

No. _____

9th Cir. No. 16-10285
D.C. No. CR-15-01495-SRB

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JUAN GODINEZ-MARTINEZ,

Defendant-Appellant.

On Petition For Writ of Certiorari
From The United States Court of Appeals, Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

- I. Whether The District Court's Rejection Of The Plea Agreement Was An Abuse Of Discretion?
- II. Whether The District Court Erred In Applying An Upward Departure Pursuant To USSG §4A1.3?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page. There is no corporate disclosure statement required in this case under Rule 29.6.

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IN THE SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner, Juan Godinez-Martinez (“Godinez-Martinez”), respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

A copy of the Order of the United States Court of Appeals for the Ninth Circuit denying Godinez-Martinez’s Petition for Panel Rehearing and Petition for Rehearing En Banc is annexed as Appendix A. A copy of the Memorandum Disposition of the United States Court of Appeals for the Ninth Circuit affirming the District Court Judgment is annexed as Appendix B. A copy of the Judgment of the United States District Court for the District of Arizona is annexed as Appendix C.

JURISDICTION

The date on which the United States Court of Appeals, Ninth Circuit decided this case was July 17, 2017. The Petition for Panel Rehearing and Petition for Rehearing En Banc was denied on January 23, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. 8 U.S.C. §1326(a) and (b)(1)
2. 18 U.S.C. §3553(a)
3. USSG §4A1.3

STATEMENT OF THE CASE

On December 2, 2015, Juan Godinez-Martinez (“Godinez-Martinez”) was charged with Reentry of Removed Alien in violation of 8 U.S.C. §1326(a) and (b)(1). *See* Information, EOR 1.

A plea hearing was conducted on December 2, 2015. (Transcript “T.” 12/2/2015 @ 3, EOR 15). The court confirmed that Godinez-Martinez wished to plead guilty pursuant to the terms of a plea agreement. *Id.* Godinez-Martinez was placed under oath, and the trial court questioned him on the record. *Id.* @ 5-7, EOR 17-19.

Godinez-Martinez confirmed that he had not consumed any alcohol or drugs. *Id.* @ 6-7, EOR 18-19. Godinez-Martinez waived his right to a grand jury indictment and instead plead guilty. *Id.* @ 8-9, EOR 20-21.

The district court reviewed the offense. *Id.* @ 10, EOR 22. Godinez-Martinez confirmed that he would be pleading guilty to violating 8 U.S.C. §1326(a), enhanced by 1326(b)(1), which is the felony offense of illegal reentry after deportation with a sentencing enhancement for having a prior felony conviction. *Id.*

The court reviewed the maximum penalties for the offense. *Id.* @ 10-12, EOR 22-24. Godinez-Martinez consented to proceed with the magistrate. *Id.* @ 12, EOR 24. Godinez-Martinez confirmed that he was not forced to plead guilty, no threats were made against him, and no promises outside the plea agreement were made to him in order to induce him to plead guilty. *Id.* @ 13, EOR 25.

The court then reviewed the Sentencing Guidelines. *Id.* @ 13-16, EOR 25-28. Godinez-Martinez stated that he understood how the Guidelines worked and had no questions. *Id.* @ 16, EOR 28. The court then reviewed the sentencing ranges possible under Godinez-Martinez's plea agreement. *Id.* @ 16-18, EOR 28-30. The court informed Godinez-Martinez that it could not predict exactly what his sentence would be. *Id.* @ 18, EOR 30. Godinez-Martinez had no questions about sentencing. *Id.* @ 19, EOR 31.

The court next reviewed Godinez-Martinez's trial rights, and confirmed that he wished to give up those rights. *Id.* @ 19-21, EOR 31-33. The court also reviewed Godinez-Martinez's appeal rights, and confirmed that he wished to give up those rights too. *Id.* @ 21-22, EOR 33-34.

The court reviewed the factual basis from Godinez-Martinez's plea agreement. *Id.* @ 23, EOR 35. Godinez-Martinez is not a citizen or national of the United States. *Id.* He was removed from the United States through Del Rio, Texas, on March 17, 2013. Godinez-Martinez was voluntarily present and found in the United States at or near Phoenix, AZ on October 13, 2015. He did not obtain the express consent of the United States Government to reapply for admission to the United States prior to returning to the United States. For sentencing purposes, Godinez-Martinez admits to being convicted of reentry of removed alien, a felony, on May 17, 2010 in the District of Arizona and sentenced to 19-months imprisonment followed by 3-years supervised release. *Id.*

The court informed Godinez-Martinez of other adverse consequences of his guilty plea, and Godinez-Martinez confirmed that he understood everything that had been talked about. *Id.* @ 25, EOR 37. Godinez-Martinez had no questions. *Id.* @ 25-26, EOR 37-38.

Godinez-Martinez entered his plea of guilty to the felony offense of illegal reentry after deportation. *Id.* @ 26, EOR 38. The court found Godinez-Martinez's plea to be knowing, intelligent, and voluntary. *Id.* The court found Godinez-Martinez competent to enter his plea. *Id.* The court signed a recommendation to the district judge recommending that Godinez-Martinez's guilty plea be accepted. *Id.* @ 26-27, EOR 38-39.

Godinez-Martinez submitted a Sentencing Memorandum arguing that the court should accept the plea agreement, reject the recommendation in the Presentence Report for an upward departure pursuant to U.S.S.G. §4A1.3, and sentence him within the stipulated guideline range of 1 to 7 months. *See* Defendant Juan Godinez-Martinez's Sentencing Memorandum, EOR 41. The Government filed a Response arguing that the court should accept the plea agreement and sentence Godinez-Martinez to 7-months incarceration and 3-years supervised release. *See* United States' Response to Defendant's Sentencing Memorandum, EOR 61.

Godinez-Martinez was sentenced on June 24, 2016. T. 6/24/2016 @ 2, EOR 65. The court formally entered a judgment of guilt. *Id.* The court noted that it had reviewed the Presentence Report and its recommendations, and the Sentencing Memoranda submitted by defense counsel and the government. *Id.* There was a recommendation by

the probation officer that the court reject the Plea Agreement, which is why the court did not immediately accept the agreement. *Id.* @ 2-3, EOR 65-66. The Presentence Report recommended an upward departure. *Id.* @ 3, EOR 66.

The Government agreed with the Offense Level calculation of 10 and Criminal History Category calculation of II. *Id.* The Government did not find any errors or have any objections. *Id.* Defense counsel also agreed with the Offense Level and Criminal History Category calculations, and did not find any errors or have any objections. *Id.*

Godinez-Martinez reviewed the Presentence Report and discussed the contents with his attorney. *Id.* @ 3-4, EOR 66-67. Godinez-Martinez confirmed that there were no errors in the report. *Id.* @ 4, EOR 67.

The court noted that the probation officer recommended an upward departure based on inadequacy of the criminal history category and that this is Godinez-Martinez's fifth felony conviction. *Id.* The court also noted that Godinez-Martinez has previous immigration-related convictions in 2004 for which he received a sentence of 9-months in prison, and in 2009 for which he received a sentence of 19-months in prison. *Id.* If the court accepted the Plea Agreement, the sentencing range within which the court would be required to sentence Godinez-Martinez would be 1 to 7 months, which is less than any previous immigration felony sentence that Godinez-Martinez has received. *Id.* @ 4-5, EOR 67-68. Godinez-Martinez also has other felony convictions for endangerment and unlawful flight from a law enforcement vehicle. *Id.* @ 5, EOR 68.

Given Godinez-Martinez's criminal history, the court asked the Government to address how it could "justify a typical fast-track plea". *Id.* The Government stated that given the majority of Godinez-Martinez's crimes are too old to receive criminal history points, and in the spirit of plea negotiations and plea agreements, and in the interests of judicial economy and resolving cases without trial, the fast-track plea agreement was offered. *Id.* The Plea Agreement serves the purpose of securing an additional felony conviction against Godinez-Martinez, which will cause Godinez-Martinez to incur additional criminal history points should he reenter the United States again. *Id.* @ 5-6, EOR 68-69.

Defense counsel argued that Godinez-Martinez's prior convictions are very old. *Id.* @ 7, EOR 70. It doesn't serve judicial economy to reject the plea agreement and give Godinez-Martinez an upward departure if he can just go to trial and basically be looking at almost the same length of incarceration. *Id.* Also, if Godinez-Martinez ever returns to the United States in the future, he would be facing a minimum Offense Level of 18 under the new sentencing provisions, which is 51 to 63-months incarceration. *Id.* There is a lot of incentive for Godinez-Martinez not to come back to the United States with the new Sentencing Guidelines going into effect because he would face a lot more time. *Id.* @ 8, EOR 71. Also, there should be weight given under the 3553 factors to the fact that Godinez-Martinez hasn't committed any new felonies and his prior felonies have expired. *Id.* @ 9, EOR 72. The court stated that although Godinez-Martinez did not

incur new charges, he came to the attention of federal authorities when he was arrested by local authorities for Theft of Means of Transportation and Assault. *Id.*

The court rejected the Plea Agreement. *Id.* The court stated that, under the analysis of the sentencing factors, it could not accept a Plea Agreement requiring him to sentence Godinez-Martinez to no greater than 7-months, which was time-served since he had already served 8-months. *Id.* @ 9-10, EOR 72-73. The court felt that Godinez-Martinez's criminal history category significantly under-represented his criminal history. *Id.* @ 10, EOR 73. Godinez-Martinez has returned to the United States even more times than he has been charged, including one time when he was on supervised release. *Id.* There is no justification under the 18 U.S.C. §3553 sentencing factors to sentence Godinez-Martinez to time served. *Id.* The court stated that it might be able to be persuaded to sentence Godinez-Martinez to less than the recommended 20-months if he proceeded to sentencing, but the court could not accept the Plea Agreement. *Id.*

The court stated that Godinez-Martinez could withdraw his plea of guilty and have his not-guilty plea reinstated, in which case the court would set his case for trial; or Godinez-Martinez could permit the court to simply sentence him without regarding the Plea Agreement's stipulations. *Id.* @ 11, EOR 74. Defense counsel asked the court for some insight into what sentence the court might give Godinez-Martinez if he chose to continue to sentencing. *Id.* The court stated "18 maybe" because it would be difficult for the court to sentence Godinez-Martinez to something less than the 19-months that he received for his prior immigration crime. *Id.* The court felt that 18-months would be the

bare minimum, and that would account of for the fact that most of his criminal history is old. *Id.*

Defendant counsel asked for a moment to confer with his client. *Id.* Defense counsel noted that he had discussed the options with Godinez-Martinez, and that he had previously advised him that the court may reject the Plea Agreement. *Id.* @ 12, EOR 75. Godinez-Martinez decided to withdraw from the plea and requested that the court move forward with sentencing and consider the Sentencing Memorandum that he had previously submitted and the statements that had been made to the court. *Id.*

The court explained to Godinez-Martinez that because it had rejected the Plea Agreement, that he could withdraw his guilty plea, reinstate his not guilty plea, and have his case set for a jury trial. *Id.* Godinez-Martinez stated that he wanted to be sentenced. *Id.* Godinez-Martinez confirmed that he wanted the court to maintain his guilty plea and allow the court to sentence him to what the court already indicated would be 18-months in prison. *Id.*

Godinez-Martinez addressed the court for his sentencing. *Id.* @ 13, EOR 76. Godinez-Martinez knows he did wrong by coming back to the United States. But he did so because life in Mexico is very difficult. He came back to the United States to give his children a better life. He comes from Acapulco, where “people are killed left and right”. His cousins have been killed. *Id.*

The court found the Presentence Report to be accurate and that it correctly calculated the Offense Level at 10 and the Criminal History Category at II. *Id.* The

Sentencing Guidelines suggest a sentencing range of 8 to 14-months in prison. *Id.* For the reasons previously stated, the court noted that the Criminal History Category for Godinez-Martinez significantly under-represented his criminal history, resulting in a guideline range that if the court were to impose a sentence even at the high end it would not meet the factors in 18 U.S.C. §3553. *Id.* Godinez-Martinez has a number of immigration-related offenses, has been deported at least six times, and was arrested by immigration authorities ten times prior to his first deportation. *Id.* @ 13-14, EOR 76-77. There is also an indication that during two arrests Godinez-Martinez was driving a vehicle carrying illegal aliens. *Id.* @ 14, EOR 77. Godinez-Martinez has been engaging in criminal conduct in the United States even beyond that of being here illegally since 1996, for the past 20 years. *Id.* The court stated that it has been a long time since Godinez-Martinez committed some of his offenses. *Id.* That resulted in his Criminal History Category of II, which is the basis for the court's departure since it does not reflect Godinez-Martinez's true criminal history. *Id.* The court also explained that a sentence of 18-months, which is one month less than what Godinez-Martinez received the last time, would serve as a deterrent. *Id.*

The court sentenced Godinez-Martinez to 18-months incarceration followed by 3-years supervised release. *Id.* @ 15, EOR 78. The court informed Godinez-Martinez of his right to appeal. *Id.*

Godinez-Martinez timely filed his Notice of Appeal and submitted briefing to the Ninth Circuit. (*See* Notice of Appeal; EOR 84). On July 17, 2017, the Court of Appeals

denied Godinez-Martinez's appeal, and on January 23, 2018, the Ninth Circuit denied the petition for rehearing and suggestion for rehearing en banc.

REASONS FOR GRANTING THE WRIT

I. THE DISTRICT COURT'S REJECTION OF THE PLEA AGREEMENT WAS AN ABUSE OF DISCRETION.

Where a defendant pleads guilty to a charged offense, Rule 11(c)(1)(C) allows the parties to agree that "a specific sentence or sentencing range is the appropriate disposition of the case." When the parties reach this type of sentencing agreement, "the court may accept the agreement, reject it, or defer" its decision pending review of a presentence report. Fed. R. Crim. P. 11(c)(3)(A). If the court rejects such a plea agreement, it must (1) inform the parties, (2) advise the defendant that the court is not bound by the plea agreement and give the defendant an opportunity to withdraw the guilty plea, and (3) advise the defendant that if the plea is not withdrawn, the court may dispose of the case less favorably toward the defendant than the plea agreement contemplated. *Morgan v. United States Dist. Court*, 506 F.3d 705, 709 (9th Cir. 2007)

Rule 11 vests district courts with the discretion to accept or reject plea agreements, including those that contain a stipulated sentence term. *Id.* Although Rule 11 does not define the criteria by which a district court should exercise its discretion to accept or reject a plea agreement, case law establishes that the broad discretion granted by Rule 11 is not unbounded. *Id.* at 710.

When considering a sentence-bargain plea agreement, a district court must provide individualized reasons for rejecting the agreement, based on the specific facts

and circumstances presented in that case. *Id.* at 711. District courts must consider individually every sentence bargain presented to them and must set forth, on the record, the court's reasons in light of the specific circumstances of the case for rejecting the bargain. *Id.* at 712. The guiding principle in this analysis is "the interest of justice." *See Ellis v. United States District Court*, 356 F.3d 1198, 1209 (9th Cir. 2004) (affirming the rejection of a plea agreement that the district court found was not in the interest of justice).

It was not in the interest of justice for the court to reject Godinez-Martinez's plea agreement. After consideration of all the facts and circumstances presented by the plea agreement, including the offense conduct, the parties' positions regarding sentencing, and Godinez-Martinez's criminal history, the court abused its discretion in rejecting the plea agreement. In rejecting the plea agreement, the court stated it felt that Godinez-Martinez's criminal history category significantly under-represented his criminal history. However, by operation of the Sentencing Guidelines, Godinez-Martinez no longer received criminal history points for many of his convictions that he did back in 2010. Godinez-Martinez's ten criminal history points in 2010 placed him in Criminal History Category V. This time, the Sentencing Guidelines mandated that Godinez-Martinez only receive three criminal history points (for his 2009 illegal reentry conviction), which placed him in a Criminal History Category II. Taking that into account, the "fast-track" plea agreement put Godinez-Martinez in a similar situation as other defendants convicted of similar conduct with the same amount of criminal history

points. The sentencing range of 1 to 7 months mandated by the plea agreement would have avoided unwarranted sentencing disparities among similarly situated defendant convicted of similar conduct.

To serve justice, Godinez-Martinez's sentence should reflect the severity of the offense conduct, including all the facts and circumstances of the crime. Also, the sentence should not create an obvious disparity between Godinez-Martinez and other similarly situated criminal actors. And the sentence should protect the public's interest in enforcement of, and respect for, the laws and system of justice. *See generally* 18 U.S.C. §3553(a); USSG §6B1.2, Commentary. Godinez-Martinez's plea agreement, with a required sentencing range of 1 to 7 months, satisfied those principles. Therefore, it was an abuse of discretion for the court to reject Godinez-Martinez's plea agreement and instead sentence him to more than double the amount of incarceration.

II. THE DISTRICT COURT ERRED IN APPLYING AN UPWARD DEPARTURE PURSUANT TO USSG §4A1.3.

Although the Sentencing Guidelines are now advisory under *United States v. Booker*, a sentencing court shall consult them in helping to determine an appropriate sentence. 543 U.S. 220 (2005); *United States v. Cantrell*, 433 F.3d 1269, 1278-79 (9th Cir. 2006). The district court must calculate the Guidelines range accurately, and must comply with Fed. R. Crim. P. 32. *See United States v. Mix*, 457 F.3d 906, 911 (9th Cir. 2006). A sentence must be reasonable in view of all the factors in 18 U.S.C. §3553(a). *United States v. Plouffe*, 445 F.3d 1126, 1128 (9th Cir. 2006).

It was unreasonable for the court to apply an upward departure pursuant to USSG §4A1.3. Section 4A1.3(a)(1) states that if “reliable information indicates that the defendant's criminal history category substantially under-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes, an upward departure may be warranted.” The information underlying an upward departure may include information concerning the following:

- (A) Prior sentence(s) not used in computing the criminal history category (e.g., sentences for foreign and tribal offenses).
- (B) Prior sentence(s) of substantially more than one year imposed as a result of independent crimes committed on different occasions.
- (C) Prior similar misconduct established by a civil adjudication or by a failure to comply with an administrative order.
- (D) Whether the defendant was pending trial or sentencing on another charge at the time of the instant offense.
- (E) Prior similar adult criminal conduct not resulting in a criminal conviction.

However, a prior arrest record itself shall not be considered for purposes of an upward departure under the Guideline. USSG §4A1.3(a)(3). Also, the court shall determine the extent of a departure by using, as a reference, the criminal history category applicable to defendants whose criminal history or likelihood to recidivate most closely resembles that of the defendant's. USSG §4A1.3(a)(4)(A).

USSG §4A1.2(d)(2) and (e) establishes the time period within which prior sentences are counted for criminal history points. Application Note 8 to Guideline §4A1.2 states that if the court finds that a sentence imposed outside this time period is evidence of similar, or serious dissimilar, criminal conduct, the court may consider this information in determining whether an upward departure is warranted under §4A1.3.

The U.S. Sentencing Guidelines Manual rejects the possibility that an upward departure could be based on remote convictions having no similarity to the offense for which a defendant is being sentenced. *United States v. Leake*, 908 F.2d 550, 554 (9th Cir. 1990). It is error for the court to consider offenses that have nothing in common with the offenses involved in deciding to upwardly depart. *Id.* When some of the reasons stated by the court for a departure are proper and some are improper, this Court must vacate and remand for resentencing. *Id.*

In this case, the district court felt that Godinez-Martinez's criminal history category significantly under-represented his criminal history thus requiring an upward departure. T. 6/24/2016 @ 10, EOR 73. The district court listed many reasons for its upward departure on the record. Godinez-Martinez has returned to the United States even more times than he has been charged, including one time when he was on supervised release. Godinez-Martinez has a number of immigration-related offenses, has been deported at least six times, was arrested by immigration authorities ten times prior to his first deportation. *Id.* @ 13-14, EOR 76-77. The court felt there was an indication that during two arrests Godinez-Martinez was driving a vehicle carrying illegal aliens. *Id.* @ 14, EOR 77. Also, the court acknowledged that it had been a long time since Godinez-Martinez committed some of his offenses. *Id.* Finally, the court stated that a sentence of 18-months, which is one month less than what Godinez-Martinez received the last time, would serve as a deterrent. *Id.*

It is clear from the record at sentencing that the district court improperly considered Godinez-Martinez's history of arrests only, and also his mere actions – such as returning to the United States – that never even resulted in arrests or charges. The district court also cited minor offenses that have nothing in common with the immigration offense for which Godinez-Martinez was being sentenced. Further, the district court did not determine the extent of the upward departure by using, as a reference, the criminal history category applicable to other defendants whose criminal history or likelihood to recidivate most closely resembled that of Godinez-Martinez. *See* USSG §4A1.3(a)(4)(A).

Therefore, the district court's reasons underlying the departure do not support adequate grounds for an upward departure pursuant to USSG §4A1.3. First, the Guidelines specifically prohibit the court from considering arrest records, alone, that never resulted in charges or convictions. Second, Godinez-Martinez's misdemeanor convictions are all minor offenses having no similarity to the instant immigration offense. The misdemeanors consist of two DUI convictions that are 16-years old, four driving on a suspended license convictions (two of which are 16-years old), two shoplifting convictions, a failure to appear, a failure to provide proper identification, and a false reporting conviction. The misdemeanor offenses are all petty or minor offenses that have no relation to the instant immigration offense. Regarding the felony convictions, the endangerment and unlawful flight from law enforcement convictions are 16-years old. Since they were not violent offenses and are in no way similar to the

instant immigration offense, they are not proper convictions for consideration for the upward departure. The Guidelines reject the possibility that an upward departure could be based on remote convictions having no similarity to the offense for which a defendant is being sentenced. *United States v. Leake*, 908 F.2d 550, 554 (9th Cir. 1990).

Godinez-Martinez only has two felony immigration offenses which are similar in nature to the instant offense. One of them was his immigration conviction from 2010, which was already counted and Godinez-Martinez received three criminal history points for that conviction. Therefore, it cannot be the basis of the upward departure. That only leaves Godinez-Martinez's 2004 immigration conviction for illegal reentry for which he received 9-months imprisonment. The offense is 12-years old. However, this one uncounted and stale immigration offense is not enough to justify an upward departure that more than doubled the length of incarceration from 7-months to 18-months.

The court's upward departure pursuant to USSG §4A1.3 based on Godinez-Martinez's one stale immigration conviction was an abuse of discretion. Also, some of the court's stated reasons for an upward departure were improper. As a result, the district court erred when it sentenced Godinez-Martinez to 18-months incarceration. At a minimum, Godinez-Martinez's case should be remanded for resentencing within the correct Sentencing Guidelines range of 8 to 14-months.

CONCLUSION

For the foregoing reasons, Godinez-Martinez respectfully requests that this Court grant certiorari on these issues.

RESPECTFULLY SUBMITTED this 6th day of February 2018.

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