

No. \_\_\_\_\_

IN THE  
SUPREME COURT OF THE UNITED STATES

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DANILO VELASQUEZ—PETITIONER

VS.

UNITED STATES OF AMERICA —RESPONDENT

PETITION FOR WRIT OF CERTIORARI

TO THE U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT

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## QUESTION PRESENTED

Following the grant of petitioner's section 2255 motion, the district court resentenced petitioner to discretionary life in this RICO gang case. This occurred after Jaime Balam, the gang member who had fired the fatal shots in the principal incident had been mistakenly deported, extradited, and then sentenced to 27 1/2 years after he was allowed to plead guilty to spare the government litigation risks and spare the victims' families a second trial.

Does petitioner's continued life sentence represent an unwarranted sentencing disparity under 18 U.S.C. § 3553(a)(6) because 1) it was grounded in impermissible considerations given the leniency shown Balam and 2) the difference between the two sentences is so much greater than the leniency afforded under the Guidelines for acceptance of responsibility that the result unfairly punished petitioner for exercising his constitutional right to jury trial?

## LIST OF PARTIES

All parties to these issues appear in the caption of the case on the cover page.

## LIST OF PRIOR PROCEEDINGS

- *United States v. Danilo Velasquez, et al*, Northern District of California No. 08-cr-730-WHA. Original trial and conviction of petitioner and codefendants. Judgment entered February 15, 2012;
- *United States v. Danilo Velasquez*, 9<sup>th</sup> Circuit No. 12-10099. Direct appeal. Memorandum decision affirming the judgment filed on December 17, 2018.
- *United States v. Danilo Velasquez*, Supreme Court No. 18-8346, petition for writ of *certiorari* on direct appeal. Petition denied on April 15, 2019.
- *United States v. Danilo Velasquez, et al*, Northern District of California No. 08-cr-730-WHA. Judgment entered on resentencing following grant of section 2255 motion on April 24, 2022.
- *United States v. Danilo Velasquez*, 9<sup>th</sup> Cir. 22-10104. Direct appeal from resentencing. Memorandum decision affirming judgment filed on August 16, 2023. Rehearing and *en banc* review denied on October 30, 2023.
- *United States v. Danilo Velasquez*, Supreme Court No. 23A687. Order extending deadline for petition for writ of *certiorari* to March 28, 2024 filed on January 28, 2024.

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## OPINIONS BELOW

The memorandum decision of the Ninth Circuit and its order denying rehearing and *en banc* review are unpublished. Appendix ("App.") 1, 4.

## JURISDICTION

On August 16, 2023, a panel of the U.S. Court of Appeals for the Ninth Circuit affirmed petitioner's sentence on direct appeal following resentencing. App.

1. On August 31, 2023, the panel extended the deadline for petitioner to file a petition for rehearing and *en banc* review to September 29, 2023. App. 18. Petitioner filed his rehearing petition on September 29, 2023. App. 5-17. On October 30, 2023, the Ninth Circuit denied the petition. App. 4. On January 28, 2024, in No. 23A687, this Court entered an Order extending the deadline for filing a petition for writ of *certiorari* to March 28, 2024.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The district court had jurisdiction of the case pursuant to 18 U.S.C. § 3231. The Ninth Circuit had jurisdiction of petitioner's appeal pursuant to 28 U.S.C. § 1291. This petition is timely under Supreme Court Rules 13.1, 13.3, and 13.5.

## CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

### United States Constitution, Sixth Amendment

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed . . . ."

18 U.S.C. § 3553(a)

"Factors to be considered in imposing a sentence. The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed--

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training,

medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for--

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines--

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title

28); and

(ii) that, except as provided in section 3742(g) [18 USCS § 3742(g)], are in effect on the date the defendant is sentenced;

....

(5) any pertinent policy statement--

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g) [18 USCS § 3742(g)], is in effect on the date the defendant is sentenced.

*(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and*

*(7) the need to provide restitution to any victims of the offense."*

#### **STATEMENT OF THE CASE**

On November 29, 2011, a jury convicted petitioner of 1) conspiracy to engage in a racketeering enterprise; 18 U.S.C. § 1962(d); 2) conspiracy to commit murder in aid of racketeering; 18 U.S.C. § 1959(a)(5); 3) conspiracy to commit assault with a dangerous weapon in aid of racketeering; 18 U.S.C. § 1959(a)(6); and 4) carrying, brandishing, or discharging a firearm in aid of a crime of violence. 18 U.S.C. § 924 (c)(1)(A). The jury found that the objects of the conspiracy charged in count one

included murder and conspiracy to commit murder. App. 110-111. On February 15, 2012, the district court imposed concurrent sentences on counts one to three, consisting of life on count one, 120 months on count two, and 36 months on count three, plus a consecutive sentence of 120 months on count four. App. 100-107.<sup>1</sup>

On December 17, 2018, in case 12-10099, the Ninth Circuit affirmed the judgment. After it denied rehearing, this Court denied *certiorari* in case 18-8346.

On July 7, 2020, under *United States v. Davis*, 139 S.Ct. 2319 (2019), the district court granted petitioner's motion under 28 U.S.C. § 2255 to vacate his conviction on count four. It ordered a full resentencing. App. 88-89. A supplemental Presentencing Report was prepared that recommended the same sentences on counts one, two, and three. Presentence Reports Under Seal ("PSR") 14-15.

On April 19, 2022, the district court imposed the recommended sentences. App. 83. Judgment was entered on April 24, 2022. App. 19. Petitioner appealed, raising the issue of unwarranted disparity between his sentence and those of the other participants in the main incident at trial, plus a procedural issue. On August 16, 2023, the Ninth Circuit affirmed the judgment. App. 1. On August 31, 2023, the panel extended the deadline for petitioner to file a petition for rehearing and *en banc* review to September 29, 2023. App. 18. Petitioner filed his rehearing petition on September 29, 2023, focusing on the disparity between his sentence and that of the other shooter, Jaime Balam. App. 5. On October 30, 2023, the Ninth Circuit

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<sup>1</sup> The case had over thirty defendants charged with various offenses. There was a separate trial involving five defendants, who were all sentenced to life.

denied the petition. App. 4. On January 28, 2024, in No. 23A687, this Court entered an Order extending deadline for petition for writ of *certiorari* to March 28, 2024.

## STATEMENT OF FACTS

### **I. The Roles of Petitioner, Jaime Balam, and the Others**

Petitioner was a member of San Francisco's 20<sup>th</sup> Street clique of the MS-13 criminal street gang. In late 2008, petitioner and Giovanni Hernandez became coleaders when the former leader was arrested. Petitioner had been a member of the clique since approximately January 2005. PSR 29.

Five murders were committed by MS-13 members in 2008 before petitioner became co-leader. Two people mistaken for rival gang members were shot and killed in response to petitioner having been shot and hospitalized. In two other separate incidents murders were committed as part of the clique's effort to tax and enforce discipline among vendors doing business in the area. The fifth killing was an attack on a suspected Norteño. Petitioner was not present at these killings. PSR 31-32.

On February 13, 2009, petitioner was one of two drivers in an incident where two men were shot and injured outside of a liquor store. He led the February 19, 2009 "hunt" for Norteños and subsequent shooting near the Daly City BART station with Jaime Balam, Luis Herrera, Giovanni Hernandez, and Wilson Villalta. Herrera drove petitioner and Balam in one car. Villalta drove Hernandez in the other car. Petitioner and Balam shot into a car of four young Latino men.<sup>2</sup> One man,

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<sup>2</sup> It was shown at trial that none of the men in the car was a gang member.

Moises Frias, was killed. Two others were injured, one seriously. PSR 30. Balam fired the fatal shots. App. 95.

On March 2, 2009, two vehicles and a suspected MS-13 member were involved in a shooting that left a man injured. The shooter yelled “revenge” as he fired. The PSR says that petitioner directed this hunt. PSR 31. However, the main cooperating witness, Wilson Villalta, could not remember who ordered it. App. 112.

On March 4, 2009, Herrera, Villalta, and two others were arrested in a stolen car. One of the guns used in the February 19, 2009 shooting was recovered. The occupants were hunting Norteños because Hernandez had recently been robbed by them. Petitioner was not present. PSR 31. He was arrested on July 8, 2009. PSR 32.

## **II. Relevant Procedural History**

### **A. The Disposition in Jaime Balam’s Case.**

After the Daly City shooting, Jaime Balam was arrested for unrelated reasons. He was deported before his involvement in the Daly City shooting was realized. Eventually, he was extradited back to the United States. App. 95-96.

In *United States v. Balam*, 12-cr-625-WHA, Balam pled guilty to the same four charges as petitioner, plus three counts of attempted murder, one count of section 924(j), and one count of being a prohibited person in possession of a firearm. The plea agreement provided for a sentence of 27 ½ years. On November 8, 2016, this Court imposed that sentence. App. 90-91. The government justified its leniency towards Balam in part because by pleading guilty, he spared the victims’ family a second trial and spared the government the risk of a possible acquittal. App. 99.

## **B. Lower Court Proceedings**

When petitioner was first sentenced in February 2012, the following exchange occurred:

“THE COURT: Why do you say that if one wants to take their chances on getting an acquittal at trial and not accepting responsibility and they go to trial and lose, why should that person be treated the same way as somebody who pled guilty, gave up the chance for an acquittal, gave up the chance for an appeal?

MS. SCHWARTZ: . . . I don’t believe that exercising your right at trial should be a basis for differentiating two defendants based on their degree of culpability.

THE COURT: Maybe you don’t believe that, but what do the Guidelines say about that?” App. 108-109.

At the resentencing hearing, petitioner argued the enormous disparity between his sentence and Balam’s was not justified by the government’s having mistakenly deported him, creating the need for a second trial. App. 55, 59. It was not justified by petitioner’s insistence on a trial and failure to accept responsibility. App. 59-60. The government argued that Balam was younger and had less history with the gang than petitioner. App. 66, 70.

In sentencing petitioner, the district court denied punishing him for going to trial. App. 77-78. It did not see any unwarranted disparities between petitioner and Balam or anybody else. App. 80-82. It noted that “acceptance of responsibility . . . is a factor that the guidelines require us to take into account.” App. 78. The fact that Balam and others “accepted responsibility and made peace with the government [was] also a major factor.” App. 81.

In its brief memorandum decision, the Ninth Circuit ruled that the district court had considered petitioner's disparity argument and had not abused its discretion in rejecting it. It had not penalized petitioner for going to trial. App. 2-3.

## REASONS FOR GRANTING THE PETITION

### I. Where Two People Both Attempt to Kill the Victims, a Sentencing Disparity of Half a Lifetime Based on Acceptance of Responsibility in Pleading Guilty is Unwarranted and Improperly Punishes the Defendant Who Went to Trial.

#### A. Introduction

Petitioner and Jaime Balam both shot into a car of innocent people.

Petitioner went to trial and was sentenced to life. Balam, who fired the fatal shots but who had the good luck to be deported and then had to be extradited to face the consequences of his actions, will get out of prison with half his life still to live. This is so because the government wanted to spare itself the burden of a second trial and spare the victims' families that burden as well. This is understandable in an informal sense, but it does not justify a sentencing disparity of half a lifetime.

There must be procedural and substantive limits to sentencing disparities grounded in acceptance of responsibility. This is necessary to avoid punishing defendants who go to trial. The petition should be granted to settle this important question of federal law. Supreme Court Rule 10(c).

#### B. The Merits

##### 1. Standard of Review

The U.S. Sentencing Guidelines are advisory only. *United States v. Booker*, 543 U.S. 220 (2005). A sentence is reviewable for substantive "unreasonableness"

considering the sentencing factors set out at 18 U.S.C. § 3553(a). *Id.* at 261; *United States v. Carty*, 520 F.3d 984, 993 (9<sup>th</sup> Cir. 2008) (en banc). A court of appeals *may* apply a presumption of reasonableness to a Guidelines sentence. *Rita v. United States*, 551 U.S. 338, 345, 350 (2007). However, the Ninth Circuit has declined to endorse such a presumption. *United States v. Carty, supra*, 520 F.3d at 994.

Sentences within a properly calculated Guidelines range may be reversed as unreasonable. *United States v. Plouffe*, 445 F.3d 1126, 1129-1131 (9<sup>th</sup> Cir. 2006). Even a sentence below the advisory Guideline range can be set aside as unreasonable. *Gall v. United States*, 552 U.S. 38, 51 (2007).

Review for substantive reasonableness is highly deferential. *United States v. Ressam*, 679 F.3d 1069, 1088 (9<sup>th</sup> Cir. 2012) (en banc). It is not so deferential, however, that review for unreasonableness is “a dead letter.” *Id.* at 1088, fn. 9 (citation omitted).

## **2. Discussion**

A defendant may not be punished more harshly for exercising his constitutional rights to trial and appeal. *United States v. Jackson*, 390 U.S. 570, 581-582 (1968); *United States v. Medina-Cervantes*, 690 F.2d 715, 716 (9<sup>th</sup> Cir. 1982). A court may grant lenient treatment to defendants who plead guilty. However, it must be understood that the norm is exercise of the right to jury trial. *United States v. Cruz*, 977 F.2d 732, 734 (2d Cir. 1992). “A sentence imposed upon a defendant who stands trial is that norm; it is not an enhancement above the norm as a cost of standing trial.” *Ibid.*

At petitioner's first sentencing hearing, the district court asked if the Guidelines had an answer to defense counsel's argument about unwarranted disparity. They do. The "discounts" for pleading guilty are embodied in the Guidelines governing acceptance of responsibility. *Ibid.* Acceptance is worth a three-level decrease in offense level. USSG § 3E1.1(a)-(b). At the high end of the sentencing table, that translates to a reduced sentencing range of approximately seven and a half to nine and a half years, not the half a lifetime that separates petitioner's sentence from Balam's.

The implicit assumption in the outcome here is that the government is presumptively entitled to the convictions it wants. The district court's initial criticism of the defendant who "wants to take their chances on getting an acquittal" denigrates the presumption of innocence and the requirement of proof beyond a reasonable doubt. It implies that going to trial where others have pled guilty is a "Hail Mary" and that an acquittal would mean something went wrong.

The government's remarks in its sentencing papers in Balam's case were to the same effect. The government believed Balam was guilty but harbored doubts about proving it. Balam gave them a gift. However, neither Balam nor petitioner had an obligation to help the government "avoid the litigation hazards" it would face in securing a conviction. App. 99. Neither was obligated to "ma[ke] peace with the government." App. 81. It was entirely proper for petitioner to believe in his own innocence or just put the government to its proof and think that the jury would not believe the self-interested liars and criminals who were its principal witnesses.

The disparity between petitioner's and Balam's sentences rests on another inappropriate consideration: the notion that petitioner had a moral obligation to provide closure to the victims by pleading guilty. There is no authority for that.

18 U.S.C. § 3553(a) provides:

"Factors to be considered in imposing a sentence. The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed--
  - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
  - (B) to afford adequate deterrence to criminal conduct;
  - (C) to protect the public from further crimes of the defendant; and
  - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- (3) the kinds of sentences available;
- (4) the kinds of sentence and the sentencing range established for--
  - (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines--
    - (i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
    - (ii) that, except as provided in section 3742(g) [18 USCS § 3742(g)], are in effect on the date the defendant is sentenced;
  - ...
  - (5) any pertinent policy statement--
    - (A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
    - (B) that, except as provided in section 3742(g) [18 USCS § 3742(g)], is

in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense."

The statute does not speak of pleading guilty to provide closure to victims.

Both petitioner's initial sentencing and Balam's sentencing were grounded in erroneous assumptions about what a criminal defendant who sees his codefendants pleading out owes to the government and to the victims. The district court's failure at petitioner's resentencing to bring his sentence in line with Balam's cemented these fallacies and perpetuated an unreasonable disparity.

This Court need not draw the precise line where disparate sentencing grounded in acceptance of responsibility turns into punishment for going to trial. It suffices to hold that a line must exist, and that additional punishment of half a lifetime crosses any line one can imagine. Petitioner deserves to be resentenced.

## CONCLUSION

For the foregoing reasons, the petition for writ of *certiorari* should be granted.

Dated: March 27, 2024

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