No. 23-

In the United States Supreme Court

RAYMOND MENDEZ,

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

CUAUHTEMOC ORTEGA
Federal Public Defender
MICHAEL T. DRAKE
**Counsel of Record*
Deputy Federal Public Defender
321 East 2nd Street
Los Angeles, CA
(213) 894-5355
michael_drake@fd.org

Counsel for Petitioner
RAYMOND MENDEZ

QUESTION PRESENTED

Throughout three cycles of 18 U.S.C. § 3582(c)(2) proceedings, the district court has denied Raymond Mendez a reduction to his life sentence based on the drug quantity finding at the core of this appeal. But through a series of procedural flukes, both the protean nature of that finding and its evidentiary basis have evaded real scrutiny:

- On direct appeal, with a due process challenge at stake, the Ninth Circuit described the finding as modest: an amount "sufficient to meet the requirements for offense level 38" under the U.S. Sentencing Guidelines.
- Yet when Mendez later appealed the denial of his first § 3582(c)(2) motion, a Ninth Circuit screening panel described the finding as far more aggressive: an amount over 90 times greater than the threshold for offense level 38.
- That panel's unreasoned ruling, in turn, has since been used as law of the case—enabling the district court to continue to recharacterize its initial finding in terms that satisfy each newly amended threshold for the same offense level.

The question presented is whether the Ninth Circuit has thus sanctioned serial departures by the district court so far from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. U.S. Sup. Ct. R. 10(a).

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The Ninth Circuit's unpublished memorandum affirmance is reproduced at App. 1, and the district court's unpublished order at App. 6.

JURISDICTION

The Ninth Circuit filed judgment on August 25, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 3582(c) provides:

> The [district] court may not modify a term of imprisonment once it has been imposed except that … [¶] (2) in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

STATEMENT OF THE CASE

This third attempt to get a reduction of Raymond Mendez's sentence under 18 U.S.C. § 3582(c)(2), previously sidelined by law of the case, was driven by the Ninth Circuit's intervening clarification that to be binding in these proceedings, the district court's drug quantity finding at initial sentencing had to be "*specific*." *United States*

v. Rodriguez, 921 F.3d 1149, 1157 (9th Cir. 2019). The district court here never made or tried to identify any such finding in any prior proceeding—and still hasn't.

A. Mendez is convicted.

After an eight-month jury trial in 1997 involving thirteen defendants charged with violations of the Racketeering Influenced and Corrupt Organizations Act and related offenses, Mendez was convicted on four counts: a substantive RICO violation, 18 U.S.C. § 1962(c) (Count 1); a RICO conspiracy, 18 U.S.C. § 1962(d) (Count 2); a conspiracy to aid and abet narcotics trafficking, 21 U.S.C. § 846 (Count 3); and a conspiracy to murder in aid of racketeering, 18 U.S.C. § 1959(a)(5) (Count 17). (PSR ¶¶ 4–7, 21.)[1] The charges arose out of Mendez's association with members of the Mexican Mafia, or *La Eme*.

B. The PSR recommends an offense level 38 based on an estimated 1,512 grams of crack cocaine.

The probation officer calculated the guideline sentencing range based on the grouped drug distribution counts. (PSR ¶¶ 157, 224–31.) For this calculation, the probation officer had to approximate drug quantity (PSR ¶ 223; U.S.S.G. § 2D1.1, cmt. n.12),[2] and in doing so, to "err on the side of caution." *United States v. August*, 86 F.3d 151, 154 (9th Cir. 1996). So with the caveat that the amount "actually distributed" was almost certainly higher (PSR ¶ 226), the probation

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[1] "PSR" and "Addendum" refer to the presentence report and PSR addendum respectively. (ECF No. 8.) "ER" refers to Mendez's excerpts of record in the Ninth Circuit (ECF No. 7). "SER" refers to the government's supplemental excerpts of record (ECF No. 29).

[2] Unless otherwise noted, guideline citations are for the 1997 edition.

officer specified an amount "reasonably calculated to fairly represent the criminal conduct involved": 1,512 grams of cocaine base (PSR ¶ 227). This was over the 1.5 kilogram threshold for level 38. U.S.S.G. § 2D1.1(a)(3), (c)(1).

Though the other grouped offenses, based on a conspiracy to murder a former *Eme* member (PSR ¶ 140), carried a base offense level of 28 under U.S.S.G. §§ 2E1.1, 2A1.5 (PSR ¶ 218), the combined offense level was still 38. (PSR ¶ 233.) This left the career offender guideline, U.S.S.G. § 4B1.1, inapplicable (*see* PSR p. 1 (marking career offender guideline "N/A")), the lower level 37 under that section "moot[ed]" by the level 38. (PSR ¶ 245–46.) Given Mendez's criminal history category VI (PSR ¶ 282), his guideline sentencing range was 360 months to life (PSR ¶ 305).

C. The government files hearsay-laden declarations "to support" the PSR's calculation.

The government then filed declarations by three police officers, along with a position paper, "to support" the level 38 in the PSR. (ER 126.) The officers jointly offered schedules purporting to specify "average daily sales" for each of fifteen named gangs. (ER 130, 132, 134.) The drug amounts in officers' declarations were all acknowledged to be based on "interviews" with unidentified informants and unspecified "discussions" with "fellow officers." (ER 130, 132; *accord* ER 134.)

While the government stated in its filing that the unspecified out-of-court statements supported a "conservative" drug quantity estimate of 139 kilograms (*Id.* at 126), the government did not object to the

PSR's estimate. Nor did the probation officer revise that estimate as a result. (*See* Addendum 2 ("maintain[ing] the assessment [of drug quantity] presented in the PSR")).

The government did not offer any live direct from these witnesses. But cross-examination provided room for doubt about the reliability of their numbers:

- None had reviewed any documentation before preparing his declaration or testifying. (SER 159, 204–05, 221.)
- Two had arrived at gram-for-gram identical estimates (*compare* ER 132 *with* ER 134) after sitting in a room with a government prosecutor, "discussing what amounts to put in the[ir] declaration[s]." (SER 219.)
- One had declared his numbers based on "extrapolations" without knowing what the word meant. (SER 230–31.)

And when it came to specific amounts of crack cocaine tied to sales by specific gangs, their testimony was sketchy. For some of the named gangs, the officers could recall no specific incident or amounts at all. (*See*, *e.g.*, SER 193 (Picket Street), 198 (State Street), 199 (TMC and Tiny Boys).) Some amounts they mentioned were for mere possession. (SER 68, 73, 196.) By far the largest specific amount mentioned was 80 "rocks" seized from a member of Broad Street (SER 191–92)—which would have totaled 8 to 16 grams (*see* SER 81 (estimating 0.1 or 0.2 grams per rock)). Yet this testimony said nothing about what this meant as far as average daily sales. (SER 191–92.) The same goes for one-ounce purchases made by another dealer discussed. (SER 201.) Specific sales-related amounts were otherwise limited to a handful of

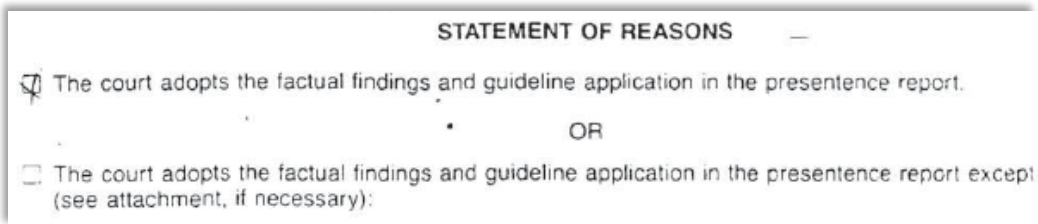
one-off episodes involving tenths of a gram or unspecified amounts "less than an ounce." (SER 68, 73, 99, 180–81, 195–97.)

D. The district court unreservedly adopts the PSR and mentions no other drug quantity.

Rather than recapitulate these cross-examinations, Mendez incorporated them at his own sentencing hearing (ER 95), held on September 5, 1997. At that hearing, no specific drug quantities were mentioned. Nor did the district court purport to accept or adopt the officers' declarations wholesale.

Instead, the district court found the "factual information" in both the presentence report and addendum correct. (ER 94.) The court also found "justif[ied]" the "probation officer['s]" proposed calculations, which it held were "support[ed]" by the government's filing and witness testimony, having been "left with" unimpeached data it found "reliable … for the *base offense level* [calculation]." (ER 116 (emphasis added).)

The district court would likewise confirm its generic "adop[tion]" of the presentence report in its statement of reasons, selecting the box saying it did so without exception:



STATEMENT OF REASONS

☒ The court adopts the factual findings and guideline application in the presentence report.

OR

☐ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

(ER 84.)

The court sentenced Mendez to life in prison. (ER 80.) Since this was years before discretionary guideline sentencing put consideration

of the statutory sentencing factors front and center, *Gall v. United States*, 552 U.S. 38, 49 (2007), those factors were neither presented nor expressly considered.

Mendez and his co-defendants appealed.

E. The Court affirms Mendez's conviction and sentence, declining to address the district court's reliance on uncorroborated hearsay to estimate drug quantity.

While the appeal was pending, the Ninth Circuit decided *United States v. Garcia-Sanchez*, 189 F.3d 1143 (9th Cir. 1999), holding that a district court "c[an]not use [an informant's] out-of-court statements" for estimating drug quantity "unless they are reliable"—that is, "unless they are corroborated or have some other minimal indicia of reliability." *Id.* at 1149. So Mendez and the other appellants argued that the district court's reliance on hearsay to prove drug quantity was reversible error. Joint Opening Br. of Appellants at 241–42, *United States v. Shryock et al.*, 342 F.3d 948 (No. 97-50468 *et al.*) (9th Cir. 2003), 2001 WL 34091052.

The Ninth Circuit nonetheless affirmed—though skirting the drug quantity challenges by invoking "stacking" as an alternative justification for the then-mandatory guideline sentences. *Shryock*, 342 F.3d at 990. But the court framed the district court's drug quantity ruling this way: a "finding … that the amount of drugs involved was sufficient to meet the requirements for offense level 38." *Id.*

F. Mendez twice moves for a sentence reduction after new guideline amendment cycles, each time rejected without analysis of the disputes about drug quantity.

Section 3582(c)(2) authorizes a district court to reduce a defendant's otherwise final sentence if it was based on a guideline sentencing range subsequently lowered by the United States Sentencing Commission, and if such a reduction is otherwise consistent with the Commission's policy statements. In considering such a motion, district courts are to substitute "the amendments … for the corresponding guideline provisions … applied when the defendant was sentenced," leaving "all other guideline application decisions unaffected." U.S.S.G. § 1B1.10(b)(1) (2021).

In 2007 and 2008, the Commission adopted Amendments 706, 711, and 713, U.S.S.G. app. C, which retroactively reduced by two points the base offense level assigned to each category of cocaine base in the drug quantity table. The effect was to lower the base offense level corresponding to 1,512 grams of crack cocaine from 38 to 36, *see* U.S.S.G. § 2D1.1(a)(5), (c)(2) (2009), which on a category VI criminal history reduced the corresponding sentencing range to 324–405 months. U.S.S.G. § 5A.

Mendez accordingly moved for a reduction of his sentence under 18 U.S.C. § 3582(c)(2). But the district court denied the motion, stating that at sentencing it had "made factual findings" that Mendez was "conservatively estimated" to have been involved in trafficking a quantity of crack cocaine "substantially exceeding" the new threshold for a level 38—now 4.5 kilograms—so that his guideline range was unchanged, and a reduction unauthorized. (ER 79.) The court

alternatively held that a reduction wouldn't be "warranted," though without addressing any of Mendez's § 3553(a) arguments. (*Id.*)

A screening panel of the Ninth Circuit affirmed, holding—without analysis—that the district court had "appropriately found" at sentencing that Mendez was "responsible for the distribution of 139 kilograms of crack cocaine." *United States v. Mendez*, 404 F. App'x 209, No. 09-50189 (9th Cir. 2010) ("*Mendez I*"). The panel also held—without analysis or briefing—that the district court's alternative, discretionary denial wasn't reviewable for reasonableness, *id.* at 210—a position the Ninth Circuit would later disavow in *United States v. Dunn*, 728 F.3d 1151, 1155 (9th Cir. 2013). Panel rehearing and certiorari review were summarily denied. *Mendez*, *supra*, ECF Nos. 37 & 40.

But by then, "virtually everyone, including Congress," recognized that the 100:1 crack-powder ration "imposed unnecessarily and unfairly severe mandatory sentences," *United States v. Baptist*, 646 F.3d 1225, 1226 (9th Cir. 2011), so much so that Congress had passed the Fair Sentencing Act of 2010, lowering the cocaine crack-powder ratio from 100:1 to 18:1, and increasing the amount of crack cocaine required to trigger the mandatory minimum sentences. 21 U.S.C. § 841(b)(1)(A)(iii), (B)(iii) (effective Aug. 3, 2010). The effect of the Sentencing Commission's conforming, retroactive amendments, U.S.S.G. app. C., amends. 748, 750, 759, was to lower the base offense level corresponding to 1,512 grams of crack cocaine from 38 to 34, U.S.S.G. § 2D1.1(c)(3) (2011), which on Mendez's category VI criminal

history reduced the corresponding sentencing range to 292 to 365 months.

Once again, Mendez moved for a reduction. Once again, the district court denied relief, stating that it had "made factual findings" at sentencing that Mendez was "conservatively estimated" to have been involved in trafficking a quantity of crack cocaine "substantially exceeding" the new threshold for a level 38—8.4 kilograms. (ER 76.) And once again, the court alternatively held that a reduction wouldn't be "warranted," addressing none of Mendez's § 3553(a) arguments. (ER 77.)

When Mendez appealed this time, the Ninth Circuit dismissed the matter (on the government's motion) as governed by law of the case set by the screening panel's unreasoned drug quantity holding in *Mendez I*—again, without analysis or mention of Mendez's contrary arguments. *United States v. Mendez*, No. 14-50410 (9th Cir. June 10, 2015), ECF No. 18. En banc reconsideration and certiorari review were summarily denied. *Id.*, ECF Nos. 20 & 23.

G. Mendez again moves for a reduction under new amendments, after the Ninth Circuit clarifies that drug quantity findings are binding only if "*specific*"—only to be denied again in district court without analysis.

Yet by this point, a third round of retroactive amendments—the "drugs minus two" amendments—had gone into effect, now generally reducing the base offense level for most drug offenses by two levels. U.S.S.G. app. C, amends. 782, 788. And though Mendez at first saw little point in bringing another § 3582(c)(2) motion given the motion

panel's own conclusory ruling about law of the case, that changed in 2019 with the Ninth Circuit's decision in *United States v. Rodriguez*, 921 F.3d 1149, 1157 (9th Cir. 2019).

Rodriguez clarified that drug quantity "findings" are binding in § 3582(c)(2) proceedings only when made "*specific*" at sentencing. *Id.* at 1157. A drug quantity finding fails to be "*specific*" in this sense—it is "ambiguous or incomplete"—when, for example, the district court merely "attributed a range of quantities" or a lower bound—such as "at least X kilograms"—to the defendant. *Id.* And drug quantities merely "alluded to" likewise fail. *Id.* at 1158.

As this generic approach was in Mendez's view the one taken at his sentencing, he again moved for a reduction. But the district court still denied relief, stating that it had not "solely" adopted the presentence report, but had "made factual findings" that Mendez was "conservatively estimated" to have been involved in trafficking a quantity of cocaine base "substantially exceeding the minimum for offense level 38." (App. 8.) The court made no attempt to explain how such a finding would amount to the "*specific*" drug quantity finding *Rodriguez* requires, or to address the due process problems that plagued any evidentiary basis for the government's numbers. Nor, again, did it address any of Mendez's § 3553(a) arguments before holding that a reduction wouldn't be warranted. (ER 6.)

H. The Ninth Circuit affirms, holding that its intervening case law "did not compel reconsideration."

Mendez took this appeal, and after a Ninth Circuit motions panel denied the government's motion for summary affirmance without

prejudice to reraising its law of the case argument (ECF No. 25), the court affirmed. Acknowledging that "the district court adopted the factual statements in the presentence report ("PSR")," the panel held that the district court "also made several findings that went beyond a generic adoption of the PSR[,] f[inding] that Mendez was responsible for a drug trafficking conspiracy spanning across a large geographic region for an extended period of time," "resolv[ing] the parties' dispute over the government's evidentiary declarations by ruling that the declarations adequately supported the disputed drug quantity finding." (App. 4.) Accordingly, it held, the district court "did not err by applying *Mendez I* as law of the case" (*id.*), and *Mendez I* did not fall within the clear-error exception to law of the case (App. 4–5).[3]

This petition follows.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's decision sanctions the district court's fundamentally unfair use of a vague, unsubstantiated drug quantity finding to perpetuate Mendez's life sentence.

Again, under Ninth Circuit law, a drug quantity found at sentencing is binding in § 3582(c)(2) proceedings "only if the sentencing court made a *specific* [drug quantity] finding." *Rodriguez*, 921 F.3d at 1157. Quantities "alluded to" in sentencing proceedings aren't enough. *Id.* at 1158. Neither is a finding of a lower bound, such as "at least X kilograms." *Id.* at 1157.

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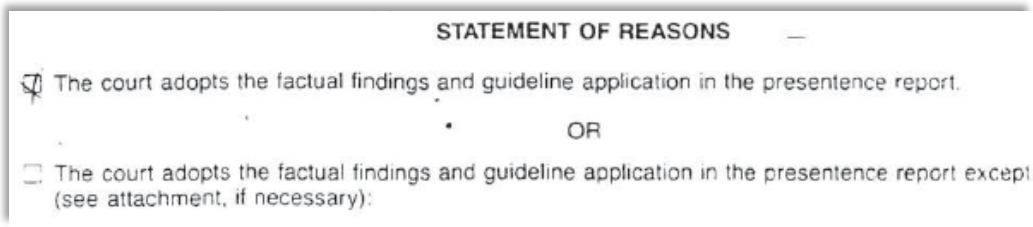
[3] Though the panel evidently considered this exception forfeited or waived (App. 4), the burden was on the government to raise law of the case in its answer. *United States v. Manzo*, 675 F.3d 1204, 1211 n.3 (9th Cir. 2012).

Apprised of these intervening clarifications, even the district court couldn't bring itself to say it had found the "*specific*" drug quantity *Mendez I* said it had. Instead, it merely maintained that it had "not solely adopt[ed]" the presentence report, and had in addition "made factual findings at sentencing" that Mendez was "conservatively estimated" to have been responsible for an amount "substantially exceeding the minimum for offense level 38." (App. 8.)

But as responses to the Ninth Circuit's intervening clarification in *Rodriguez*, these avowals were apropos of nothing. And, worse, the "substantially exceeding" language is just a figment of the district court's prior boilerplate denial orders, each characterizing the relevant "finding" in the same, generic terms: as pertaining to some drug quantity—never specified—"substantially exceeding" each newly amended threshold. (*Id.*; ER 76, 79.)

What the district court *did* at Mendez's sentencing—and what it was therefore obligated to leave "unaffected" absent supplemental findings under *Rodriguez*, U.S.S.G. § 1B1.10(b)(1)—was find that the PSR calculations for "offense level" and "criminal history category" were "justif[ied]," that the government's drug evidence "support[ed]" them (ER 116), and that the "factual information" in both the PSR and addendum was correct (ER 94). And in case there was any doubt about its findings, the court afterward confirmed in its statement of reasons that it had indeed "adopt[ed] the factual findings and guideline application in the presentence report"—without exceptions:



STATEMENT OF REASONS

☑ The court adopts the factual findings and guideline application in the presentence report.

OR

☐ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

(ER 84.)

The Ninth Circuit this time around is pretty clearly alive to the problem, especially given its oddly qualified ruling that reconsideration isn't compelled on the "amended quantity threshold of 8.4 kilograms" operative here. (App. 4.) After all, if *Mendez I* were fully fledged law of the case, any amount short of 139 kilograms would do.[4]

Yet neither of the findings the Ninth Circuit cites to justify affirming under law of the case does any work: That the conspiracy "span[ned] a large geographic region for an extended period of time" was not a finding "beyond" the PSR (*cf.* App. 4.); it was the very finding the PSR itself proposed (PSR ¶¶ 224–255). Nor could the district court's finding that the government witnesses' declarations "adequately supported the disputed drug quantity finding" fairly imply that it had found some greater quantity (*cf.* App. 4.)—not least because on direct appeal, with a due process challenge at stake, the Ninth Circuit itself recognized the district court's finding as the far more modest finding it was: a finding that the drug amount was "sufficient

[4] While the Ninth Circuit panel states that the district court "appl[ied] *Mendez I* as law of the case" (App. 4), the district court in fact merely noted that *Mendez I* "affirmed" the district court's own prior ruling that it had found a quantity "substantially exceeding the minimum for offense level 38." (App. 8.) Nowhere in its order does the district court invoke law of the case.

to meet the requirements for offense level 38." *United States v. Shryock*, 342 F.3d 948, 990 (9th Cir. 2003).

But the real problem here is that the government has never come close to substantiating the average daily sales in its witnesses' declarations. Not for a single day. Nor for a single gang. *See supra*, Statement of the Case, Part C. And because the *Shryock* court sidestepped Mendez's due process challenge to the district court's initial drug quantity finding, that dispute was never resolved. This procedural anomaly, in turn, enabled the district court, with each new guideline amendment cycle, to recharacterize its initial finding in terms that met each newly amended threshold for an offense level 38. And the end result was to unjustly perpetuate Mendez's life sentence.

Given all these considerations, the Ninth Circuit's application of law of the case—an "amorphous concept" to begin with, *Pepper v. United States*, 562 U.S. 476, 506 (2011)—serves only to unreasonably shield the district court's suspect rulings, sanctioning that court's departure from the fundamental fairness judicial proceedings demand. The departure calls for an exercise of this Court's discretion. U.S. Sup. Ct. R. 10(a).

(*cont'd next page*)

CONCLUSION

For all these reasons, the Court should grant the petition, vacate the Ninth Circuit's judgment, and remand with instructions to decide Mendez's appeal unfettered by law of the case.

Respectfully submitted,
CUAUHTEMOC ORTEGA
Federal Public Defender

November 22, 2022

MICHAEL T. DRAKE
Counsel of Record
Deputy Federal Public Defender
321 East 2nd Street
Los Angeles, California 90012
(213) 894-5355
michael_drake@fd.org

Counsel for Petitioner
RAYMOND MENDEZ