

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

JOSE OCHOA-CALEDON, also known as Ramiro Cerna-Gonzalez,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a district court abuses its discretion when it determines a Guidelines sentencing range of 24 to 30 months and imposes a 40-month sentence without explaining how the Guidelines fails to achieve the statutory purposes of sentencing?

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Jose Ochoa-Caledo, also known as Ramiro Cerna-Gonzalez, (“Ochoa”) respectfully petitions for writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

CITATION OF REPORTS OF OPINIONS AND ORDERS

The United States Court of Appeals for the Fifth Circuit issued an unpublished opinion in *United States v. Jose Ochoa-Caledo, also known as Ramiro Cerna-Gonzalez*, 697 Fed.Appx. 344 (5th Cir. 2017), a copy of which appears at pages 28a-29a of the appendix to this petition (“pet. app.”). The United States District Court for the Northern District of Texas, Fort Worth Division entered judgment of conviction and sentence in *United States v. Jose Ochoa-Caledo, a/k/a Ramiro Cerna-Gonzalez*, No. 4:16-CR-079-A (1), a copy of the judgment of conviction, pet. app. 1a-5a, and the statement of reasons for the sentence, pet. app. 6a-9a, appears in the appendix to this petition. A transcript of the sentencing hearing appears in the appendix to this petition. *See* pet. app. 10a-27a.

STATEMENT OF BASIS FOR JURISDICTION

The Court of Appeals for the Fifth Circuit entered judgment in this case on September 7, 2017. The United States District Court for the Northern District of Texas, Fort Worth Division entered a written judgment on September 9, 2016

after entering oral judgment on September 8, 2016. Title 28 of the United States Code section § 1254(1) provided the basis for this Court's jurisdiction.

STATUTES INVOLVED

This petition involved the Sentencing Reform Act of 1984 (“SRA”), 18 U.S.C. § 3551 et seq. (held unconstitutional in part by *United States v. Booker*, 543 U.S. 220 (2005)), relevant provisions of which appear in the appendix to this petition. See pet. app. 33a-39a.

STATEMENT OF THE CASE

I. Basis for Federal Jurisdiction in the District Court.

Title 18 of the United States Code section 3231 provided the basis for the district court's subject-matter jurisdiction in the case below.

II. Material Facts.

The district court sentenced Ochoa for the offense of illegal reentry after deportation, in violation of 8 U.S.C. § 1326 (included in Appendix at pet. app. 30a-32a). *See* pet. app. 28a. The Guidelines range was 24 to 30 months. *See* pet. app. 28a. The district court imposed a 40-month sentence. *See* pet. app. 1a. Ochoa appealed the 40-month sentence arguing that the record lacked an adequate explanation to impose an upward variance. *See* pet. app. 29a. The court of appeals affirmed the district court holding that the explanation was legally sufficient. *See* pet. app. 29a.

ARGUMENT FOR ALLOWING WRIT

I. Argument.

The district court determined that the Guidelines resulted in a sentencing range of 24 to 30 months. *See* pet. app. 6a, 15a, and 28a. The district court imposed a 40-month sentence. *See* pet. app. 1a, 24a, and 28a. The court of appeals first determined that “the district court imposed a nonguidelines sentence or upward variance based on the 18 U.S.C. § 3553(a) sentencing factors.” Pet. app. 29a. The court of appeals then held that because the district court made reference to other conduct of the petitioner, including prior convictions that did not receive criminal history points under the Guidelines, the district court adequately explained its reasons for the sentence. Pet. app. 29a.

The process sanctioned by the court of appeals nullifies this Court’s direction that a district court adequately explain the chosen sentence. *See Gall v. United States*, 552 U.S. 38, 51 (2007). The petitioner asserts that this Court’s direction requires either that the district court conform its consideration of the statutory sentencing factors with the Guidelines consideration of those factors, determine whether the information in the case meets the Guidelines criteria for a departure sentence, or demonstrate that the Guidelines fails to achieve the statutory purposes of sentencing.

II. Statutes and Rules at Issue.

This petition involves the application of the Sentencing Reform Act of 1984. *See* 18 U.S.C. § 3551 et seq. The act requires that a district court impose a sentence that is sufficient but not greater than necessary to achieve the statutory purposes of sentencing. *See* 18 U.S.C. § 3553(a). The district court must consider, among other things, the extant Guidelines range in determining the sentence. The act states in relevant part that:

The court, in determining the particular sentence to be imposed, shall consider --

...

(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), are in effect on the date the defendant is sentenced.

18 U.S.C. § 3553(a)(4).

III. Decisions of this Court at Issue.

This Court recognizes three manners by which a district court may impose a sentence. First, the district court may impose a sentence that coincides with a properly calculated Guidelines range. As a general matter, the Guidelines provide the explanation for the sentence in such a case. *Rita v. United States*, 551 U.S. 338, 356-357 (2007). Second, the district court may depart from the Guidelines

range. The Guidelines provide the procedure for such a sentence. USSG §§5K1.1-5K3.1. Third, the district court may impose a sentence outside the Guidelines range where the range “fails properly to reflect § 3553(a) considerations.” *Kimbrough v. United States*, 552 U.S. 85 at 109 (2007) (quoting *Rita v. United States*, 551 U.S. 338, 351 (2007)).

IV. Analysis.

The court of appeals required only that the district court state some reason for the sentence without regard to the quality of the reason. The court of appeals thus applied a standard of review for the district court’s variance from the Guidelines range that sanctions a sentence “based solely on the [district court’s] view that the Guidelines range” fails to achieve the statutory purposes of sentencing in contravention of the closer review called for by this Court. *Kimbrough*, 552 U.S. at 109. Such closer review requires that the district court explain how the Guidelines fails as a general matter to achieve the statutory purposes of sentencing *Id.*

V. Conclusion.

The court of appeals sanctioned a departure by the district court from this Court’s direction regarding how to implement the SRA so far from the accepted and usual course of judicial proceedings that this Court ought to exercise its supervisory power in order to remediate such action. The district court’s

explanation for the sentence it chose amounts to a statement of personal opinion rather than a legal reason therefor. The court of appeals affirmation countenances such a procedure in contravention of this Court's direction.

This Court should grant this petition for certiorari.

Respectfully submitted,

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