

No. 18-5280

In the Supreme Court of the United States

October Term 2017

PATRICK LANIER, Petitioner

V.

UNITED STATES OF AMERICA, Respondent

PETITION FOR REHEARING OF WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR REHEARING

Pursuant to Rule 44 of this Court, Petitioner Patrick Lanier, hereby respectfully petitions for re-hearing of this case before a full nine-Member Court.

REASONS FOR GRANTING REHEARING

- I. A rehearing of the decision in this matter is in the interest of justice because the point of error raised by the applicant in his original petition seeking certiorari was drafted while the matter of *Rosales-Mireles v. United States*, 585 U.S. ___, 138 S.Ct. 1897, 201 L.Ed2d 376 (2018), had been argued but was still pending decision by the Court on May 9, 2018.**

Petitioner's Petition for Writ of Certiorari was submitted prior to this Court's opinion in *Rosales-Mireles v. United States*, 585 U.S. ___, 138 S.Ct. 1897, 201 L.Ed.2d 376 (2018), but due to technical errors in the original filing, was not docketed until after the opinion was released, therefore, there was no specific reference in the petition for writ of certiorari to the *Rosales-Mireles* opinion, which reversed a decision by the Fifth Circuit that had applied an unduly restrictive standard to forfeited plain error by using the "shock the conscience" standard.

In this case, because Lanier had not filed a post-verdict motion challenging the sufficiency of the evidence to support the verdict against him for wire fraud and conspiracy to commit wire fraud, the Fifth Circuit treated the error as unpreserved, and likewise utilized an incorrect and overly restrictive standard of review: "Our review is circumscribed still further when error is unpreserved.

In such cases, ‘review is only for a manifest miscarriage of justice.’ *United States v. McDowell*, 498 F.3d 308, 312 (5th Cir. 2007). When this standard applies, the conviction will stand ‘unless the record is devoid of evidence pointing to guilt or if the evidence is so tenuous that a conviction is shocking.’” (Opinion at 4).

In the wake of *Rosales-Mireles*, this Court has reversed and remanded a number of cases to the Fifth Circuit for “plain error” review and further determination if the cases were moot, including *Renteria-Martinez v. United States*, 138 S.Ct. 2671 (2018); *Cruz-Pena v. United States*, 138 S.Ct. 2672 (2018); *Anthony v. United States*, 138 S.Ct. 2672 (2018); *Agustin-Garcia v. United States*, 138 S.Ct. 2673 (2018); *Ruiz-Dominguez v. United States*, 138 S.Ct. 2673 (June 25, 2018); *Solano-Hernandez v. United States*, 138 S.Ct. 2701 (2018); and *Villarreal-Garcia v. United States*, 138 S.Ct. 2701 (2018).

Petitioner requests that this court reverse the opinion of the Fifth Circuit and remand this case for a review of his “unpreserved” points of error under the standards articulated in *Rosales-Mireles*.

II. A rehearing of the decision in this matter is further justified in the interest of justice because the final judgment in this case is internally inconsistent and is not correctable by Rule 35(a) as having been time barred on matters of substantive nature and not correctable as mere clerical errors as contemplated by Rule 36.

When there are sentencing errors that are apparent on the face of the judgment the errors should be corrected or returned to the trial court for resentencing and full consideration because of the victims alleged actual losses

which can be done at any time under FED. R. CRIM. P. 36 and necessitates reversal under FED. R. CRIM. P. 52(b) for plain error and not the “far more strict” standard “manifest miscarriage of justice.”

A careful reading of the Statement of Reasons and the Judgment, compared to the oral pronouncement of the sentence in the full transcript of the sentencing hearing (attached to the petition for writ of certiorari as an appendix), reveals that the trial court’s oral pronouncement is in substantial conflict with the Statement of Reasons and the written judgment. The district court determined the amount of injury caused by the conspiracy was \$37,544,944.16 (which amount was reflected in the judgment), but noted that the probation department had only provided a list of victims totaling \$32 million. (*See Transcript*, p. 45–46 attached to Petition for Writ of Certiorari). The district court directed the probation officer to correct the restitution amount. (*Transcript*, pp. 45–46). This amount was never supplemented, updated, or corrected. The Statement of Reasons states that it “adopts the presentence investigation report without change.” Therefore, there is a substantial inconsistency in the judgment that should have been corrected by the district court and the Fifth Circuit.

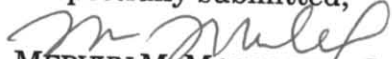
The Criminal Monetary Penalties portion of the judgment fails to contain an attachment of the payees entitled to restitution and one column reflects a total loss of \$0.00, but orders restitution in the amount of \$37,544,944.16. Whenever there is a conflict between the oral sentence and the written judgment to the extent it become ambiguous, the entire record should be reviewed. Had the

Statement of Reasons been complete, it would have been apparent that a portion of the restitution would flow to others who were either co-conspirators or entities controlled by co-conspirators. Such consideration of granting restitution to co-conspirators except in extra ordinary cases would be an “absurd result.” See, *United States v. Lazarenko*, 629 F.3d 1247, 1251 (9th Cir. 2010). Any order under the Mandatory Victim Restitution Act that would have the effect of treating co-conspirators as victims and requiring restitution payments to perpetrators of an offense of the conviction, contains error so fundamental and so adversely reflecting on public reputation of judicial proceedings that an appellate court or this court may deal with it sua sponte. *United States v. Reifler*, 446 F.3d 65 (2nd Cir. 2006); *Wiborg v. United States*, 163 U.S. 632S.Ct. 1127, 41 L.Ed 289,165 (1896); *Silber v. United States*, 370 U.S. 717, 82 S.Ct. 1287, 8 L.Ed2d 798 (1962).

CONCLUSION

For the foregoing reasons, and for the reasons stated in the petition for writ of certiorari, petitioner prays that this Court grant rehearing of the order of denial, vacate that order, grant the petition for writ of certiorari, and reverse the opinion of the Fifth Circuit and remand this case for a review of his “unpreserved” points of error and re-sentencing under the standards articulated in *Rosales-Mireles*.

Respectfully submitted,


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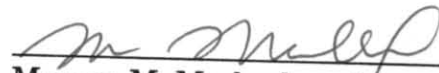
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Dated: October 26, 2018

CERTIFICATE OF COUNSEL

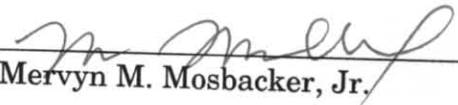
As counsel for the petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 44.2.



Mervyn M. Mosbacher, Jr.

CERTIFICATE OF SERVICE

I, Mervyn M. Mosbacker Jr., certify that today, October 26, 2018 I filed this Petition for Rehearing of Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit using the ECF system, which will automatically serve a copy of this brief on Ms. Carmen Mitchell, Assistant U.S. Attorney and on the United States Solicitor General, Room 5616, Department of Justice, 950 Pennsylvania Ave., N. W., Washington, DC 20530-0001.


Mervyn M. Mosbacker, Jr.