

IN THE SUPREME COURT OF THE UNITED STATES

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JOSE LUIS GUEVARA, PETITIONER

v.

UNITED STATES OF AMERICA

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

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BRIEF FOR THE UNITED STATES

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DONALD B. VERRILLI, JR.  
Solicitor General  
Counsel of Record

LESLIE R. CALDWELL  
Assistant Attorney General

JOHN-ALEX ROMANO  
Attorney

Department of Justice  
Washington, D.C. 20530-0001  
SupremeCtBriefs@usdoj.gov  
(202) 514-2217

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## QUESTIONS PRESENTED

1. Whether petitioner's prior drug-trafficking conviction under California Health & Safety Code § 11351 (West 2007) qualifies as a "drug trafficking offense" under Sentencing Guidelines § 2L1.2(b)(1)(A)(i) (2013).

2. Whether the district court erred in denying petitioner a downward departure for cultural assimilation under Sentencing Guidelines § 2L1.2, comment. (n.8) (2013) when calculating his advisory Sentencing Guidelines range.

3. Whether petitioner's sentence for illegal reentry, which is below the advisory Sentencing Guidelines range, is procedurally or substantively unreasonable.

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No. 15-7832

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-3) is not published in the Federal Reporter but is reprinted in 619 Fed. Appx. 648.

JURISDICTION

The judgment of the court of appeals was entered on October 19, 2015. The petition for a writ of certiorari was filed on January 15, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a guilty plea in the United States District Court for the Central District of California, petitioner was convicted of being an alien found in the United States following deportation, in violation of 8 U.S.C. 1326(a). He was sentenced to 50 months of imprisonment, to be followed by three years of supervised release. The court of appeals affirmed. Pet. App. 1-3.

1. Petitioner is a citizen of Mexico. In 1987, he entered the United States illegally. In 2007, he was convicted of possessing cocaine for sale, in violation of California Health & Safety Code § 11351 (West 2007), and in 2008, he was deported. Petitioner illegally reentered the United States and in 2010, he was deported again. Soon thereafter, petitioner illegally entered the United States a third time. He came to the attention of law enforcement when he renewed his California driver's license; in 2013, a United States Immigration and Customs Enforcement (ICE) officer arrested him. Gov't C.A. Br. 4-5; Presentence Investigation Report (PSR) ¶¶ 7-11.

2. A grand jury sitting in the United States District Court for the Central District of California returned an indictment charging petitioner with being an alien found in the United States following deportation, in violation of 8 U.S.C. 1326(a). The indictment alleged that at least one of

petitioner's prior deportations had occurred after his conviction for an aggravated felony, i.e., his California drug conviction. C.A. E.R. 149-150; see 8 U.S.C. 1326(b)(2) (raising the statutory maximum sentence to 20 years of imprisonment for a person convicted of illegal reentry who had been removed after a conviction for an aggravated felony).

Petitioner pleaded guilty to the sole count in the indictment. C.A. E.R. 154. The PSR recommended a sentence of 57 to 71 months of imprisonment, based in part on a 16-level enhancement under Sentencing Guidelines § 2L1.2(b)(1)(A) (2013) because petitioner had a prior conviction for a "drug trafficking offense." See PSR ¶¶ 18-19, 71.<sup>1</sup> The commentary to the Guidelines defines a "drug trafficking offense" as, inter alia, "an offense under federal, state, or local law that prohibits \* \* \* the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense." Sentencing Guidelines § 2L1.2, comment. (n.1(B)(iv)) (2013).

Petitioner objected to the 16-level enhancement. He contended that the California offense does not categorically

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<sup>1</sup> The PSR noted that, if the government did not prove that petitioner's prior drug conviction was for an aggravated felony, petitioner's Guidelines range would be 24 months, which is the otherwise applicable statutory maximum. PSR ¶¶ 70-71; see 8 U.S.C. 1326(a).

qualify as a "drug trafficking offense" because California Health & Safety Code § 11351 (West 2007) criminalizes possession of more substances than the federal Controlled Substances Act and the modified categorical approach may not be used to identify the basis for his conviction because the California statute is not divisible based on drug type under Descamps v. United States, 133 S. Ct. 2276 (2013). See C.A. E.R. 65-70. Petitioner also objected to the PSR's failure to recommend a downward departure on grounds of cultural assimilation. Id. at 70-71; see Sentencing Guidelines § 2L1.2, comment. (n.8) (2013).

At sentencing, the district court overruled petitioner's objection to the 16-level enhancement. C.A. E.R. 13-14. From a review of state jury instructions, the court concluded that the California statute is divisible based on drug type because "the jury is required to find" the controlled substance involved in the offense. Id. at 13. The court noted that the charging instrument and transcript of guilty plea in petitioner's prior case established that he had been convicted of possession of cocaine for sale. Id. at 13-14; see id. at 100, 116 (conviction documents). The court concluded that petitioner had been convicted of a "drug trafficking offense" under Sentencing Guidelines § 2L1.2(b)(1)(A) and also that his prior offense was an aggravated felony under 8 U.S.C. 1326(b)(2). C.A. E.R. 14, 20. Based on those findings, the court determined that

petitioner's advisory Guidelines range was 57 to 71 months of imprisonment. Id. at 14.

The district court declined to depart downward on the ground of cultural assimilation because petitioner had not met the factors set out in the Guidelines, namely, he had not resided in the United States continuously since early childhood or "gone to school here," and the court did not think "there's really been assimilation into society." C.A. E.R. 21-22. The court also was "troubled" by petitioner's previous conviction for assaulting his wife. Id. at 22; see PSR ¶ 34. Nevertheless, after considering the factors in 18 U.S.C. 3553, the court decided to vary downward because this is a "very unusual case" in that petitioner came to the attention of law enforcement because he was "attempting to comply with the law by updating his address with the DMV." C.A. E.R. 22. The court sentenced petitioner "to 50 months in recognition of the fact that [not] as much deterrence is needed as is usual because \* \* \* [petitioner] was following the law at the time that he, in essence, sort of turned himself in." Id. at 22-23. The court denied petitioner's request not to impose supervised release, finding that it was necessary to deter petitioner from illegally reentering the United States again. See id. at 23.

3. The court of appeals affirmed in an unpublished memorandum opinion. Pet. App. 1-3. The court first rejected

petitioner's challenge to the 16-level enhancement for a "drug trafficking offense." Petitioner had argued that his California drug offense did not qualify because California Health & Safety Code § 11351 is not divisible and therefore is not subject to the modified categorical approach. Pet. C.A. Br. 30-31, 46-59. The court of appeals rejected that argument based on United States v. Torre-Jimenez, 771 F.3d 1163, 1167 (9th Cir. 2014), where the court of appeals held that California Health & Safety Code § 11351 is a divisible statute. Pet. App. 2.

The court of appeals rejected petitioner's procedural challenges to his sentence. Pet. App. 2-3. The court noted that these challenges are reviewable for plain error, and it found none. Id. at 2. The court determined that "the district court listened to [petitioner's] mitigating arguments and recognized its discretion to vary from the Guidelines on policy grounds" and that the court "did not rely on clearly erroneous facts at sentencing." Id. at 2-3.

Finally, the court rejected petitioner's substantive challenges to his sentence, including his request for a downward departure based on cultural assimilation. Pet. App. 3. The court determined that petitioner's "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 [petitioner's] criminal record, his immigration



history, and the need to avoid unwarranted sentencing disparities.” Ibid. The court also concluded that “[t]he district court did not abuse its discretion in imposing the term of supervised release as an added measure of deterrence.” Ibid.

#### DISCUSSION

1. Petitioner contends (Pet. 14-25) that his prior violation of California Health & Safety Code § 11351 (West 2007) does not qualify as a “drug trafficking offense” under Sentencing Guidelines § 2L1.2(b)(1)(A)(i) under the “modified categorical approach” of Taylor v. United States, 495 U.S. 575 (1990), and Descamps v. United States, 133 S. Ct. 2276 (2013).

On April 26, 2016, this Court heard oral argument in Mathis v. United States, No. 15-6092, in which the question presented is whether a court may employ the “modified categorical approach” under Taylor and Descamps when a defendant has been convicted of violating a state statute that sets out, in the alternative, several forms of committing an offense, or whether instead the applicability of the modified categorical approach depends on a state-law inquiry into whether the alternative forms of the offense represent “means” or “elements.” Because resolution of the question presented in this petition may be affected by this Court’s resolution of Mathis, the petition should be held with respect to the first question presented

pending this Court's decision in Mathis, and then disposed of as appropriate in light of that decision.

2. Petitioner contends (Pet. 26-29, 30) that the district court erred by denying his request for a downward departure for cultural assimilation, in part by making clearly erroneous findings of fact. Petitioner does not assert any disagreement in the circuits on this question. The court of appeals correctly rejected the claim, see Pet. App. 3, and that fact-bound issue warrants no further review.

A district court at sentencing first calculates the advisory Guidelines sentencing range (including any departures under the Guidelines), and after considering other relevant factors stated in 18 U.S.C. 3553(a), exercises its discretion to impose a sentence that is sufficient, but not greater than necessary, to achieve the statutory purposes of punishment. Gall v. United States, 552 U.S. 38, 49-50 (2007). The court of appeals reviews the sentence for "reasonableness," which is akin to review for abuse of discretion. United States v. Booker, 543 U.S. 220, 262 (2005).<sup>2</sup>

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<sup>2</sup> The courts of appeals have taken different approaches to the review of sentences involving potential consideration of departure factors under the Guidelines. Several courts of appeals have indicated that a reviewing court should review the propriety of any potential Guidelines departures before addressing whether the ultimate sentence was reasonable. See, e.g., United States v. Wallace, 461 F.3d 15, 32-33 (1st Cir. 2006); United States v. Fumo, 655 F.3d 288, 308 (3d Cir. 2011); United States v. Woods, 670 F.3d 883, 886 (8th Cir. 2012).

Before Booker, a defendant could not appeal a district court's refusal to grant a discretionary departure under the Guidelines, so long as the court recognized that it had discretion, see, e.g., United States v. Ruiz, 536 U.S. 622, 627 (2002) (collecting cases), and that principle has survived Booker, see, e.g., United States v. Cooper, 437 F.3d 324, 333 (3d Cir. 2006). Here, petitioner argues that the district court erred by declining to grant him a downward departure for cultural assimilation. The district court did not hold that it could never grant such a downward departure, but rather concluded that, on the facts of this case, a change in petitioner's Guidelines range was not warranted. Such a claim is not reviewable.

In any event, the district court did not abuse its discretion in denying the downward departure. The commentary to the Sentencing Guidelines provides that a downward departure based on "cultural assimilation" "may" be appropriate, but "only" in cases where "(A) the defendant formed cultural ties primarily with the United States from having resided

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Other circuits review sentences for reasonableness without separately considering the correctness of any departure decisions. See, e.g., United States v. Johnson, 427 F.3d 423, 426-427 (7th Cir. 2005); United States v. Mohamed, 459 F.3d 979, 986-987 (9th Cir. 2006). The difference in approach does not matter here, because petitioner's argument lacks merit if reviewed separately or as part of his overall challenge to his sentence.

continuously in the United States from childhood"; "(B) those cultural ties provided the primary motivation for the defendant's illegal entry 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." Sentencing Guidelines § 2L1.2, comment. (n.8) (2013). The commentary further provides that, in determining whether such a departure is appropriate, the court should consider, inter alia, "the age in childhood at which the defendant began continuously residing in the United States"; "whether and for how long the defendant attended school in the United States"; "the duration of the defendant's continued residence in the United States"; "the duration of the defendant's presence outside the United States"; "the nature and extent of the defendant's familial and cultural ties in the United States"; "the seriousness of the defendant's criminal history"; and "whether the defendant engaged in additional criminal activity after illegally reentering the United States." Ibid.

In this case, the district court explained its decision not to depart downward based on cultural assimilation as follows:

I don't find that this case fits within the factors that the Court is directed to in Note 8 [of the Commentary to Guidelines § 2L1.2] 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 argument[]

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.

C.A. E.R. 21-22.

The court of appeals reviewed petitioner's cultural assimilation claim in the context of his overall challenge to the substantive reasonableness of his sentence and appropriately rejected it. Pet. App. 3. The district court's fact findings are not clearly erroneous (or erroneous at all). Petitioner did not reside in the United States continuously since childhood; he came to the United States from Mexico at age 15. PSR ¶¶ 44, 48; see Pet. 8. As petitioner conceded (C.A. E.R. 70), he never went to school in the United States, PSR ¶ 61, and his residency in the United States was not continuous because he was deported twice, PSR ¶¶ 9-10. Petitioner's mother and four siblings reside in Mexico, and his oldest son was born in Mexico. PSR ¶¶ 44-45, 50. And, far from being an otherwise law-abiding citizen, petitioner had seven criminal history points (Category IV). PSR ¶¶ 33-39. All of the factors considered by the district court were relevant to whether a departure for cultural assimilation was warranted. Nothing in the district court's fact-specific assessment of cultural assimilation warrants this Court's review.

3. Petitioner contends (Pet. 29-36) that his sentence is procedurally and substantively unreasonable because the sentence was based on clearly erroneous findings of fact; the court failed to consider certain defense arguments in mitigation; the court placed excessive reliance on petitioner's previous deportations and criminal history; the court disregarded the need to avoid unwarranted sentencing disparities; the application of the 16-level enhancement was unreasonable on the facts of this case; and the 50-month sentence was substantively unreasonable. Petitioner does not claim any disagreement in the circuits on any of those issues. The court of appeals' decision is correct, and further review of petitioner's fact-found challenges is unwarranted.

The court of appeals concluded that petitioner's procedural arguments are reviewed only for plain error. See Pet. App. 2. To prevail on such review, petitioner would have to show that the error (1) was "clear or obvious, rather than subject to reasonable dispute," (2) "affected [his] substantial rights," and (3) "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." United States v. Marcus, 560 U.S. 258, 262 (2010) (citation omitted). No error occurred: petitioner had an opportunity to make arguments about the appropriate sentence in writing (C.A. E.R. 64-75) and at a hearing (id. at 11-12, 14-18, 21), and the district court

considered those arguments, as well as the sentencing factors in 18 U.S.C. 3553, in fashioning a sentence, C.A. E.R. 20, 21-23. "The record reflects that the district court listened to [petitioner's] mitigating arguments and recognized its discretion to vary from the Guidelines on policy grounds." Pet. App. 2. Further, any procedural error was not prejudicial, because the district court sentenced petitioner to a term of imprisonment below the bottom of his Guidelines range based on its view that his case was unusual. C.A. E.R. 22-23.

The substantive reasonableness of petitioner's sentence is reviewed for abuse of discretion. See Gall, 552 U.S. at 51; see also Pet. C.A. Br. 31 (acknowledging this standard of review). The court of appeals correctly concluded that petitioner's below-Guidelines sentence was not an abuse of discretion in light of all of the circumstances, including his multiple prior deportations and criminal convictions and the need to promote deterrence. Pet. App. 3; see Gall, 552 U.S. at 51 ("When conducting [abuse-of-discretion] review, the court will, of course, take into account the totality of the circumstances, including the extent of any variance from the Guidelines range."). Further review of petitioner's fact-bound claims is not warranted.

CONCLUSION

With respect to the first question presented, the petition for a writ of certiorari should be held pending the Court's decision in Mathis v. United States, No. 15-6092, and then disposed of as appropriate in light of that decision. In all other respects, the petition should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.  
Solicitor General

LESLIE R. CALDWELL  
Assistant Attorney General

JOHN-ALEX ROMANO  
Attorney

MAY 2016