

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

FELIPE MENDOZA-ZAZUETA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

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QUESTION PRESENTED

When the Sentencing Guidelines recommend that a sentencing court will not impose supervised release on an alien who will be deported, must a district court make an explicit finding that supervised release is necessary for added deterrence before imposing supervised release on a deportable alien, as the Second, Third, Fifth, and Sixth Circuits have found, or is silence when imposing supervised release sufficient, as the Ninth Circuit found here?

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PRAYER FOR RELIEF

Petitioner, Felipe Mendoza-Zazueta, respectfully prays for a writ of certiorari to issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

JURISDICTION

Petitioner was convicted of illegal reentry, in violation of 8 U.S.C. § 1326, in the United States District Court for the Southern District of California. The United States Court of Appeals for the Ninth Circuit reviewed his sentence under 28 U.S.C. § 1291, and denied a petition for rehearing on January 12, 2018. The Court has jurisdiction to review the judgment under 28 U.S.C. § 1254(1).

OPINIONS BELOW

The Ninth Circuit's unpublished memorandum opinion, filed on July 3, 2017, is reproduced in the appendix. *See* App. A. On January 12, 2018, the Ninth Circuit denied Petitioner's request for rehearing. *See* App. B.

STATEMENT OF THE CASE

Mr. Mendoza was charged with one count of being a removed alien found in the United States, in violation of 8 U.S.C. § 1326(a) and (b), and pleaded guilty, pursuant to a plea agreement with the government.

In preparation for sentencing, Probation filed a Pre-sentence Report (PSR) with its Guideline calculation and sentencing recommendation. It stated: "[s]ince the offense is a Class C felony, the guideline range for a term of supervised release is 1 to 3 years. USSG § 5D1.2(a)(2)." The PSR made no express reference to § 5D1.1(c), which states that supervised release is not ordinarily appropriate for a deportable alien, nor did it in any way acknowledge that the Guidelines ordinarily

recommend no supervised release for someone in Mr. Mendoza's position. *See* U.S.S.G. § 5D1.1(c). Instead, it recommended a three-year term of supervised release. Neither Petitioner nor the government included a term of supervised release in their respective sentencing recommendations.

At sentencing, the parties all agreed that Petitioner had serious mental health issues and was homeless, and that a sentence was unlikely to deter further illegal entries because he was essentially desperate and had nowhere to go. The district court agreed that Petitioner's mental health issues represented a significant mitigating circumstance, and imposed a mid-Guidelines range custodial sentence. It specifically concluded that the custodial sentence "would be sufficient to punish the individual before the court, deter, hopefully, [Petitioner] and others and to protect society." Regarding supervised release, it said only, "I would elect to impose supervised release for a period of two years for further deterrent effect."

Petitioner appealed, arguing that the district court had plainly erred in failing to calculate his Guideline range as to the term of supervised release. Instead, it had relied on the PSR's erroneous calculation that the supervised release term was one to three years of supervision, and then imposed what it believed was a mid-range supervision term: two years. But the correct range was not one to three years; the Guidelines generally recommend no supervision for deportable aliens like Petitioner, and, even when supervised release is appropriate there is no minimum requirement of a one-year term. Given this, Petitioner argued, the district court's failure to calculate the recommended supervised release term could not be saved by looking to the record as a whole, since the PSR was incorrect. Reversal was required because had the district court kept in mind that the Guidelines recommend no supervised release for deportable aliens unless additional deterrent effect is needed, *see* U.S.S.G. § 5D1.1 cmt. n.5, it would likely not have imposed a supervised release term.

The Ninth Circuit affirmed, holding that the district court did not err because it was clear from the record that the district court was aware of the applicable Guidelines range. Further, “the district court’s imposition of a term of supervised release for further deterrence is consistent with U.S.S.G. § 5D1.1(c), with which we presume the district court was familiar.” See App. A.

Petitioner requested rehearing, arguing that the Memorandum conflicted with other Ninth Circuit cases holding that before imposing supervised release on a deportable alien, a district court must make a “specific and particularized explanation that supervised release would provide an added measure of deterrence and protection” based on the individual case. See, e.g., *United States v. Valdavinos-Torres*, 704 F.3d 679 (9th Cir. 2012). Additionally, he argued, the Memorandum was in conflict with at least four other Circuits which require district courts to give an explanation before deviating from the presumption in U.S.S.G. § 5D1.1 that supervised release not be imposed on a deportable alien. The Ninth Circuit denied Petitioner’s request for rehearing. See App. B.

REASONS FOR GRANTING THE PETITION

- A. Because the Ninth Circuit’s decision is in conflict with other Circuits’ rules that a district court must explain why it chooses not to follow U.S.S.G. § 5D1.1(c)’s commentary when imposing supervised release on a deportable alien, this Court should grant review to ensure uniformity in sentencing for non-citizen defendants.**

Section 5D1.1 of the Sentencing Guidelines governs the imposition of supervised release as part of a sentence. Recognizing that removal is “nearly an automatic result for a broad class of noncitizen offenders,” the Guidelines note that most noncitizen offenders will not be subject to supervision because they will not remain in the United States after serving their custodial sentence. U.S.S.G. Supp. App. C., Amend. 756, Reason for Amendment. The Guidelines therefore provide

that a sentencing “court ordinarily should not impose a term of supervised release in a case in which supervised release is not required by statute and the defendant is a deportable alien who likely will be deported after imprisonment.” U.S.S.G. 5D1.1(c). The commentary explains that in these circumstances “the need to afford adequate deterrence and protect the public ordinarily is adequately served by a new prosecution.” U.S.S.G. § 5D1.1 cmt. n.5. However, a sentencing court “should ... consider imposing a term of supervised release on such a defendant if the court determines it would provide an added measure of deterrence and protection based on the facts and circumstances of a particular case.” *Id.*

This Court held in *Stinson v. United States* that Guidelines commentary interpreting a Guideline or explaining how it is to be applied must be followed by a district court, unless the commentary is inconsistent with the Guideline it interprets. 508 U.S. 36, 42-43 (1993). Although the Guidelines are now advisory, they “continue to guide district courts in exercising their discretion by serving as the framework for sentencing.” *Beckles v. United States*, 137 S. Ct. 886, 894 (2017) (citation omitted). Because they remain an active and important part of the federal sentencing process, this Court has identified the Guidelines as “the starting point and the initial benchmark” of a federal sentence, *Gall v. United States*, 552 U.S. 38, 49 (2007), and as the “lodestar” for federal sentencing proceedings. *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1346 (2016). As the Guidelines “inform and instruct the district court's determination of an appropriate sentence,” *id.*, sentencing courts must consider both the Guidelines and their commentary before imposing sentence. Here, that means considering U.S.S.G. § 5D1.1(c)’s statement that courts should not “ordinarily” impose supervised release on a alien who will likely be deported, as well as the

commentary that supervised release may nevertheless be imposed to provide an added measure of deterrence and protection based on the particular facts of the case. U.S.S.G. § 5D1.1 cmt. n.5.

Additionally, this Court has held that a sentencing court must adequately explain the sentence imposed, *Gall v. United States*, 552 U.S. 38, 51 (2007), and provide enough detail so that a reviewing court can be sure that the parties' arguments were considered and the district court exercised sound decision making. *Rita v. United States*, 551 U.S. 338, 356 (2007). But in Petitioner's case, the district court did not mention U.S.S.G. § 5D1.1(c), nor the commentary, and it imposed a two-year supervised release term that was in conflict with the commentary's presumption against supervised release for deportable aliens. It did this without ever mentioning that *added* deterrence was necessary in light of Petitioner's facts.

The Ninth Circuit blessed this procedure, saying that the district court imposed supervised release consistently with U.S.S.G. § 5D1.1(c), which it presumed the district court was familiar with. *See App. A.* But this holding cannot be squared with the fact that the district court explained nothing about an extra need to deter, and in fact, prior to imposing supervised release the district court expressly determined that the 18-month custodial sentence "would be sufficient to ... deter, hopefully, Mr. Mendoza and others and to protect society." Simply put, nothing the district court said indicated that Petitioner's was a non-ordinary case where added deterrence and protection were needed, so supervised release was warranted.

The Ninth Circuit's holding that the district court did not err conflicts with this Court's explanation requirement, *see, e.g., Rita*, 551 U.S. at 356, as well as the rule in every other Circuit to consider the issue of supervised release for noncitizen offenders. It highlights a conflict among the

Circuits about the extent of explanation required when a district court deviates from U.S.S.G. § 5D1.1(c) and imposes supervised release on a deportable alien.

Both the Third and Sixth Circuits require explicit explanation for a district court to deviate from the “ordinary” no-term-of-supervised-release rule in § 5D1.1(c). In these Circuits the “‘explanation ‘should directly address’ the presumption against imposing supervised release ‘and provide the court’s reasoning for taking a different course of action in the case before it.’” *United States v. Azcona-Polanco*, 865 F.3d 148, 154 (3d Cir. 2017) (quoting *United States v. Solano-Rosales*, 781 F.3d 345, 353-54 (6th Cir. 2015)). As stated by the Third Circuit, explicit explanation when deviating from § 5D1.1(c):

assures the public that the decision to impose supervised release was a “reasoned decision[]” rather than the force of habit. [*Rita v. United States*, 551 U.S. 338, 356 (2007)]. Indeed, the Sentencing Commission created Section 5D1.1(c) in response to data that district courts were imposing supervised release “in more than 91 percent of cases in which the defendant is a noncitizen,” a “high rate” that the Commission deemed “unnecessary.” U.S.S.G. Supp. App. C, Amend. 756, Reason for Amendment. In addition, a district court’s adequate explanation will allow us to conduct “meaningful” substantive review of Section 5D1.1(c) cases (or render those appeals unnecessary). [*Gall v. United States*, 552 U.S. 38, 50 (2007)]. Relatedly, providing an explanation under Section 5D1.1(c) will “guide” a district court to impose supervised release on a deportable immigrant only when doing so is substantively reasonable.

Id. at 154.

The Ninth Circuit’s decision here conflicts with this rule in the Third and Sixth Circuits because the lone comment of Petitioner’s sentencing court that it would “elect to impose supervised release for a period of two years for further deterrent effect” does not come close to meeting the “explicit explanation” standard. And the Memorandum’s simply presuming the district court was familiar with § 5D1.1 does not further any of the underlying purposes of the explicit explanation rule.

In contrast to the Third and Sixth Circuits, the Second and Fourth Circuits do not require a district court provide explicit explanation when deviating from Section 5D1.1(c)'s recommendation of no supervised release. These Circuits will find no error when "it is clear that the District Court (1) was aware of the amended version of Section 5D1.1(c), (2) considered [the defendant's] specific circumstances and the Section 3553(a) factors, and (3) was convinced that additional deterrence was needed." *United States v. Alvarado*, 720 F.3d 153, 159 (2d Cir. 2013) (footnotes omitted); *see also United States v. Aplicano-Oyuela*, 792 F.3d 416, 424 (4th Cir. 2015) (agreeing with the three factors identified in *Alvarado*).

And yet, the Ninth Circuit's Memorandum conflicts with even these Circuits' lower standard. Even assuming – but not conceding – that the district court's "further deterrent effect" comment showed an awareness of Section 5D1.1(c), there is nothing to show that the district court was "convinced that additional deterrence was needed," based on the "specific circumstances" of Petitioner's case. Even in these Circuits, the district court's brief comment would not have been sufficient to justify imposing supervised release.

The Memorandum's finding of no error conflicts with every Circuit to consider the issue, as well as the well-established explanation requirement, *see Rita*, 551 U.S. at 356; *Gall*, 552 U.S. at 51. This Court should grant review to clarify a sentencing court's procedural obligations under U.S.S.G. § 5D1.1(c) when sentencing a deportable alien. Given that tens of thousands of non-citizen criminal defendants are sentenced every year, *see Quick Facts, Non-U.S. Citizen Federal Offenders*, United States Sentencing Commission, at 1 (noting that 41.7% of all offenders in 2016 were non-U.S. citizens), the issue is a prevalent one, and uniformity among the Circuits is important.

B. This case provides the Court with an ideal vehicle for providing guidance to the lower courts on this question.

This case provides an ideal vehicle for determining the amount of explanation required when imposing supervised release on a deportable alien. The district court did not mention U.S.S.G. § 5D1.1(c) nor the commentary, and the Guideline was not discussed at the sentencing hearing.

Further, the district court did not state that extra deterrence, above and beyond any future prosecution, was necessary, and, in fact, it explicitly stated that the custodial sentence was sufficient to deter Petitioner. The issue is thus squarely presented.

Additionally, in at least four other Circuits, the district court's procedure would have been erroneous, but the Ninth Circuit affirmed, ignoring the complete lack of explanation and instead assuming that the district court was aware of U.S.S.G. § 5D1.1(c). Review by this Court will resolve an existing Circuit split and affect Petitioner's sentence, as Petitioner was released from custody in June 2017 and therefore still subject to his two-year supervised release term. For these reasons, the instant case provides an appropriate means to test the important question of law raised by the Petition.

CONCLUSION

The Ninth Circuit's Memorandum conflicts with four other Circuits' rules regarding U.S.S.G. § 5D1.1(c) and imposing supervised release on a deportable alien. This Court should grant the writ to address this important issue.

Date: April 12, 2018

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Kristi A. Hughes" followed by "for".

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APPENDIX A

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

JUL 3 2017

FOR THE NINTH CIRCUIT

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

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

FELIPE MENDOZA-ZAZUETA, a.k.a.
Reyes Cintero, a.k.a. Reyes Cortez-Ayon,

Defendant-Appellant.

Nos. 16-50089

16-50090

D.C. Nos. 3:15-cr-02291-DMS

3:16-cr-07007-DMS

MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Dana M. Sabraw, District Judge, Presiding

Submitted June 26, 2017**

Before: PAEZ, BEA, and MURGUIA, Circuit Judges.

In these consolidated appeals, Felipe Mendoza-Zazueta appeals from the district court's judgments and challenges the sentences imposed following his guilty-plea conviction for being a removed alien found in the United States, in

* 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).

violation of 8 U.S.C. § 1326, and admitted violation of supervised release. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

Mendoza-Zazueta first contends that the district court procedurally erred by failing to calculate the applicable supervised release term as part of its Guidelines calculation for the reentry conviction. Although a district court's failure to calculate the applicable Guidelines range may constitute plain error, *see United States v. Hammons*, 558 F.3d 1100, 1105 (9th Cir. 2009), it is clear from the record that the district court was aware of the applicable supervised release Guidelines range. Contrary to Mendoza-Zazueta's argument on appeal, the Presentence Investigation Report correctly calculated the advisory Guidelines range for supervised release for this Class C felony. *See* U.S.S.G. § 5D1.2(a)(2). Moreover, the district court's imposition of a term of supervised release for further deterrence is consistent with U.S.S.G. § 5D1.1(c), with which we presume the district court was familiar. *See United States v. Carty*, 520 F.3d 984, 992 (9th Cir. 2008) (en banc).

Mendoza-Zazueta next contends that the district court procedurally erred by failing to provide him with an opportunity to allocute prior to the court's imposition of the supervised release revocation sentence. This argument is unsupported by the record. In the combined sentencing hearing, the district court invited Mendoza-Zazueta to address the court immediately following arguments

from Mendoza-Zazueta's counsel regarding sentencing on both the reentry conviction and the supervised release violation and prior to the court's imposition of sentences for both. Thus, the court provided Mendoza-Zazueta with "an opportunity to make a statement and present any information in mitigation," before the sentence was imposed. *See* Fed. R. Crim. P. 32.1(b)(2)(E); *see also United States v. Allen*, 157 F.3d 661, 666 (9th Cir. 1998).

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

JAN 12 2018

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

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

FELIPE MENDOZA-ZAZUETA, a.k.a.
Reyes Cintero, a.k.a. Reyes Cortez-Ayon,

Defendant-Appellant.

Nos. 16-50089
16-50090

D.C. Nos. 3:15-cr-02291-DMS
3:16-cr-07007-DMS
Southern District of California,
San Diego

ORDER

Before: PAEZ, BEA, and MURGUIA, Circuit Judges.

The panel has voted to deny the petition for panel rehearing.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

Mendoza-Zazueta's petition for panel rehearing and petition for rehearing en banc (Docket Entry No. 34) are denied.