No. _____

In the

Supreme Court of the United States

CENOBIO HUMBERTO HERRERA, SR., Petitioner

v.

UNITED STATES OF AMERICA, 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

1. Did the Ninth Circuit err in failing to vacate the district court's order because the court based its analysis on two clearly erroneous facts—the amount of methamphetamine that could have been produced from the pseudoephedrine involved in the case, and the custodial status of the only other co-defendant to take the case to trial?

2. Did the Ninth Circuit err in failing to recognize the district court's abuse of discretion where it concluded that Mr. Herrera's age and health conditions did not warrant release under § 3553(a)?

Statement of Related Proceedings

- *United States v. Cenobio Humberto Herrera, Sr.,* 20-50213 (9th Cir. Jun. 29, 2021)
- *United States v. Cenobio Humberto Herrera, Sr.,* 2:02-cr-00531-RSWL (C.D. Cal. Dec. 23, 2003)
- *United States v. Cenobio Humberto Herrera, Sr.,* 20-50127 (9th Cir. May 13, 2020)
- *United States v. Cenobio Humberto Herrera, Sr.,* 17-56666 (9th Cir. Dec. 18, 2017)
- *United States v. Cenobio Humberto Herrera, Sr.,* 2:15-cv-07260-GHK (C.D. Cal. Oct. 16, 2017)
- *United States v. Cenobio Humberto Herrera, Sr.,* 17-56462 (9th Cir. Dec. 18, 2017)
- *United States v. Cenobio Humberto Herrera, Sr.,* 2:11-cv-10505-RSWL (C.D. Cal. Jan. 17, 2013)
- *United States v. Cenobio Humberto Herrera, Sr.,* 15-73045 (9th Cir. Feb. 29, 2016)
- *United States v. Cenobio Humberto Herrera, Sr.,* 15-56645 (9th Cir. Jun. 15, 2016)
- *United States v. Cenobio Humberto Herrera, Sr.,* 2:00-cr-00201-ODW-3 (C.D. Cal. Feb. 21, 2003)
- *United States v. Cenobio Humberto Herrera, Sr.,* 13-56846 (9th Cir. Jul. 28, 2014)
- *United States v. Cenobio Humberto Herrera, Sr.,* 13-56634 (9th Cir. May 22, 2014)
- *United States v. Cenobio Humberto Herrera, Sr.,* 13-55654 (9th Cir. May 22, 2014)
- *United States v. Cenobio Humberto Herrera, Sr.,* 12-56971 (9th Cir. Aug, 21, 2014)
- *United States v. Cenobio Humberto Herrera, Sr.,* 2:11-cv-06486-RSWL-MAN (C.D. Cal. Oct. 1, 2012)
- *United States v. Cenobio Humberto Herrera, Sr.,* 12-55372 (9th Cir. Jun. 21, 2012)
- *United States v. Cenobio Humberto Herrera, Sr.,* 2:12-cv-00976-JSL-MAN (C.D. Cal. Feb. 8, 2012)
- *United States v. Cenobio Humberto Herrera, Sr.,* 09-57046 (9th Cir. Mar. 17, 2010)
- *United States v. Cenobio Humberto Herrera, Sr.,* 2:09-cv-08218-UA-DUTY (C.D. Cal. Dec. 4, 2009)

- *Cenobio Humberto Herrera, Sr. v. United States,* 10-11111 (Supreme Court, Oct. 3, 2011)
- *United States v. Cenobio Humberto Herrera, Sr.,* 09-50275 (9th Cir. Feb. 7, 2011)
- *United States v. Cenobio Humberto Herrera, Sr.,* 08-71491 (9th Cir. Jun. 10, 2008)
- *United States v. Cenobio Humberto Herrera, Sr.,* 08-55664 (9th Cir. Jul. 14, 2008)
- *United States v. Cenobio Humberto Herrera, Sr.,* 2:07-cv-02229-SJO (C.D. Cal. Apr. 10, 2007)
- *United States v. Cenobio Humberto Herrera, Sr.,* 08-50138 (9th Cir. Feb. 23, 2009)
- *United States v. Cenobio Humberto Herrera, Sr.,* 08-50087 (9th Cir. Jul. 9, 2008)
- *United States v. Cenobio Humberto Herrera, Sr.,* 2:97-cr-00206-GHK-1 (C.D. Cal. May 8, 2000)
- *United States v. Cenobio Humberto Herrera, Sr.,* 06-55394 (9th Cir. Jan. 25, 2007)
- *United States v. Cenobio Humberto Herrera, Sr.,* 2:04-cv-09880-DT (C.D. Cal. Feb. 28, 2006)
- *United States v. Cenobio Humberto Herrera, Sr.,* 05-56258 (9th Cir. Nov. 25, 2005)
- *United States v. Cenobio Humberto Herrera, Sr.,* 2:05-cv-00251-GHK (C.D. Cal. Jul. 21, 2005)
- *United States v. Cenobio Humberto Herrera, Sr.,* 04-50000 (9th Cir. Jan. 23, 2007)
- *United States v. Cenobio Humberto Herrera, Sr.,* 03-50091 (9th Cir. Apr. 26, 2004)
- *United States v. Cenobio Humberto Herrera, Sr.,* 02-50218 (9th Cir. Feb. 19, 2003)
- *United States v. Cenobio Humberto Herrera, Sr.,* 00-50115 (9th Cir. Feb. 6, 2002)

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In the

Supreme Court of the United States

CENOBIO HUMBERTO HERRERA, SR., Petitioner

v.

UNITED STATES OF AMERICA, Respondent

Petition for Writ of Certiorari

Cenobio Humberto Herrera, Sr. petitions for a writ of certiorari to review the memorandum decision entered by the United States Court of Appeals for the Ninth Circuit affirming the denial of Mr. Herrera's motion under 18 U.S.C. § 3582(c)(1)(A).

Opinions Below

The Ninth Circuit's memorandum disposition affirming the denial of Mr. Herrera's 18 U.S.C. § 3582(c)(1)(A) motion was not published. (App. 1a-2a.) The district court issued written orders denying Mr. Herrera's initial motion and his renewed motion. (App. 3a-29a.)

Jurisdiction

The Ninth Circuit issued its memorandum disposition affirming the denial of Mr. Herrera's 18 U.S.C. § 3582(c)(1)(A) motion on June 29, 2021. (App. 1a-2a.) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Statutory Provisions Involved

18 U.S.C. § 3582(c)(1)(A) provides:

> (c) Modification of an Imposed Term of Imprisonment. The court may not modify a term of imprisonment once it has been imposed except that
> . . .
>
> (1) in any case
>
> (A) the court, upon motion of the Director of the Bureau of Prisons, or upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that
>
> (i) extraordinary and compelling reasons warrant such a reduction; . . .and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission[.]

Introduction

Mr. Herrera is a 76-year-old man who served with honor in the United States Marine Corps, including serving during the war in Vietnam. He has been in continuous federal custody since 1999, and is currently serving a 30-year sentence for buying and selling large amounts of cold medicine containing

pseudoephedrine in 1997 and 1998. At his trial, the jury found that Mr. Herrera knew or had reason to know that the people to whom he was selling pseudoephedrine were using it to make methamphetamine. But there was never any suggestion that Mr. Herrera was involved the manufacturing process himself. Instead, he's serving a sentence for openly purchasing large amounts of pseudoephedrine from a pharmacy supply company, at a time when pseudoephedrine was not as highly regulated as it is today, and re-selling it for a profit.

Fast forward to 2020. Mr. Herrera is in a low security facility. He's on track to earn all the good time credit available to him, and works in the prison's legal department. But the decades in custody have taken a toll on his health. He has had multiple heart surgeries and still has heart problems that put him at risk for sudden cardiac arrest. His kidneys are failing. He's had surgery on both knees, and reports bouts of dizziness and some difficulty in walking up stairs. He is blind in one eye and partially blind in the other. Based on his age and medical conditions, he asked the district court to reduce his sentence under the compassionate release statute.

The district court concluded that he satisfied the threshold eligibility criteria for release, but declined to release him as a discretionary matter. While crediting Mr. Herrera's health problems and his viable release plan, the district court viewed his crime as so serious as to foreclose any option except

keeping him in federal prison until he is 82 years old. The court faulted Mr. Herrera for failing to express remorse for his offense, and believed his release would result in an unwarranted disparity, given another co-defendant was still in custody for similar conduct.

The court's decision was founded on a pair of faulty premises. One, the district court repeated a mathematical error that has been present since the drafting of the PSR in 2002. The PSR wrongly calculated the quantity of methamphetamine that could have been produced from the amount of pseudoephedrine involved. Though Mr. Herrera pointed out the math error, the district court repeated it in its order. In so doing, the district court overestimated by nearly one thousand kilograms how much methamphetamine could have been manufactured from the cold medicine involved in the offense. And two, the district court was wrong about the co-defendant; she had been released from BOP custody before the district court issued its order. Given that the district court considered the case a close one, these errors warranted remand for a new exercise of discretion. The Ninth Circuit erred in failing to do so.

But regardless of these errors, the Ninth Circuit should have been left with the definite and firm conviction that the court below committed a clear error of judgment. The finding that Mr. Herrera's offense, buying and sending large amounts of pills containing pseudoephedrine, was so serious that it could

not be overcome by his age, his serious health conditions, his solid plan for re-entry into the community, and two decades earning all available good time credit lacks a basis in reason. The district court's decision should have been vacated. This Court should grant certiorari and correct the error.

Statement of the Case

On January 23, 2020, Mr. Herrera filed a pro se motion to reduce his sentence under § 3582(c)(1)(A). Counsel subsequently entered a notice of appearance in the case and filed a supplemental brief. In those two briefs, Mr. Herrera argued that he had satisfied the requirement of exhaustion because he presented his request to the Warden on January 19, 2020. (ER-21.) As an extraordinary and compelling reason for release, he pointed to the Guidelines' policy statement, which includes among the categories of extraordinary and compelling reasons this age-based criteria:

> The defendant (i) is at least 65 years old; (ii) is experiencing a serious deterioration in physical or mental health because of the aging process; and (iii) has served at least 10 years or 75 percent of his or her term of imprisonment, whichever is less.

U.S.S.G. § 1B1.13, application note 1(B). Mr. Herrera is 76 years old, and had been in custody far more than ten years. (ER-69-70.) The BOP staff that reviewed his requests certified that he "suffer[ed] from chronic or serious

medical conditions relating to the aging process." (ER-53.) As such, Mr. Herrera argued that he met the baseline criteria for release.

Mr. Herrera argued that the § 3553(a) weighed in favor of his release as well. He argued that his offense, while serious, resulted in him being treated as a drug kingpin when his conduct was closer to trafficking in cold medicine for a significant profit. (ER-75.) He also argued that the PSR contained a mathematical error: It stated that 1.5 pounds of pseudoephedrine would yield one pound of methamphetamine—a yield of 66%—but that Mr. Herrera's 1,202 kilograms of pseudoephedrine could have yielded 1,762.9 kilograms of methamphetamine—a yield of close to 150%. (ER-5.) It appears that the PSR author applied the formula backwards: 1,202 kilograms of pseudoephedrine would in fact yield 793.32 kilograms of methamphetamine, meaning the PSR had overstated the quantity by almost one thousand kilograms.

In terms of his history and characteristics, Mr. Herrera pointed to his years of active duty in the Marine Corps, including serving in Vietnam during the war. His age and severe medical conditions were both relevant to his characteristics and to his likelihood of recidivism—a 76-year-old person who has heart failure after a triple bypass surgery and four stents, chronic kidney disease, double knee surgery, and blind in one eye doesn't seem particularly likely to commit new crimes, and Sentencing Commission statistics bear out that individuals released at his age are highly unlikely to be reincarcerated for

new criminal conduct. U.S. Sentencing Commission, *The Effects of Aging on Recidivism Among Federal Offenders* (Dec. 2017).[1]

He also argued that, if he were released, his family support would further reduce the likelihood of recidivism. He would live in his son's house, where his wife of 48 years already lived, and could receive health care and a pension through the Veterans Administration. (ER-77.)

On the other hand, remaining in FCI Lompoc was likely to only aggravate his medical conditions further. He argued that Lompoc seemed poised for a coronavirus outbreak, and that Mr. Herrera's heart conditions made him particularly vulnerable to the most serious effects of the virus. (ER-77.)

The government opposed the motion. It argued that Mr. Herrera was housed in a facility that was taking extraordinary steps to protect those housed there from COVID-19, and disputed that Mr. Herrera's conditions were serious enough to satisfy the age-based criteria in U.S.S.G. § 1B1.13. (ER-90, 98-99.) Finally, the government argued that Mr. Herrera was a danger to the community if he were released. In this respect, it pointed to his criminal history, which included an earlier wire-fraud offense, and the fact that he had

[1] https://www.ussc.gov/sites/default/files/pdf/research-andpublications/research-publications/2017/20171207_Recidivism-Age.pdf

never accepted responsibility for his crime, as demonstrated by his numerous meritless filings since his conviction. (ER-101-02.) The government pointed out a BOP unit team finding that, "if released, Mr. Herrera will rapidly resume participating in new criminal activities." (ER-102.) (That finding had been premised on the fact that he had provided the team no release plan, and that he had a technical supervised-release violation twenty years ago.) (ER-55.)

On April 24, 2020, the district court issued an order agreeing with Mr. Herrera that he satisfied the exhaustion requirement and that his age-related medical conditions satisfied the threshold requirements for a reduction under § 3582(c)(1). (App. 20a-24a.) It then denied the motion as a discretionary matter. The court enumerated several reasons for its denial, including that Mr. Herrera had a significant criminal history dating back to the early 1980s; that Mr. Herrera had bought large quantities of pseudoephedrine—pseudoephedrine that would yield approximately 1,792.9 kilograms of methamphetamine; that Mr. Herrera had been a prolific filer, suggesting that he did not appreciate the severity of his offense; and that Mr. Herrera's release plan was inadequate. (App. 26a-App. 29a.)

Mr. Herrera filed a timely notice of appeal, but then dismissed his appeal and instead filed a renewed motion for compassionate release based on changed circumstances: In May 2020, Mr. Herrera was one of 929 inmates—of a total population at FCI Lompoc of 963—who tested positive for COVID-19.

(ER-134.) While he was largely asymptomatic, he argued that this fact supported his cause for two reasons: He faced both a short-term risk of developing symptoms and a long-term risk that medical care at Lompoc would be swamped by this health crisis, and would neglect chronic care, for a long time. (ER-137-40.) To make that latter point, he provided records showing that an outside cardiologist had recommended evaluation for a defibrillator in December 2019, but the BOP had delayed the appointment by several months. (ER-160.) In the meantime, the left ventricle of his heart was pumping only 20-25% of its volume and he was at risk of sudden cardiac arrest. (ER-157.) The BOP had also canceled two consecutive nephrology appointments, apparently due to lock-downs at the facility. (ER-139, 163.) Given the challenges faced by the medical team stretched thin by COVID, Mr. Herrera argued that the § 3553(a) factors—and in particular the one requiring a court to consider the need to provide medical care in the most effective manner possible— tipped the balance in favor of release.

This concern would later be corroborated by the Department of Justice's OIG and by a court appointed neutral expert, both which identified lapses in Lompoc's handling of the COVID outbreak and in its provision of chronic care during the pandemic. *See* Dep't of Justice, Office of Inspector General, Remote Inspection of Federal Correctional Complex Lompoc (Jul. 23, 2020), https://oig.justice.gov/reports/remote-inspection-federal-correctional-complex.

Mr. Herrera also used his renewed motion to address points in the district court's initial denial order. He argued that his numerous attempts to challenge his sentence were less relevant to the § 3553(a) analysis than was his compliance with the rules of the facility where he was housed, and that given his significant health conditions, he was unlikely to pose a significant risk to the community. (ER-140-41.)

Finally, Mr. Herrera submitted a more fulsome release plan. He showed that he had an active referral for a veterans' re-entry program called Veterans Administration Justice Outreach. (ER-165-66.) A social worker from that program had confirmed that Mr. Herrera was entitled to health care through the VA, confirmed the VA location close to his son's house, and confirmed that Mr. Herrera was eligible for a pension through the VA. (Id.) Mr. Herrera's wife wrote that she and her son were available to transport Mr. Herrera to appointments, and she described the significant family support Mr. Herrera would have if he were released. (ER-168.)

The government again opposed, though it did not contest the district court's prior findings on the threshold questions of exhaustion and extraordinary and compelling reasons for the reduction. Instead, the government argued that Mr. Herrera's COVID-19 status and his release plan should not alter the district court's conclusion that the § 3553(a) factors counseled against release. (ER-176.)

The district court against denied the motion. The court reaffirmed its prior conclusion that Mr. Herrera had sufficiently exhausted his request, and that his age and medical conditions constituted an extraordinary and compelling reason for a sentencing reduction. (App. 6a-7a.) Nevertheless, it stood firm in its conclusion that the discretionary factors did not warrant relief. The court reiterated its prior conclusions about Mr. Herrera's criminal history and the quantity of pseudoephedrine involved—including the (still wrong) quantity of methamphetamine that could be produced from the amount of pseudoephedrine involved. (App. 9a-10a.) It repeated the fact that Mr. Herrera continued to question the legitimacy of his conviction. (App. 11a-12a.) The court minimized his concerns about missed specialist appointments as "bare allegations" that were insufficient to turn the tide on his request for compassionate release. (App. 13a.) Balancing all these factors was a "close call." (App. 15a.) But, in the end, the court concluded that the § 3553(a) factors did not warrant release. (*Id*.)

Finally, the district court added a new ground for weighing the factors against Mr. Herrera: unwarranted disparity. The court concluded that it would be unfair to release Mr. Herrera when Nelly Herrera was still in custody serving her sentence. (App. 15a.) This was not a ground argued by the government or included in the earlier order. Had the court signaled some intent to consider this factor, Mr. Herrera could have informed the court that,

in fact, Nelly Herrera had been released from custody on home confinement, due to her age, health conditions, and length of sentenced served. *See Motion for Voluntary Dismissal, United States v. Nelly Herrera*, 20-50148, at *3 (9th Cir. Jul. 1, 2020). Mr. Herrera timely appealed.

On appeal, Mr. Herrera argued that the district court made two factual errors. The first was a calculation error in the hypothetical yield of methamphetamine from the pseudoephedrine involved in the case. The second was the district court's unwarranted assumption that Mr. Herrera's sister remained in custody when in fact she had been released from custody on home confinement. He also argued that the district court's decision was an abuse of discretion, given Mr. Herrera's age and health conditions, his good conduct in custody, the length of sentence served, and the nature of his offense.

The Court rejected both arguments. It found that the calculation error was harmless because it wouldn't have changed the guideline range, and rejected the second error because, though Mr. Herrera's sister was out of custody, she technically remained under service of sentence while on home confinement. Finally, it found that the district court's weighing of the § 3553(a) factors was not an abuse of discretion. (App. 1a-2a.)

Reasons for Granting the Writ

The Ninth Circuit erred when it failed to recognize the district court's abuse of discretion in denying Mr. Herrera's motion. First, the Court should have vacated and remanded for factual error. A weighing of discretionary factors must start with a correct understanding of the relevant facts, and as such, the district court abuses its discretion when it bases a discretionary decision on incorrect factual findings. That is precisely what happened here. The district court used an erroneous calculation of the quantity of drugs that could be produced from the pseudoephedrine involved, and mistakenly assumed that Mr. Herrera's codefendant was still in custody when she was not. Given that the district court considered the case close even with those factual misapprehensions, the Court should remand the case for the district court to re-weigh the discretionary factors under a proper understanding of the facts. In failing to do so, the Ninth Circuit ignored this Court's instructions in *Gall v. United States*, 552 U.S. 38, 50 (2007), that the district court errs when it weighs the sentencing factors based on clearly erroneous facts. Because the Ninth Circuit's decision conflicts with this Court's caselaw, the Court should grant the writ.

Second, though the abuse-of-discretion standard is a difficult one to surmount, it was met in this case. Here, the district court concluded that Mr.

Herrera, a 76-year-old person, partially blind, with barely functioning kidneys and heart, who at times finds it challenging to climbs stairs, had not been sufficiently punished for his role in a cold-medicine scheme, despite his decades in custody. This decision is not based in reason. Mr. Herrera is the last co-conspirator in his case that remains in custody. The individuals who actually made methamphetamine out of the cold medicine they purchased were released in 2002 and 2003. The two individuals who trafficked twice as much pseudoephedrine as Mr. Herrera were released from custody—and one was released over a decade ago. Mr. Herrera is statistically a low risk of recidivism, and his conduct in custody and his low security placement give the Court no reason to believe that he will be a statistical outlier. That strong showing of mitigating factors cannot be overcome by the fact that Mr. Herrera has persisted in nonsensical filings or by decades' old criminal history. Concluding that Mr. Herrera must be held in custody because he is too dangerous or because twenty years has not sufficiently met the severity of this offense is not a conclusion based in reason.

Mr. Herrera has a home to return to, a wife of 48 years waiting for him, children who can take care of him, and a VA re-entry program that will ensure his transition to the community is smooth. It was an abuse of discretion to find that the sentence originally imposed is not greater than necessary to serve the purposes of punishment, given the significant mitigating factors that now

exist. In holding otherwise, the Ninth Circuit erred.

A. The District Court's Discretionary Decision is Founded on Clearly Erroneous Facts.

It is elemental that a district court cannot properly exercise its sentencing (or here, sentence-reducing) discretion if it labors under an incorrect apprehension of crucial facts. *United States v. Safirstein*, 827 F.2d 1380, 1385 (9th Cir. 1987). Where the district court "demonstrably relies" on materially untrue facts or facts lacking indicia of reliability, or where it draws "unfounded assumptions or groundless inferences" from facts in the record, this Court must remand. *Id.*; *see also United States v. Carty*, 520 F.3d 984, 993 (9th Cir. 2008) (en banc) (a district court procedurally errs when it "choose[s] a sentence based on clearly erroneous facts").

Here the district court exercised its discretion under two crucial misapprehensions of fact. The first was the quantity of methamphetamine that hypothetically could have been created from the pseudoephedrine involved in this case. The PSR states that Mr. Herrera's company purchased 1,202 kilograms of pseudoephedrine. The PSR stated that 1.5 pounds of pseudoephedrine will yield 1 pound of methamphetamine, a 66% yield rate. And yet, when the Probation Officer went to calculate the yield, he apparently applied the formula backwards, and concluded that the potential yield was 1762.9 kilograms of methamphetamine. (PSR ¶ 88.) Using the PSR's formula,

the yield for 1,202 kilograms of pseudoephedrine should have been about 793 kilograms of methamphetamine. The PSR's calculation was off almost by a thousand kilograms, more than 50%. Mr. Herrera raised his error in his brief, but the district court nevertheless repeated the incorrect quantity in its order. (ER-5, 189.)

The mathematical error would not have changed the guideline calculation. But both the mandatory guidelines then, and certainly the § 3553(a) factors now, permit a district court to consider a defendant's position within the drug table—i.e., how much the quantity exceeded the amount necessary to trigger the guideline range. (PSR ¶ 89. *See also* U.S.S.G. § 2D1.1, app. note 27(B).) In this spirit, the district court took into account the "sheer" amount of methamphetamine that could have been produced given the pseudoephedrine involved and both times quoted the erroneous figure. (ER-130, 189.) The excessive quantity was one significant factor in the district court's discussion of severity of the offense, and severity of the offense was the driving force in the court's analysis. It is reasonable to conclude, then, that the district court's thousand-kilogram error played a role in the district court's conclusion that the offense was so serious that it could not be overcome by the substantial mitigating factors. And given that the district court believed the question to be a close one even with that incorrect factual finding, (ER-194,)

this clear error prejudiced Mr. Herrera and the Ninth Circuit should have ordered a remand.

The district court also clearly erred in concluding that releasing Mr. Herrera would result in an unwarranted sentencing disparity because his sister remained in custody. (ER-194.) The government never argued this point to the district court; the district court simply made an assumption based on the fact that both had received the same sentence. But, in fact, Nelly Herrera had been released from BOP custody under home confinement prior to the district court's decision. *See* Motion for Voluntary Dismissal, *United States v. Nelly Herrera*, 20-50148, at *3 (9th Cir. Jul. 1, 2020)).[2] There was no basis in the evidence for the district court to infer that she remained in custody; indeed, only three months prior, the same district court had re-directed Ms. Herrera toward applying for home confinement under the COVID-relief bill, the CARES Act. *See* Order, *United States v. Nelly Herrera*, 2:02-cr-531-RSWL, Dkt. 541, at 10 & n.2 (C.D. Cal. May 11, 2020) (denying Ms. Herrera's request for

[2] That information was not only included in Ms. Herrera's pleading to this Court, but is publicly and readily available using the Bureau of Prisons' online inmate locator. *See* https://www.bop.gov/inmateloc. Any individual who shows as being under the supervision of an "RRM," as Ms. Herrera's record indicates, is no longer in BOP custody. The district court was clearly aware of this resource; the court, in fact, checked Mr. Herrera's BOP inmate locator data on the date of the filing of the order. (ER-191 (citing the BOP inmate locator with respect to Mr. Herrera's release date, and showing that the website was "last accessed August 10, 2020").)

release without prejudice, noting that AG Barr had ordered immediate review of all inmates for home confinement suitability and that the BOP had already increased its use of home confinement by 75%, and concluding that the BOP was better suited to decide whether release was appropriate). That order was issued three months before the order in this case. To conclude, then, that Nelly Herrera remained in custody was an unwarranted assumption that was not only wrong, but clearly erroneous. *See United States v. Corona-Gonzalez*, 628 F.3d 336, 340-41 (7th Cir. 2010) (reversing, on plain error review, for procedural error where district court made a factually baseless assumption that defendant had been deported before); *Safirstein*, 827 F.2d at 1386-87 (finding clear error in the district court's unwarranted inference that the defendant had been involved in additional criminal conduct).[3] Moreover, the error was not harmless. Given the closeness of this case, the Ninth Circuit

[3] This error should not be subject to plain-error review. The district court did not rely on any fact in the government's pleadings when it came to its conclusion, nor did it indicate to the parties that it intended to rely on Nelly Herrera's custodial status in making its decision. It held no hearing, and gave Mr. Herrera no chance to object before relying on this factor. Plain error does not apply where a defendant has no opportunity to object to the error. Fed. R. Crim. P. 51(b) ("If a party does not have an opportunity to object to a ruling or order, the absence of an objection does not later prejudice that party."); *see also United States v. Mancinas-Flores*, 588 F.3d 677, 686 (9th Cir. 2009) (declining to apply plain-error standard where defense counsel had "no chance to object, raise an exception, or otherwise remonstrate").

should have found that error prejudicial and remanded for the district court to re-exercise its discretion. In failing to do so, the Court erred.

B. This Court Should Be Left With a Firm Conviction That The District Court Reached the Wrong Conclusion Here.

Even setting aside these factual errors, the district court's ultimate conclusion was an abuse of discretion. The abuse of discretion standard precludes this Court from substituting its own judgment for that of the district court, but it does not write this Court of the process entirely. Though the standard is deferential, the Court must reverse if it is left with a "definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached." *United States v. Hinkson*, 585 F.3d 1247, 1260 (9th Cir. 2009) (en banc). It should do so where the district court's decision was "illogical, implausible, or without support in inferences that may be drawn from facts in the record." *Id.* at 1262. Put another way, for this Court to affirm, it must be able to say that the district court's exercise of judgment had "a basis in reason." *Gonzalez*, 408 F.3d at 618. And as applied to the § 3553(a) analysis, the district court's decision must satisfy the parsimony principle—the district court must conclude that the sentence is "sufficient, but not greater than necessary" to comply with the purposes of sentencing. *See* 18 U.S.C. § 3553(a); *See also United States v. Park*, 16-cr-00473, 2020 WL 1970603, at *5 (S.D.N.Y. Apr. 24, 2020) (applying the parsimony principle to the compassionate-release context,

and concluding that granting the motion was the only way to avoid a sentence "that was sufficient but no greater than necessary [when imposed] from becoming one immeasurably greater than necessary") (internal citation and quotation marks omitted).

The facts of this case met the very high standard for reversal. The district court recognized that Mr. Herrera's age and health stated an extraordinary and compelling reason for a sentencing reduction, but concluded that the severity of his offense nevertheless required his continued incarceration. (ER-194.) This lacks basis in reason. Mr. Herrera is now 76 years old. He has minimal heart function, failing kidneys, and two knees that were arthroscopically replaced. He is blind in one eye, and has low vision in the other. He experiences fatigue walking up stairs. His age and health conditions make him an unlikely candidate for future crime sprees.

And fortunately, the Court doesn't need to rely on instincts here. The Sentencing Commission keeps data on recidivism by age at release. Only 4.1% of federal defendants released after age 65 will be reincarcerated—and, of course, Mr. Herrera is deep into that age category. *See* U.S. Sentencing Comm'n, *The Effects of Aging on Recidivism Among Federal Offenders*, at 23 (Dec. 2017).[4] The Department of Justice's Office of Inspector General issued a

[4] https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171207_Recidivism-Age.pdf

report in 2013 which looked at data from a five-year period, and showed not a single re-arrest in an individual released after their 70th birthday. *See* Dep't of Justice, Office of Inspector General, *The Impact of an Aging Inmate Population on the Federal Bureau of Prisons*, at 39-40 (Feb. 2016).[5]

There is no reason to think that Mr. Herrera would be an outlier. He has been in continuous custody since 1999 and appears to be on track to earn all the good time credit available to him. (ER-76 (setting forth calculation).) He works in the law library and is housed at a low security facility. He has family support, stable housing, a VA pension, and good health care and re-entry case management services through the VA. All of these things make him an excellent candidate for release.

The district court credited each of these facts. It credited Mr. Herrera's health conditions, and in the second order, appeared to accept Mr. Herrera's release plan. (ER-193-94.) The district court also seemed to give some credence to the notion that Mr. Herrera might receive better health care in the community. (ER-191.) Even so, the district court found these mitigating facts outweighed by the seriousness of his conviction, his prior criminal history, his lack of remorse, and the sentencing disparity that would result from his release. (ER-194.) This conclusion lacks a basis in reason.

[5] https://www.oversight.gov/sites/default/files/oig-reports/e1505.pdf

In terms of the seriousness of offense, Mr. Herrera committed the instant offense as a relatively young and relatively healthy man. His offense consisted of buying large amounts of legal cold medicine, openly and from an apparently legitimate company, either knowing or having reason to believe others would use that cold medicine to make methamphetamine. That's not admirable conduct, not in the least, but in the pantheon of federal crimes, it's also not the worst. His offense didn't involve violence and was a significant step removed from the production of methamphetamine itself. And in any event, the conduct occurred in 1997 and 1998, and Mr. Herrera has been in federal custody since September 1999. His criminal history is even more dated, stretching back to 1981, and thus is even less probative of the individual Mr. Herrera is today, at age 76. (PSR ¶ 109.)

Despite these facts, the district court said that the severity of the offense outweighed all countervailing factors, and that further incarceration was necessary to protect the community, deter future misconduct, and promote respect for the law. That conclusion lacks basis in reason. Mr. Herrera's age, his health conditions, and his two decades of largely clear conduct in custody are far more probative of his current dangerousness than is his two-decades-old crimes. While there are no doubt crimes that are so serious that they couldn't be overcome by any mitigating factors, surely buying and selling cold medicine is not such a crime.

The court also noted, as a negative factor, Mr. Herrera's apparently lack of remorse. (ER-194.) But again, this factor lacks much probative value. For one thing, while Mr. Herrera's pleadings were annoyingly persistent, most of them were nonsensical and did not truly go to any unwillingness to accept guilt. Indeed, even in his § 2255 motion, where he proclaimed his "innocence," the heart of the complaint involved railing against the concept that he could be charged as if—and sentenced as if—he had actually manufactured methamphetamine. Despite harboring these feelings, Mr. Herrera has generally conformed his conduct to the rules of the facility and is a statistically low risk of recidivism. His subjective feelings of remorse are less important in the § 3553(a) calculus than these objective facts.

And finally, the district court's disparity conclusion also lacks a basis in inferences that can be drawn from the facts in the record. Nelly Herrera is in fact out of custody, and Mr. Herrera is now the only person from the entire conspiracy who remains behind bars. Given the facts as they are, the district court's decision to deny Mr. Herrera's motion is particularly illogical. Those who actually manufactured methamphetamine are out of custody. Nuvia Golding and Nelly Herrera, the ones that both participated in Mr. Herrera's scheme *and* ran an entirely separate scheme that exceeded the sales of Mr. Herrera's company, are out. There is no logical reason why Mr. Herrera should be the only one that remains behind bars.

Mr. Herrera is a minimal risk to the community, and his age and health make him a significant burden to the federal prison system. There is simply no good reason for keeping him in custody. The Ninth Ciruict should have been firmly convinced that the district court's conclusion lacked a basis in reason, and should have remanded for entry of an order granting compassionate release. In failing to do so, the Court erred.

Conclusion

For the foregoing reasons, Mr. Herrera respectfully requests that this Court grant his petition for writ of certiorari.

Respectfully submitted,

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