

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

MARVIN CARCAMO,

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 FOR REVIEW

1. Did the Ninth Circuit incorrectly affirm the district court's procedural error determining racketeering conduct was reasonably foreseeable under the U.S. Sentencing Guidelines to Mr. Carcamo based on his mere membership in a gang?
2. Whether the Ninth Circuit misapplied this Court's precedent on reviewing sentences for procedural error when it found the district court's erroneous Sentencing Guideline calculation was harmless because it would not have impacted the ultimate Guidelines range, instead of assessing whether it would have impacted the ultimate sentence imposed?

INTERESTED PARTIES

Petitioner is Marvin Carcamo, an inmate at the United States Penitentiary in Lewisburg, Pennsylvania. Mr. Carcamo was the defendant in the district court and the appellant below. Respondent is the United States.

RULE 14.1(b)(iii) STATEMENT

There are no proceedings directly related to the case in this Court.

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INTRODUCTION

Petitioner Marvin Carcamo respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Mr. Carcamo was one of 34 defendants charged in a sprawling 60 count Racketeer Influenced and Corrupt Organizations Act (“RICO”) and Violent Crime in Aid of Racketeering (“VICAR”) indictment targeting the MS-13’s 20th Street clique in San Francisco. The centerpiece of the government’s case was five murders that took place in San Francisco over five months in 2008.

Following a five month long jury trial in 2011, Mr. Carcamo received a life sentence, a severe sanction that stood out because it was undisputed that he did not kill anyone, and thus was neither charged with, nor convicted of, substantive VICAR murder. It also stood out because it was undisputed that at the time all the murders took place, Mr. Carcamo was in immigration detention and had no advance knowledge of the murders, did not order, plan, or organize these acts of violence, and was not actively involved with the gang.

Despite these undisputed facts, the district court nonetheless found the murders reasonably foreseeable to Mr. Carcamo, which resulted in an advisory Guideline range of life imprisonment. Its decision was based on Mr. Carcamo’s mere membership in the gang and the fact he went to trial rather than plead guilty. The Ninth Circuit’s decision to affirm that faulty reasoning requires this Court grant a writ of certiorari.

OPINIONS BELOW

The Ninth Circuit's unpublished memorandum affirming Mr. Carcamo's sentence is unreported but available at 2023 WL 5607526 (9th Cir. 2023) and included in the Appendix at 1a. Its November 22, 2023 order denying Mr. Carcamo's petition for panel rehearing and rehearing en banc is unreported and included in the Appendix at 5a.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Ninth Circuit entered its judgment in favor of respondent on August 30, 2023, denied the petition for panel rehearing and rehearing en banc on November 22, 2023, and issued its mandate on November 30, 2023. This petition is timely under Sup. Ct. R. 13.3.

REGULATIONS INVOLVED

United States Sentencing Guideline § 1B1.3(a)(1)(B) provides:

(a) Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:

...

(1)(B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all acts and omissions of others that were—

- (i) within the scope of the jointly undertaken criminal activity,
- (ii) in furtherance of that criminal activity, and
- (iii) reasonably foreseeable in connection with that criminal activity;

that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;

U.S.S.G. § 1B1.3(a)(1)(B).

STATEMENT OF THE CASE

I. Mr. Carcamo is sentenced to life imprisonment for RICO conspiracy in 2011.

Mr. Carcamo was born in El Salvador in 1980. His father left the family to come to the United States for work, leaving Mr. Carcamo in the care of his mother. Mr. Carcamo attended school until the fourth grade and at 13 years old, he was working full-time in the fields planting corn to support his family. At 17 years old, Mr. Carcamo came to San Francisco, California. In 2003 he moved to Oakland, California where he lived until his arrest in 2007. Mr. Carcamo worked in construction, working on home remodeling projects.

In San Francisco, Mr. Carcamo befriended MS-13 gang members. Far from home and lonely, he felt a commonality with the young men from El Salvador and began hanging out with them, playing soccer in the Mission District in San Francisco. But as he spent more time with these gang members, Mr. Carcamo felt he had no choice but to join the gang himself and he was “jumped” into the gang in 2000, at just 20 years old. While in the gang, he regularly abused alcohol and marijuana, and occasionally experimented with harder drugs like cocaine and ecstasy.

On December 30, 2007, Mr. Carcamo was arrested by immigration authorities at the San Francisco International Airport after an administrative immigration warrant was issued on October 31, 2007. He remained in immigration

custody awaiting deportation until he was indicted in the underlying criminal case and transferred into criminal custody in October 2008.

Mr. Carcamo was one of 34 defendants charged in a 60 count RICO and VICAR indictment targeting the MS-13's 20th Street clique in San Francisco. The centerpiece of the government's case was five murders that took place between March 29, 2008, and July 31, 2008 in San Francisco. All the murders took place while Mr. Carcamo was in immigration custody awaiting deportation proceedings, and it was undisputed that Mr. Carcamo did not carry out any of the murders personally, had any involvement or advance knowledge of the murders, or ordered them specifically.

Mr. Carcamo and several co-defendants went to trial from March to August 2011. On August 30, 2011, a jury found Mr. Carcamo guilty of RICO conspiracy, 18 U.S.C. § 1962(d) (count 1), VICAR conspiracy to commit murder in aid of racketeering, 18 U.S.C. § 1959(a)(5) (count 2), VICAR conspiracy to commit assault with a deadly weapon in aid of racketeering, 18 U.S.C. § 1959(a)(6) (count 3), and use of a firearm in furtherance of a crime of violence, 18 U.S.C. § 924(c)(1)(A) (count 4).

At sentencing, the government asked for a life sentence. It argued that because Mr. Carcamo had been convicted of a racketeering offense, "he is legally culpable for all reasonably foreseeable acts taken in furtherance of the racketeering enterprise," and that there was "a preponderance of the evidence to support the finding that the five murders attributed to Carcamo were both reasonably

foreseeable to him and were taken in furtherance of the MS-13 enterprise.” It believed “Carcamo was a long-standing member of MS-13 who rose to leadership in 2007. Not only was Carcamo aware that the gang engaged in murder, he pushed the gang to be murderous.”

The district court held a two-day sentencing hearing for five of the defendants, including Mr. Carcamo, on November 30, 2011 and December 1, 2011. Mr. Carcamo was sentenced to life imprisonment for the RICO conspiracy, ten years in prison on count 2, and three years in prison on count 3, with all terms to run concurrent with each other. On count four, charging a violation of 18 U.S.C. § 924(c), Mr. Carcamo was sentenced to ten years in prison to run consecutive to the other counts.

On July 19, 2019, the Ninth Circuit Court vacated Mr. Carcamo’s § 924(c) conviction and sentence following this Court’s decision in *United States v. Davis*, 139 S. Ct. 2319 (2019), and remanded for resentencing on counts one through three. *United States v. Cruz-Ramirez*, 782 Fed. Appx. 531, 538 (9th Cir. 2019).

II. Mr. Carcamo is resentenced to 39 years in prison in 2022.

In preparation for the resentencing hearing, the Probation Office prepared a supplemental report. It adopted the advisory U.S. Sentencing Guideline (“U.S.S.G.”) range calculations submitted in the original PSR. Specifically, the probation office calculated the advisory Guidelines range by grouping counts 1, 2 and 3 under U.S.S.G. § 3D1.2(c) and then determined the most serious offense level was the one generated for the RICO conspiracy charged in count one. Applying U.S.S.G. §

2E1.1(a), the PSR determined “pseudo counts” for each of five racketeering acts, specifically a 2006 attempted robbery, and the murders occurring in 2008.

For the attempted robbery, the PSR determined an adjusted offense level of 27. For each of the murders, the PSR calculated an adjusted offense level of 47: it found the base offense level was 43 under U.S.S.G. § 2A1.1(a) for first degree murder, and then found that Mr. Carcamo was a leader or organizer of criminal activity, and thus received a four-level upward adjustment under U.S.S.G. § 3B1.1(a). Taking the highest offense level of 47 and adding another four levels for five units due to the multiple racketeering acts, it determined the combined adjusted offense level on count one was 51. Since that was the highest offense level of all the counts, that became the controlling offense level of the grouped counts. Finally, the PSR lowered the offense level to 43 as directed by the Guidelines.

Because Mr. Carcamo had no prior criminal convictions, and was in criminal history category I, the Guideline range was determined to be life imprisonment for counts one through three.

After adopting the Guideline calculations from the original PSR, the Probation Office recommended Mr. Carcamo be sentenced to life imprisonment on Count 1, ten years imprisonment on count 2, and three years’ imprisonment on count 3, with all sentences running concurrent with one another. The government made the same request in its resentencing memorandum.

Before sentencing, Mr. Carcamo challenged the probation office’s Guideline calculations. He argued the murders were not reasonably foreseeable to him, as it

was undisputed that he did not commit any of the murders, played no role whatsoever in planning them, and was incarcerated at the time they occurred.

He explained he was the only one of his co-defendants who received a life sentence who did not actually kill another person, and who was not involved in the day-to-day activities of the gang at the time of the murders because he was incarcerated. Mr. Carcamo also highlighted the fact there were other co-defendants in the sprawling case who were convicted of the same RICO and VICAR conspiracy counts as Mr. Carcamo who neither the probation office nor the prosecutors argued should be held responsible for the murders, and who were not sentenced under the Sentencing Guideline for murder. In other words, the Court did not find the murders were reasonably foreseeable to those co-defendants. As a result, those co-defendants received sentences ranging from 97 to 240 months, a far cry from the life sentence Mr. Carcamo faced.

At the sentencing hearing on April 14, 2022, the bulk of the arguments concerned the Sentencing Guidelines calculation. Concerning whether the murders were reasonably foreseeable, Mr. Carcamo again noted “under the Government’s theory...if the murder is reasonably foreseeable to Mr. Carcamo, who was incarcerated, had no involvement whatsoever, then it should be theoretically reasonably foreseeable to every member in the indictment.” Yet “neither the Government, nor the Probation Office have sought to apply that framework on any of the other defendants who did not go to trial. In other words, the only defendants...for whom the murders were deemed reasonably foreseeable were the

defendants who went to trial, the bulk of which faced substantive VICAR mandatory life sentences because they actually committed a murder.”

But the district court rejected that argument, noting co-defendants who pleaded guilty “made a deal with the Government” and “accepted responsibility” but Mr. Carcamo “did not and wanted to go to trial. So that’s a huge difference.” Mr. Carcamo protested that “[t]here could be other reasons why [he] should not get the same sentence as a defendant who pled guilty,” but for purposes of the Sentencing Guideline calculation, it could not be that “[h]e went to trial is the reason why the murders were reasonably foreseeable to him and they are not reasonably foreseeable” to other co-defendants convicted of the same RICO and VICAR conspiracy by a guilty plea.

The district court ultimately concluded all five murders were reasonably foreseeable to Mr. Carcamo because “This is MS-13. It had a well-defined pattern of violence, including—especially murder. And—not always murder, but human life had almost no value to members of the gang.” It continued that Mr. Carcamo “set in motion a pattern and practice and way of life of the gang that involved murder, that if they wanted, murder was on the table as a way to achieve the ends of the gang,” and thus the murders were reasonably foreseeable.

The district court adopted the Sentencing Guideline range set out in the Probation Office’s supplemental memorandum and advocated by the government: an adjusted offense level of 51, reduced to the maximum offense level of 43, which resulted in an advisory Guideline range of life imprisonment.

Despite giving Mr. Carcamo a life sentence at his original sentencing hearing in 2011, the district court revised the sentence for the RICO conspiracy to 39 years. Relying on 18 U.S.C. § 3553(a), it elaborated that Mr. Carcamo “was in custody, ICE custody at the time, and he did not pull the trigger. And there is no specific evidence by the Government that he gave the green light to kill a specific person or go out on a specific hunt.” Although it believed that before “going into ICE custody he set in operation a murderous plan of attack, a murderous way of life...that is slightly removed from giving a direct order to go and kill somebody on a given night.”

III. The Ninth Circuit Affirms the Sentence.

Mr. Carcamo appealed the sentence, challenging the district court’s calculation of the advisory Guideline range, and specifically its finding that the five murders were reasonably foreseeable to Mr. Carcamo. The Ninth Circuit affirmed the sentence.

First, the appellate court found the district court did not rely on Mr. Carcamo’s “mere membership” in the gang to find the murders reasonably foreseeable, but instead “determine[d] the scope of the criminal activity’ that Carcamo in particular ‘agreed to jointly undertake,’” noting that the murders “were appropriately included as underlying racketeering activity.” App. 3a (quoting U.S. Sentencing Guideline § 1B1.3) (brackets in original).

Second, it found that that any error would be harmless “because it did not affect Carcamo’s Guidelines range” and the “Guidelines range still would have been life.” App. 4a.

The Ninth Circuit thereafter denied Mr. Carcamo's petition for panel rehearing and rehearing en banc. App. 5a.

REASONS FOR GRANTING THE WRIT

Like the district court below, the Ninth Circuit erred in relying on the fact that the murders were included as racketeering activity in an indictment charging 39 defendants as a substitute for an individualized assessment of whether the murders were "reasonably foreseeable" to Mr. Carcamo for purposes of calculating the applicable U.S. Sentencing Guidelines range. Doing so meant that the decision to find the murders reasonably foreseeable to Mr. Carcamo was based on his mere membership in the gang and the fact he went to trial rather than plead guilty.

The Ninth Circuit also misapplied this Court's precedent when it held any error in calculating the Sentencing Guidelines range was harmless because it would not have affected the ultimate Guidelines range, rather than focus on whether the Guidelines error would have affected the ultimate sentence imposed.

This Court should grant a petition for a writ of certiorari.

I. The district court incorrectly calculated the U.S. Sentencing Guideline range.

A "district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range." *Gall v. United States*, 552 U.S. 38, 49 (2007). "Failure to calculate the correct Guidelines range constitutes procedural error." *Peugh v. United States*, 569 U.S. 530, 537 (2013).

When a defendant is convicted of a conspiracy or other form of "jointly undertaken criminal activity," his Sentencing Guideline range is calculated by determining "all acts and omissions of others that were (i) within the scope of the

jointly undertaken criminal activity, (ii) in furtherance of that criminal activity, and (iii) reasonably foreseeable in connection with that criminal activity.” U.S.S.G. § 1B1.3(a)(1)(B); *see generally Witte v. United States*, 515 U.S. 389, 393 (1995).

Guidelines commentary explains, “the scope of the ‘jointly undertaken criminal activity’ is not necessarily the same as the scope of the entire conspiracy, and hence relevant conduct is not necessarily the same for every participant.” U.S.S.G. § 1B1.3 app. n. 3(B); *see also* § 1B1.3 app. n. 3(D) (“the criminal activity that the defendant agreed to jointly undertake, and the reasonably foreseeable conduct of others in furtherance of that criminal activity, are not necessarily identical.”).

Because a “conspirator is to be judged on the basis of the” criminal conduct “he reasonably foresaw or which fell within ‘the scope’ of his particular agreement with the conspirators, rather than on the” conduct “made by the entire conspiracy,” a district court “must make an express factual finding regarding” whether the criminal activity was reasonably foreseeable. *United States v. Whitecotton*, 142 F.3d 1194, 1198 (9th Cir. 1998); *see also United States v. Evans*, 90 F.4th 257, 262-63 (4th Cir. 2024) (“Only acts of co-conspirators that fall within the ‘scope of the criminal activity the *particular* defendants agreed to jointly undertake’—as opposed to ‘the scope of the *entire* conspiracy’—count as relevant conduct”) (quoting U.S.S.G. § 1B1.3 app. n. 3(B) (emphasis in original)). That way, “the Guidelines works with the statute to ensure that a defendant is not exposed to unlimited liability,” and to “establish a fair sentence based on an individualized assessment of accountability.” *United States v. Collazo*, 984 F.3d 1308, 1336 (9th Cir. 2021) (en banc).

The district court failed to undertake this “individualized assessment;” instead it relied on Mr. Carcamo’s mere membership in the gang to determine the murders were reasonably foreseeable to him notwithstanding the fact it was undisputed that Mr. Carcamo did not commit any of the murders, had no advance knowledge of them, played no role in planning them, and was incarcerated when they occurred. The district court effectively concluded that all murders committed by MS-13 gang members were reasonably foreseeable to Mr. Carcamo by virtue of his membership in the gang. It explained, “[t]his is MS-13. It had a well-defined pattern of violence, including—especially murder. And—not always murder, but human life had almost no value to members of the gang.” It thus relied on the conduct of “the entire conspiracy” rather than make a factual determination of whether these specific murders were “reasonably foreseeable” to Mr. Carcamo.

The Ninth Circuit rejected Mr. Carcamo’s challenge to this argument, finding that the district court focused on the “scope of the criminal activity” that Mr. Carcamo “in particular ‘agreed to jointly undertake’” because the murders were included “as underlying racketeering activity” in the indictment. App. at 3a (citing U.S.S.G. § 1B1.3).

But relying on the fact that the murders were included as racketeering activity in an indictment charging 39 defendants is not a substitute for an individualized assessment of whether the murders were “reasonably foreseeable” to Mr. Carcamo. Many other co-defendants in the sprawling case who entered into plea agreements and were convicted of the same RICO and VICAR conspiracy counts as Mr. Carcamo

were not held responsible for the murders. The district court noted those co-defendants “made a deal with the Government” and “accepted responsibility,” but Mr. Carcamo “did not and wanted to go to trial. So that’s a huge difference.” But that was an insufficient reason to find the murders were reasonably foreseeable to Mr. Carcamo under principles of relevant conduct. While that difference may justify withholding an acceptance of responsibility reduction under U.S.S.G. § 3E1.1—an adjustment that Mr. Carcamo did not seek—or for imposing a longer sentence more generally, it has no bearing whatsoever on whether these specific murders were reasonably foreseeable to Mr. Carcamo.

In contrast to Mr. Carcamo, other co-defendants held accountable for the murders were involved in carrying out or planning the murders or were involved in the day-to-day activities of the gang at the time of the murders, meaning the specific murders were certainly “reasonably foreseeable” to them. It was Mr. Carcamo alone who was singled out and found to be legally responsible for murders he was not involved in, based solely on his mere membership in the gang and the fact he went to trial.

If the Ninth Circuit focused on the facts specific to Mr. Carcamo, it would have found there was no evidence to support a finding that the murders were within “the scope” of Mr. Carcamo’s “particular agreement” with other members of the conspiracy. Indeed, as the district court, government and probation recognized, at the time of the murders in 2008, Mr. Carcamo was incarcerated, and the probation office noted Mr. Carcamo’s “day-to-day leadership...diminished” as a result. The district

court claimed that Mr. Carcamo “set in motion a pattern and practice and way of life of the gang that involved murder,” but cited no evidence to support that sweeping assertion.

The only evidence cited by the government at the sentencing hearing undercuts that conclusion. The district court asked the prosecutor, “before Mr. Carcamo went into custody, what was the most violent thing that the gang did? Not necessarily what he did, but the gang did; what was the most violent thing the gang did?” The prosecutor responded it “might actually be similar to the two things that he did, which were fairly brutal armed robberies.” While armed robbery is of course egregious behavior, it is not the same as murder. And the fact that the scope of the gang’s conduct under Mr. Carcamo’s watch never rose to murder undercuts the government’s claim that it was Mr. Carcamo—not his successor who was the undisputed leader of the gang at the time of all the murders—that “pushed the gang to be more murderous.” Or in the language of the Sentencing Guidelines, it demonstrated that the scope of Mr. Carcamo’s “particular agreement” with his co-conspirators extended no further than assault.

The murders were tragic and senseless, but they were not reasonably foreseeable to Mr. Carcamo, who was incarcerated and no longer involved in the day-to-day activities of the gang in 2008. The district court committed procedural error by erroneously calculating the Guideline range, and the Ninth Circuit erroneously affirmed that decision.

II. The Ninth Circuit misapplied this Court’s precedent on reviewing sentences for procedural error.

The Sentencing Guidelines “are not only the starting point for most federal sentencing proceedings but also the lodestar.” *Molina-Martinez v. United States*, 578 U.S. 189, 200 (2016). “[E]mpirical evidence indicat[es] that the Sentencing Guidelines have the intended effect of influencing the sentences imposed by judges.” *Peugh*, 569 U.S. at 543. The Sentencing Commission’s own “data indicate that when a Guidelines range moves up or down, offenders’ sentences move with it.” *Id.* “The Guidelines’ central role in sentencing means that an error related to the Guidelines can be particularly serious.” *Molina-Martinez*, 578 U.S. at 199.

The Ninth Circuit ruled that no remand was necessary because any error was harmless, as it “did not affect Carcamo’s Guideline range.” App. at 4a. But that was a misapplication of this Court’s precedent.

A district court must not only “begin their analysis with the Guidelines” but also “remain cognizant of them throughout the sentencing process.” *Gall*, 552 U.S. at 50 n. 6. It follows then that “when a defendant shows that the district court used an incorrect range, he should not be barred from relief on appeal simply because there is no other evidence that the sentencing outcome would have been different had the correct range been used.” *Id.* at 200. That is true “whether or not the defendant’s ultimate sentence falls within the correct range.” *Id.* at 198; *see also Rosales-Mireles v. United States*, 585 U.S. 129, 139-42 (2018).

Under the standards set by this Court, the Guidelines error at Mr. Carcamo’s sentencing were not harmless even if the Guidelines range would not have changed

and even though the district court imposed a below Guideline range sentence of 39 years. The district court's reasoning for the below Guideline sentence was not predicated on having the correct Guidelines range in mind.

Before announcing the sentence, the district court emphasized that Mr. Carcamo "set in operation a murderous plan of attack, a murderous way of life, and that—by which his fellow gang members would go out on hunts." Nonetheless, it felt Mr. Carcamo was "slightly removed from giving a direct order to go and kill somebody on a given night" which was "worth of some consideration." In other words, the district court varied not because it had the correct Guideline range—without a finding the murders were reasonably foreseeable to Mr. Carcamo and without an organizer or leader enhancement—in mind, but notwithstanding the incorrect Guidelines range.

Thus, it is plausible the district court could have varied even more if it had applied the correct Guideline range and had a range in mind that did not consider the murders reasonably foreseeable. The fact that the district court revised its original life sentence to 39 years when the Guidelines issues were more robustly challenged by Mr. Carcamo at the resentencing hearing reinforces the point that with the correct Guidelines range in mind, the district court could have revised the sentence even lower.

The Ninth Circuit misapplied this Court's precedent by concluding that any error was harmless because it would not have affected the Guideline range, instead of focusing on whether the error affected the ultimate sentence. This Court should

grant certiorari to clarify that harmless error review of Sentencing Guidelines errors is focused on whether it would have affected the sentence, not the Guideline range.

CONCLUSION

The petition for a writ of certiorari should be granted.

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