

IN THE SUPREME COURT OF THE UNITED STATES

JESUS BARRAGAN,

PETITIONER,

- vs -

UNITED STATES OF AMERICA,

RESPONDENT.

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

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Question Presented for Review

- I. Whether an error in calculating the guidelines range can be harmless.

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USSG Chapter 3

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Petitioner, Jesus Barragan, respectfully prays that a writ of *certiorari* issue to
review the judgment of the United States Court of Appeals for the Ninth Circuit.

Opinion Below

The Ninth Circuit affirmed Petitioner's convictions and 320-month sentence for RICO conspiracy and three drug-trafficking offenses on September 8, 2017. *United States v. Barragan*, 871 F.3d 689 (9th Cir. 2017).¹ The court denied his petition for rehearing and rehearing en banc on November 17, 2017.

Jurisdiction

This Court has jurisdiction under 28 U.S.C. § 1254(1).

Sentencing Guidelines

USSG § Chapter 3

¹ The Opinion is attached as Appendix A.

Statement of the Case

Jesus Barragan was convicted after a lengthy trial of RICO conspiracy and three substantive drug-trafficking offenses. He proceeded to sentencing almost immediately and without the benefit of a Presentence Report in order to be sentenced by his trial judge, who was about to retire. The court imposed a 320-month sentence, which reflected a 40-month downward variance from the guidelines range(s) arrived at by the court.

There is no question that the court calculated those guidelines erroneously: over objection, it failed to arrive at “a single offense level that encompasses all the counts of which the defendant is convicted” as required by Chapter 3. That is, instead of arriving at a *single* guidelines range of 360-life (reflecting a career-offender enhancement), the court found that Barragan was subject to *three* distinct guidelines ranges of 360-life, as well as a fourth range of 262-327 months. And importantly, all four of these ranges (one for RICO conspiracy and three for substantive drug counts) were driven by the same conduct – drugs – and ratcheted up by the career-offender enhancement.

Barragan argued on appeal that he was prejudiced by the court’s failure to arrive at the single guidelines range required by Chapter 3 because the length of the downward variance he received was likely affected by the fact that the court was

confronted by not one, but *four* extremely high guidelines ranges, *three* of which were 360-life. The Ninth Circuit, however, concluded that “because he faced a 360- months-to-life range for one of his drug convictions, any such error was harmless.” 871 F.3d at 715 n. 26. Barragan accordingly petitions for a writ of *certiorari*.

Summary of the Argument

This Court held in *Gall v. United States*, that reviewing courts must “first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the guidelines range.” 552 U.S. 38, 51 (2007). Consistent with that directive, the Ninth Circuit had heretofore consistently reversed sentences for errors in calculating the guidelines range, even under plain-error review. With footnote 26 in *Barragan*, however, it joins a number of other circuits that routinely hold that guidelines errors are harmless. Because the guidelines are already advisory, subjecting them to harmless-error review effectively renders them meaningless. This court should grant *certiorari* to decide whether a district court’s error in calculating the guidelines range should be subject to harmless-error analysis.

Reason for Granting the Petition

I.

This Court should grant the petition to decide whether an error in calculating the guidelines range can be harmless.

This Court held in *Gall v. United States*, that reviewing courts must “first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the guidelines range.” 552 U.S. 38, 51 (2007). Consistent with *Gall*, the Ninth Circuit has held that “[a]ll sentencing proceedings are to begin by determining the applicable Guidelines range.’ The ‘range must be calculated correctly’ and ‘[i]t would be procedural error for a district court to fail to calculate – or to calculate incorrectly – the Guidelines range.’” *United States v. Hammons*, 558 F.3d 1100, 1105 (9th Cir. 2009) (alterations in original) (quoting *United States v. Carty*, 520 F.3d 984, 991, 993 (9th Cir. 2008 (en banc))).

The Ninth Circuit has also emphasized that the correct guidelines range is “the starting point” or “benchmark” and must “be kept in mind throughout the process.” *United States v. Vargem*, 747 F.3d 724, 729 (9th Cir. 2014). For that reason, the court has also consistently remanded for resentencing – under plain-error review – even where the defendant received a below-guidelines sentence. See *United States v. Lloyd*, 807 F.3d 1128, 1175 n. 19 (9th Cir. 2015).

With footnote 26 in *Barragan*, however, the Ninth Circuit joins a number of other circuits that subject guidelines-calculation errors to highly deferential harmless-error review. *See, e.g., United States v. Zabielski*, 711 F.3d 381 (3d Cir. 2013); *United States v. Savillon-Matute*, 636 F.3d 119 (4th Cir. 2011); *United States v. Abbas*, 560 F.3d 660 (7th Cir. 2009).

Such deferential review is a blank check to the district court to simply ignore the guidelines as the “starting point” and instead proceed directly to 18 U.S.C. § 3553(a). *See United States v. Vrdolyak*, 593 F.3d 676, 686 (7th Cir. 2010) (“because the sentencing guidelines are no longer mandatory, appellate courts should readily find that guideline errors are harmless”) (Hamilton, J., dissenting). That interpretation is contrary to this Court’s holding in *Gall* and warrants review.

Conclusion

Deferential harmless-error review for guidelines-calculation errors imperils the very existence of advisory guidelines, themselves. It is also not consistent with this Court's holding in *Gall*. This Court should grant the petition to resolve this important question.

Respectfully submitted,

Date: February 17, 2018

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