

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JORGE WALTER BARRIOS, Jr.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

*On Petition for a Writ of Certiorari to the United States Court of Appeals
for the Ninth Circuit*

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, when a district court imposes an outside-the-guidelines sentence which varies downward for the term of imprisonment based on a review of the factors in 18 U.S.C. § 3553(a) but also simultaneously varies upward regarding the term of supervised release, an appellant's right to meaningful appellate review is violated when a court of appeals infers the reasons for the upward variance from the record as a whole rather than requiring that the district court specifically state in open court the reasons for the imposition of the upward variance pursuant to 18 U.S.C. § 3553(c).

PARTIES TO THE PROCEEDINGS

All parties appear in the caption of the case on the cover page.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Jorge Walter Barrios, Jr., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The unpublished memorandum disposition of the Court of Appeals for the Ninth Circuit (App., *infra*, 1a-2a) is reported at 712 F. App'x 713. The judgment of the United States District Court for the Southern District of California (App., *infra*, 3a-6a) is unreported.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on February 21, 2018. This Court has jurisdiction to review this case under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

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;

(3) the kinds of sentences available;

(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) [18 USCS § 3742(g)], are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued

by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements 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);

(5) any pertinent policy statement--

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement 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

(B) that, except as provided in section 3742(g) [18 USCS § 3742(g)], is in effect on the date the defendant is sentenced.[]

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

...

(c) Statement of reasons for imposing a sentence. The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence . . . is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in a statement of reasons form

18 U.S.C. § 3583(c)

Factors to be considered in including a term of supervised release. The court, in determining whether to include a term of supervised release, and, if a term of supervised release is to be included, in determining the length of the term . . . shall consider the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7).

STATEMENT OF THE CASE

The jurisdiction of the district court was invoked under 18 U.S.C. § 3231 because Mr. Barrios was alleged to have committed offenses against the laws of the United States.

Mr. Barrios entered into a plea agreement with the government in which he agreed to plead guilty to a single-count information charging him with knowingly and intentionally importing “a mixture and substance containing a detectable amount of Methamphetamine, a Schedule II Controlled Substance, into the United States from a place outside thereof; in violation of [21 U.S.C. §§ 952 and 960] and [18 U.S.C. § 2].” (Excerpts of Record (ER) 54.)

A federal Drug Enforcement Administration laboratory analysis revealed that the approximately 11.60 kilograms of methamphetamine which was found in the vehicle with Mr. Barrios as he attempted to

cross the border from Mexico contained 7.80 kilograms of actual methamphetamine and 2.87 kilograms of heroin. (Presentence Investigation Report (PSR) 3, ¶ 5.) The PSR ultimately computed Mr. Barrios's offense level as 33. (PSR 19.)

The PSR also contained a recitation of Mr. Barrios's criminal history and, after determining a criminal history category of IV, calculated a sentencing guideline range of 188-235 months. (PSR 9, ¶ 34; PSR 19.) The PSR further noted the guideline term for supervised release was three years.¹ (PSR 14, ¶ 71; PSR 17, ¶ 96.)

¹ Mr. Barrios was convicted and sentenced in accordance with 21 U.S.C. § 960(b)(3) which carries a maximum sentence to imprisonment of twenty years and a mandatory minimum sentence to supervised release of three years. Because of the statutory maximum imprisonment of twenty years, Mr. Barrios's crime is considered a Class C felony. *See* 18 U.S.C. § 3559(a)(3). According to the sentencing guidelines, for those convicted of a Class C felony, the length of the term of supervised release shall be "at least one year but not more than three years" UNITED STATES SENTENCING COMMISSION, *GUIDELINES MANUAL* § 5D1.2(a)(2) (Nov. 2015). However, the guidelines also state that "[t]he term of supervised release imposed shall not be less than any statutorily required term of supervised release." U.S.S.G. § 5D1.2(c). Therefore, reading U.S.S.G. §§ 5D1.2(a)(2) and 5D1.2(c) together, because the guidelines provide a range of one to three years but 21 U.S.C. § 960(b)(3) requires a minimum term of three years, the guideline for supervised release in Mr. Barrios's case is three years. U.S.S.G. § 5D1.2, comment. (n.6) ("if subsection (a) [of § 5D1.2] provides

Based on an analysis of the factors listed in 18 U.S.C. § 3553(a), the probation officer recommended a sentence varying downward to 120 months of confinement, followed by the mandatory minimum three years of supervised release. (PSR 16, ¶ 85; PSR 17, ¶¶ 94, 97.)

The government's sentencing summary chart mirrored the PSR and also calculated the sentencing guidelines range as 188-235 months. (ER 51; PSR 19.) However, the government varied further downward regarding imprisonment and recommended to the District Court a sentence of eighty-four months followed by the mandatory minimum three years of supervised release. (ER 51.)

In Mr. Barrios's sentencing memorandum, he referenced the mandatory supervised release and argued that application of the relevant sentencing factors found in 18 U.S.C. § 3553(a) as well as consideration of the significant collateral consequences of his conviction warranted a sufficient, but not greater than necessary sentence of seventy-one months of imprisonment, or a downward variance of 117

a range of two years to five years, but the relevant statute requires a minimum term of supervised release of five years and a maximum term of life, the term of supervised release provided by the guidelines is five years.").

months from the low end of the guidelines. (ER 36-41.) Neither party filed objections to the PSR. (ER 32; ER 50.)

The District Court judge began the sentencing hearing by stating that he had read the PSR, Mr. Barrios's sentencing memorandum and the government's sentencing summary chart. (ER 8-9.) Addressing the sentencing guidelines range in this case, the District Court stated,

[G]uidelines for this, given his record, are very, very high. And I think I agree with the government that they're too high. I'm just not sure I can get down, by means of a variance, to where the government wants me to go. . . . [A]ccording to the parties' sentencing summary chart, on the guidelines is 188 months . . . [.] I think that's too long. He's 26 years old. He has a serious felony prior. He has a true finding for another serious felony. He has some misdemeanor stuff. He hasn't done well on parole or probation. But putting this in the context of the kinds of cases that we see on a regular basis here, and his culpability as relative as we can assess it compared to other offenders who have been convicted of this, you know, I agree with the government that 188 months is far too great a sentence, but tell me how I get down to 84 months. I mean, that's over a hundred-month reduction, and I'm not sure I can articulate reasons that would justify a reduction to that extent.

(ER 16-17.)

Considering the need to avoid unwanted sentencing disparities, the District Court went on to state "under 3553(a)(6), compared to other

offenders who bring in methamphetamine, other than his record, he's about the same, and none of those people is being sentenced to 188 months." (ER 18.) The District Court further noted as an aggravating factor that "when you look at his record from age 16 going forward, he's been continuously in criminal trouble, and it's been escalating in seriousness. That's the concern that I have. That's how the record informs my judgment here, and it makes me hesitate that such a huge variance as the one [the government has] recommended is appropriate." (ER 19.)

After allowing further argument from Mr. Barrios's trial defense counsel, the District Court confirmed that the defense concurred with the guideline calculations as set forth in the government's sentencing summary chart and adopted them. (ER 22.)

The District Court then rejected Mr. Barrios's recommendation of a seventy-one month sentence to imprisonment but stated, "I think a variance is in order here. I just – the government has recommended 104, and I can't get down that far." (ER 27.) After concluding that a ninety-four month sentence was appropriate instead of eighty-four

months, the District Court added that he recommended Mr. Barrios for the Bureau of Prisons Residential Drug Abuse Program (RDAP), “which will shave a year off of that” (ER 27.)

The District Court then sentenced Mr. Barrios to ninety-four months of confinement, followed by five years of supervised release, and imposed a \$100 assessment. (App., *infra*, 3a-5a.) After having considered the 18 U.S.C. § 3553(a) factors and concluded that a downward variance was warranted for the term of imprisonment, the District Court gave no explanation on the record in open court as to why it then varied upward by two years for the length of the supervised release term. Mr. Barrios did not object to the lack of an explanation in open court for the upward variance.

Mr. Barrios timely appealed the District Court’s judgment to the Court of Appeals for the Ninth Circuit raising as an issue that the District Court had procedurally erred during sentencing by failing to provide an adequate explanation for imposing an above-guidelines term of supervised release. (App., *infra*, at 2a.) The

Ninth Circuit had jurisdiction to review the case under 28 U.S.C. § 1291.

The Ninth Circuit reviewed the case for plain error and on February 21, 2018, issued a memorandum disposition affirming the District Court. (App., *infra*, at 2a.) The Ninth Circuit found that “the record reflects that the district court adequately explained its reasons for selecting an above-guidelines term of supervised release.” (App., *infra*, at 2a.) In support of this conclusion, the Ninth Circuit relied on its decision in *United States v. Carty*, 520 F.3d 984 (9th Cir. 2008) (*en banc*), explaining that “adequate explanation may be inferred from the record as a whole.” (App., *infra*, at 2a.)

REASONS FOR GRANTING THE PETITION

I. This Case has Decided an Important Federal Question Regarding the Right to Meaningful Appellate Review in which the Ninth Circuit Court of Appeals Decision Conflicts with the Relevant Decisions of this Court.

“Where, as here, Congress has declared that a decision will be governed by consideration of particular factors, a district court must carefully consider those factors as applied to the particular

case and, whatever its decision, clearly articulate their effect in order to permit meaningful appellate review.” *United States v. Taylor*, 487 U.S. 326, 336 (1988).

“Where the judge imposes a sentence outside the Guidelines, the judge will explain why he has done so.” *Rita v. United States*, 551 U.S. 338, 357 (2007).

If a District Court judge

decides that an outside-Guidelines sentence is warranted, he must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance. . . . After settling on the appropriate sentence, he must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing.

Gall v. United States, 552 U.S. 38, 50 (2007).

Congress has specified in 18 U.S.C. § 3583(c) that the determination of the length of supervised release by a District Court judge will be governed by specific factors. In particular, those factors are found in 18 U.S.C. § 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7). Except for the omission of 18

U.S.C. §§ 3553(a)(2)(A) and (a)(3), these are the same factors to be considered in determining the length of imprisonment.

Further, Congress has mandated in 18 U.S.C. § 3553(c)(2) that, if the District Court imposes a sentence outside the guideline range, it shall state in open court its reasons for doing so with specificity. The reason for this requirement is “[d]efendants have a right to meaningful appellate review of their sentences and § 3553(c) facilitates such a review by requiring the district court to state its specific reasons for imposing a particular sentence.” *United States v. Blackie*, 548 F.3d 395, 402 (6th Cir. 2008).

In this case, the District Court did articulate in open court during the sentencing hearing several of the factors it considered pursuant to § 3553(a) in arriving at the length of imprisonment that was imposed. Additionally, no objections by the parties were made to the PSR which also analyzed several § 3553(a) factors before the probation officer recommended a downward variance for the length of imprisonment and the mandatory minimum term of supervised release. The government also recommended a substantial downward variance for imprisonment

and the mandatory minimum term of supervised release. The District Court ultimately concluded that the § 3553(a) factors warranted a substantial downward variance in the term of Mr. Barrios's imprisonment.

However, the District Court simultaneously varied substantially upward regarding Mr. Barrios's term of supervised release, but provided no further statement in open court of its reasons for doing so. Every analysis of the § 3553(a) factors, whether done by the District Court, the United States Probation Office, the government or Mr. Barrios, supported a *downward* variance in the sentence. Regardless, the Ninth Circuit found that adequate explanation for the District Court's *upward* variance for the supervised release portion of the sentence could be inferred from the record as a whole.

In such a case, where a District Court simultaneously imposes a sentence that is both above and below the guidelines and which is based on an analysis of factors which lead to a downward variance for one part of the sentence, it violates an appellant's right to meaningful

appellate review if the District Court is not required to state in open court its reasons for the upward variance portion of the sentence.

The Ninth Circuit's decision in this case allowing for the reasons for the above-guideline part of the sentence to be inferred from the record violates Mr. Barrios's right to meaningful appellate review and therefore conflicts with the relevant decisions of this Court.

II. The Question Presented is Important and Affects Society's Trust and Perception of the Judicial System.

"[A] failure to comply with § 3553(c) causes grave institutional harm, as well as simultaneously depriving the defendant of the benefit of [an appellate court's] review." *In re Sealed Case*, 527 F.3d 188, 193 (D.C. Cir. 2008).

[E]nabling the public to learn why [the] defendant received a particular sentence, section 3553(c) has implications beyond the immediate rights of criminal defendants or the government, or the effective conduct of particular criminal proceedings. It tends to instill understanding of, trust in, and respect for the court and its proceedings on the part both of those who are themselves parties to the proceeding and those who are not.

United States v. Lewis, 424 F.3d 239, 247 (2d Cir. 2005).

It is essential to society that the public have trust in the judicial system and believe that it is fair. However, a member of the public looking at a case such as this is left to wonder how one analysis of certain sentencing factors by a District Court judge could lead to the simultaneous and contradictory conclusion that both upward and downward variances are necessary.

This question only arises because of the Ninth Circuit's failure to apply the plain language of 18 U.S.C. 3553(c) which requires that reasons for such a result must be stated in open court. Permitting the explanation for the above-guideline sentence to be inferred from the record as a whole gives the appearance that the upward variance may have been arrived at arbitrarily and capriciously and that the appellant did not truly receive meaningful appellate review. *See Blackie*, 548 F.3d at 403 ("We do not assume that the sentence was imposed arbitrarily, but without compliance with § 3553(c)(2) we cannot meaningfully review [appellant's] sentence.").

This Court should grant the petition for a writ of certiorari to ensure that the federal Courts of Appeals correctly interpret and apply 18 U.S.C. 3553(c) so that the public can trust that the judiciary does not impose sentences arbitrarily and capriciously and all appellants will be ensured of their right to receive meaningful appellate review of their cases.

CONCLUSION

Petitioner Jorge Walter Barrios, Jr. respectfully requests that this Court grant a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,



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