatever his desire may be as to that result.'

"In the case of most crimes, 'the limited distinction between knowledge and purpose has not been considered important since 'there is good reason for imposing liability whether the defendant desired or merely knew of the practical certainty of the results.' United States v. United States Gypsum Co., supra, at 445, quoting LaFave & Scott 197. Thus, in Gypsum we held that a person could be held criminally liable under § 1 of the Sherman Act if that person exchanged price information with a competitor either with the knowledge that the exchange would have unreasonable anticompetitive effects or with the purpose of producing those effects. 438 U.S., at 444-445, and n. 21.

. . .

"Another such example is the law of inchoate offenses such as attempt and conspiracy, where a heightened mental state separates criminality itself from otherwise innocuous behavior. See Model Penal Code § 2.02, Comments, p. 125 (Tent. Draft No. 4, 1955) (hereinafter MPC Comments).

"In a general sense, 'purpose' corresponds loosely with the common-law concept of specific intent, while 'knowledge' corresponds loosely with the concept of general intent. See ibid.; LaFave & Scott 201-202." [Emphasis added.]

United States v. Bailey, 444 U.S. 394, 403-05 (1980).

"The element of intent in the criminal law has traditionally been viewed as a bifurcated concept embracing either the specific requirement of purpose or the more general one of knowledge or awareness.

"'[It] is now generally accepted that a person who acts (or omits to act) intends a result of his act (or omission) under two quite different circumstances: (1) when he consciously desires that result, whatever the likelihood of that result happening from his conduct; and (2) when he knows that the result is practically certain to follow from his conduct, whatever his desire may be

> as to that result.' W. LaFave & A. Scott, Criminal Law 196 (1972)." [Emphasis added.]

United States v. United States Gypsum Co., 438 U.S. 422, 445 (1978).

A desired outcome is a useful feature for distinguishing between specific intent and general intent. It helps to determine what motivates an action, what the purpose of an action was. No one has ever suggested, however, that "desire" could simply replace "specific intent" as an element. People brim with desires – money, sex, fame, world peace, personal ambition, acceptance, social status, living circumstances. The list is literally endless, with urges overlapping, contradicting and competing, sometimes controlled, sometimes not, sometimes shared in-common with other people and sometimes shared not at all by other people.

If "specific intent" were equivalent to a "conscious desire," then 9TH CIR. CRIM. JURY INSTR. 5.4 (Specific Intent) would be a lot more straightforward than the rather circumspect non-instruction that exists now. The Ninth Circuit Jury Instructions Committee is not willing to commit to anything more than a comment. The instruction has been nothing more than a placeholder for decades because of the complexity of defining specific intent. The Government, however, has no trouble looking at a headnote ("i.e., conscious desire") and defining specific intent as nothing more than a "conscious desire" and then substituting that language into the indictment,

into the plea agreement and into the factual basis at the change of plea hearing. If that was a legitimate equivalence, the Committee could have signed off on that definition years ago.

In *United States v. Spatig*, 870 F.3d 1079 (9th Cir. 2017), the Ninth Circuit recently reached defined specific intent in terms of purpose or objective, with no reference at all to conscious desire.

> "Black's Law Dictionary provides guidance about the difference between general and specific intent. At the time § 6928(d)(2)(A) was passed, the dictionary observed that the 'most common usage of 'specific intent' is to designate a special mental element which is required above and beyond any mental state required with respect to the actus reus of the crime.' Specific Intent, Black's Law Dictionary (6th ed. 1990). Currently, it interprets 'specific intent' as '[t]he intent to accomplish the precise criminal act that one is later charged with.' Specific Intent, Black's Law Dictionary (10th ed. 2014). These definitions boil down to the same principle: specific intent means that the defendant acted with a particular purpose or objective." [Emphasis added.]

United States v. Spatig, 870 F.3d 1079, 1083 n.1 (9th Cir. 2017). If "specific intent" was interchangeable with "conscious desire," Black's Law Dictionary would reflect that by now.

Fed. Rule Crim. Proc. 11(b)(1)(G) requires the court to "inform the defendant of, and determine that the defendant understands … the nature of each charge to which the defendant is pleading." The adequacy of a Rule 11 plea colloquy is subject to de novo review. *United States v. Minore*, 292 F.3d 1109, 1115 (9th Cir. 2002). Because Mr. Flores-Villalvaso did not object

below to the Rule 11 colloquy, his conviction may be reversed for Rule 11 error only if the district court committed plain error. *United States v. Vonn*, 535 U.S. 55 (2002). Misstating the mens rea element of the offense is plain error.

> "The plea colloquy did not satisfy the requirements of Rule 11. This is error, and it is plain.
>
> . . .
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> "… neither the court nor the prosecutor ever set forth the nature of the charges against Pena. … The defendant's right to be informed of the nature of the charges is so vital and fundamental that it cannot be said that its omission did not affect his substantial rights and the fairness, integrity, or public reputation of judicial proceedings. The district court's wholesale failure to comply with the requirements of Rule 11 requires that we reverse Pena's conviction."

United States v. Pena, 314 F.3d 1152, 1157-58 (9th Cir. 2003).

> "There is no adequate substitute for demonstrating in the record at the time the plea is entered the defendant's understanding of the nature of the charge against him."

McCarthy v. United States, 394 U.S. 459, 470 (1969).

No one, at any time, ever informed Mr. Flores-Villalvaso that the mens rea element of the offense to which he was pleading guilty was specific intent rather than "conscious desire."

II
Mr. Flores-Villalvaso's Consecutive Sentences Totaling 45 Months Were Not Sufficiently Minimal as Required by the 18 U.S.C. § 3553(A) Objectives and Were Overall Substantively Unreasonable

Review of the substantive reasonableness of a sentence is for abuse of discretion. *United States v. Spangle*, 626 F.3d 488, 497 (9th Cir. 2010) (citing *United States v. Autery*, 555 F.3d 864, 871 (9th Cir. 2009)). The Court considers "the totality of the circumstances, and presumes neither that a non-Guidelines sentence is unreasonable nor that a within-Guidelines sentence is reasonable". *United States v. Treadwell*, 593 F.3d 990, 1009 (9th Cir. 2010). The Court may reverse a sentence "if, upon reviewing the record, [the Court has] a definite and firm conviction that the district court committed a clear error of judgment. . . ." *United States v. Ressam*, 679 F.3d 1069, 1087 (9th Cir. 2012) (citing *United States v. Amezcua-Vasquez*, 567 F.3d 1050 (9th Cir. 2009)).

> "Our explanation of 'reasonableness' review in the Booker opinion made it pellucidly clear that the familiar abuse-of-discretion standard of review now applies to appellate review of sentencing decisions.
>
> "Regardless of whether the sentence imposed is inside or outside the Guidelines range, the appellate court must review the sentence under an abuse-of-discretion standard."

Gall v. United States, 552 U. S. 38, 49- 50 (2007).

Mr. Flores-Villalvaso's attorney argued at sentencing that Mr. Flores-Vallalvaso's case was exceptional as there were no offenses in his criminal history (Category VI) other than reentry offenses.

> MR. WILLIMANN: . . . The other reason I find that Mr. Flores-Villalvaso is exceptional is that there are no offenses other than immigration offenses. We've got an individual that doesn't have any drug offenses, alcohol offenses. He's not involved in smuggling aliens or drugs. This is an individual who simply -- and his crime, as I've told him before, is that he wasn't born in the United States, nor did he have any claim to living in the United States without fear of being prosecuted.

(RT January 21, 2020, pp.11-12; EOR 36-37.)

Mr. Flores-Villalvaso's entire criminal history, PSR ¶¶22-27, is for the crime of being an illegal alien. Mr. Flores-Villalvaso has never had so much as a single arrest for a single shoplifting or a DUI or a disorderly conduct. Criminal History Category VI is a rare achievement. It is hard to get there at all, let alone get there without stealing, assaulting, drug dealing or victimizing at least someone.

Mr. Flores-Villalvaso re-enters a lot, but he is obviously not very good at it. None of his removals are far enough apart for him to have ever succeeded at it. So far, his success rate is 0 for 49. As his sentencing counsel argued, he seems to suffer some kind of pathology that causes him to wander in the desert until he is arrested for illegal reentry. Other than that, he really does not bother anybody.

A person could finish a 25-year sentence for a first-degree premeditated triple murder and be a Criminal History Category II. If they did it again, they would be a Category III. Mr. Flores-Villalvaso got all the way to Category VI on nothing but reentry convictions – technically illegal, but a very different kind of illegality than what most people have to do to get to a Category VI.

Mr. Flores-Villalvaso might well be the most moral, upstanding, trustworthy, kind, loving, gentle, caring and generous human being that one has ever met. Except that he has the odd hobby of eluding, often less than successfully, Border Patrol agents in the desert. He has been caught for it 49 times now. (PSR ¶38.) And he is only 37 years old. So if he ever succeeded at it at all, it was a lark and he just went back to try it again. In between, he picks garlic for $5.00 per day. (PSR ¶44.)

U.S.S.G. § 4A1.3(b) contemplates a downward departure in such pitiful circumstances where the defendant's criminal history category substantially over-represents the seriousness of the defendant's criminal history. 18 U.S.C. § 3553(a) is similarly preceded by the "parsimony principle." *Dean v. United States*, 137 S. Ct. 1170, 1175 (2017). It similarly requires a consideration of the history and characteristics of the defendant – a history here that is non-violent, non-dangerous, non-drug related, non-moral turpitude and not even all that blameworthy.

> "It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue." *Koon v. United States*, 518 U.S. 81, 113, 116 S. Ct. 2035, 135 L. Ed. 2d 392 (1996)."

Pepper v. United States, 562 U. S. 476, 487 (2011). Mr. Flores-Villalvaso is a unique study. But also a harmless one. Forty-five consecutive months to deter Mr. Flores-Villalvaso from wandering in the desert is substantively unreasonable and is based on a highly overrepresented Criminal History Category. "[A] sentence of imprisonment may work to promote not respect, but derision, of the law if the law is viewed as merely a means to dispense harsh punishment without taking into account the real conduct and circumstances involved in sentencing." *Gall v. United States*, 552 U.S. 38, 54 (2007).

Rather than taking into account "the real conduct and circumstances" that should have produced a lower sentence, the court ignored those circumstances and simply focused upon imposing a higher sentence than Mr. Flores-Villalvaso had received previously. A sentence is unlikely to promote deterrence where it is perceived as arbitrary or premised on an error of law. *Gall v. United States*, 552 U.S. 38, 54 (2007).

The sentence is also far greater than necessary to protect the public from further crimes, since Mr. Flores-Villalvaso has never committed any

crimes against the public. 18 U.S.C. § 3553(a)(2)(C) (the sentence imposed should "protect the public from further crimes of the defendant").

CONCLUSION

Based on plain error in the magistrate judge's misstatement of the mens rea element of the offense of 8 U.S.C. § 1326(a) and a resulting Rule 11(b)(1)(G) failure to insure that the defendant understands the nature of the charge to which he pled guilty, Mr. Flores-Villalvaso requests that his conviction be vacated and that case be remanded to the district court. This frolic, this diversion that Mr. Flores-Villalvaso has devised to amuse himself when he is not picking garlic, lacks any sort of specific intent to enter the United States. Mr. Flores-Villalvaso might, deep down, "want" to enter the United States, but that is not what he had specifically set out to accomplish. This charge of illegal reentry would be defensible had the magistrate judge not substituted "desire" for "specific intent" at Mr. Flores-Villalvaso's change of plea hearing.

As Mr. Flores-Villalvaso's consecutive sentences totaling forty-five consecutive months are substantively unreasonable and are based on a highly overrepresented Criminal History Category, Mr. Flores-Vallalvaso requests that this matter be remanded for resentencing. A Criminal History Category VI based on nothing more than reentry offenses entirely overstates

Mr. Flores-Villalvaso's degree of criminality. Mr. Flores-Villalvaso is a nuisance. But he has never hurt anyone, stolen anything or even trafficked any drugs. A Category VI sentence based on such a harmless background is excessive. The Sentencing Guidelines are a good starting point. But a Guidelines sentence, as an ending point, is not even presumed reasonable. *United States v. Perez*, 962 F.3d 420, 447 (9th Cir. 2020).

Dated February 2, 2021.

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