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No. \_\_\_\_\_

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In the  
**Supreme Court of the United States**

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**JOSE LUIS GUEVARA**, Petitioner

v.

**UNITED STATES**, Respondent

---

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

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**MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS**

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The petitioner, by his undersigned counsel, asks leave to file the attached petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit without prepayment of costs and to proceed in forma pauperis. Petitioner was represented by counsel appointed in the trial court under the Criminal Justice Act, 18 U.S.C. §3006A(b).

\* \* \*

This motion is brought pursuant to Rule 39.1 of the Rules of the Supreme Court of the United States.

Respectfully submitted,

HILARY POTASHNER  
Federal Public Defender

DATED: January 15, 2016

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KATHRYN A. YOUNG  
Deputy Federal Public Defender

Attorneys for the Petitioner  
Counsel of Record

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**PETITION FOR WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED FOR REVIEW

Petitioner Jose Luis Guevara was sentenced to 50 months imprisonment, following his guilty plea to violation of 8 U.S.C. § 1326(a) (illegal alien found in the United States following deportation).

This Petition presents the following question for review:

Whether Guevara's sentence should be reversed because the district court erred in imposing a 16-level enhancement based on Guevara's prior conviction under California Health & Safety Code §11351.

Whether Guevara's sentence should be reversed because the district court erred in denying a departure for cultural assimilation under U.S.S.G. §2L1.2.

Whether Guevara's sentence should be reversed because it is unreasonable. The district court did not reasonably consider the factors set forth in 18 U.S.C. § 3553.

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**PETITION FOR WRIT OF CERTIORARI**

---

Jose Luis Guevara respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in his case.

**OPINION BELOW**

The Ninth Circuit's order affirming the judgment of the district court in *United States v. Jose Luis Guevara*, Ninth Circuit Case No. 14-50024, is unreported. (See Appendix A, "Memorandum") No written opinions (other

than minute orders) were issued by the district court when it issued the rulings which are the subject of this Petition.

### **BASIS FOR JURISDICTION IN THIS COURT**

The judgment of the Ninth Circuit sought to be reviewed was entered on October 19, 2015. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

### **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

#### **18 U.S.C. § 3553(a)**

(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, ....

(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.

### **Application Note 9 to U.S.S.G. §2L1.2**

Departure Based on Cultural Assimilation. There may be cases in which a downward departure may be appropriate on the basis of cultural assimilation. Such a departure should be considered only in cases where (A) the defendant formed cultural ties primarily with the United States from having resided continuously in the United States from childhood, (B) those cultural ties provided the primary motivation for the defendant's illegal reentry or continued presence in the United States, and (C) such a departure is not likely to increase the risk to the public from further crimes of the defendant.

In determining whether such a departure is appropriate, the court should consider, among other things, (1) the age in childhood at which the defendant began residing continuously in the United States, (2) whether and for how long the defendant attended school in the United States, (3) the duration of the defendant's continued residence in the United States, (4) the duration of the defendant's presence outside the United States, (5) the nature and extent of the defendant's familial and cultural ties inside the United States, and the nature and extent of such ties outside the United States, (6) the seriousness of the defendant's criminal history, and (7) whether the defendant engaged in additional criminal activity after illegally reentering the United States.

### **California Health and Safety Code Section 11351 (2007)**

"Except as otherwise provided in this division, every person who possesses for sale or purchases for purposes of sale (1) any controlled substance specified in subdivision (b), (c), or (e) of Section 11054, specified in paragraph (14), (15), or (20) of subdivision (d) of Section 11054, or specified in subdivision (b) or (c) of Section 11055, or specified in subdivision (h) of Section 11056, or (2) any controlled substance classified in Schedule III, IV, or V which is a narcotic drug, shall be punished by imprisonment in the state prison for two, three, or four years."

## STATEMENT OF THE CASE

### **A. Jurisdiction in the Courts Below**

The district court had jurisdiction pursuant to 18 U.S.C. § 3231, and the Ninth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

### **B. Facts Material to Consideration of Questions Presented**

**Offense.** On January 13, 2014, Petitioner Jose Luis Guevara was sentenced to 50 months in prison for violation of 8 U.S.C. § 1326(a) (illegal alien found in the United States following deportation).

On November 2, 2007, Guevara was convicted in Los Angeles Superior Court Case Number BA325655, of violating California Health and Safety Code Section 11351 (possession for sale of a controlled substance, to wit, cocaine), and was sentenced to two years in prison.

On September 19, 2008, Guevara was deported from the United States, and subsequently illegally reentered the United States.

On July 24, 2013, an ICE officer arrested Guevara, who came to the attention of ICE after renewing his California driver's license on July 19, 2012. That triggered an investigation which confirmed Guevara had been previously deported.

**Sentencing Guideline Range.** Pursuant to U.S.S.G. §2L1.2(a), the base offense level was 8. The district court imposed a 16-level enhancement under §2L1.2(b)(1)(A), on the ground that Guevara was previously deported after a conviction for a felony that is a drug trafficking offense for which the sentence imposed exceeded 13 months (Guevara's 2007 conviction for

violation of Section 11351). The district court applied a three-level reduction for acceptance of responsibility under §3E1.1, resulting in total offense level 21.

The PSR calculated that Guevara had seven criminal history points, establishing a criminal history category of IV. Guevara was assessed one point for DUI in 2001. Guevara was assessed one point for corporal injury to cohabitant in 2002. The PSR reported that in compliance with the state court's order, Guevara completed the domestic violence program and 30 days of community service. According to the arrest report, the victim was Guevara's current wife, who had been living with Guevara since 1987 and was the mother of his three children. Guevara was assessed two points for possession of a controlled substance in 2007. Guevara was assessed three points for his 2007 violation of Section 11351.

Guevara's total offense level 21 and criminal history category IV generated a sentencing guideline range of 57-71 months. However, if the government could not prove the aggravated felony prior conviction, then the statutory maximum term of imprisonment was two years under §1326(a).

Guevara was born in Mexico in December 1971. Guevara's father was murdered when Guevara was ten years old. His mother continues to reside in Mexico. Prior to his arrest, Guevara was in semi-monthly contact with his mother. Guevara has three brothers and one sister who reside in Mexico and with whom he has occasional contact. While they were growing up, his family struggled financially but they had sufficient food to survive. Guevara's father worked hard as a factory laborer to provide for Guevara and his siblings.

Guevara's mother stayed at home and cared for the children. They lived in a two-room house with a concrete floor, but no indoor plumbing or electricity. At age 16, Guevara moved to the United States. He applied for asylum and was granted a work visa.

In 2006, Guevara married his current wife Juliana Valero, with whom he had been living since 1988. Valero continues to work full time as a machine operator at a sewing factory. Valero resides with their three sons. Guevara was in semi-weekly phone contact with his wife and sons since his arrest. Guevara is very proud that none of his sons have ever been arrested.

At the time of sentencing, Guevara's oldest son Santiago (26) was employed as a laborer in a furniture repair factory and as a professional boxer. Santiago and his girlfriend had an infant daughter for whom Santiago provided financial support.

Guevara's middle son Junior (21) graduated from high school and was employed full-time as a grocery store cashier. Junior and his girlfriend had an infant son for whom Junior provided financial support.

Guevara's youngest son Adrian (14) was a student. Upon Guevara's deportation, Valero would remain in the United States to raise Adrian as she did not want him living in Mexico. Guevara would live in Mexico with his mother.

In the PSR, the probation officer recognized this case was unique in that Guevara, unlike most defendants facing sentencing for illegal reentry, was not discovered in the United States because he violated another law. Rather, Guevara was discovered in July 2012, because he complied with the

law by updating the California Department of Motor Vehicles with his address. Guevara had further recently demonstrated some respect for the law in that upon his arrest he immediately admitted that he was in the United States unlawfully and plead guilty to that offense. Additionally, Guevara mentioned that he was proud of the fact his sons did not have criminal histories.

The PSR quoted Guevara's son Junior, who described his father as "always really generous to us and good with my mom. He helped us out a lot. He was really supportive of us. He supported me and my older brother to go pro with boxing. We were never on welfare. He always worked hard. He helped my mom's uncle who was disabled. He would drive him places and pick up his meds."

Guevara's wife Valero stated that she would like the sentencing court to know that she needed Guevara, and that "he has always been there for us. He has always been a responsible person and we never had to get food stamps or other help from the government. He always liked having his family close and united. His priorities were always his family."

With respect to education and employment, the PSR reported that Guevara completed seven years of formal education in Mexico, quitting school at age 12. Since 1998 (the last 15 years), Guevara had been employed by Los Angeles Taxi Service as a taxi driver. His net weekly income was approximately \$700. His prior work experience included operating a sewing machine at a factory and pouring wax at a candle company. Guevara had filed tax returns.

After Guevara's arrest, his family had to move to a smaller apartment and put up for sale the car that Guevara drove as a taxi.

**Defense Sentencing Papers.** The defense requested a sentence of one year and one day as sufficient but not greater than necessary to meet the goals of sentencing.

The defense objected to the PSR's classification of Guevara's 2007 conviction for violation of California Health and Safety Code §11351 as a felony drug trafficking conviction and, pursuant to U.S.S.G. §2L1.2(b)(1)(A), recommendation of a sixteen-level specific enhancement. This classification was incorrect because §11351 was categorically not a drug trafficking offense, *United States v. Leal-Vega*, 680 F.3d 1160, 1167-68 (9th. Cir. 2012), and the modified categorical approach was not applicable to that section. *Descamps v. United States*, 133 S. Ct. 2276, 2283 (2013). The correct enhancement would be the four-level enhancement in U.S.S.G. §2L 1.2(b)(1)(D), for deportation following a felony conviction.

The defense further argued that the PSR erroneously failed to apply a departure for cultural assimilation. Guevara was eligible for a departure for cultural assimilation, pursuant to U.S.S.G §2L1.2, Application Note 8, because he met almost all of the factors enumerated under that provision.

Guevara was born in Mexico but had lived in the United States almost continuously for over fifteen years. Although Guevara did not attend school in the United States, it was because he ceased attending school altogether at age twelve. When Guevara first came to the United States, he was a teenager. He had since established roots in the United States that served as the primary



motive for his return. Other than part of his childhood, Guevara had spent little time in Mexico; and his wife, three children, and two grandchildren all reside in the United States. Guevara's criminal history was relatively minor in recent years, with only a misdemeanor conviction for providing false information to a peace officer in 2010 - an offense which was not difficult to understand for a person like Guevara, who was in the country without permission and therefore sought to avoid detection. Finally, Guevara did not commit any new crimes following his reentry and was only discovered when he complied with state law and updated the address on his driver's license.

With respect to the nature and circumstances of the offense and history and characteristics of the defendant, the driving force behind Guevara's return was the desire to be a loving husband, father, and grandfather, and help provide for his family. Guevara took great pride in having worked continuously since arriving in the United States, including working as a sewing machine operator, pouring wax in a candle company, and working as a taxi driver. Guevara's wife also worked full-time and, between the two of them, they had been able to provide for themselves, their three children, and now their two grandchildren, without ever resorting to any government benefits or aid.

Guevara's wife and children described him as being very loving, supportive, and hardworking, always placing a priority on family. When Guevara's wife's uncle became ill, Guevara stepped in to help drive him to appointments and pick up necessary medication for him. His wife's uncle recognized in the past twenty-one years how incredibly dedicated to his

family Guevara was and how much Guevara having been raised without a father impacted him and drove him to always be present in his children's lives.

To that end, in addition to always providing food, shelter, and basic necessities for his family, Guevara had worked diligently with his two oldest sons to train them as professional boxers. Guevara's oldest son had now made it as a professional boxer, and his middle son was on his way to also becoming a professional boxer. Throughout the past sixteen or seventeen years that Guevara had been working with his sons to help train them as boxers, Guevara became close to the sons' boxing instructor, who had witnessed first-hand how dedicated to his family Guevara was and how proud Guevara was that none of his children had criminal records and that all his children were either employed full-time or in school full-time.

Deterrence was not an issue in this case because Guevara had already demonstrated that he was able to rebuild his life and live a law-abiding life dedicated to family and full-time employment. Unlike many other illegal reentry defendants, Guevara did not come to the attention of law enforcement through a new arrest or conviction, but was rather discovered because he was complying with state law and updating his address on his driver's license.

Prior to the instant offense, Guevara's last conviction was a misdemeanor conviction nearly four years ago for providing false information to a peace officer - an offense that was understandable given that Guevara was residing in the United States without permission. Prior to that offense, Guevara last sustained a criminal conviction more than five years ago. This

period of relatively minimal criminal activity demonstrated that Guevara was capable of successfully changing his habits and living a law-abiding life.

Although Guevara was incredibly dedicated to his immediate family, all of whom reside in the United States, Guevara understood that it was better for his family if he were free and residing in Mexico rather than incarcerated in the United States. Guevara was thus not likely to return to the United States. Guevara's wife and children could easily visit Guevara in Mexico and Guevara could work in Mexico and send money to help support his family. In Mexico, Guevara could live with his mother or one of his siblings, all of whom reside in Mexico and could provide him support until he had established himself. Thus, a sentence of one year and one day was sufficient to meet the goal of deterrence because it was unlikely Guevara would reoffend.

**Sentencing Hearing.** The district court heard argument on whether Guevara's 2007 conviction was an aggravated felony. The district court found that §11351 was divisible. The district court had looked at the jury instructions, both CALJIC and CALCRIM, as well as the statute. The district court found that §11351 was divisible when it went to trial. The jury was required to find what the controlled substance was. The actual transcript of defendant's plea asked how he plead to Count 1 to the crime of possession for sale of a controlled substance, to wit, cocaine, in violation of Health and Safety Code, Section 11351, a felony, to which he answered no contest. So the district court found that the prior conviction qualified as an aggravated felony.

The offense level was 21, which with criminal history category IV resulted in a 57-71 month Sentencing Guideline range. The district court turned to the Section 3553 factors.

The district court imposed a 50-month sentence, stating that:

"The Court does not deviate for cultural assimilation under 2L1.2. I have read Note 8, and I don't find that this case fits within the factors that the Court is directed to in Note 8 for departure based on cultural assimilation. This Defendant has not, in fact, resided here continuously since early childhood, and usually that is the case when it is argued; and in addition to that, he hasn't really gone to school here.

Those are normally the types of cases in which the Court sees this arguments being made, continuously residing here since very early childhood, going to school, those ties providing primary motivation for illegal re-entry, and a very minimal criminal history as well because, otherwise, I don't feel that there's really been assimilation into society, and I am troubled by the assault on his wife.

However, this is a very unusual case in one regard, and that is that the Defendant was, actually, attempting to comply with the law by updating his address with the DMV, and that's what led to his being caught, essentially, to his being found out. That is a very unusual factor, and although this Court essentially, very rarely if ever, deviates in a case like this, I do feel, based upon that, that I would slightly deviate from the low end, 57 months, to 50 months in recognition of the fact that I don't think as much deterrence is needed as is usual because

of the fact that this Defendant was following the law at the time that he, in essence, sort of turned himself in.”

REASONS FOR GRANTING THE WRIT

GUEVARA'S SENTENCE SHOULD BE REVERSED  
BECAUSE THE DISTRICT COURT ERRED IN IMPOSING  
A 16-LEVEL ENHANCEMENT BASED ON GUEVARA'S PRIOR  
CONVICTION UNDER CALIFORNIA HEALTH & SAFETY CODE  
§11351

The Ninth Circuit Memorandum stated that:

“Guevara contends that the district court erred in determining that California Health & Safety Code § 11351 is divisible within the meaning of *Descamps v. United States*, 133 S. Ct. 2276, 2284 (2013), and therefore subject to the modified categorical approach. However, Guevara concedes that his argument is foreclosed by precedent, and we agree. See *United States v. Torre-Jimenez*, 771 F.3d 1163, 1167 (9th Cir. 2014) (holding that section 11351 is a divisible statute).”

Guevara contends that his prior conviction under California Health & Safety Code §11351 does not qualify as "a drug trafficking offense" for purposes of U.S.S.G. §2L1.2(b)(1)(A)(i)'s 16-level adjustment. The court must apply the "formal categorical approach" established in *Taylor v. United States*, 495 U.S. 575 (1990), "whereby sentencing courts 'compare the elements of the statute of conviction with a federal definition of the crime to determine whether conduct proscribed by the statute is broader than the generic federal definition.'" *United States v. Acosta-Chavez*, 727 F.3d 903, 907 (9th Cir. 2013).

In *Descamps v. United States*, 133 S.Ct. 2276 (2013), the Supreme Court recently summarized and clarified this approach. Under the categorical approach, "[s]entencing courts may 'look only to the statutory definitions' – i.e., the elements – of a defendant's prior offenses, and not 'to the particular facts underlying those convictions.'" Id. at 2283. If the prior-conviction statute has the same elements as the federally-defined generic crime, or if the prior-conviction statute defines the crime more narrowly, then the prior conviction can enhance the sentence; but if the prior-conviction statute sweeps more broadly than the generic crime, it cannot, "even if the defendant actually committed the offense in its generic form." Id. "The key ... is elements, not facts." Id.

In a "narrow range of cases[,]"" sentencing courts may apply the modified categorical approach, where they may look beyond the statutory elements to certain judicially-noticeable documents from the prior case. Id. at 2283-84. This is allowed only where a "statute is 'divisible' – i.e., comprises multiple, alternative versions of the crime[.]" Id. at 2284. To put it another way:

"[A] so-called 'divisible statute' ... sets out one or more elements of the offense in the alternative – for example, stating that burglary involves entry into a building or an automobile. If one alternative (say, a building) matches an element in the generic offense, but the other (say, an automobile) does not, the modified categorical approach permits sentencing courts to consult a limited class of documents, such as indictments and jury instructions, to determine which alternative

formed the basis of the defendant's prior conviction. The court can then do what the categorical approach demands: compare the elements of the crime of conviction (including the alternative element used in the case) with the elements of the generic crime." *Id.* at 2281.

Thus "the modified approach serves a limited function: It helps effectuate the categorical analysis when a divisible statute, listing potential offense elements in the alternative, renders opaque which element played a part in the defendant's conviction." *Id.* at 2283. The Supreme Court explained:

"[T]he modified approach merely helps implement the categorical approach when a defendant was convicted of violating a divisible statute. The modified approach thus acts not as an exception, but instead as a tool. It retains the categorical approach's central feature: a focus on the elements, rather than the facts, of a crime. And it preserves the categorical approach's basic method: comparing those elements with the generic offense's. All the modified approach adds is a mechanism for making that comparison when a statute lists multiple, alternative elements, and so effectively creates several different crimes. If at least one, but not all of those crimes matches the generic version, a court needs a way to find out which the defendant was convicted of. That is the job, as we have always understood it, of the modified approach: to identify, from among several alternatives, the crime of conviction so that the court can compare it to the generic offense." *Id.* at 2285 (internal citation and quotation marks omitted).



On the other hand, a court cannot apply the modified categorical approach "when a defendant was convicted under an 'indivisible' statute – i.e., one not containing alternative elements – that criminalizes a broader swath of conduct than the relevant generic offense." *Id.* at 2281. See also *id.* at 2282 ("sentencing courts may not apply the modified categorical approach when the crime of which the defendant was convicted has a single, indivisible set of elements").

To summarize, the categorical approach requires the court to answer three questions: (1) is the conduct proscribed by §11351 broader than §2L1.2's definition of "drug trafficking offense"?; (2) if so, is §11351 divisible – that is, does it effectively create a series of different crimes, some of which qualify as drug trafficking and some of which do not?; and (3) if §11351 is divisible, does the modified categorical approach establish which of the alternate crimes Guevara was convicted of? As explained below, the Ninth Circuit has already answered the first question and held that §11351 is not categorically a drug trafficking offense. This Court should now answer the second question by holding that §11351 is not divisible.

**A. Section 11351 Is Not Categorically A "Drug Trafficking Offense" For Purposes Of U.S.S.G. §2L1.2.**

For purposes of §2L1.2, "[d]rug trafficking offense' means an offense under federal, state, or local law that prohibits the manufacture, import, export, distribution, or dispensing of, or offer to sell a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute,

or dispense." U.S.S.G. §2L1.2, Application Note 1(B)(iv). The term "controlled substance" in this definition means those substances listed in the federal Controlled Substances Act (CSA). *United States v. Leal-Vega*, 680 F.3d 1160, 1167 (9th Cir. 2012), cert. denied, 133 S.Ct. 982 (2013).

At the time of Guevara's conviction in 2007, §11351 provided:

"Except as otherwise provided in this division, every person who possesses for sale or purchases for purposes of sale (1) any controlled substance specified in subdivision (b), (c), or (e) of Section 11054, specified in paragraph (14), (15), or (20) of subdivision (d) of Section 11054, or specified in subdivision (b) or (c) of Section 11055, or specified in subdivision (h) of Section 11056, or (2) any controlled substance classified in Schedule III, IV, or V which is a narcotic drug, shall be punished by imprisonment in the state prison for two, three, or four years."

As the Ninth Circuit recognized in *Leal-Vega*, 680 F.3d at 1167, "[§]11351 is categorically broader than the Guidelines definition of 'drug trafficking offense' because it criminalizes possession or purchase of certain substances that are not covered by the CSA." Accordingly, §11351 does not categorically qualify as a "drug trafficking offense" under §2L1.2. *Id.*

#### **B. Section 11351 Is Not Divisible, So The Modified Categorical Approach Cannot Be Used.**

The next issue is whether §11351 is divisible. The Supreme Court explained what makes a statute divisible in *Descamps*, 133 S.Ct. at 2281-92. Again, a "statute is 'divisible' [if it] comprises multiple, alternative versions of

the crime" thereby "effectively creat[ing] 'several different crimes.'" Id. at 2284-85. The Supreme Court gave a couple of examples. First, it noted that a divisible statute might provide that burglary involves entry into a building (which matches an element in the generic offense) or entry into an automobile (which does not). Id. at 2281.

Second, it noted the difference between a hypothetical statute that criminalized assault with any of eight specified weapons (which would be divisible) and one that requires only an indeterminate "weapon" (which would not). Id. at 2290. The Supreme Court rejected the Ninth Circuit's conclusion that "an indivisible statute 'requiring use of a 'weapon' is not meaningfully different' ... 'from a statute that simply lists every kind of weapon in existence ('gun, axe, sword, baton, slingshot, knife, machete, bat,' and so on).'" Id. at 2289. The Supreme Court recognized that, "[i]n a similar way, every indivisible statute can be imaginatively reconstructed as a divisible one." Id. But that is not allowed:

"[T]he thing about hypothetical lists is that they are, well, hypothetical. As long as the statute itself requires only an indeterminate 'weapon,' that is all the indictment must (or is likely to) allege and all the jury instructions must (or are likely to) mention. And most important, that is all the jury must find to convict the defendant. The jurors need not all agree on whether the defendant used a gun or a knife or a tire iron (or any other particular weapon that might appear in an imagined divisible statute), because the actual statute requires the jury to find only a 'weapon.' And even if in many cases, the jury could have readily

reached consensus on the weapon used, a later sentencing court cannot supply that missing judgment." *Id.* at 2290.

The manner in which the Ninth Circuit applied *Descamps* in *United States v. Acosta-Chavez* is instructive. That case concerned whether an Illinois sexual-abuse statute defined "minor" more broadly than federal law (which defines a minor as someone under 16 years of age). *Acosta-Chavez*, 727 F.3d at 908-09.

The state statute's age element was "stated as a range – 'at least 13 years of age but under 17 years of age.'" *Id.* at 909. The Ninth Circuit concluded that "[t]he statutory language is therefore not written in a manner that defines this element 'alternatively, with one statutory phrase corresponding to the generic crime and another not.'" *Id.* In contrast, if "the statute defined a minor as a person '14, 15, 16, or 17 years of age,' [then] the statute's age element would be divisible." *Id.* at 909 n.5. The Ninth Circuit recognized that, "[a]lthough the statute 'implies' a sequence of ages, the *Descamps* Court expressly prohibited sentencing courts from 'hypothetically reconceiving such a statute in divisible terms.' ... The Supreme Court clearly stated that divisibility exists only when an element of the crime of conviction contains alternatives, one of which is an element of its federal analogue." *Id.* at 909.

Under *Descamps* and *Acosta-Chavez*, §11351 is indivisible. That statute does not set forth a list of alternate controlled-substance elements (e.g., "drug a" or "drug b" or "drug c", etc.) resulting in multitude of separate crimes (e.g., "sale of drug a" or "sale of drug b" or "sale of drug c", etc.). Rather, it defines

one crime that prohibits the sale of "any controlled substance" listed in certain provisions of the California drug schedules (California Health & Safety Code §§11054-11058).

Even though §11351 uses the conjunction "or" several times when referring to those other statutes (each of which lists numerous relevant substances), that does not make that statute divisible. To "imaginatively reconstruct[]" (*Descamps*, 133 S.Ct. at 2289) a divisible statute, the court would have to rewrite §11351 as if it listed each of more than a hundred controlled substances in the alternative by incorporating various subsections of five other statutes. Doing that would be as improper as reinterpreting "at least 13 years of age but under 17 years of age" (the language at issue in *Acosta-Chavez*) as "a person 14, 15, 16, or 17 years of age." It makes no difference whether §11351 "implies" a series of controlled substances because that's not the way the statute is actually written. *Acosta-Chavez*, 727 F.3d at 909.

But even if the court could "hypothetically reconceive [§11351] in divisible terms" by listing each controlled substance in the alternative, that would not make the statute divisible for categorical-approach purposes unless the particular controlled substance is an element of that statute. *Descamps*, 133 S.Ct. at 2290. As the Supreme Court explained in *Descamps*, the "elements of the offense – as distinct from amplifying but legally extraneous circumstances" – are those facts that a jury must unanimously agree were proved beyond a reasonable doubt in order to convict. *Id.* at 2288. The

Supreme Court highlighted this critical difference in the weapon hypothetical discussed above. *Id.* at 2290.

California case law establishes that the type of controlled substance is not an element of §11351. This principle was recognized in *People v. Romero*, 55 Cal.App.4th 147, 150 (1997), where the defendant was charged with possession of a controlled substance (alleged as cocaine) for sale in violation of §11351 and sale or transportation of a controlled substance (alleged as cocaine) in violation of California Health & Safety Code §11352 (which, like §11351, refers to "any controlled substance" specified in certain provisions of the California drug schedules). The defendant, who claimed that he believed that he had only marijuana, objected to the following jury instruction: "Cocaine and marijuana are both controlled substances. It is no defense to the charges of transportation, and possession of cocaine for sale that the defendant believed he possessed marijuana." *Id.* at 151. In affirming the defendant's convictions, the California Court of Appeal considered an earlier case involving a defendant who offered to sell an undercover officer either LSD or Mescaline:

"Innes's holding that a defendant cannot be convicted on two counts of selling a controlled substance based on a single sale of a single controlled substance is unobjectionable. We disagree, however, with its further statement that the defendant in that case was actually guilty of sale of mescaline, and not guilty of sale of LSD. In our view, she was guilty of a single offense, sale of a controlled substance. There may have been sound reasons, related to due process, for the information to allege

which particular controlled substance she sold.... Even if so, however, this pleading requirement does not transmute the offense of possession of a controlled substance into as many different offenses as there are controlled substances. We therefore do not believe the *Innes* court really had to decide whether the defendant there was guilty of selling mescaline, or guilty of selling LSD." *Id.* at 155-56 (emphasis added).

To reconstruct §11351 as a divisible statute for *Descamps* purposes, the court would have to do exactly what *Romero* holds it cannot do – "transmute the offense of [sale] of a controlled substance into as many different offenses as there are controlled substances." *Id.* at 156.

*Romero* relied on *Ross v. Municipal Court*, 49 Cal.App.3d 575 (1975), and *Sallas v. Municipal Court*, 86 Cal.App.3d 737 (1978). In *Ross*, 49 Cal.App.3d at 577, the defendant was charged under California Health & Safety Code §11550, which provided "that 'no person shall use, or be under the influence of any controlled substance' as defined in various specified portions of the California Uniform Controlled Substances Act." There were over 100 controlled substances within the scope of that statute. *Id.* Nevertheless, the appellate court allowed the prosecutor's "uniform practice of charging violations of Health and Safety Code section 11550 without identifying the controlled substance involved." *Id.* at 578-79. It wrote: "The complaint before us gave to petitioner fair notice of the crime of which he was accused. True, it did not tell him the means by which he committed the crime, but we would suppose, unless the accused happens to be a frequent user of several controlled substances, he would already have good reason to know the

identity of the controlled substance involved." *Id.* at 579 (emphasis added). In other words, the court recognized that the element at issue was use of a "controlled substance" and that the particular type of substance was merely a means to satisfy that element. In *Sallas*, 86 Cal.App.3d at 740-43, another division of the California Court of Appeal also considered whether a complaint alleging a violation of §11350 that did not specify the specific controlled substance involved was sufficient to advise a defendant of the precise nature of the charge for due process purposes. On that narrow issue, the court disagreed with *Ross*, although it emphasized: "We do not hold, or suggest, that in such prosecutions the charge must pinpoint one of the many controlled substances of the statute. It may be that among them are families, or classes, or chemical groupings, of such substances with substantially the same qualities, symptoms and behavioral effects, and that constitutional demands would be satisfied by charging use or abuse of one of the substances of that family, class or group." *Id.* at 743-44. Thus, *Sallas* did not disagree with *Ross's* conclusion that drug type is only a means to satisfy the controlled-substance element; the only disagreement was over whether that means had to be alleged in a charging document to give the defendant the constitutionally required notice of the charges against him so he could prepare and present his defense and not be taken by surprise by evidence at his trial. *Id.* at 742. See also *People v. Martin*, 169 Cal.App.4th 822, 824-27 (2008) (affirming conviction despite conflicting references to "cocaine" and "cocaine base" in charging document, at trial, in jury instructions, and in verdict forms because "[t]he jury was correctly instructed on the elements of



the crime of possession of a controlled substance" and "the conflicting references ... caused no prejudice to appellant, as the penalty in section 11350(a) is the same, whether the controlled substance is cocaine or cocaine base"); *People v. Huerta*, 148 Cal.App.2d 272, 275 (1957) (mid-trial amendment of indictment to change "marijuana" to "heroin" did not change the nature of the offense charged); *People v. Gelardi*, 77 Cal.App.2d 467, 471-72 (1946) (information was not required to allege specific type of narcotic sold); *People v. Orozco*, 2003 WL 23100024, \*4 (Cal. Ct. App. 2003) (unpublished) (where an information charged defendant with possessing cocaine but the trial evidence pertained to possession of heroin, the court wrote: "we conclude the elements of the crime charged in the information were proved by sufficient evidence that defendant possessed a controlled substance targeted by subdivision (a) of Health and Safety Code section 11350. While defendant is correct that the prosecution must establish certain facts regarding the item he possessed, such as that it was a controlled substance, it does not follow that an error in pleading which controlled substance is tantamount to a failure of proof of an element of the offense"; emphasis in original).

For all of these reasons, the Court should find that §11351 is not a divisible statute, which means that the modified categorical approach cannot be used.

Therefore, §11351 is categorically not a drug trafficking offense for purposes of §2L1.2.

**GUEVARA’S SENTENCE SHOULD BE REVERSED**  
**BECAUSE THE DISTRICT COURT ERRED IN DENYING A**  
**DEPARTURE FOR CULTURAL ASSIMILATION UNDER SECTION**

**2L1.2**

The Ninth Circuit Memorandum stated that:

“Guevara contends that the district court procedurally erred by failing to respond to his request for a downward variance in light of his history and characteristics, ... We review for plain error [despite Guevara’s objection], see *United States v. Valencia-Barragan*, 608 F.3d 1103, 1108 (9th Cir. 2010), and find none. The record reflects that the district court listened to Guevara's mitigating arguments ... See *Rita v. United States*, 551 U.S. 338, 358 (2007)....”

Application Note 9 (note 8 at the time of Guevara’s sentencing) to Section 2L1.2 provides for departure based upon cultural assimilation:

“Departure Based on Cultural Assimilation. There may be cases in which a downward departure may be appropriate on the basis of cultural assimilation. Such a departure should be considered only in cases where (A) the defendant formed cultural ties primarily with the United States from having resided continuously in the United States from childhood, (B) those cultural ties provided the primary motivation for the defendant's illegal reentry or continued presence in the United States, and (C) such a departure is not likely to increase the risk to the public from further crimes of the defendant.

In determining whether such a departure is appropriate, the court should consider, among other things, (1) the age in childhood at which the defendant began residing continuously in the United States, (2) whether and for how long the defendant attended school in the United States, (3) the duration of the defendant's continued residence in the United States, (4) the duration of the defendant's presence outside the United States, (5) the nature and extent of the defendant's familial and cultural ties inside the United States, and the nature and extent of such ties outside the United States, (6) the seriousness of the defendant's criminal history, and (7) whether the defendant engaged in additional criminal activity after illegally reentering the United States.”

The district court unreasonably denied Guevara's request for a departure for cultural assimilation. With respect to the factors enumerated in Application Note 8 to §2L1.2, departure should be considered because (A) Guevara formed cultural ties primarily from having resided continuously in the United States from childhood; (B) those ties provided the primary motivation for Guevara's illegal reentry or continued presence, since it was undisputed that the reason Guevara returned was to support his family; and (C) such a departure was not likely to increase the risk to the public from further crimes, since Guevara had committed no further crimes after the 2007 felony that resulted in imprisonment and separation from his family.

Departure was also appropriate under the factors that the Application Note 8 advised the court to consider: (1) and (2) Guevara came to the United

States at age 15, having left school at age 12. He brought with him his partner and infant son whom he supported although he was still a child himself. (3) Since then Guevara had continually lived in the United States for 26 years with brief exceptions after two deportations. (4) Guevara spent part of his childhood, up to age 15, in Mexico, along with brief periods after his deportations in 2008 and 2010. (5) Guevara had extensive familial and cultural ties inside the United States, including a wife, three sons, two grandchildren, and an extended family including an uncle whom he supported. His cultural ties included full-time employment during his residence in the United States, payment of taxes, and support of and devotion to his family. His cultural ties outside the United States included a mother and siblings in Mexico with whom he maintained semi-monthly or occasional contact. (6) Guevara's criminal history category IV included the following offenses: 2001 driving with BAC of .08%; 2002 domestic violence; 2007 possession of narcotic substance and possession for sale of controlled substance. After his 2008 and 2010 deportations, Guevara engaged in no further criminal activity beyond the status offense of illegal reentry (with which his 2010 false information offense constituted relevant conduct, *United States v. Rivera-Gomez*, 634 F.3d 507, 513 (9th Cir. 2011)).

Thus the Guidelines factors supported Guevara's request for departure for cultural assimilation. The district court's basis for denying such a departure was meritless. The district court erroneously relied on the belief that Guevara had not resided here continuously since early childhood and had not gone to school here. However, the Guidelines speak of childhood, not

necessarily early childhood. Moreover, Guevara had in fact been here since childhood, and the reason he had not gone to school here was that he had been obliged to leave school at age 12. The district court further erred in stating that there had not really been assimilation into society since Guevara had not been here since very early childhood and did not have minimal criminal history. That ignored the 26 years of Guevara's "very, very hard work," (paying taxes, supporting his family, raising law-abiding and loving children, and generally being a positive contributor to the United States.

**GUEVARA'S SENTENCE SHOULD BE REVERSED**  
**BECAUSE IT IS UNREASONABLE**

The Ninth Circuit Memorandum rejected Guevara's claims that his sentence was unreasonable, stating:

"Guevara contends that the district court procedurally erred by failing to respond to his request for a downward variance in light of his history and characteristics, by failing to respond to his policy challenge to the illegal reentry guidelines, and by relying on clearly erroneous facts. We review for plain error, see *United States v. Valencia-Barragan*, 608 F.3d 1103, 1108 (9th Cir. 2010), and find none. The record reflects that the district court listened to Guevara's mitigating arguments and recognized its discretion to vary from the Guidelines on policy grounds. See *Rita v. United States*, 551 U.S. 338, 358 (2007); *United States v. Ayala-Nicanor*, 659 F.3d 744, 752-53 (9th Cir. 2011). And, contrary to Guevara's contention, the district court did not rely on clearly

erroneous facts at sentencing. [¶] Guevara contends that his sentence is substantively unreasonable in light of his cultural assimilation, the mitigating factors he presented at sentencing, and the need to avoid unwarranted sentencing disparities. Contrary to Guevara's argument, the below-Guidelines sentence is substantively reasonable in light of the 18 U.S.C. § 3553(a) sentencing factors and the totality of the circumstances, including Guevara's criminal record, his immigration history, and the need to avoid unwarranted sentencing disparities. See *Gall v. United States*, 552 U.S. 38, 51 (2007)."

**Clearly Erroneous Facts.** Guevara's sentence was procedurally and substantively unreasonable. It was procedurally unreasonable because, inter alia, it was based upon clearly erroneous facts, *Gall v. United States*, 552 U.S. 38, 511, 28 S. Ct. 586, 169 L. Ed. 2d 445 (2007).

For example, the district court stated that "I don't feel that there's really been assimilation into society." As discussed above, Guevara presented an extraordinary example of assimilation. As a child himself, he supported a partner and infant son. He worked extremely hard for 26 years to support a family of three boys who turned into responsible and law-abiding adults. His work ethic and devotion to his family were remarkable. Such contributions to family and society are the essence of assimilation.

Thus the district court's sentence was unreasonable because it was based upon clearly erroneous facts.

### Failure to Consider Specific Nonfrivolous Defense Arguments.

The district court failed to consider nonfrivolous mitigation arguments presented by the defense, in violation of *Rita v. United States*, 551 U.S. 338, 357 (2007).

The district court did not consider the specific nonfrivolous defense arguments regarding Guevara's history and characteristics, including that he worked very hard full-time and paid taxes while he was in the United States. He provided for his children, who turned out to be law-abiding citizens. He was devoted to his family and helped and supported them, including his extended family. He grew up without a father and lost his mother to remarriage at an early age. Nonetheless, when Guevara himself became a parent at the young age of 14, he worked twelve hours a day to earn money to pay for medical care for his child. His imprisonment sentence and the time that it took him away from his family taught him his lesson so he did not get in trouble again.

Additionally, the defense demonstrated that the illegal reentry guidelines had varied significantly over the recent past. Initially the maximum offense level for illegal reentry was 12. In 1991 the guideline was amended to add 16 levels to a base of 8 for any aggravated felony. Then in 2001 the guideline was amended again. Throughout this history, there was the recognition that these sentences were overly harsh because of the fast track system. None of this extensive analysis was considered by the district court.

**Excessive Reliance on One Factor and Insufficient Weight and Consideration To Other Factors; Failure to Consider Specific**

**Nonfrivolous Defense Arguments.** A district court commits procedural error when it fails adequately to consider and weigh each of the relevant § 3553(a) factors, and to explain the sentence selected. See, e.g., *United States v. Paul*, 561 F.3d 970 (9th Cir. 2009) (district court's excessive reliance on one factor (abuse of trust) while not giving sufficient consideration to other factors was substantively unreasonable).

Here the district court abused its discretion in giving too much weight to Guevara's deportations and criminal history (which were already taken into consideration and double-counted in the Sentencing Guidelines range) and not enough weight to other relevant Section 3553(a) factors (which were ignored in the Sentencing Guidelines range). The district court did not give sufficient weight to Guevara's mitigating factors. Even if the district court believed that Guevara did not meet all the requirements for departure for cultural assimilation, the district court should still have considered Guevara's "imperfect" assimilation in its sentencing calculus. Even the probation officer recognized that Guevara's family responsibility and ties to the United States were mitigating factors.

Instead, the district court indicated that it rarely if ever deviated in an illegal reentry case: "this Court essentially, very rarely if ever, deviates in a case like this." Thus even though the guideline range encompasses only aggravating factors, and double counts aggravating factors, the district



court's comments that it rarely if ever deviates reflect that the district court does not sufficiently consider mitigating factors in such cases.

Notably, the Sentencing Guidelines range failed to give any weight to Guevara's mitigating factors. The Sentencing Guidelines range was based exclusively on the aggravating factors of the offense and Guevara's criminal history. Therefore the insufficient weight given by the district court to Guevara's mitigating factors meant that the district court did not appropriately weigh all the §3553(a) factors.

**Unwarranted Sentencing Disparities.** Section 3553(a) requires the sentencing court to consider, among other things, the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct. Furthermore, it is also legitimate to avoid “unwarranted *similarities* among [defendants] who were not similarly situated.” *Gall v. United States*, 552 U.S. 38, 128 S. Ct. 586, 600, 169 L. Ed. 2d 445 (2007) (emphasis in original). “The goal of the Sentencing Guidelines is, of course, to reduce unjustified disparities and so reach toward the evenhandedness and neutrality that are the distinguishing marks of any principled system of justice.” *Koon v. United States*, 518 U.S. 81, 113 (1996). Although the Sentencing Guidelines are not mandatory and are merely advisory, avoidance of sentencing disparity remains an important and “central goal” of the Guidelines. 28 U.S.C. §991(b)(1)(B); U.S.S.G. Ch. 1., Pt. A, p.s. 3 (“Congress sought reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders”).

The district court disregarded that mandate in this case. The district court caused unwarranted sentencing disparities by failing to take Guevara's mitigating history and characteristics into consideration.

According to the Sentencing Commission, the average sentence length for illegal reentry offenders was 19 months. Almost half of the illegal reentry defendants received a sentence reduction, which reduction averaged 38%. Those reductions were due both to government-sponsored reductions (38%) and to non-government-sponsored reductions (12%).

[http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick\\_Facts\\_Illegal\\_Reentry.pdf](http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Illegal_Reentry.pdf)

The fact that Guevara's sentence resulting in unwarranted disparities was exemplified by the sentence imposed on one of his fellow inmates. Notably, Guevara was incarcerated with another illegal reentry defendant who was sentenced in the Central District at approximately the same time as Guevara. Dionisio Rios was in criminal history category V, a higher criminal history category than Guevara; and Rios had a higher sentencing guideline range, of 70-87 months. Furthermore, Rios had been deported more times than Guevara -- three -- and Rios' prior felony drug trafficking offense was violation of Section 11351. The probation office and the government recommended that Rios be sentenced to 70 months imprisonment. (Government's Sentencing Memorandum, pp.1-2, Docket 22, Central District Case No. 13-682-DMG) But on February 20, 2014, the district court imposed a 27-month sentence on Rios, *United States v. Rios*, Central District Case No.

13-682-DMG, approximately half the sentence imposed on Guevara one month earlier.

Thus Guevara's sentence was unreasonable because the district court's failure to consider Guevara's mitigating characteristics resulted in unwarranted sentence disparities.

**Unreasonable-As-Applied Enhancement.** In *United States v. Amezcua-Vasquez*, 567 F.3d 1050, 1055-56 (9th Cir. 2009), the Ninth Circuit stated that the 16-level enhancement for a stale prior conviction was unreasonable as applied in that case. The staleness of the conviction did not affect the Guidelines calculation, but it did affect the §3553(a) analysis.

Similarly, Guevara contends that the 16-level enhancement was unreasonable as applied in his case. His 2007 drug trafficking conviction, for which he was sentenced to two years prison and for which he served slightly over one year, taught him his lesson and he stayed out of trouble thereafter. But that conviction resulted in a 51-month increase in the low end of his Guideline range -- almost the entirety of that range. As in *Amezcua-Vasquez*, 567 F.3d at 1055, the crucial question is whether the measure of seriousness provided by the enhancement is in fact reasonable.

**Substantive Unreasonableness.** Guevara's sentence was unreasonable under *Kimbrough v. United States*, 552 U.S. 85 (2007) ("overarching" sentencing consideration is the parsimony principle: imposition of "'a sentence sufficient, but not greater than necessary' to accomplish the goals of sentencing").

The Sentencing Guidelines range already encompasses the aggravating facts of the offense and the defendant's criminal history, but none of the mitigating factors of the individual defendant's offense or history. In this case, the Sentencing Guidelines range was unreasonable because the range took into consideration, and in fact magnified, the aggravating factors of the offense and Guevara's criminal history, but failed to accord any consideration whatsoever to the mitigating characteristics of Guevara's life.

And the district court compounded that unreasonableness by, as discussed above, selecting a sentence which denied departure or consideration for cultural assimilation, was based upon clearly erroneous facts, failed to consider specific nonfrivolous defense arguments, excessively relied on aggravating factors and accorded insufficient weight and consideration to other factors, created unwarranted sentencing disparities, and employed unreasonable-as-applied guideline provisions.

A 50-month sentence in this case violated the overarching parsimony principle and did not achieve sentencing objectives. Thus the district court failed to perform an individualized assessment of the specific §3553(a) factors applicable to Guevara and the degree to which those factors determined the appropriate sentence in his case; and the district court's sentence failed to embody the overarching parsimony principle.

CONCLUSION

For the foregoing reasons, Guevara respectfully requests that this Court grant his petition for writ of certiorari to review the decision of the Ninth Circuit in this case.

Respectfully submitted,

HILARY POTASHNER  
Federal Public Defender

DATED: January 15, 2016

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KATHRYN A. YOUNG  
Deputy Federal Public Defender  
Attorneys for the Petitioner  
Counsel of Record

# Appendix

**FILED**

**NOT FOR PUBLICATION**

OCT 19 2015

UNITED STATES COURT OF APPEALS

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

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JOSE LUIS GUEVARA, a.k.a. Andres  
Fierro Cantu, a.k.a. Jose Andreas Lopez,  
a.k.a. Jose Lopez, a.k.a. Jose Andreas  
Ruiz,

Defendant - Appellant.

No. 14-50024

D.C. No. 2:13-cr-00639-ABC

MEMORANDUM\*

Appeal from the United States District Court  
for the Central District of California  
Audrey B. Collins, District Judge, Presiding

Submitted October 14, 2015\*\*

Before: SILVERMAN, BYBEE, and WATFORD, Circuit Judges.

Jose Luis Guevara appeals from the district court's judgment and challenges the 50-month custodial sentence and three-year term of supervised release imposed

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\* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

\*\* The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

following his guilty-plea conviction for being an illegal alien found in the United States following deportation, in violation of 8 U.S.C. § 1326. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

First, Guevara contends that the district court erred in determining that California Health & Safety Code § 11351 is divisible within the meaning of *Descamps v. United States*, 133 S. Ct. 2276, 2284 (2013), and therefore subject to the modified categorical approach. However, Guevara concedes that his argument is foreclosed by precedent, and we agree. *See United States v. Torre-Jimenez*, 771 F.3d 1163, 1167 (9th Cir. 2014) (holding that section 11351 is a divisible statute).

Second, Guevara contends that the district court procedurally erred by failing to respond to his request for a downward variance in light of his history and characteristics, by failing to respond to his policy challenge to the illegal reentry guidelines, and by relying on clearly erroneous facts. We review for plain error, *see United States v. Valencia-Barragan*, 608 F.3d 1103, 1108 (9th Cir. 2010), and find none. The record reflects that the district court listened to Guevara's mitigating arguments and recognized its discretion to vary from the Guidelines on policy grounds. *See Rita v. United States*, 551 U.S. 338, 358 (2007); *United States v. Ayala-Nicanor*, 659 F.3d 744, 752-53 (9th Cir. 2011). And, contrary to



Guevara's contention, the district court did not rely on clearly erroneous facts at sentencing.

Third, Guevara contends that his sentence is substantively unreasonable in light of his cultural assimilation, the mitigating factors he presented at sentencing, and the need to avoid unwarranted sentencing disparities. Contrary to Guevara's argument, the below-Guidelines sentence is substantively reasonable in light of the 18 U.S.C. § 3553(a) sentencing factors and the totality of the circumstances, including Guevara's criminal record, his immigration history, and the need to avoid unwarranted sentencing disparities. *See Gall v. United States*, 552 U.S. 38, 51 (2007).

Finally, Guevara contends that his three-year term of supervised release is substantively unreasonable. The district court did not abuse its discretion in imposing the term of supervised release as an added measure of deterrence. *See* U.S.S.G. § 5D1.1 cmt. n.5; *United States v. Valdavinos-Torres*, 704 F.3d 679, 692-93 (9th Cir. 2012).

**AFFIRMED.**

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No. \_\_\_\_\_

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In the  
**Supreme Court of the United States**

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**JOSE LUIS GUEVARA**, Petitioner

v.

**UNITED STATES**, Respondent

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

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**CERTIFICATE OF SERVICE**

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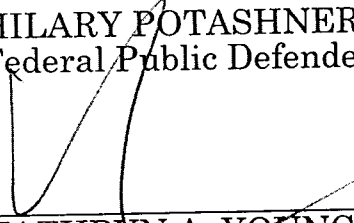
I, Kathryn A. Young, hereby certify that on this 15th day of January, 2016, copies of the petitioner's Motion for Leave to Proceed in Forma Pauperis and Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit were mailed postage prepaid, to the Solicitor General,

Department of Justice, 950 Pennsylvania Ave., N.W., Washington, D.C.  
20530, counsel for the Respondent.

Respectfully submitted,

HILARY POTASHNER  
Federal Public Defender

DATED: January 15, 2016



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