

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

CARLOS ALBERTO FUENTES-CANALES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In Rosales-Mireles v. United States, 138 S. Ct. 1897 (2018), this Court held that, in the ordinary case, proof of a plain Sentencing Guidelines error that affects the defendant's substantial rights is sufficient to meet the fourth prong of plain-error review. In its opinion this Court stated, *inter alia*, that “[a] substantive reasonableness determination . . . is an entirely separate inquiry from whether an error warrants correction under plain-error review” and that it is for *the district court* to decide “in the first instance . . . whether, taking all sentencing factors into consideration, including the correct Guidelines range, a sentence is ‘sufficient, but not greater than necessary.’ 18 U.S.C. § 3553(a).” 138 S. Ct. at 1910. Relatedly this Court indicated that, while a defendant's criminal history may be “relevant to *the District Court's* determination of an appropriate sentence under 18 U.S.C. § 3553(a)” (emphasis added), it “does not help explain whether the plain procedural error in [the] sentencing proceedings, which may have resulted in a longer sentence than is justified in light of that history, seriously affects the fairness, integrity, or public reputation of” those proceedings. *Id.* at 1910 n.5.

In Petitioner's case, the Fifth Circuit agreed that the district court plainly erred in deciding that his prior Texas conviction for burglary qualified as one for generic “burglary” and therefore plainly erred in deciding that the conviction qualified as one for a “crime of violence” warranting a 16-level enhancement under USSG § 2L1.2(b)(1)(A)(ii) (2014). The court denied him relief under the fourth prong of plain-error review, however. In its view, the facts of the case did not establish that Petitioner will serve a prison sentence that is “more than ‘necessary’ to fulfill the purposes of incarceration” because Petitioner “actually committed a [prior] crime just as serious as, if not more serious than, generic burglary” and “other defendants, convicted of far less culpable conduct, properly receive such an enhancement under the Guidelines.” The court also stressed that the “50-month sentence that he received is comparable to sentences that would be imposed on those who committed a comparable prior offense.”

The question presented is:

Did the Fifth Circuit err—to the point of warranting summary reversal—when it denied Petitioner relief under the fourth prong of plain-error review based on its own conclusions about the seriousness of the prior burglary offense and the need to avoid unwarranted sentencing disparities among defendants with similar records?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings are named in the caption of the case before this Court.¹

¹ In the courts below, Petitioner Carlos Fuentes-Canales was also known by the name of “Carlos Alberto Fuentes.”

TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES	iv
PRAYER.....	1
OPINION BELOW	1
JURISDICTION.....	1
SENTENCING GUIDELINE INVOLVED.....	2
STATEMENT OF THE CASE	3
BASIS OF FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT	5
REASONS FOR GRANTING THE WRIT.....	6
CONCLUSION.....	9
APPENDIX, Opinion of the court of appeals	10

TABLE OF AUTHORITIES

	<u>Page</u>
<u>CASES</u>	
Brosseau v. Haugen, 543 U.S. 194 (2004)	8
Rosales-Mireles v. United States, 138 S. Ct. 1897 (2018)	i, 6-8
Tolan v. Cotton, 134 S. Ct. 1861 (2014)	8
United States v. Agustin-Garcia, 699 Fed. Appx. 391 (5th Cir. 2017) (unpublished), <u>cert. granted, judgment vacated by</u> Agustin-Garcia v. United States, 138 S. Ct. 2673 (2018)	6
United States v. Cooks, 589 F.3d 173 (5th Cir. 2009)	7
United States v. Fuentes-Canales, -- F.3d --, 2018 WL 4140657 (5th Cir. 2018)	3-4, 7
United States v. Smith, 440 F.3d 704 (5th Cir. 2006)	7
United States v. Villarreal-Garcia, 685 Fed. Appx. 297 (5th Cir. 2017) (unpublished), <u>cert. granted, judgment vacated by</u> Villarreal-Garcia v. United States, 138 S. Ct. 2701 (2018)	6-7
<u>STATUTES AND RULES</u>	
8 U.S.C. § 1326(a)	3
8 U.S.C. § 1326(b)(2)	3
18 U.S.C. § 3231	5
18 U.S.C. § 3553(a)	i, 6
18 U.S.C. § 3553(a)(1)	7
18 U.S.C. § 3553(a)(6)	7

TABLE OF AUTHORITIES – (Cont’d)

	<u>Page</u>
<u>STATUTES AND RULES – (Cont’d)</u>	
28 U.S.C. § 1254(1)	1
Sup. Ct. R. 10(a)	8
Sup. Ct. R. 10(c)	8
Sup. Ct. R. 13.1	1
Sup. Ct. R. 16.1	8

SENTENCING GUIDELINES

USSG § 2L1.2	2
USSG § 2L1.2, comment. (n.1(B)(iii)) (2014)	2
USSG § 2L1.2(a)	2
USSG § 2L1.2(b)(1)(A)(ii) (2014)	i, 2-3

PRAYER

Petitioner Carlos Alberto Fuentes-Canales (“Petitioner”) respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

On August 30, 2018, the United States Court of Appeals for the Fifth Circuit entered its judgment and opinion affirming the judgment of conviction and sentence. The Westlaw version of the Fifth Circuit’s opinion is reproduced in the appendix to this petition.

JURISDICTION

The judgment of the court of appeals was entered on August 30, 2018. This petition is filed within 90 days of that date and therefore is timely. See Sup. Ct. R. 13.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

SENTENCING GUIDELINE INVOLVED

Section 2L1.2 of the 2014 edition of the United States Sentencing Guidelines provided in relevant part as follows:

§ 2L1.2. Unlawfully Entering or Remaining in the United States

- (a) Base Offense Level: **8**
- (b) Specific Offense Characteristic

(1) Apply the Greatest:

If the defendant previously was deported, or unlawfully remained in the United States, after –

- (A) a conviction for a felon that is . . . (ii) a crime of violence; . . . increase by **16** levels if the conviction receives criminal history points under Chapter Four or by **12** levels if the conviction does not receive criminal history points; . . .

USSG § 2L1.2 (2014) (bolding in original). The commentary to USSG § 2L1.2 provided in pertinent part that “[c]rime of violence’ means any of the following offenses under federal, state, or local law: . . . burglary of a dwelling . . .” USSG § 2L1.2, comment. (n.1(B)(iii)) (2014).

STATEMENT OF THE CASE

Petitioner was convicted and sentenced under 8 U.S.C. § 1326(a) and (b)(2), prohibiting an undocumented alien from attempting to enter, entering, or being found in the United States after deportation following an aggravated felony conviction. His offense level was increased by 16 levels for a pre-deportation “crime of violence” under USSG § 2L1.2(b)(1)(A)(ii) (2014), based on a prior Texas felony conviction for burglary of a habitation. Petitioner did not object to the 16-level enhancement. The district court sentenced him to a within-Guidelines sentence of 50 months’ imprisonment and three years’ supervised release.

On appeal, Petitioner argued that, due to an intervening change in Fifth Circuit law, the district court plainly erred in determining that his prior Texas burglary conviction qualified as one for generic “burglary” and therefore plainly erred in applying the 16-level “crime of violence” enhancement. The Fifth Circuit agreed with Petitioner that the first and second prongs of plain-error review were satisfied (*i.e.*, there was an error and the error was plain), but affirmed the sentence “because [Petitioner] failed to satisfy the fourth prong of plain-error review.” United States v. Fuentes-Canales, -- F.3d --, 2018 WL 4140657, at *1, *3-*4 (5th Cir. 2018) (Appendix).²

The Fifth Circuit’s decision to deny relief under the fourth prong of plain-error review was based on its own conclusions about the seriousness of the prior burglary offense and the

² The Court assumed, without deciding, that the third prong of plain-error review was satisfied. Fuentes-Canales, 2018 WL 4140657, at *5.

need to avoid unwarranted sentencing disparities among defendants with similar records. In its view, the facts of the case did not establish that Petitioner will serve a prison sentence that is “more than ‘necessary’ to fulfill the purposes of incarceration” because Petitioner “actually committed a [prior] crime just as serious as, if not more serious than, generic burglary” and “other defendants, convicted of far less culpable conduct, properly receive such an enhancement under the Guidelines.” Fuentes-Canales, 2018 WL 4140657, at *8, *10. It also stressed that the “50-month sentence that he received is comparable to sentences that would be imposed on those who committed a comparable prior offense.” Id. at *10.

BASIS OF FEDERAL JURISDICTION IN THE
UNITED STATES DISTRICT COURT

The district court had jurisdiction pursuant to 18 U.S.C. § 3231.

REASONS FOR GRANTING THE WRIT

In Rosales-Mireles v. United States, 138 S. Ct. 1897 (2018), this Court held that, in the ordinary case, proof of a plain Sentencing Guidelines error that affects the defendant's substantial rights is sufficient to meet the fourth prong of plain-error review. In its opinion this Court stated, inter alia, that “[a] substantive reasonableness determination . . . is an entirely separate inquiry from whether an error warrants correction under plain-error review” and that it is for *the district court* to decide “in the first instance . . . whether, taking all sentencing factors into consideration, including the correct Guidelines range, a sentence is ‘sufficient, but not greater than necessary.’ 18 U.S.C. § 3553(a).” 138 S. Ct. at 1910. Relatedly the Court stated that, while a defendant's criminal history may be “relevant to *the District Court's* determination of an appropriate sentence under 18 U.S.C. § 3553(a)” (emphasis added), it “does not help explain whether the plain procedural error in [the] sentencing proceedings, which may have resulted in a longer sentence than is justified in light of that history, seriously affects the fairness, integrity, or public reputation of” those proceedings. Id. at 1910 n.5.

In so stating, the Court in Rosales-Mireles firmly rejected the Fifth Circuit's practice of relying on a defendant's criminal history and recidivism as bases for denying relief under the fourth prong of plain-error review. See, e.g., United States v. Agustin-Garcia, 699 Fed. Appx. 391, 391-92 (5th Cir. 2017) (unpublished), cert. granted, judgment vacated by Agustin-Garcia v. United States, 138 S. Ct. 2673 (2018); United States v. Villarreal-Garcia, 685 Fed. Appx. 297, 298-99 (5th Cir. 2017) (unpublished), cert. granted, judgment vacated

by Villarreal-Garcia v. United States, 138 S. Ct. 2701 (2018).

In Petitioner's case, the Fifth Circuit denied relief under the fourth prong of plain-error review based on its own conclusions about the seriousness of the prior burglary offense and the need to avoid unwarranted sentencing disparities among defendants with similar records, see 18 U.S.C. § 3553(a)(1), (6). In its view, the facts of the case did not establish that Petitioner will serve a prison sentence that is "more than 'necessary' to fulfill the purposes of incarceration" because Petitioner "actually committed a [prior] crime just as serious as, if not more serious than, generic burglary" and "other defendants, convicted of far less culpable conduct, properly receive such an enhancement under the Guidelines." Fuentes-Canales, 2018 WL 4140657, at *8, *10. It also stressed that the "50-month sentence that he received is comparable to sentences that would be imposed on those who committed a comparable prior offense." Id. at *10.

The Fifth Circuit's decision is directly contrary to Rosales-Mireles. In essence the Fifth Circuit affirmed the 50-month sentence as reasonable,³ contrary to Rosales-Mireles's guidance that a substantive reasonableness determination is "an entirely separate inquiry from whether an error warrants correction under plain-error review." 138 S. Ct. at 1910. In so doing, it also ignored that a defendant's criminal history (here, the circumstances of the

³ The Fifth Circuit has said that a sentence is substantively unreasonable where it "does not account for a factor that should receive significant weight, it gives significant weight to an irrelevant or improper factor, or it represents a clear error of judgment in balancing sentencing factors." United States v. Cooks, 589 F.3d 173, 186 (5th Cir. 2009) (citation omitted) (so holding for a Guidelines sentence) (citation omitted); United States v. Smith, 440 F.3d 704, 708 (5th Cir. 2006) (same for a non-Guidelines sentence).

prior burglary offense) is not relevant to the fourth prong of plain-error review. See id. at 1910 n.5. The Fifth Circuit thus applied the fourth-prong of plain-error review, in a published decision, in a way that conflicts with Rosales-Morales and also represents a serious departure from the accepted and usual course of judicial proceedings. And, for those reasons, this Court should grant certiorari in petitioner’s case. See Sup. Ct. R. 10(a), (c).

Because the conflict is direct and readily apparent from the Fifth Circuit’s rationale, and because ensuring proper application of the standards for plain-error review is important, this is a rare case in which a “summary disposition on the merits” is appropriate. See Sup. Ct. R. 16.1. This Court has recognized that summary reversal is appropriate where a lower court’s judgment reflects a clear misapprehension of the governing legal standards in light of this Court’s precedents. See Tolan v. Cotton, 134 S. Ct. 1861, 1868 (2014) (“And while ‘this Court is not equipped to correct every perceived error coming from the lower federal courts,’ we intervene here because the opinion below reflects a clear misapprehension of summary judgment standards in light of our precedents.” (citations omitted)); Brosseau v. Haugen, 543 U.S. 194, 198 n.3 (2004) (“We exercise our summary reversal procedure here simply to correct a clear misapprehension of the qualified immunity standard.”).

Accordingly, the petition for a writ of certiorari should be granted, and the case summarily reversed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted, and the case summarily reversed.

Respectfully submitted,

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