No._____

IN THE
SUPREME COURT OF THE UNITED STATES

DOMINGO AGUSTIN-SIMON

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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DATE SENT VIA United States Postal Service: April 7, 2025

QUESTIONS PRESENTED

1. Is United States Sentencing Guidelines Section 2A4.1(b)(1) (ransom demand) applicable in the context of an arms-length agreement between an alien smuggling organization ("ASO") and an alien seeking the ASO's services, where the alien agrees to remain within the custody and control of the ASO until the alien is transported from a foreign country to an agreed-upon location within the United States and the agreed-upon smuggling fee is paid?

2. Is a district court obligated, under 18 U.S.C. §3553(a)(5) and the Sentencing Guidelines, to consider, *sua sponte*, the appropriateness of a downward departure based on a United States Sentencing Guidelines ("U.S.S.G.") Policy Statement made clearly applicable by facts squarely before it at a sentencing proceeding?

PARTIES TO THE PROCEEDING

All parties to the proceedings are listed in the caption. The petitioner is not a corporation.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Domingo Agustin-Simon ("Agustin"), respectfully requests that this petition for a writ of certiorari be granted, the judgment of the Ninth Circuit Court of Appeals be vacated, and the case be remanded for further proceedings consistent with Petitioner's positions asserted herein.

OPINIONS BELOW

The underlying conviction and sentence were entered on January 14, 2013. (DC No. 2:11-cr-01622-DGC-5, Doc. 329)[1] (Appendix A, hereto)

On June 19, 2020, Agustin filed an application to the Ninth Circuit Court of Appeals for authorization to file a second or successive 28 U.S.C. § 2255 motion. On May 25, 2022, the Ninth Circuit granted the application, and transferred the matter to the district court for further proceedings. (CA 20-71747, Doc. 22) (Appendix B, hereto)

[1] The abbreviation "Doc." refers to the docket entries in the Clerk's record, and will be followed by the docket number designated in the Clerk's file. The abbreviation "ER" refers to the Excerpts of the Record in Ninth Circuit Court of Appeals case number 23-1323, and will be preceded by the volume number, and followed by the relevant page number referenced in Appellant's Excerpts of the Record.

On October 24, 2022, the district court granted Agustin's § 2255 motion, and set the matter for resentencing, indicating that at that hearing the conviction and sentence on Count 5 (the 18 U.S.C. § 924(c) charge) of the indictment would be vacated. (DC No. 2:11-cr-01622-DGC-5, Doc. 412) (DC No. CV 20-2508-PHX-DGC) (Appendix C, hereto)

On June 20, 2023, the district court dismissed Count 5 of the indictment, and sentenced Agustin to 35 years in prison on Counts 1 and 2, and ten years in prison on Counts 3 and 4, all counts to be served concurrently, with credit for time served. Five-year terms of supervised release were imposed on Counts 1 and 2, and three-year terms of supervised release were imposed on Counts 3 and 4, all terms to begin upon Agustin's release from imprisonment, and all to run concurrently. (DC No. 2:11-cr-01622-DGC-5, Doc. 436) (Appendix D, hereto)

On June 22, 2023, Agustin filed a timely notice of appeal, appealing the June 20, 2023 judgment and sentence.

On November 4, 2024, the Ninth Circuit Court of Appeals, in a Memorandum Decision, denied relief, holding, in part, that U.S.S.G. § 2A4.1(b)(1) "applies anytime a defendant demands money from a third party for a release of a victim, regardless of whether that money is already owed to the defendant", citing *United States v. Sierra-Velasquez*, 310 (F.3d 1217, 1221 (9th Cir. 2002). (CA No. 23-1323, Doc. 49) (Appendix E, hereto)

On December 16, 2024, Agustin filed a Petition For Panel Rehearing and Rehearing En Banc.

On January 8, 2025, the Ninth Circuit Court of Appeals denied Agustin's Petition for Panel Rehearing and Rehearing En Banc. (CA No. 23-1323, Doc. 53) (Appendix F, hereto)

JURISDICTION

The Order of the United States Court of Appeals for the Ninth Circuit denying relief was entered on January 8, 2025. That Court had jurisdiction pursuant to 28 U.S.C. § 1291. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS

18 U.S.C. § 3553. Imposition of a sentence

. . .

(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), 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), is in effect on the date the defendant is sentenced.[1]

(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.

(b) APPLICATION OF GUIDELINES IN IMPOSING A SENTENCE.—

(1) IN GENERAL.—
Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

§2A4.1. Kidnapping, Abduction, Unlawful Restraint

(a) Base Offense Level: 32

(b) Specific Offense Characteristics

(1) If a ransom demand or a demand upon government was made, increase by 6 levels.

. . .

Application Notes:

1. For purposes of this guideline—

Definitions of "*serious bodily injury*" and "*permanent or life-threatening bodily injury*" are found in the Commentary to §1B1.1 (Application Instructions). However, for purposes of this guideline, "*serious bodily injury*" means conduct other than criminal sexual abuse, which is taken into account in the specific offense characteristic under subsection (b)(5).

2. "*A dangerous weapon was used*" means that a firearm was discharged, or a "firearm" or "dangerous weapon" was "otherwise used" (as defined in the Commentary to §1B1.1 (Application Instructions)).

3. "*Sexually exploited*" includes offenses set forth in 18 U.S.C. §§ 2241–2244, 2251, and 2421–2423.

4. In the case of a conspiracy, attempt, or solicitation to kidnap, §2X1.1 (Attempt, Solicitation, or Conspiracy) requires that the court apply any adjustment that can be determined with reasonable certainty. Therefore, for example, if an offense involved conspiracy to kidnap for the purpose of committing murder, subsection (b)(7) would reference first degree murder (resulting in an offense level of 43, subject to a possible 3-level reduction under §2X1.1(b)).

Similarly, for example, if an offense involved a kidnapping during which a participant attempted to murder the victim under circumstances that would have constituted first degree murder had death occurred, the offense referenced under subsection (b)(7) would be the offense of first degree murder.

Background: Federal kidnapping cases generally encompass three categories of conduct: limited duration kidnapping where the victim is released unharmed; kidnapping that occurs as part of or to facilitate the commission of another offense (often,

sexual assault); and kidnapping for ransom or political demand.

The guideline contains an adjustment for the length of time that the victim was detained. The adjustment recognizes the increased suffering involved in lengthy kidnappings and provides an incentive to release the victim.

An enhancement is provided when the offense is committed for ransom (subsection (b)(1)) or involves another federal, state, or local offense that results in a greater offense level (subsections (b)(7) and (c)(1)).

Section 401 of Public Law 101–647 amended 18 U.S.C. § 1201 to require that courts take into account certain specific offense characteristics in cases involving a victim under eighteen years of age and directed the Commission to include those specific offense characteristics within the guidelines. Where the guidelines did not already take into account the conduct identified by the Act, additional specific offense characteristics have been provided.

Subsections (a) and (b)(5), and the deletion of subsection (b)(4)(C), effective May 30, 2003, implement the directive to the Commission in section 104 of Public Law 108–21.

§5K2.10. VICTIM'S CONDUCT (POLICY STATEMENT)

If the victim's wrongful conduct contributed significantly to provoking the offense behavior, the court may reduce the sentence below the guideline range to reflect the nature and circumstances of the offense. In deciding whether a sentence reduction is warranted, and the extent of such reduction, the court should consider the following:

(1) The size and strength of the victim, or other relevant physical characteristics, in comparison with those of the defendant.

(2) The persistence of the victim's conduct and any efforts by the defendant to prevent confrontation.

> (3) The danger reasonably perceived by the defendant, including the victim's reputation for violence.
>
> (4) The danger actually presented to the defendant by the victim.
>
> (5) Any other relevant conduct by the victim that substantially contributed to the danger presented.
>
> (6) The proportionality and reasonableness of the defendant's response to the victim's provocation.
>
> Victim misconduct ordinarily would not be sufficient to warrant application of this provision in the context of offenses under Chapter Two, Part A, Subpart 3 (Criminal Sexual Abuse). In addition, this provision usually would not be relevant in the context of non-violent offenses. There may, however, be unusual circumstances in which substantial victim misconduct would warrant a reduced penalty in the case of a non-violent offense. For example, an extended course of provocation and harassment might lead a defendant to steal or destroy property in retaliation.

STATEMENT OF THE CASE

Petitioner, Domingo Agustin-Simon, is challenging his June 20, 2023 sentence in the United States District Court for the District of Arizona for conspiracy to commit hostage taking, hostage taking, bringing in illegal aliens, harboring illegal aliens, and using/carrying a firearm during and in relation to a crime of violence. The sentencing Court's address is 401 West Washington Street, Phoenix, Arizona 85003.

On September 20, 2011, a federal grand jury returned a superseding indictment charging Agustin with one count of conspiracy to commit hostage

taking (Count 1), in violation of 18 U.S.C. § 1203(a), one count of hostage taking, and aid and abet (Count 2), in violation of 18 U.S.C. §§ 1203(a) and 2, one count of bringing in illegal aliens, and aid and abet (Count 3), in violation of 8 U.S.C. § 1324(a)(2)(B)(ii) and 18 U.S.C. § 2, one count of harboring illegal aliens, and aid and abet (Count 4), in violation of 8 U.S.C. §§ 8-1324(a)(1)(A)(iii), 8-1324(a)(1)(A)(v)(II), 8-1324(a)(1)(B)(i), and 18 U.S.C. § 2, and one count of use and carrying a firearm during and in relation to a crime of violence, (hostage taking) and aid and abet (Count 5), in violation of 18 U.S.C. §§ 924(c)(1)(A) and 2. (DC No. 2:11-cr-01622-DGC-5, Doc. 42)

The government alleged that Agustin was a manager of a "drop house" in Mesa, Arizona, that served as a clearinghouse for foreign nationals being smuggled into the United States from Mexico and other countries by one or more alien smuggling organizations ("ASOs"). The smuggled aliens ("SAs") were allegedly guided northward across the United States-Mexico border, and placed at the Mesa drop house until the servicing ASO's smuggling fees could be collected, via wire transfer, from third-party sponsors. The SAs were then moved by their respective servicing ASOs to their final destinations throughout the interior of the United States. The government alleged that some of the SAs in Agustin's care were detained in the drop house against their will, subjected to harsh living conditions, and threatened with bodily harm if the ASO's smuggling fees were not timely paid. The government

referred to the co-conspirator SAs as "hostages", and the agreed-upon smuggling fees as "ransom."

CASE HISTORY

After an eight-day jury trial, Agustin was found guilty on all counts. (DC No. 2:11-cr-01622-DGC-5, Doc. 270) On January 14, 2013, the district court sentenced Agustin to concurrent 35-year terms of imprisonment on Counts 1 and 2, 120 months of imprisonment on Counts 3 and 4 (to be served concurrently with Counts 1 and 2), and 84 months of imprisonment on Count 5 (to be served consecutively to Counts 1, 2, 3 and 4). Consecutive terms of supervised release were ordered on each count of conviction, to be served concurrently with one another. (DC No. 2:11-cr-01622-PHX-DGC, Doc. 329)

On January 28, 2013, Agustin filed an appeal to the Ninth Circuit Court of Appeals, appealing the judgments of guilt and sentences in that case. (CA 13-10036, Doc. 39-1) On November 19, 2015, the Court of Appeals denied relief. (CA 13-10036, Doc. 88)

On June 19, 2020, Agustin filed, in the Ninth Circuit Court of Appeals, an Application to File a Second or Successive § 2255 Motion Pursuant to 28 U.S.C. §§ 2255(h) and 2244(b)(3)(A). There, Agustin argued, *inter alia*, that "hostage taking", under 18 U.S.C. § 1203(a) (as alleged in Count 2 of the superseding indictment), was not a "crime of violence" under 18 U.S.C. § 924(c). (CA 20-71747, Doc. 1-3)

On November 12, 2020, that Court held that Agustin's application raised issues that warranted further briefing. The Court appointed counsel, and gave counsel leave to file a Supplemental Application for Authorization to File a Second or Successive § 2255 Motion. (CA 20-71747, Doc. 2-1)

On March 31, 2021, Agustin filed a Supplemental Application for Authorization to File a Second or Successive § 2255 Motion. (CA 20-71747, Doc. 19)

On May 25, 2022, the Ninth Circuit Court of Appeals granted Agustin's application, and remanded the case to the district court for a ruling on the motion. (CA 20-71747, Doc. 22) (CV 20-02508-PHX-DGC-ESW, Doc. 22)

On October 24, 2022, the district court granted defendant's § 2255 motion, and set the matter for a *de novo* resentencing, indicating that at that hearing the conviction and sentence on Count 5 (the 18 U.S.C. § 924(c) charge) of the indictment would be vacated, as "hostage taking" was not a "crime of violence". (DC No. 2:11-cr-01622-DGC, Doc. 412) (CV 20-02508-PHX-DGC-ESW, Doc. 32)

On November 14, 2022, the Probation Department submitted a revised Presentence Investigation Report (PSR), wherein the presentence report writer recommended a life sentence on Counts 1 and 2, and 120 months incarceration on Counts 3 and 4, concurrently with each other and with Counts 1 and 2, those sentences to be followed by five-year terms of supervised release on Counts 1 and 2, and three-year terms of supervised

release on Counts 3 and 4, all such terms to run concurrently with one another. (PSR, p. 17) In arriving at that recommendation, the Probation Department applied the following enhancements for Counts 1 through 4: U.S.S.G. §§ 2A4.1(b)(1) (+6 – ransom demand); 2A4.1(b)(3) (+2 – brandishing firearm); 2A4.1(b)(5) (+6 – sexual exploitation of victim); 3A1.1(b)(1) (+2 – vulnerable victim); and 3B1.1(a) (+4 – role). (PSR, pp. 8-10)

On May 9, 2023, Agustin filed Defendant's Objections to the PSR, objecting, *inter alia*, to the Probation Department's application of U.S.S.G. §2A4.1(b)(1) (ransom demand).

On June 20, 2023, the district court adopted all of the Probation Department's Sentencing Guidelines calculations, and sentenced Agustin to 35 years in prison on Counts 1 and 2, and ten years in prison on Counts 3 and 4, all counts to be served concurrently, with credit for time served. Five-year terms of supervised release were imposed on Counts 1 and 2, and three-year terms of supervised release were imposed on Counts 3 and 4, all terms to begin upon Agustin's release from imprisonment, and all to run concurrently. The previous judgment on Count 5 of the superseding indictment was vacated, and Count 5 was dismissed. (DC No. 2:11-cr-01622-DGC, Doc. 436)

A timely Notice of Appeal was filed on June 22, 2023.

On appeal, Agustin argued that the district court's factual finding that U.S.S.G. §2A4.1(b)(1) (ransom demand) applied was clearly erroneous, and an abuse of its discretion. Agustin posited that that error was

procedural in nature, and led to a substantially unreasonable aggregate sentence, and, therefore, constituted an abuse of discretion. In his reply brief, Agustin acknowledged that the application of §2A4.1(b)(1) by the district court did not constitute procedural error, but, nevertheless, produced a substantively unreasonable sentence. (CA 23-1323, Doc. 13)

Additionally, Agustin argued that the district court should have granted a downward departure under U.S.S.G. § 5K2.10 (Policy Statement), *sua sponte*, on the ground that the trial evidence clearly indicated that the "victims" were actually co-conspirators with the ASO in their cross-border smuggling operation, and agreed in advance to pay a specific smuggling fee for the ASO's services with the mutual understanding that they would remain under the custody and control of the ASO until the agreed-upon fee was paid. The failure of the district court, *sua sponte*, to grant, or even consider, a § 5K2.10 downward departure, constituted an abuse of its discretion, and produced a substantively unreasonable sentence. (CA 23-1323, Doc. 13)

For these and other reasons, Agustin argued that the new aggregate prison sentence on Counts 1 through 4 should have been significantly *less* than 35 years.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit Court of Appeals decided two important questions of federal law that have not been, but should be, settled by the United States Supreme Court.

Granting the Writ in this case would allow this Court to correct the error the Ninth Circuit Court of Appeals made in holding that the six-level sentencing enhancement for ransom demand applies "anytime" a defendant demands money from a third party for the release of a "victim", regardless of whether that money is already owed to the defendant, and, presumably, even if the "victim" has agreed to be held/controlled until payment is made.

It would also allow this Court to better define a district court's obligation under 18 U.S.C. §3553(a)(5) to consider, *sua sponte*, the appropriateness of a downward departure based on a Policy Statement made clearly applicable to the sentencing decision by facts squarely before the district court at a sentencing proceeding.

ARGUMENT

1) On appeal, Agustin challenged the six-level enhancement for ransom demand under U.S.SG. §2A4.1(b)(1) because the smuggled aliens previously agreed to pay the defendants the sums demanded, and because no one was "kidnapped" or held for "ransom" as those terms are commonly understood.

Citing *United States v. Sierra-Velasquez*, 310 F.3d 1217, 1221 (9th Cir. 2002), the Panel held that the enhancement "applies anytime a defendant

demands money from a third party for a release of a victim, regardless of whether that money is already owed to the defendant." (CA 23-1323, Doc. 49)

Implicit in the Panel's conclusion that the enhancement under §2A4.1(b)(1) was appropriate was that the smuggled aliens were "seized" simply by virtue of their being hidden and sequestered in a drop house until their fees could be collected from their sponsors, and transportation could be arranged to move them to their final destination. Yet, there was no credible evidence presented at trial suggesting the smuggled aliens didn't agree to be hidden and sequestered by the defendants until their fees were paid and transportation could be arranged to move them out of the drop house.

The people paying for the services of the ASO were, themselves, all complicit in the ASO's smuggling operations, and they all tacitly agreed, in advance, to hike through the rugged Sonoran Desert in a manner designed to avoid detection by the United States Border Patrol, and to remain sequestered in a drop house until their agreed-upon fees were paid, and transportation could be arranged for travel to their final destination. They, no doubt, fully expected that the smugglers would have in place procedures to ensure the secrecy of the ASO's operations, and the payment of the smuggling fees, and, in fact, were given instructions by the ASO(s) on what to do to avoid detection by the Border Patrol, and on what to do if encountered by Border Patrol. Most of the testifying SAs appeared to have no issue with the

fact that they were to remain briefly in the drop house until their agreed-upon smuggling fees were paid, notwithstanding the allegedly harsh conditions within the drop house. The ones who complained that they were held beyond their payment date were being held not for ransom, but for the arrival of transportation to their next destination. The testimony at trial supported no other plausible explanation. Even the allegations by two of the SAs that their smuggling fees were increased appeared, in one case, to be related to a change in destination by the complaining SA. In the other, the SA provided no context to allow the jury or the sentencing judge to conclude the small alleged increase actually occurred, and/or was contrary to the SA's agreement with the ASO.[2] While the jury necessarily found that the seizure of at least one smuggled alien occurred, the jury's verdict did not require a specific finding that ransom was paid as a condition of releasing that "victim".

Given these facts, the Panel arguably misconstrued U.S.S.G. §2A4.1(b)(1). If so, the case should be remanded for resentencing without

[2] SA, Marlen Garcia-Rodriguez, claimed she was initially destined for Dallas, Texas, but decided, instead, to go to New York. (5-ER-798) SA, Jose Martinez-Veliz, claimed his fee was increased from $3,500 to $4,200, but he failed to elaborate on the circumstances underlying the original agreed-upon sum or the explanation, if any, he received for the alleged change. (4-ER-691) Notably, none of the other testifying SAs reported that their fees were increased.

the §2A4.1(b)(1) enhancement.[3]

2) On appeal, Agustin challenged the district court's failure, *sua sponte*, to depart downward under Policy Statement U.S.S.G. §5K2.10 to account for the smuggled aliens' contribution, as co-conspirators, to the ASO's operation, and to their own circumstances.

While Agustin did not expressly ask the district court to depart downward under §5K2.10, he was emphatic regarding the smuggled aliens' contribution to the smuggling operation, and to their circumstances. Agustin's sentencing memorandum contained the following passage:

> The people paying for the services of the smuggling operation in issue were, themselves, all criminals by definition, and they all tacitly agreed, in advance, to hike through the Sonoran Desert, and to remain in a drop house in Tucson until their agreed-upon fees were paid, and transportation was arranged for their final destination, and, no doubt, fully expected that the smugglers would have in place procedures to ensure the secrecy of their operations and the payment of the smuggling fees. The alleged harshness of the conditions of the journey through the desert, and at the drop house did not alter that first principle.

(2-ER-212) (DC No. 2:11-cr-01622-DGC-5, Doc. 318)

Thus, the issue of the smuggled aliens' contribution to the illegal human smuggling enterprise, including the circumstances they helped

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[3] In the two other published cases counsel was able to find where § 2A4.1(b)(1) was deemed to apply, the alleged victims were clearly "seized or detained" as required under 18 U.S.C. § 1203(a). *See United States v. Digiorgio*, 193 F.3d 1175, 1178 (11th Cir. 1999); *United States v. Escobar-Posado*, 112 F.3d 82, 83 (2nd Cir. 1997).

create, was front and center at the sentencing stage of the district court proceedings. That being so, coupled with the district court's obligation, under 18 U.S.C. § 3553(a)(5) to consider *all* applicable Guidelines and Policy Statements, the district court had a duty, *sua sponte*, to at least consider a §5K2.10 departure. There is no evidence in the record that the district court took any account of the smuggled aliens' collaborative - indeed crucial - role in the criminal enterprise.

Indeed, the inherently collaborative nature of alien smuggling operations likely explains the marked differences between the advisory sentences under U.S.S.G. §§ 2A4.1, *et seq.* (Kidnapping, Abduction, Unlawful Restraint) and 2L1.1, *et seq.* (Smuggling, Transporting, or Harboring an Unlawful Alien).

Even if the claimed error was not procedural in nature, but, as suggested by the government, goes only to the substantive reasonableness of the sentence, the district court was still obligated to at least *consider* a departure under §5K2.10, in light of the facts squarely before it during sentencing proceedings. [4]

In response to that argument, the Ninth Circuit Panel held, as follows:

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[4] See, e.g., *United States v. Rosales-Gonzales*, 801 F.3d 1177, 1180 (9th Cir. 2015), where this Court made clear that it is procedural error to *fail to consider* §3553(a) factors, *which include pertinent Policy Statements*. In *Rosales-Gonzales*, the district court considered, then rejected a requested departure, and, thus, the procedural requirement for consideration under *Carty* was met.

> Agustin-Simon's final procedural argument is that the district court erred by not *sua sponte* applying a downward departure under U.S.S.G. § 5K2.10 to account for the victims' contribution to the illegal conduct as "co-conspirators." Agustin-Simon did not request this downward departure in the district court, nor did he object to the district court's failure to apply it. We thus decline to review this issue for the first time on appeal. *See Unted States v. Robertson*, 52 F.3d 789, 791 (9th Cir. 1994) ("Issues not presented to the district court cannot generally be raised for the first time on appeal.").

(CA 23-1323, Doc. 49)

Augustin posits that, the Ninth Circuit Court of Appeals erred in concluding that 18 U.S.C. § 3553(a)(5) confers no obligation on the district court to consider, *sua sponte*, Policy Statements made relevant by facts squarely before it at the sentencing proceeding.

That being so, the case should be remanded with instructions to resentence after considering whether a downward departure under § 5K2.10 should be applied.

CONCLUSION

There was no evidence presented at trial that ransom was sought or paid in this case. The Ninth Circuit Court of Appeals, in this case, and in *United States v. Sierra-Velasquez*, *supra*, erred in holding that U.S.S.G. § 2A4.1(b)(1) applies *anytime* a defendant demands money from a third party for the release of a "victim", regardless of whether that money is already owed to the defendant, and the conditions precedent to the "victim's" release (payment of smuggling fee) were agreed upon beforehand.

Moreover, the district court had a duty under 18 U.S.C. § 3553(a)(5), to consider, *sua sponte*, the applicability of U.S.S.G. § 5K2.10 (Policy Statement) to the facts squarely before it at the sentencing proceeding, and failed to do so. The Court of Appeals erred in concluding the district court had no such duty.

For the foregoing reasons, this Court should grant this petition for writ of certiorari, reverse the decision of the Ninth Circuit Court of Appeals, and remand the case with instructions to resentence Agustin without regard for U.S.S.G. § 2A4.1(b)(1), and after considering U.S.S.G. § 5K2.10, in its sentencing analysis.

RESPECTFULLY SUBMITTED this 7th day of April, 2025, by

MICHAEL J. BRESNEHAN, P.C.

s/ Michael J. Bresnehan
Attorney for Petitioner/Appellant