No. 07-836

In the Supreme Court of the United States

CARLOS ESPINOLA, PETITIONER

v.

UNITED STATES OF AMERICA

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

MEMORANDUM FOR THE UNITED STATES

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Petitioner contends (Pet. 6) that the district court erroneously applied a presumption of reasonableness to the advisory Sentencing Guidelines range when it sentenced him to a prison term of 148 months, three months *below* his advisory Guidelines range. According to petitioner, the district court stated that the Guidelines range set forth a "presumptive result," within which the court should sentence "unless there are reasons to go away," and that "there is a limit in how far I can go away, either up or down from this range." Pet. 4-5.

In *Rita* v. *United States*, 127 S. Ct. 2456 (2007), this Court held that courts of appeals may apply a presumption of reasonableness in reviewing within-range sentences, *id.* at 2467, but that district courts do "not enjoy the benefit of a legal presumption that the Guidelines sentence should apply." *Id.* at 2465. In *Gall* v. *United States*, 128 S. Ct. 586 (2007), the Court reiterated that a district court "may not

presume that the Guidelines range is reasonable," but instead "must make an individualized assessment based on the facts presented." *Id.* at 596-597. The court of appeals, in a decision issued before *Rita* and *Gall*, stated that "[i]n this circuit, no such presumption [of reasonableness] applies," but proceeded to find that, despite the district judge's characterization of the Guidelines, based on the entire sentencing record, the judge "understood the proper role of the guidelines" as articulated in circuit law, and, accordingly, "no purpose would be served by remanding this case under a rephrased standard." Pet. App. 5a.

In *United States* v. *Booker*, 543 U.S. 220, 268 (2005), this Court made clear that even a judge's erroneous application of mandatory guidelines may not require resentencing under the "harmless-error doctrine," and it follows *a fortiorari* that even a judge's erroneous articulation of a presumption in favor of a Guidelines sentence may be found harmless if the entire record reveals that the court understood the scope of its discretion under Section 3553(a) and imposed a properly individualized sentence. In this case, the district court imposed a below-range sentence, and the court of appeals determined that either the judge's characterizations of the Guidelines did not impede the judge's ability to apply the Section 3553(a) factors or that any erroneous articulation of a presumption of reasonableness was harmless in light of the court's actual application of the Section 3553(a) factors and its imposition of a below-range sentence. Pet. App. 5a.

Nothing in *Rita* or *Gall* necessarily calls the court of appeals' judgment into question. Neither *Rita* nor *Gall* precludes harmless-error review, and neither decision makes the Guidelines range irrelevant to the district court's exercise of sentencing discretion. To the contrary, *Gall* makes clear the Guidelines range is "the starting point and

the initial benchmark," 128 S. Ct. at 596, and that "[i]f [a judge] decides that an outside-Guidelines sentence is warranted, he must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance," *id.* at 597. The Court also found it "uncontroversial that a major departure should be supported by a more significant justification than a minor one." *Ibid.*

Petitioner relies on *Kimbrough* v. *United States*, 128 S. Ct. 558 (2007), in arguing that the district court was unaware of the court's discretion to "reject the drug quantity Guideline if she had reasons for doing so." Pet. 7. But petitioner gives no indication that he gave the district court reasons for doing so or that he preserved any such argument in the court of appeals.

Nevertheless, although the ultimate judgment of the court of appeals may be correct, the court of appeals did not have the benefit of this Court's decisions in *Rita*, *Gall*, or *Kimbrough*. While the court of appeals concluded that the district court "understood the proper role of the guidelines" as articulated in circuit law, Pet. App. 5a, it did not have the opportunity to ascertain whether the district court understood the proper role of the Guidelines as articulated in this Court's later decisions. Accordingly, the petition for a writ of certiorari should be granted, the judgment vacated, and the case remanded for further consideration in light of *Rita*, *Gall*, and *Kimbrough*, subject to applicable doctrines of waiver, forfeiture, and harmless error.[*]

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[*] Petitioner also asserts (Pet. 8-16) that facts pertinent to advisory Guidelines calculations should, as a matter of due process, be found beyond a reasonable doubt. He alleges no circuit split on that issue, and this Court has frequently denied review of that issue. See, *e.g.*, *United*

Respectfully submitted.

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States v. *Grier*, 475 F.3d 556 (3d Cir.) (en banc), cert. denied, 128 S. Ct. 106 (2007). The government waives any further response to the petition unless this Court requests otherwise.