No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DANIEL RAY
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

The Court has observed that "where a party presents nonfrivolous reasons for imposing a different sentence, the judge will normally go further and explain why he has rejected those arguments." *Rita v. United States*, 551 U.S. 338, 339 (2007).

This case presents the question whether sentencing judges *must* do what judges "normally" do by explaining why they have rejected a nonfrivolous argument made by a defendant in favor of a lower sentence.

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INTRODUCTION

The Court has said a failure "to adequately explain the chosen sentence" constitutes "significant procedural error." *Gall v. United States*, 552 U.S. 38, 51 (2007). This case tests whether that explanation must include a response to nonfrivolous arguments made by defendant.

At Daniel Ray's initial sentencing hearing, the court weighed all of the sentencing factors and found adequate mitigation to merit imposing a sentence at the low-end of the guideline range, 100 months. But the district court had miscalculated the guideline range. At Mr. Ray's resentencing, the district court recited the same sentencing factors and correctly calculated the guideline range but selected a sentencing in the middle of the recalculated range, 95 months. When Mr. Ray asked why the lower court felt a mid-range sentence was appropriate in light of the new

mitigation and the correctly reduced guidelines, the district court did not meaningfully respond. Nonetheless, without guidance from the Court, the Ninth Circuit affirmed by concluding "the sentencing judge considered the relevant evidence and argument," notwithstanding the district court's failure to respond. Pet. App. 3a. To facilitate appellate review, promote confidence in the fairness of sentencing proceedings, and afford Due Process to criminal defendants, the Court should intervene to require more of sentencing judges.

STATEMENT OF RELATED CASES

This case concerns an appeal from the judgement entered in *United States v. Patrick Bacon and Daniel Ray*, Central District of California case number 5:17-cr-00159-PA. The petition for certiorari arises from a direct appeal in Ninth Circuit Court of Appeals case number 21-50024. There were two earlier, related appeals to the Ninth Circuit Court of Appeals in case number 18-50115 (by Mr. Ray) and case number 18-50120 (by Mr. Bacon).

OPINION BELOW

The unpublished opinion of the U.S. Court of Appeals for the Ninth Circuit is reproduced in the appendix. Pet. App. 1a-5a.

JURISDICTION

The court of appeals entered judgment on May 9, 2022. Pet. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

From a young age, Daniel Ray's life was characterized by trauma and instability. His father experienced schizophrenia and bipolar disorder. PSR 15. His mother also suffered debilitating leg and back problems. *Id.* When Mr. Ray was five years old, his father went to prison after trying to rape Mr. Ray's ten-year-old sister. *Id.* When Mr. Ray was ten years old himself, he was placed into foster care. PSR 8. After struggling with addiction himself, Mr. Ray committed a serious federal offense while in prison.

Mr. Ray, at that time, evinced little insight into the seriousness of the offense or desire for rehabilitation. He remarked during allocution that he was innocent, he would never apologize, and that no matter the sentence imposed "or how much time you put on my shoulders, you're never going to break me, not now, not ever." ER54.

At his initial sentencing in 2018, despite his inflammatory allocution and lack of remorse, the sentencing judge concluded that mitigating circumstances justified a sentence at the very low end of the guideline range of 100 to 125 months. ER57. The court imposed a 100-month sentence. ER57. But that sentence was reversed on appeal because of the district court's miscalculation of the guidelines. *Ray*, 811 F. App'x at 417.

On remand, the district court recalculated the guideline range as 84 to 105 months. Additionally, there was new mitigating evidence. The PSR reflected Mr. Ray's good conduct while in-custody. PSR at 16. Probation spoke with Mr. Ray's case

manager in the Bureau of Prisons who reported Mr. Ray's completion of seven classes and successful completion of a 12-month, non-punitive residential rehabilitation program. *Id.* Mr. Ray's counsel highlighted Mr. Ray's performance in prison and the remand for resentencing on an open record. ER35-36. The Government submitted no new information but urged the Court to reimpose the same sentence – 100 months. ER39-40.

Finally, consistent with his rehabilitative programming in-custody Mr. Ray's allocution was completely different than it had been before. Instead of boasting that no amount of time in prison could "break" him, ER54, Mr. Ray explained that he had "learned a lot from this experience," had "been looking in [himself] and just really learning who [he is]," and "just programming, and staying away from the riffraff here in this prison." ER19. Mr. Ray explained that he had been "program[ming] like crazy." *Id.*

Thus, at resentencing, the only new information about Mr. Ray was positive. The guidelines were 16 to 20 months lower. Mr. Ray appeared to be a changed man. Meanwhile, the world had changed substantially because of a global pandemic. However, the court repeated its prior analysis of the case almost verbatim. *Compare* ER56 with ER21. Other than Mr. Ray's rehabilitative classes, the only other deviation during the court's analysis at resentencing was mitigating. The court observed "It appears that the defendant may have engaged in this offense because he had become accustomed to the cultural [sic] of violence that exists within custodial institutions and may have been influenced by an untreated mental condition." ER21.

Nonetheless, the court imposed a sentence only five months less than Mr. Ray received at his first sentencing. The rehabilitative steps, untreated mental condition, and 16-to-20-month lower guidelines resulted in a sentence reduced from 100 months to 95 months.

Mr. Ray politely inquired of the court why, if he had been sentenced at the bottom of his guidelines at the original sentencing, he was not sentenced in the bottom half of his corrected guidelines now. ER26. This was especially confusing since Mr. Ray had been "doing great" in his rehabilitative classes in the interim period between sentencing hearings. *Id.* At bottom, Mr. Ray asked the court for an explanation why its view of the appropriate sentence within the guidelines had changed even though he had additional mitigating evidence and there was no new aggravating information. ER27.

In response, the court did not explain its changed view of the appropriate sentence within the guideline range. Instead, the court explained that it had used Mr. Ray's prior sentence as a starting place rather than the shifted guideline range and would have reimposed a 100-month sentence – at the high end of the newly calculated guidelines – "but I thought you should receive some credit for what you've done since the last time you were here." ER27.

The Ninth Circuit affirmed, stating only "Appellant contends this explanation was procedurally inadequate. However, because 'the record makes clear that the

sentencing judge considered the relevant evidence and argument,' we affirm." Pet. App. 3a (quoting *United States v. Vasquez-Cruz*, 692 F.3d 1001, 1008 (9th Cir. 2012)).

REASONS FOR GRANTING THE PETITION

A court's failure "to adequately explain the chosen sentence" constitutes "significant procedural error." *Gall v. United States*, 552 U.S. 38, 51 (2007). A sentencing explanation not only allows appellate courts "to conduct meaningful appellate review," but it "'promote[s] the perception of fair sentencing,' creating trust in sentencing decisions by reassuring the public of the judiciary's commitment to reasoned decision-making." *United States v. Emmett*, 749 F.3d 817, 820 (9th Cir. 2014) (quoting *Gall*, 552 U.S. at 50).

The court "should normally explain why he accepts or rejects the party's position . . . when a party raises a specific, nonfrivolous argument tethered to a relevant § 3553(a) factor in support of a requested sentence[.]" *United States v. Carty*, 520 F.3d 984, 992-93 (9th Cir. 2008) (en banc) (citing *Rita v. United States*, 551 U.S. 338, 357 (2007)). Even "a within-Guidelines" sentence will require explanation when a party argues "that a different sentence is otherwise warranted." *Carty*, 520 F.3d at 992.

But appellate courts increasingly apply divergent standards when examining whether a defense argument must be addressed during sentencing. For example, the Fourth Circuit has held that a court may not "passively hear[] the parties' arguments and then seem[] to ignore them." *United States v. Montes-Pineda*, 445 F.3d 375, 381

(4th Cir. 2006). In the Seventh Circuit, "a judge who fails to mention a ground of recognized legal merit (provided it has a factual basis) is likely to have committed an error or oversight." *United States v. Cunningham*, 429 F.3d 673, 679 (7th Cir. 2005). Meanwhile, in the Ninth Circuit, although "it is the better practice for district courts to explain whether they accept or reject 'nonfrivolous argument[s] tethered to a relevant § 3553(a) factor," a district court's general discussion of the 3553(a) factors suffices even if the sentencing judge does not mention "undoubtedly weighty" defense arguments. *United States v. Amezcua-Vasquez*, 567 F.3d 1050, 1053-54 (9th Cir. 2009) (quoting *Carty*, 520 F.3d at 992-93).

Here, those divergent standards made a difference. In response to Mr. Ray's inquiry ("why didn't I get the bottom half of my reinstated guidelines" after he got the very low-end at his original sentencing), the court never explained its changed view of the appropriate sentence within the guideline range. Instead, the court answered that it gave Mr. Ray credit for completing rehabilitative classes, that there was some merit to the Government's request that the same sentence be reimposed, and that "in my mind I guess . . . that's what the sentence called for." ER26-27. Thus, the court sidestepped Mr. Ray's nonfrivolous argument entirely.

Although the sentencing court was not required to adhere to its prior determination that Mr. Ray's offense and characteristics supported a sentence at the low-end of the guidelines, it was required to explain its change-of-heart when Mr. Ray asked for an explanation. The Ninth Circuit affirmed here, but the varying explanation requirements in other circuits suggest a contrary outcome would have

occurred in the Fourth or Seventh Circuit. *See Montes-Pineda*, 445 F.3d at 381; *Cunningham*, 429 F.3d at 679.

The Court should intervene to ensure a uniform procedural standard applies nationwide.

* * *

For these reasons, this Court should grant review here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

August 5, 2022

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