IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	C.A. NO. 08-50296
	)	
Plaintiff-Appellee,	)	
	)	
	)	D.C. NO. CR. 02-03220-W-1
vs.	)	(Southern California)
	)	
ARMANDO RANGEL-RODRIGUEZ,	)	
	)	
Defendant-Appellant.	)	
	)	

DEFENDANT-APPELLANT'S OPENING BRIEF;
CERTIFICATE OF COMPLIANCE; CERTIFICATE OF SERVICE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA,

The Honorable Thomas J. Whelan,
United States District Judge

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TABLE OF CONTENTS

JURISDICTIONAL STATEMENT. 1

STATEMENT OF ISSUE PRESENTED. 2

STATEMENT OF THE CASE. 3
A. The First Sentencing Proceeding on September 25, 2003.. 3
B. The Trial and the Second Sentencing Proceeding on August 28, 2006.. 5
C. The Third Sentencing Proceeding on June 23, 2008... 7

BAIL STATUS. 8

STATEMENT OF RELEVANT FACTS 9

SUMMARY OF THE ARGUMENT. 10

ARGUMENT 12
A. The District Court Committed Procedural Error in Resentencing Rangel-Rodriguez Because it Treated the Guidelines as Mandatory Instead of Advisory and Failed to Consider the § 3553(a) Factors, or Otherwise under the Totality-of-the-Circumstances Standard Imposed an Unreasonable Sentence of 188 Months. 12
1. Standard of Review.. 12
2. Discussion.. 12
A. The District Court Did Not Consider the Relevant § 3553(a) Factors.. 15
B. The District Court Presumed the Guidelines Range Was Reasonable.. 16
C. The District Court Acknowledged That the 168-month Sentence Was Sufficient, but Not Greater than Necessary... 16
D. The District Court Erroneously Believed it Could Not Sentence Outside the Applicable Range.. 19

CONCLUSION. 23

STATEMENT OF RELATED CASES.. 24

CERTIFICATE OF COMPLIANCE.. . . . .

CERTIFICATE OF SERVICE. . . . .

TABLE OF AUTHORITIES

CASE LAW

Berman v. United States, 302 U.S. 211 (1937). 2

Gall v. United States, ---U.S. ----, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007). . . 11-14, 16, 19-21

Kimbrough v. United States, --- U.S. ----, 128 S.Ct. 558, 169 L.Ed.2d 481 (2007) 11-14, 19

Rita v. United States, --- U.S. ----, 127 S.Ct. 2456, 168 L.Ed.2d 203 (2007). . . 11-14, 16

United States v. Booker, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005) 12, 13, 16

United States v. Carty, 520 F.3d 984 (9th Cir. 2008) (*en banc*), *cert. denied sub nom*. Zavala v. United States, 128 S.Ct. 2491 (2008)... 11, 12, 14-16, 19-21

UNITED STATES CODE, RULES & REGULATIONS

UNITED STATES CODE

18 U.S.C. § 3231. 1

18 U.S.C. § 3553(a). 2, 7, 10-15, 18, 19, 22, 23

18 U.S.C. § 3553(a)(2). 13, 19

28 U.S.C. § 1291. 1

28 U.S.C. § 1294(1). 1

8 U.S.C. § 1324 *et seq*.. 3

8 U.S.C. § 1324. 1

8 U.S.C. § 1324(a)(1)(A)(ii). 3

8 U.S.C. § 1324(a)(2)(B)(ii). 3, 7

8 U.S.C. § 1326. . . . . 4, 6, 19, 21

FEDERAL RULES OF APPELLATE PROCEDURE

Federal Rules of Appellate Procedure, Rule 4(b). 2

UNITED STATES SENTENCING GUIDELINES

U.S.S.G. Chapter Five, Part A.. . . . . 4, 6

U.S.S.G. § 2L1.1(a)(2). 4, 5

U.S.S.G. § 2L1.1(b)(3)(B).. 4

U.S.S.G. § 2L1.1(b)(5). 4

U.S.S.G. § 3B1.1(a).. 4

U.S.S.G. § 3D1.2(d). 5

JURISDICTIONAL STATEMENT

This appeal stems from a conviction in an alien smuggling case. On June 23, 2008, in the United States District Court for the Southern District of California, San Diego, imposed a sentence against the defendant-appellant, Armando Rangel-Rodriguez ("Rangel-Rodriguez") after a jury found him guilty on Counts 4, 5, 6, 9 and 10 of the Indictment for charges related to transporting and bringing illegal aliens to the United States in violation of 8 U.S.C. § 1324. [Excerpts of Record Volume I ("ER I"), 2-25].[1]

The United States District Court for the Southern District of California, San Diego ("district court" or "court"), had jurisdiction of this matter pursuant to 18 U.S.C. § 3231, which provided the court with original jurisdiction of all offenses against the laws of the United States. 18 U.S.C. § 3231.

This Court has jurisdiction to review timely appeals from final orders entered within the Ninth Circuit's geographical jurisdiction. 28 U.S.C. § 1291, §

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[1] As used here in this opening brief: "ER I" refers to Rangel-Rodriguez's Excerpts of Record Volume I, and "ER II" refers to his Excerpts of Record Volume II; "CR" refers to the clerk's record of proceedings in this matter from the United States District Court Southern California, attached to ER II, and will be followed by the number of filed document; "PSR" refers to the Presentence Investigation Report, addenda and related sealed sentencing papers, simultaneously filed with this opening brief, but under seal pursuant to Circuit Rule 30 - 1.9.

1294(1). The district court filed the Amended Judgment in a Criminal Case on June 23, 2008. [ER I 2]. That judgment is a final order. Berman v. United States, 302 U.S. 211, 213 (1937).

Rangel-Rodriguez filed his notice of appeal on June 24, 2008. [ER I 1]. Pursuant to the 10-day filing rule under Rule 4(b), Federal Rules of Appellate Procedure ("F.R.A.P."), since Rangel-Rodriguez filed his notice of appeal within 10 days of entry of the Amended Judgment, the appeal is timely. Because the appeal is timely, filed from a final order and the Southern District of California is within the Ninth Circuit's geographical jurisdiction, this Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUE PRESENTED

Whether the district court committed procedural error in resentencing Rangel-Rodriguez because it treated the Guidelines as mandatory instead of advisory and failed to consider the § 3553(a) factors, or otherwise under the totality-of-the-circumstances standard imposed an unreasonable sentence of 188 months?

//

//

STATEMENT OF THE CASE

A. The First Sentencing Proceeding on September 25, 2003.

Rangel-Rodriguez has been sentenced three times in this appeal, having twice successfully appealed his conviction. The first leg of this procedural history begins back on December 5, 2002, when a grand jury returned a ten-count indictment against Rangel-Rodriguez and two codefendants for violation of 8 U.S.C. § 1324 *et seq*., concerning the apprehension of illegal aliens on March 26, 2002 and June 12, 2002. [ER II 97-101]. Both codefendants, Daniel A. Martinez and his father Timothy A. Martinez, pleaded guilty and testified against Rangel-Rodriguez at his trials in 2003 and 2006. [*See* PSR 2-9].

A jury convicted Rangel-Rodriguez on all ten counts: five counts of bringing undocumented aliens into the United States in violation of 8 U.S.C. § 1324(a)(2)(B)(ii) (the "bring-to" counts); and five counts of transporting undocumented aliens within the United States in violation of 8 U.S.C. § 1324(a)(1)(A)(ii). [CR 65].

Based on the then-mandatory United States Sentencing Guidelines ("U.S.S.G." or "Guidelines"), on September 25, 2003, the district court, the Honorable Thomas J. Whelan presiding, imposed a sentence that included 168 months total incarceration. [CR 85; ER II 95]. This incarceration period

represented the low end the applicable Guidelines range of 168-210 months. That range was the result of the total offense level ("TOL") of 31 coupled with the criminal history category ("CHC") of V. *See* U.S.S.G. Chapter Five, Part A. [ER II 94-95].

The CHC of V was based on a finding that Rangel-Rodriguez had a criminal history score of 12. [ER II 95]. The TOL of 31 was based on an offense level of 12 pursuant to U.S.S.G. § 2L1.1(a)(2), plus four enhancements:

- nine levels pursuant to U.S.S.G. § 2L1.1(b)(2)(C), based on a finding by clear and convincing evidence that Rangel-Rodriguez smuggled 100 or more unlawful aliens;
- four levels pursuant to § 2L1.1(b)(3)(B) because Rangel-Rodriguez had two or more convictions for felony immigration and naturalization offenses arising out of separate prosecutions;
- four levels pursuant to § 3B1.1(a) based on a finding that Rangel-Rodriguez was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive;
- two levels pursuant to § 2L1.1(b)(5) because Probation determined that the offense involved intentionally or recklessly creating a substantial risk of death or serious bodily injury to another person.

[ER II 94-95].

At this time a separate prosecution (02-02274-001-BTM) was proceeding in district court against Rangel-Rodriguez, alleging violation of 8 U.S.C. § 1326, Deported Alien Found in the United States. [PSR 14]. On April 24, 2003, Rangel-

Rodriguez pleaded guilty to the offense. [PSR 14]. In that case, on November 18, 2003, the judgment was entered reflecting a 30-month sentence. [PSR 14].

In the instant matter, Rangel-Rodriguez appealed his conviction. [CR 90]. In an unpublished opinion this Court reversed the conviction and sentence, holding that the district court's failure to inquire into Rangel-Rodriguez's request for a lawyer amounted to an abuse of discretion. *See* United States v. Rangel-Rodriguez-Rodriguez, 109 Fed. Appx. 182, 182 (9th Cir. 2004). [*See* ER II 111].

B. The Trial and the Second Sentencing Proceeding on August 28, 2006.

The case returned to the district court where the plaintiff-appellee the United States of America (the "Government") tried Rangel-Rodriguez on March 14-17, 2006. [CR 161]. Again the jury convicted him on all ten counts. [CR 162].

At sentencing on August 28, 2006, the district court relied upon the PSR prepared by the United States Probation Office ("Probation") on or about May 1, 2006. Probation grouped together the counts of conviction pursuant to U.S.S.G. § 3D1.2(d) since the counts were related and involved substantially the same harm. [PSR 22]. Like before, pursuant to U.S.S.G. § 2L1.1(a)(2) Probation found a base offense level of 12. [PSR 22]. Like before, Probation applied the four enhancements, resulting in a TOL of 31. [PSR 22-23].

At the second sentencing hearing the CHC was higher, however, increasing

from V to VI. [PSR 14-15]. This happened because pending Rangel-Rodriguez's appeal, the district court sentenced him to 30 months in the § 1326 case (02-02274-001-BTM) as reflected in the judgment entered on November 18, 2003. [PSR 14]. When the time came to resentence him again in this case – after remand, retrial and conviction – the sentence in the § 1326 case now raised the CHC from V to VI. [*See* PSR 14-15]. The new CHC of VI coupled with the TOL of 31 resulted in a higher Guidelines range of 188-235 months. U.S.S.G. Chapter Five, Part A. [PSR 23]. Based upon the new Guidelines calculations, at the second sentencing hearing on August 28, 2006, the district court imposed a sentence that included 188 months incarceration. [ER II 58]. That sentence is 20 months higher than the 168 months imposed on September 25, 2003.

Again, Rangel-Rodriguez appealed, challenging his convictions concerning the 'bring-to' counts, as well as raising three sentencing issues. Concerning the 'bring-to' counts, Rangel-Rodriguez attacked the jury instruction. He argued that the instruction told the jury that the crime continues until the alien reaches his immediate destination, in conflict with the Ninth Circuit's *en banc* decision in United States v. Lopez.[2] Concerning the sentencing issues, he sought, *inter alia*, review of the 188-month term on the ground that the district court failed to apply

[2] United States v. Lopez, 484 F.3d 1186 (9th Cir. 2007).

the factors under 18 U.S.C. § 3553(a) while calculating the Guidelines, instead mechanically increasing the sentence by 20 months given the increase in the CHC from V to VI.

Under plain error review and in an unpublished decision, this Court reversed and remanded the convictions for five 'bring-to' counts under 8 U.S.C. § 1324(a)(2)(B)(ii), holding that there was a reasonable probability that the instructional error was responsible for Rangel-Rodriguez's convictions and that the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." United States v. Rangel-Rodriguez-Rodriguez, 267 Fed.Appx. 679, 681 (9th Cir. 2008). [ER II 30]. As to the remaining sentencing issues, this Court declined to reach those issues as a result of its disposition on the five 'bring-to' counts, and the prospect of re-sentencing. Id., 681. [ER II 30-31]. "The parties concede that the sentencing issues may or may not arise again after re-sentencing." Id. [ER II 31].

C. The Third Sentencing Proceeding on June 23, 2008.

Back in the district court on remand, rather than retry Rangel-Rodriguez on the reversed 'bring-to' counts the Government moved to dismiss the five counts, which motion the court granted. [*See* ER I 2]. On June 23, 2008, the district court sentenced Rangel-Rodriguez on the remaining five transportation counts, Counts

4, 5, 6, 9 and 10 of the indictment.

Based upon the same Guidelines factors seen in the second sentencing proceeding on August 28, 2006 – a TOL of 31 and a CHC of VI – the applicable custodial range was 188-235 months. After acknowledging the PSR addendum and the parties' sentencing memoranda, and listening to the parties' arguments, the district court again imposed the low end of the range, for a total incarceration period of 188 months. [ER I 9-22].

On June 24, 2008, Rangel-Rodriguez filed a timely notice of appeal. [ER I 1]. By scheduling order of this Court, this opening brief and excerpts of record are due on or before November 12, 2008. [*See* ER II 104].

BAIL STATUS

According the Federal Bureau of Prisons ("BOP") website (www.bop.gov), Armando Rangel-Rodriguez-Rodriguez, BOP #: 08306-112, is currently incarcerated at the FCI Gilmer Federal Correctional Institution, with a mailing address of: FCI Gilmer, Federal Correctional Institution; P.O. BOX 6000; GLENVILLE, WV 26351. According to the BOP website, his projected release date is May 18, 2016.

STATEMENT OF RELEVANT FACTS

In a remote area of Southern California east of San Diego, Mexican nationals were crossing the border on foot and entering the United States without papers or documentation. This case focused on an alien smuggler operating in the area known as ‘Flaco’, who transported the aliens within the United States. The Government believed Rangel-Rodriguez was Flaco.

At the trial in March 2006 Mexican nationals testified concerning the events leading to their apprehension in the United States on March 26, 2002 and June 12, 2002. They had contracted with individuals in Mexico to be smuggled into the United States without authorization from United States authorities. [ER II 62-63, 65]. With a guide, they crossed the United States-Mexico border on foot. [ER II 63-64, 69]. Once in the United States, they waited at designated locations near remote stretches of road until vehicles arrived, then transported them to drop-off locations in and around San Diego. [ER II 65-66].

Four United States citizens who drove these vehicles testified against Rangel-Rodriguez at the trial concerning the events on March 26, 2002 and June 12, 2002, and other incidents.[3] All four alleged that Rangel-Rodriguez was Flaco

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[3] Concerning codefendants Timothy Martinez and his son Daniel Martinez, both pled guilty on January 17, 2003, to one count of Transportation of Illegal Aliens, and Aiding and Abetting, in violation of 8 U.S.C. § 1324(a)(1)(A)(ii) and

[ER II 71-72, 76-78, 81, 88], for whom they worked picking up illegal aliens at remote locations east of San Diego, then driving the aliens to drop-off locations where Flaco usually met them, and paid them $80.00 per alien. [ER II 73, 74-75, 79-80, 82-83, 84-85, 89-90]. All four drivers knew each other and were methamphetamine addicts during the time that they smuggled the illegal aliens. [ER II 75, 79, 82, 86-87, 91].

SUMMARY OF THE ARGUMENT

The issue presented in this appeal is whether the district court committed procedural error in resentencing Rangel-Rodriguez because it treated the Guidelines as mandatory instead of advisory and failed to consider the § 3553(a) factors, or otherwise under the totality-of-the-circumstances standard imposed an unreasonable sentence of 188 months?

(v)(II). [PSR ii]. On August 4, 2003, the district court imposed sentences against both Timothy and Daniel Martinez, with each receiving a prison term of time served. [PSR ii].

Concerning driver/witness Megan Von Ben Schoten, on June 13, 2002, she pled guilty to Count 2 of a four-count indictment, 8 U.S.C. § 1324 (a)(1)(A)(ii), Transportation of Illegal Aliens. On January 9, 2003, the district court imposed sentence, which included a prison term of time served. [PSR iii].

Concerning driver/witness Lindsey Rose, on September 5, 2002, she pled guilty to Count 2 of a four-count indictment, 8 U.S.C. § 1324(a)(1)(A)(ii), Transportation of Illegal Aliens. On November 25, 2002, the court imposed sentence, which included a prison term of time served. [PSR iii].

Rangel-Rodriguez argues herein that the answer must be 'yes'. The legal basis for this argument lies in this Court's recent *en banc* decision in United States v. Carty, wherein the Court provided our circuit with the sentencing procedure to follow that encompasses the recent Supreme Court decisions in Rita, Gall and Kimbrough. United States v. Carty, 520 F.3d 984, 991-994 (9th Cir. 2008) (*en banc*), *cert. denied sub nom.* Zavala v. United States, 128 S.Ct. 2491 (2008), *citing* Rita v. United States, --- U.S. ----, 127 S.Ct. 2456, 2465, 168 L.Ed.2d 203 (2007); Gall v. United States, — U.S. ----, 128 S.Ct. 586, 591, 169 L.Ed.2d 445 (2007); Kimbrough v. United States, --- U.S. ----, 128 S.Ct. 558, 564, 169 L.Ed.2d 481 (2007).

Rangel-Rodriguez argues that the procedure provided in Carty was not followed by the district court in resentencing Rangel-Rodriguez on June 23, 2008, as it should have been. As fully set forth below, the record from the hearing on June 23, 2008, shows that the district court treated the Guidelines as mandatory rather than advisory, and failed to consider the relevant § 3553(a) factors as required in Carty. Carty, 520 F.3d at 993. Otherwise, he argues under the totality-of-the-circumstances standard, id., that the district court erred in imposing an unreasonable sentence of 188 months, which sentence is 20 months higher than the original 168-month sentence imposed and is based solely on the Guidelines.

ARGUMENT

A. The District Court Committed Procedural Error in Resentencing Rangel-Rodriguez Because it Treated the Guidelines as Mandatory Instead of Advisory and Failed to Consider the § 3553(a) Factors, or Otherwise under the Totality-of-the-Circumstances Standard Imposed an Unreasonable Sentence of 188 Months.

1. Standard of Review.

"Appellate review is to determine whether the sentence is reasonable; only a procedurally erroneous or substantively unreasonable sentence will be set aside." Carty, 520 F.3d at 993, *citing* Rita, 127 S.Ct. at 2459 (*citing* United States v. Booker, 543 U.S. 220, 261-63, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005)); Gall, 128 S.Ct. at 594 (emphasizing that "appellate review of sentencing decisions is limited to determining whether they are 'reasonable' ").

2. Discussion.

This Court's recent *en banc* decision in Carty provides our circuit with the sentencing procedure to follow that encompasses the recent Supreme Court decisions in Rita, Gall and Kimbrough. Carty, 520 F.3d at 991-994*, citing* Rita, 127 S.Ct. at 2465; Gall, 128 S.Ct. at 591; Kimbrough, 128 S.Ct. at 564.

In light of these three cases, and in the wake of Booker which rendered the

Sentencing Guidelines advisory[4], this Court in Carty provided the following sentencing process, which we quote at length and in relevant part:

> "• The overarching statutory charge for a district court is to '***impose a sentence sufficient, but not greater than necessary***' to reflect the seriousness of the offense, promote respect for the law, and provide just punishment; to afford adequate deterrence; to protect the public; and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment. 18 U.S.C. § 3553(a) and (a)(2).
>
> • All sentencing proceedings are to begin by determining the applicable Guidelines range. The range must be calculated correctly. In this sense, the Guidelines are 'the 'starting point and the initial benchmark,'' Kimbrough, 128 S.Ct. at 574 (*quoting* Gall, 128 S.Ct. at 596), and are to be kept in mind throughout the process, Gall, 128 S.Ct. at 596-97 n. 6.
>
> • The parties must be given a chance to argue for a sentence they believe is appropriate. [Footnote omitted.]
>
> • ***The district court should then consider the § 3553(a) factors to decide if they support the sentence suggested by the parties,*** i.e., it should consider the nature and circumstances of the offense and the history and characteristics of the defendant; the need for the sentence imposed; the kinds of sentences available; the kinds of sentence and the sentencing range established in the Guidelines; any pertinent policy statement issued by the Sentencing Commission; the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and the need to provide restitution to any victims. 18 U.S.C. § 3553(a)(1)-(7); Gall, 128 S.Ct. at 596-97 n. 6.
>
> • ***The district court may not presume that the Guidelines range is reasonable***. Rita, 127 S.Ct. at 2465 (*citing* Booker, 543 U.S. at 259-60, 125 S.Ct. 738); Gall, 128 S.Ct. at 596-97. ***Nor should the Guidelines factor be***

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[4] Booker, 543 U.S. at 245, 125 S.Ct. at 757.

given more or less weight than any other. While the Guidelines are to be respectfully considered, they are one factor among the § 3553(a) factors that are to be taken into account in arriving at an appropriate sentence. Kimbrough, 128 S.Ct. at 570; Gall, 128 S.Ct. at 594, 596-97, 602.

• The district court must make an individualized determination based on the facts. However, the district judge is not obliged to raise every possibly relevant issue sua sponte. Gall, 128 S.Ct. at 597, 599.

• If a district 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. This does not mean that the district court's discretion is constrained by distance alone. Rather, the extent of the difference is simply a relevant consideration. At the same time, as the Court put it, '[w]e find it uncontroversial that a major departure should be supported by a more significant justification than a minor one.' Id. This conclusion finds natural support in the structure of § 3553(a), for the greater the variance, the more persuasive the justification will likely be because other values reflected in § 3553(a)-such as, for example, unwarranted disparity-may figure more heavily in the balance.

• Once the sentence is selected, the district court must explain it sufficiently to permit meaningful appellate review. A statement of reasons is required by statute, § 3553(c), and furthers the proper administration of justice. See Rita, 127 S.Ct. at 2468 (stating that '[c]onfidence in a judge's use of reason underlies the public's trust in the judicial institution'). An explanation communicates that the parties' arguments have been heard, and that a reasoned decision has been made. It is most helpful for this to come from the bench, but adequate explanation in some cases may also be inferred from the PSR or the record as a whole."

Carty, 520 F.3d at 990-992 (emphasis added).

Here, the procedure set out in Carty was not followed by the district court in resentencing Rangel-Rodriguez on June 23, 2008.

A. The District Court Did Not Consider the Relevant § 3553(a) Factors.

The district court acknowledged § 3553(a): "... the 3553(A) factors are what I have to look at, and under 3553(A), as everybody is aware, I look at the totality of the circumstances of the offense conduct." [ER I 20].

While Carty directed that the lower courts consider the circumstances of the offense, the inquiry did not end there. Pursuant to § 3553(a), in addition to the circumstances of the offense, Carty directed the court to also consider, *inter alia*, the need for the sentence imposed. Carty, 520 F.3d at 991. The district court did not do this, and it should have. Consideration of this factor would have shown the court that the original sentence of 168 months was "sufficient, but not greater than necessary." 18 U.S.C. § 3553(a).

Indeed, the court itself acknowledged that the original 168-month was sufficient, and therefore, by implication, there was no need to increase the sentence by 20 months. The court stated: "As the sentencing would show that first time after the first trial and the second trial, I went to the low end of the adjusted Guidelines range because I think that that is a sentence ***that is sufficient but not greater than necessary***." [ER I 21].

B. The District Court Presumed the Guidelines Range Was Reasonable.

The court recognized, "an obligation to correctly compute [Rangel-Rodriguez's] guideline range at the time of sentencing" and "agree[d] with [Probation's] calculations of the base offense level and the criminal history score". [ER I 10-11]. The court determined that, "I think that my sentence is imposed based on it being within the guideline range, ***which is a presumptively reasonable sentence*** based on the totality of his conduct in the case with all the drivers that he had." [ER I 21; emphasis added].

This determination breaches Carty, wherein this Court instructed that "[t]he district court may not presume that the Guidelines range is reasonable." Carty, 520 F.3d at 991, *citing* Rita, 127 S.Ct. at 2465 (*citing* Booker, 543 U.S. at 259-60, 125 S.Ct. 738); Gall, 128 S.Ct. at 596-97. Yet clearly this was the district court's mindset when it imposed the 188- month sentence based upon the CHC increase from V to VI.

C. The District Court Acknowledged That the 168-month Sentence Was Sufficient, but Not Greater than Necessary.

Just before imposing the 188-month sentence [ER I 22], the court stated that the original sentence of 168 months was sufficient but not greater than necessary: "As the sentencing would show that first time after the first trial and the second

trial, I went to the low end of the adjusted Guidelines range because I think that that is a sentence ***that is sufficient but not greater than necessary***." [ER I 21]. Thus we have the district court's own characterization of the 168-month sentence as sufficient but not greater than necessary. 18 U.S.C. § 3553(a); Carty, 520 F.3d at 990.

The court rejected Probation's recommendation of a mid-range sentence, opting instead for the low end of the range: "I ***still*** think the low end of the adjusted guideline range is a sufficient, but not unreasonable sentence. It's not greater than necessary, and that would be my intent to re-impose that." [ER I 11; emphasis added]. Presumably the court was referring to its imposition of the low end of the adjusted range at the original sentencing on September 25, 2003, which range was 168-210 months. [ER II 95]. At that time, the court declined to follow Probation's recommendation of the high end of the range, and followed the Government's recommendation of imposing the low end because, as the Government stated, "168 months appears to be an appropriate penalty under the Guidelines, taking into account all factors in this particular case." [ER II 93].

Since the imposition of the 168-month sentence on September 25, 2003, and with the exception of the increase in the CHC from V to VI, no other relevant sentencing facts have occurred in this matter. All of the relevant variables were

controlled for. The same judge, Judge Thomas Whelan, heard the same evidence at the trial in March 2006 as was presented at the trial in July 2003. In fact, the Government read prior testimony into the record during the March 2006 trial for witnesses who became unavailable. [ER II 61.1-61.2, 68.1-68.2]. Probation requested the same sentence based upon the same sentencing facts and calculations – save the increase in the CHC.

One and only one variable changed. This time the Guidelines sentence was higher – through no fault of Rangel-Rodriguez's – due to an increase in the CHC. Without pausing to consider whether this seemingly arbitrary result was fair, particularly given the court's determination that the previous 168-month sentence was "sufficient but not greater than necessary" [ER I 21], the district court simply applied the new Guidelines range and raised Rangel-Rodriguez's sentence by 20 months.

If the original sentence of 168 months was "sufficient, but not greater than necessary" on September 25, 2003, and, save the increase in the CHC, no other facts changed or came to light relevant to sentencing, then clearly the Guidelines were given predominant weight over all other factors when the court imposed sentence on June 23, 2008. The only basis for the 20-month increase was the change in the CHC from V to VI due to the sentence imposed on or about

November 18, 2003 in the § 1326 immigration case, and the resulting increase in applicable range under the Guidelines.

This result runs contrary to the decision in Carty: "Nor should the Guidelines factor be given more or less weight than any other. While the Guidelines are to be respectfully considered, they are one factor among the § 3553(a) factors that are to be taken into account in arriving at an appropriate sentence." Carty, 520 F.3d at 991, *citing* Kimbrough, 128 S.Ct. at 570; Gall, 128 S.Ct. at 594, 596-97, 602.

Moreover, it runs contrary to "[t]he overarching statutory charge for a district court is to 'impose a sentence sufficient, but not greater than necessary' to reflect the seriousness of the offense, promote respect for the law, and provide just punishment". Carty, 520 F.3d at 991, *quoting* 18 U.S.C. § 3553(a).

D. The District Court Erroneously Believed it Could Not Sentence Outside the Applicable Range.

The court's erroneous deference to the Guidelines is seen in its response to Rangel-Rodriguez's request to be sentenced outside the Guidelines range of 188-235 months, resulting from the increased CHC of VI. Rangel-Rodriguez's attorney argued:

> "So, what I respectfully suggest to the court is if based on one factor alone that he is now a six when he used to be a five, his sentence automatically

> bumps up from a 168 to a 188 in terms of months of the sentence, then it literally is the Guidelines that are controlling his sentence, not the totality of the circumstances, as it should under 3553. That's why I make that point. If it was something other that the Guidelines, then that would have been, 188 would have been in reach before. So, the analysis, I suggest, is: okay, now, the Guidelines call for 188. I've already sentenced him to 168. Is it necessary, under the law, to increase 20 months to effect justice and I suggest the answer is no."

[ER I 15]. The court explained that it could not do this: "anything outside the Guidelines range, I think, would be inappropriate." [ER I 21].

This rationale is contrary to Carty:

> "If a district 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. This does not mean that the district court's discretion is constrained by distance alone. Rather, the extent of the difference is simply a relevant consideration."

Carty, 520 F.3d at 991, *citing* Gall, 128 S.Ct. at 597.

There would have been nothing inappropriate with imposing a sentence outside the Guidelines range as long as the court provided sufficient justification to support the extent of the variance. The record yields ample justification. As to the extent of the variance, Rangel-Rodriguez sought a mere 20-month, or 10 percent, reduction from the low end of the 188-235 range. Thus, the court would have had to reach far to provide justification. Second, the district court itself had already stated that the original 168-month sentence was "sufficient but not greater

than necessary". [ER I 21]. Third, with the exception of the sentence imposed on or about November 18, 2003 for the § 1326 violation[5], no new events or conduct on Rangel-Rodriguez's part had occurred to justify an additional 20 months to his sentence. Indeed, other than the Guidelines the district court pointed to no other factor to justify raising the sentence by 20 months and imposing the low end of the applicable range, 188 to 235.

In Carty, this Court stated that in sentencing appeals like this one, it would "first consider whether the district court committed significant procedural error, then we consider the substantive reasonableness of the sentence." Carty, 520 F. At 993, *citing* Gall,128 S.Ct. at 597. Among the forms of procedural error identified by the Court, it found that it would be procedural error for a district court, "to treat the Guidelines as mandatory instead of advisory; to fail to consider the § 3553(a) factors". Carty, 520 F.3d at 993. Concerning reasonableness of the sentence, the Court will consider the "totality of the circumstances". Id. This Court declined to adopt a presumption that a sentence within the Guidelines range is reasonable. Id.

Based upon the record discussed above, Rangel-Rodriguez argues that the district court committed significant procedural error by treating the Guidelines as

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[5] Which offense Rangel of-Rodriguez had already pleaded guilty to on April 24, 2003, at the time of the original sentence in this matter on September 25, 2003.

mandatory instead of advisory, and failing to consider relevant § 3553(a) factors. Otherwise, he argues under the totality-of-the-circumstances standard that the district court erred by imposing an unreasonable sentence of 188 months, which sentence is 20 months higher than the original 168-month sentence imposed and is based solely on the Guidelines factor concerning the increase in the CHC from V to VI.

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CONCLUSION

This appeal presents one issue for consideration: Whether the district court committed procedural error in resentencing Rangel-Rodriguez because it treated the Guidelines as mandatory instead of advisory and failed to consider the § 3553(a) factors, or otherwise under the totality-of-the-circumstances standard imposed an unreasonable sentence of 188 months?

The answer should, yes. Yes, the record reflects that the district court treated the Guidelines as mandatory, failed to consider the relevant § 3553(a) factors and, otherwise, imposed an unreasonable sentence. Rangel-Rodriguez requests that this Court reverse the sentence, and remand the case for resentencing.

DATED: Wailuku Maui, Hawai'i, November 12, 2008.

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GEORGIA K. MCMILLEN
Attorney for Defendant-Appellant

STATEMENT OF RELATED CASES

Upon information and belief, the following cases are related to the instant matter:

03-00590-BTM: Bachmeier, Felix: June 9, 2003, pled guilty to Count 13 of a 13-count indictment, 8 U.S.C. § 1324(a)(2)(B)(ii) and 18 U.S.C. § 2, Bringing in Illegal Aliens for Financial Gain, Aiding and Abetting. Sentencing was set for September 16, 2003. [PSR iii].

0 2-01172-J: Van Ben Schoten, Megan Lee, June 13, 2002, pled guilty to Count 2 of a four-count indictment, 8 U.S.C. § 1324 (a)(1)(A)(ii), Transportation of the Illegal Aliens. On January 9, 2003, sentenced to time served and three years supervised release. [PSR iii].

02-02046-H: Rose, Lindsey: September 5, 2002, pled guilty to Count 2 of the four-count indictment, 8 U.S.C. § 1324(a)(1)(A)(ii), Transportation of Illegal Aliens. On November 25, 2002, sentenced to time served and two years supervised release.

[PSR iii].

02-2274-1-BTM: On April 24, 2003, Rangel-Rodriguez pleaded guilty to one count of Deported Alien Found in the United States. On November 18, 2003, the United States District Court entered the judgment, reflecting the sentence of 30 months custody and two years supervised release. [PSR 14].

DATED: Wailuku Maui, Hawai'i, November 12, 2008.

GEORGIA K. MCMILLEN
Attorney for Defendant-Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two copies of the foregoing Opening Brief and Certificate of Compliance were duly served on the following, by placing said copy in the U.S. mail, postage prepaid, addressed as set forth below:

- Rebekah W. Young, Assistant United States Attorney
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  Attorney for Plaintiff-Appellee
  UNITED STATES OF AMERICA

DATED: Wailuku Maui, Hawai'i, November 12, 2008.

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