

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

UNITED STATES OF AMERICA,

Respondent,

vs.

JAVIER GARIBAY MENDOZA-ROMERO,

Petitioner.

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

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QUESTIONS PRESENTED FOR REVIEW

1. WHETHER THE DISTRICT COURT ERRED IN CALCULATING THE GUIDELINES BY FINDING CALIFORNIA PENAL CODE SECTION 211 (ROBBERY) IS A GENERIC CRIME OF VIOLENCE.

2. WHETHER THE 48 MONTH SENTENCE IMPOSED ON AN UNAGGRAVATED REENTRY OFFENSE WAS SUBSTANTIVELY UNREASONABLE.

Prefix.

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**PETITION FOR WRIT OF CERTIORARI TO THE UNITED
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The Petitioner, Javier Garibay Mendoza-Romero, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on November 20, 2017.

OPINION BELOW

On November 20, 2017, the Court of Appeals filed an unpublished opinion

affirming Mr. Mendoza-Romero sentence. A copy of the decision is attached to this petition as Appendix "A".¹

JURISDICTION

On November 20, 2017, the court of appeals issued an opinion affirming the conviction and sentence. This appeal arises from the 48 month sentence imposed by the district court on September 28, 2015. Mr. Mendoza-Romero was charged with one count of deported alien found in the United States, in violation of 8 U.S.C. § 1326, in the United States District Court for the Southern District of California. The district court had original jurisdiction pursuant to 18 U.S.C. § 3231. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

WHY GRANTING OF WRIT IS OF VITAL IMPORTANCE

This case arises from the sentencing after guilty plea to the simple offense of having been found in the United States after deportation. First, the district court erred when it miscalculated the guideline range by imposing a 12-level increase to Mr. Mendoza-Romero's base offense level for a crime of violence enhancement under 2L1.2(b)(1)(A)(ii). Given the fact that California Penal Code section 211 is overbroad and categorically not a crime of violence aggravated felony, the district court erred in enhancing the sentence based on the conviction, and the district court should have

1/ No other petitioner is involved in this petition.

found that Mr. Mendoza-Romero had a much lower adjusted base offense level, and a much lower guideline range.

Second, the district court imposed an unreasonable sentence in violation of § 3553(a) and *Booker*.^{2/} The aforementioned procedural errors resulted in a sentence that did not reflect the goals of § 3553(a) and was thus unreasonable. Further, a sentence of 48 months, far beyond even the government’s recommendation, was unnecessarily harsh and is in contravention of the court’s duty to impose a sentence that is “sufficient, but not greater than necessary” to comply with the purposes of sentencing.

The petition should be granted because first, the conduct-centric analysis is flatly inconsistent with the element-centric analysis required by the Supreme Court’s subsequent decision in *Descamps v. United States*, 133 S. Ct. 2276, 2287–88 (2013). *See Op. Br.* at 10-20.

Descamps made clear that defendants are convicted of elements, not conduct, and the conduct underlying a conviction is simply irrelevant to the categorical—modified or not—analysis. Thus, *Becerril-Lopez* is clearly irreconcilable with *Descamps*. This analysis is supported by the recent case of *United States v. Cisneros*, F.3d, 2016 WL 3435389 (9th Cir. June 22, 2016), which held

2/ *United States v. Booker*, 543 U.S. 220 (2005).

that *Descamps* required the court to reconsider a prior ruling (*United States v. Snyder*, 643 F.3d 694 (9th Cir. 2011)), that an Oregon burglary statute was a crime of violence by finding that *Snyder* predated *Descamps* and that under the proper analysis the statute was overbroad and non-divisible.

In the court below, the Government contended that *Becerril-Lopez* remains good law. In doing so, the Government cites to (1) pre-*Descamps* cases or (2) unpublished, post-*Descamps* cases that do not even purport to address whether *Becerril-Lopez* and *Descamps* are consistent with each other. See Gov't Br. at 9-15. Those cases, then, hardly advance the Government's argument. Besides citing to those cases, the Government's position boils down to the idea that *Descamps* could not have overruled *Becerril-Lopez* because *Becerril-Lopez* relied on the categorical approach and *Descamps* discussed the modified categorical approach. However, in light of the recent Supreme Court case *Mathis v. United States*, No. 15-6092 (U.S. June 23, 2016), the court is required to look only as to the elements of the offense, and not the alternative facts, and this only confirms the holding in *Dixon* that California robbery is overbroad and non-divisible.

And second, Mr. Mendoza-Romero's above-guideline 48-month sentence was substantively unreasonable given, *inter alia*, that he had not been convicted of a non-immigration felony for over 23 years, the sentence was 11 months beyond the

high-end of the higher (and disputed) guideline range, the plea agreement called for no more than a 37 month recommendation by the government, and Mr. Mendoza-Romero was not entering the U.S. to commit any crime.

STATUTORY PROVISIONS
INVOLVED IN THIS CASE

U.S.S.G. § 2L1.2(b)(1):

If the defendant previously was deported, or unlawfully remained in the United States, after—

- (A) A conviction for a felony that is....(ii) a crime of violence..., increase by 16 levels if the conviction receives criminal history points under Chapter Four or by 12 levels if the conviction does not receive criminal history points;

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.

STATEMENT OF THE CASE

On April 9, 2015, a Border Patrol agent arrested Javier Garibay Mendoza-Romero north of the United States/Mexico border, near the Otay Mesa Port of Entry, under suspicion he had illegally reentered the country in violation of 8 U.S.C. § 1326. [PSR 4; CR 1 at p. 2 (Complaint).] On April 10, 2015, the government filed a complaint against Mr. Mendoza-Romero, alleging a violation of § 1326. [CR 1.] Mr. Mendoza-Romero waived indictment on May 7, 2015 [CR 10], and the government filed a one-count Information charging a violation of § 1326. [ER 1; CR 8.] On May 28, 2015, Mr. Mendoza-Romero pleaded guilty to the Information, pursuant to a “fast-track”^{3/} plea agreement reached with the government. [ER 11; CR 12, 14.]

Mr. Mendoza-Romero’s sentencing hearing was held on September 28, 2015. [ER 33; CR 24.] There, the court found Mr. Mendoza-Romero was in a criminal

3/ The fast-track program offers shorter sentences to defendants who plead guilty quickly and thus save the maximum amount of government resources. See *United States v. Gonzalez-Zotelo*, 556 F.3d 736, 739 (9th Cir. 2009) (“The fast-track program allows federal prosecutors to offer shorter sentences to defendants who plead guilty at an early stage in the prosecution and agree to waive appeal and other rights.”).

history category V. Moreover, the court found that Mr. Mendoza-Romero's offense level should be increased from a beginning offense level of 8, an additional 12 levels based on a 1983 robbery conviction under California Penal Code section 211, without any discussion whatsoever whether it was a crime of violence under U.S.S.G. § 2L1.2(b)(1)(A)(ii). [ER39-40] After adjustments for acceptance of responsibility and fast track, the court found the resulting guideline range to be 30-37 months, but then varied upward and imposed a sentence of 48 months, with three years supervised release to follow. [ER 40.]

On October 5, 2015, Mr. Mendoza-Romero filed a timely notice of appeal regarding his sentence. [ER 9; CR 26.] Mr. Mendoza-Romero appealed, and on November 20, 2017, the Ninth Circuit Court of Appeal denied the appeal finding that the district court did not err, and that the sentence was reasonable. This petition follows.

STATEMENT OF FACTS

1. Introduction.

Javier Garibay Mendoza-Romero, who is 55 years old, has lived the vast majority of his life in the United States, immigrating here when he was only fifteen years old. [PSR 13.] Mr. Mendoza-Romero's mother died when Mr. Mendoza-Romero was two years old, and his father died when Mr. Mendoza-Romero was

fifteen years old. [PSR 13.] Mr. Mendoza-Romero was the youngest of 11 siblings and moved to the United States in 1975, to work and reside with family members in the Los Angeles area. Since that time, he has worked primarily on farms and in factories in California. [PSR 14-15.]

On April 9, 2015, a U.S. Border Patrol agent using the infrared scope observed Mr. Mendoza-Romero in an area north of the Mexican border. [CR 1 at p. 2 (Complaint)] The agent responded to the area and encountered Mr. Mendoza-Romero and another individual. After being approached and questioned, Mr. Mendoza-Romero freely admitted to being a Mexican citizen and to not having documentation or permission allowing him to enter the U.S. [PSR 4] Record checks revealed Mr. Mendoza-Romero had a criminal history and was illegally present in the U.S. [PSR 4.]

2. The Plea Agreement.

In the “fast-track” plea agreement, Mr. Mendoza-Romero admitted that (1) he was convicted of robbery in California under Penal Code section 211 in 1983; (2) he was deported on April 7, 2015, and (3) he was found within the U.S. on April 9, 2015, without obtaining consent to reenter the country. [ER 14.] In the “Sentencing Guidelines Calculations” section of the agreement, the parties jointly recommended the following: (1) a base offense level of eight under U.S.S.G. § 2L1.2; (2) specific

offense characteristic for prior conviction under U.S.S.G. § 2L1.2(b)(1) to be determined by the court at the time of sentencing following preparation of the presentence report; (3) a two or three level downward departure for “Acceptance of Responsibility” under USSG § 3E1.1, and (4) a four-level downward departure for fast track under USSG § 5K1.3. [ER 7; PSR 16.]

3. The Presentence Report.

The presentence report in this case was filed on July 27, 2015, and listed Mr. Mendoza-Romero’s alleged criminal convictions. [PSR 6-11.] The only convictions that scored were for prior illegal reentry convictions. [PSR 9-11]. In relevant part to this appeal, the PSR noted a conviction for California robbery under Penal Code section 211 in 1983. [PSR 6.]

The report noted that the conviction was too old to score for criminal history points, [PSR 6], but was utilized under section 2L1.2(b)(1)(A)(ii) to increase the base offense level by 12 levels purportedly as a crime of violence. [PSR 5].

The report therefore found the guideline range to be:

2L1.2 (base offense level)	8
2L1.2(b)(1)(A)(ii) (increase for crime of violence-1983 PC 211 conv.)	+12
3E1.1(acceptance of responsibility)	-3

5K3.1 (fast track) -4

total offense level 13

In criminal history category V, the resulting guideline range was 30 - 37 months. The probation officer recommended a sentence of 37 months. [PSR 17].

4. The Sentencing.

Both the government and the defense filed sentencing summary charts following the probation report's calculations, with the government recommending 37 months, and the defense recommending 30 months. [ER 25, 29; CR 19, 22].

Mr. Mendoza-Romero was sentenced on September 28, 2015. [ER 33.] At the hearing, defense counsel noted that the court's tentative of a 48 month sentence was unduly harsh based on the nature of the offense, and the likelihood that Mr. Mendoza-Romero would receive additional custodial time for a supervised release violation based on the same conduct of illegally entering the United States. [ER 36].

In response to these arguments, the court noted that Mr. Mendoza-Romero had a substantial criminal record and had previous convictions for violations of section 1326. [ER 37-38]. The court did briefly reference the sentencing guidelines and calculated the offense level to begin at 8, increased by 12 levels for the robbery conviction, decreased by 3 levels for acceptance of responsibility, and 4 levels for fast-track. [ER 39-40].

Thus, the court agreed with the calculations of the PSR, and arrived at a guideline range of 30-37 months. However, the court did not discuss in any way how the robbery conviction met the definition of a crime of violence. The court then noted the government's recommendation, but varied upward beyond the high-end of that range, and sentenced Mr. Mendoza-Romero to 48 months, with three years supervised release to follow. [ER 40.]

ARGUMENT

I.

THE DISTRICT COURT ERRED AS A MATTER OF LAW BY IMPOSING A SENTENCING ENHANCEMENT FOR A CRIME OF VIOLENCE BASED ON THE CALIFORNIA ROBBERY CONVICTION.

The district court relied on the probation report's conclusory claim that the California Penal Code section 211 robbery conviction from 1983 was a crime of violence and therefore a 12 level upward adjustment was mandated under 2L1.2(b)(1)(A)(ii). [PSR 6]. However, the court did not undertake the necessary analysis to match the elements of California Penal Code section 211 to determine if it meets the generic definition of a crime of violence. [ER 39]. Moreover, robbery under section 211 is overbroad and non-divisible, so does not meet the definition of crime of violence, and therefore should not have been used to enhance the sentence under 2L1.2(b)(1)(A)(ii).

The law has been changing in light of *Descamps v. United States*, 133 S. Ct. 2276 (2013). *Descamps* was a watershed case in *Taylor* analysis jurisprudence. It resolved circuit splits regarding when and how to apply the categorical and modified categorical approach to determine if a prior conviction meets the generic definition for an offense that can serve as the basis for a ground of removal. The teachings of *Descamps* are critical in this case for two reasons. First, *Descamps* re-affirmed that the *Taylor* analysis is an elements-based inquiry that compares the elements of a prior conviction with the elements of the generic offense to determine if it is a match. Second, *Descamps* clarified how to distinguish between “elements” and non-elemental facts, holding that “elements” are those facts upon which a jury must unanimously agree exist beyond a reasonable doubt.

In *Descamps*, the Supreme Court granted certiorari after the Ninth Circuit affirmed the lower court’s ruling that petitioner’s prior California burglary conviction was a “violent felony” under ACCA using the modified categorical approach. 133 S. Ct. at 2281-2282. Generic burglary is an enumerated “violent felony” under ACCA, and it requires an element of unlawful entry. *Id.* at 2282. Mr. Descamps argued that the district court impermissibly applied the modified categorical approach to find that his prior burglary conviction was a predicate for generic burglary. *Id.* at 2282. According to Mr. Descamps, the sentencing court should not have been able

to rely on the prosecutor's statement at the plea colloquy for his prior burglary conviction that his crime involved "breaking and entering of a grocery store" to find that the element of unlawful entry was established because "breaking and entering" was not an element of the California offense. *Id.* He argued in short, "breaking and entering" was a non-elemental, superfluous fact. See *id.* The Supreme Court agreed and reversed. *Id.* at 2283. In reaching Mr. Descamps' argument, the Supreme Court re-visited first principles under *Taylor v. United States*, 495 U.S. 575 (1990), and its progeny.

The Court's first critical step in its reasoning was to re-affirm that *Taylor* analysis is an elements-based inquiry. Under the categorical approach: "Sentencing courts may look only to statutory definitions – i.e., the elements – of a defendant's prior offenses, and not to the particular facts underlying those convictions." *Id.* at 2283 (internal quotations omitted) (*italics in original*). "The key, we emphasize[], is elements, not facts." *Id.* The Supreme Court also explained that the modified categorical approach is simply a tool, not an exception, to implementing the categorical approach. *Id.* at 2285. "It retains the categorical approach's central feature: a focus on the elements, rather than the facts, of a crime. And it preserves the categorical approach's basic method: comparing those elements with the generic offense's." *Id.*

Also critical to reaching its decision, the Court defined what is and is not an “element” when conducting *Taylor* analysis. The Court considered “the categorical approach’s Sixth Amendment underpinnings” and held that only facts found unanimously by a jury beyond a reasonable doubt constitute “elements.” *Id.* at 2288. The Court explained that, “The Sixth Amendment contemplates that a jury – not a sentencing court – will find such facts, unanimously and beyond a reasonable doubt. And the only facts the court can be sure the jury so found are those constituting elements of the offense – as distinct from amplifying but legally extraneous circumstances.” *Id.*

The *Descamps* Court’s holding that “elements” are facts that the jury must find unanimously and beyond a reasonable doubt was firmly rooted in prior Supreme Court precedent. Citing to *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), the Court explained that the *Taylor* definition of “elements” was consistent with its prior holding that any fact that increases the statutory maximum, beyond the fact of prior conviction, must also be submitted to the jury and proven beyond a reasonable doubt. *Id.* *Descamps* also cited to *Richardson v. United States*, 526 U.S. 813 (1999). *Id.* *Richardson* explained that, “calling a particular kind of fact an ‘element’ carries certain legal consequence...[t]he consequence that matters for this case is that a jury in a federal criminal case cannot convict unless it unanimously finds that the

Government has proved each element.” 526 U.S. at 817; see also *Evans v. Michigan*, 133 S. Ct. 1069, 1077 (2013) (“elements are...facts that must be proved to sustain a conviction.”).

Finally, *Descamps* explained that relying on non-elemental facts – i.e., facts a jury would not have to find unanimously and beyond reasonable doubt – to enhance a person’s sentence would be unfair. *Descamps*, 133 S. Ct. at 2289 (citing *Taylor*, 495 U.S. at 601-02). Defendants have little incentive to contest non-elemental facts. *Id.* This could confuse the jury at trial. *Id.* At a plea hearing, contesting facts irrelevant to the conviction could irk the court or prosecutor. *Id.* Mr. Descamps was “likely not thinking about the possibility that his silence could come back to haunt him in an ACCA sentencing 30 years in the future.” *Id.*

In sum, *Descamps* reached its ultimate holding that the district court improperly applied the modified categorical approach to enhance his sentence by relying on two foundational *Taylor* analysis principles. First, the *Taylor* inquiry is an elements-based approach that compares the elements necessary to convict with the elements of the generic offense. *Id.* at 2283, 2285. Second, *Descamps* clarified that “elements” are facts that the jury must unanimously find beyond a reasonable doubt in order to convict. *Id.*

Now turning specifically to California PC § 211, that statute is overbroad, and is non-divisible, so can not form the basis to find an aggravated felony crime of violence in order to impose the upward adjustment under 2L1.2(b)(1)(A)(ii) .

The Ninth Circuit recently held that in fact, California PC § 211 is overbroad and is not categorically a crime of violence in part relying on *People v. Anderson*, 252 P.3d 968, 972 (Cal. 2011), because a defendant can commit California robbery by accidentally using force. *United State v. Dixon*, 805 F.3d 1193 (9th Cir. November 20, 2015).

In *Anderson*, the California Supreme Court held that the intent element of robbery does not include an intent to apply force against the victim or to cause the victim to feel fear. The *Dixon* court noted that:

The facts of *Anderson* illustrate why CPC § 211 is not a categorical match to the ACCA's definition of "violent felony." Anderson broke into an unoccupied car that was parked in a parking garage, intending to steal it. *Id.* at 970-71. He drove the car out of its parking spot and attempted to leave the garage, but could not because the gate was closed and he did not have a way to open it. *Id.* After the gate opened, Anderson sped out of the garage in the stolen car, running over the car's owner in the process. *Id.* Although Anderson claimed this was an accident, the California Supreme Court upheld his CPC § 211 conviction, ruling that the statute does not require finding the defendant acted with the intent to use force against another, as long as the defendant did use force against another person with the intent to steal. *Id.* at 971-72.

Dixon, at p. 1197.

Because of this, and because *Descamps* requires an “elements based inquiry,” PC 211 is not categorically a crime of violence. *Dixon*, at pp. 1197-98, citing *Descamps* at 2287.

More importantly, the *Dixon* court also held that because § 211 contains only alternative means to commit the offense, it is not divisible. “The disjunctively worded phrases in the statute and jury instructions are alternative means, not alternative elements. To return a guilty verdict on a CPC § 211 charge, a jury must find that the elements are satisfied, but jurors need not agree on the disjunctively worded alternatives.” *Dixon*, at p. 1198. This means that the modified categorical approach does not apply, and this is the end of the inquiry. See, *Rendon v. Holder*, 764 F.3d 1077, 1084-86 (9th Cir. 2014). Therefore, the offense here does not meet the generic definition of a crime of violence, and can not serve as a sentencing enhancement under 2L1.2(b)(1)(A)(ii).

The previous cases in the Ninth Circuit pre-*Descamps*, like *United States v. Becerril-Lopez*, 541 F.3d 881 (9th Cir. 2008), and *United States v. Flores-Mejia*, 687 F.3d 1213 (9th Cir. 2012), are no longer controlling on this issue in light of *Dixon*. Those prior cases do not take into consideration the holding in *Dixon*, that 211 is overbroad as a crime of violence because it does not require the intentional use of

force. Accordingly, for all these reasons, the court below erred, and this Court should grant the petition.

II.

THE PETITION SHOULD BE GRANTED BECAUSE THE FORTY EIGHT MONTH SENTENCE WAS SUBSTANTIVELY UNREASONABLE.

Although Mr. Mendoza-Romero had not been convicted of a non-immigration felony for over 23 years, the district court sentenced him to 11 months beyond the high-end of the higher (and now-disputed) guideline range of 30-37 months.^{4/} In doing so, the court imposed a sentence that was substantively unreasonable in light of the considerations under § 3553(a).

By reviving the primary sentencing mandate of § 3553(a), *United States v. Booker*, 543 U.S. 220 (2005) requires courts to impose only the minimally sufficient sentence to achieve the statutory purposes of punishment—justice, deterrence, incapacitation, and rehabilitation. 18 U.S.C. § 3553(a) (“The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in 18 U.S.C. § 3553(a)(2)”). *Booker* set forth a limit on the length and type of sentence that may be imposed. This provision is not simply a factor to be considered in determining the appropriate sentence; it represents a cap above which the district

^{4/} Of course, as noted above, the defense believes that the proper guideline range, at most, was actually 9 - 15 months.

court is statutorily prohibited from sentencing. *See United States v. Foreman*, 436 F.3d 638, 643 n.1 (6th Cir. 2006) (“[A] district court’s job is not to impose a ‘reasonable’ sentence. Rather, a district court’s mandate is to impose ‘a sentence sufficient but not greater than necessary, to comply with the purposes’ of section 3553(a)(2).”); *United States v. Crowe*, 563 F.3d 969, 977 n.16 (9th Cir. 2009) (equating a “reasonable sentence” with one that is “sufficient but not greater than necessary”). “Imposition of a sentence greater than necessary to meet [the purposes of § 3553] is therefore a violation of section 3553(a) appealable under subsection 3742(a)(1) and reversible under subsection 3742(f)(1).” *United States v. Denardi*, 892 F.2d 269, 276-77 (3d Cir. 1989) (Becker, J., concurring).

Here, a sentence of 48 months was greater than necessary under § 3553(a), and the district court’s failure to sentence Mr. Mendoza-Romero to a minimally sufficient sentence warrants reversal.

First, although the probation report and defense counsel noted mitigating factors as part of Mr. Mendoza-Romero’s personal history and characteristics, the district court failed to take into account these factors. For instance, the court did not acknowledge that Mr. Mendoza-Romero, a fifty-five year old man, was getting older and, if anything, was much less likely to recidivate as time went on. In addition, Mr. Mendoza-Romero, having lived the majority of his life in this country, had developed

strong ties here, and as noted by the defense at sentencing, Mr. Mendoza-Romero is “very much a stranger in a strange land in his native country.” [ER 37].

Regarding the nature and circumstances of the offense, there was nothing aggravating about the crime. In fact, Mr. Mendoza-Romero did not resist or attempt to flee from the border agent and freely admitted he did not have permission to be in the U.S. Further, Mr. Mendoza-Romero was not entering the United States to commit a crime, but to return to earn a living and to reunite with his family members who live in California. [PSR 5.] This fact should have weighed in favor of imposing a within-guidelines sentence, as sentencing increases “were intended to target undocumented immigrants returning to the United States after deportation to engage in serious criminal activity” – which was not the case here. Zoey T. Jones, *Prescribing Disproportionate Punishment: The Federal Sentencing Guidelines for Illegal Reentry*, 33 Cardozo L. Rev. 1217 (2012). Mr. Mendoza-Romero had not committed a non-immigration related felony since 1992 and had not committed a non-immigration related misdemeanor since 2001 – revealing he merely wished to escape the despair that financial difficulties were causing in Mexico. This trend also revealed that Mr. Mendoza-Romero’s offenses had decreased substantially in seriousness over time, a factor that should have been taken into account but was not. To the contrary,

the court relied heavily on the criminal record without weighing at all the age of the convictions. [ER 37-38].

The court also obviously did not give any consideration to the fact that Mr. Mendoza-Romero's prior sentences for a violation of § 1326 were inflated because at the time those sentence were imposed, Mr. Mendoza-Romero was wrongly considered to have an aggravated felony crime of violence, incorrectly increasing his offense level by 16 levels.

Lastly, even assuming that the court did not err in calculating the guideline range, it should have taken into account the significant impact that simple prior immigration offenses had on Mr. Mendoza-Romero's ultimate sentence. After all, Mr. Mendoza-Romero's entire scoreable criminal history points came from three prior illegal reentry convictions, the first of which occurred around 20 years ago in 1996. [PSR 9-11]. Given the lack of aggravating factors in Mr. Mendoza-Romero's offense, the numerous mitigating factors present, and the equitable considerations of the length of the sentence imposed on this 55-year-old, the district court should not have rejected the guideline range and should have imposed a much lesser sentence.

At a minimum, the court should have imposed a sentence within the sentencing guideline range. Instead, the court varied *upward* from the high-end of the range and imposed a sentence that was much higher than what was recommended by the

government under the plea agreement. The sentence was in contravention of the dictate of § 3553(a) and of *Booker*. Accordingly, the petition should be granted for this reason as well.

CONCLUSION

For the foregoing reasons, Javier Mendoza-Romero respectfully requests that this Court grant the petition for writ of certiorari.

Respectfully submitted,

/s/ Robert L. Swain

DATED: February 2, 2018

ROBERT L. SWAIN

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Email: rls11@aol.com

Attorney for Petitioner

Mendoza-Romero

NO. _____

**IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2017**

=====

UNITED STATES OF AMERICA
Respondent.

vs.

JAVIER GARIBAY MENDOZA-ROMERO,
Petitioner.

=====

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Pursuant to Title 18, United States Code Section 3006A(d)(6) and Rule 39 of this Court, Petitioner, Javier Garibay Mendoza-Romero, asks leave to file the attached Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit without prepayment of fees or costs and to proceed in forma pauperis.

Petitioner was represented by counsel appointed pursuant to Title 18, United States Code Section 3006A on appeal to the Ninth Circuit Court of Appeals.

Respectfully submitted,

/s/ Robert L. Swain

Dated: February 2, 2018

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Attorney for Petitioner

NO. _____

**IN THE SUPREME COURT OF THE UNITED STATES
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=====

**UNITED STATES OF AMERICA,
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vs.

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Petitioner.**

=====

PROOF OF SERVICE AND DECLARATION OF COUNSEL

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN DIEGO)

ROBERT L. SWAIN, being first duly sworn, deposes and says:

Counsel is a member in good standing of the Supreme Court Bar and was court appointed pursuant to Title 18, United States Code Section 3006A on appeal to the Ninth Circuit Court of Appeals;

That on February 2, 2018, the petition for writ of certiorari and motion plus 10 copies in the above-entitled case were deposited in a United States Post Office mailbox located in San Diego, California, with first class postage prepaid, properly addressed to the Honorable William Sutter, Clerk of the Supreme Court of the United States, One First Street, NE, Washington, D.C. 20543, and within the time allowed for filing said petition;

That an additional copy of the petition, motion and the affidavit of proof of mailing of the petition and motion was served on counsel for respondent: The Honorable Noel Francisco, Solicitor General of the United States Department of Justice Washington, D.C. 20530.

Dated at San Diego, California, this 2nd, day of February, 2018.

/s/ Robert L. Swain
Robert L. Swain

APPENDIX A

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

NOV 20 2017

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JAVIER GARIBAY MENDOZA-
ROMERO, a.k.a. Javier Garibay-Romero,
a.k.a. Jose Mendoza-Romero,

Defendant-Appellant.

No. 15-50431

D.C. No. 3:15-cr-01189-BEN

MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Roger T. Benitez, District Judge, Presiding

Submitted November 15, 2017**

Before: CANBY, TROTT, and GRABER, Circuit Judges.

Javier Garibay Mendoza-Romero appeals from the district court's judgment and challenges the 48-month sentence imposed following his guilty-plea conviction for being a removed alien found in the United States, in violation of

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

8 U.S.C. § 1326. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

Mendoza-Romero first argues that the district court erred in relying on his prior conviction for robbery under California Penal Code § 211 to impose a 12-level crime of violence enhancement under U.S.S.G. § 2L1.2(b)(1)(A)(ii). This contention is foreclosed. *See United States v. Becerril-Lopez*, 541 F.3d 881, 893 (9th Cir. 2008) (a conviction for robbery under California Penal Code § 211 is a categorical crime of violence); *see also United States v. Chavez-Cuevas*, 862 F.3d 729, 740 (9th Cir. 2017) (affirming continuing viability of *Becerril-Lopez*).

Mendoza-Romero next claims that his sentence is substantively unreasonable in light of the decrease in the seriousness of his criminal offenses over time and other mitigating factors. The district court did not abuse its discretion in imposing Mendoza-Romero's sentence. *See Gall v. United States*, 552 U.S. 38, 51 (2007). Contrary to Mendoza-Romero's suggestion, the record reflects that the court considered his mitigating arguments. The sentence is substantively reasonable in light of the 18 U.S.C. § 3553(a) factors and the totality of the circumstances, including Mendoza-Romero's criminal and immigration history. *See Gall*, 552 U.S. at 51.

AFFIRMED.