No. 18-5969

IN THE SUPREME COURT OF THE UNITED STATES

CARLOS ALBERTO FUENTES-CANALES, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

BRIAN A. BENCZKOWSKI
Assistant Attorney General

KIRBY A. HELLER
Attorney

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

QUESTION PRESENTED

Whether the court of appeals permissibly exercised its discretion to deny relief on plain-error review of the calculation of petitioner's advisory Sentencing Guidelines range.

IN THE SUPREME COURT OF THE UNITED STATES

No. 18-5969

CARLOS ALBERTO FUENTES-CANALES, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-10) is reported at 902 F.3d 468.

JURISDICTION

The judgment of the court of appeals was entered on August 30, 2018. The petition for a writ of certiorari was filed on September 6, 2018. 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 Southern District of Texas, petitioner was convicted of

unlawful reentry into the United States following removal, in violation of 8 U.S.C. 1326. Pet. App. 1. The district court sentenced him to 50 months of imprisonment, to be followed by three years of supervised release. Ibid. The court of appeals affirmed. Id. at 1-10.

1. Petitioner is an El Salvadoran citizen who was removed from the United States in February 2015, following a felony conviction for Texas burglary in 2010. Presentence Investigation Report (PSR) ¶ 8. According to state records from the Texas burglary conviction, petitioner had entered the home of his ex-wife without permission, placed three knives to her abdomen, and stated that he was going to kill her. PSR ¶ 25. Two months after his removal, in April 2015, petitioner was found in Laredo, Texas, by a United States Border Patrol officer, and admitted he had no right to be in the United States. PSR ¶ 7. A grand jury in the Southern District of Texas returned an indictment charging petitioner with entering, attempting to enter, and being found illegally in the United States, in violation of 8 U.S.C. 1326. Indictment 1. Petitioner pleaded guilty to the charge without a plea agreement. PSR ¶ 2.

The Probation Office prepared a presentence report. In the report, the Probation Office determined that petitioner's base offense level under the Sentencing Guidelines was eight, but recommended a 16-level increase under Sentencing Guidelines § 2L1.1(b)(1)(A)(ii) (2014), because petitioner previously had

been removed from the United States following a conviction for a felony crime of violence, which the Guidelines defined to include "burglary of a dwelling or any other offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another." Id. § 2L1.2(b)(1)(A)(ii), comment. (n.1(B)(iii)); see PSR ¶¶ 13-14. The report listed petitioner's 2010 Texas conviction for burglary as the qualifying crime of violence. PSR ¶ 14. Based on a criminal history category of III, the Probation Office calculated petitioner's advisory Guidelines range as 46 to 57 months of imprisonment. PSR ¶ 54. Petitioner did not object to the Probation Office's Guidelines calculations.

The district court adopted the Probation Office's calculations and sentenced petitioner to 50 months of imprisonment, to be following by three years of supervised release. Sent. Tr. 7-8. The court rejected petitioner's request for a sentence of 36 months of imprisonment, stating that a downward variance from the Guidelines range was not warranted in light of the seriousness of petitioner's criminal history, the recency of his prior convictions, and his illegal reentry a mere two months after he was removed. Id. at 6-7. The court also explained that "although * * * a high range would have been and could have been justified," it did not impose a higher sentence because "it's your first conviction for * * * this offense." Id. at 8.

2. The court of appeals affirmed. Pet. App. 1-10.

Petitioner argued for the first time on appeal that the district court erred in applying the 16-level enhancement, because his prior conviction under Texas Penal Code Ann. § 30.02(a) (West 2003) did not qualify as "burglary of a dwelling," as required to trigger the enhancement under Sentencing Guidelines § 2L1.1(b)(1)(A)(ii), comment. (n.1(b)(iii)). See Pet. C.A. Br. 10-16. Texas Penal Code Ann. § 30.02(a) (West 2003) provides that a person commits burglary

> if without the effective consent of the owner, the person: (1) enters a habitation, or a building (or any portion of a building) not then open to the public, with intent to commit a felony, theft, or an assault; or (2) remains concealed, with intent to commit a felony, theft, or an assault, in a building or habitation; or (3) enters a building or habitation and commits or attempts to commit a felony, theft, or an assault.

Petitioner contended his conviction under that provision did not qualify as a conviction for generic burglary under the Guidelines because Subsection (a)(3) "does not have as an element 'intent to commit a crime at the time of entry,'" and the state court records for his conviction did not indicate the specific subsection of the statute under which petitioner was convicted. Pet. C.A. Br. 14 (quoting United States v. Castaneda, 740 F.3d 169, 174 (5th Cir. 2013) (per curiam)).

The court of appeals observed that petitioner would be entitled to relief on his forfeited claim only if he could establish plain error under Federal Rule of Criminal Procedure 52(b), which requires a threshold showing of "an 'error' that is

'plain' and that 'affects substantial rights.'" Pet. App. 2 (quoting United States v. Olano, 507 U.S. 725, 732 (1993)) (brackets omitted). The court explained that, even if those three elements are satisfied, Rule 52(b) "leaves the decision to correct the forfeited error within the sound discretion of the court of appeals, and the court should not exercise that discretion unless the error seriously affects the fairness, integrity or public reputation of judicial proceedings." Ibid. (quoting Olano, 507 U.S. at 732) (brackets omitted). The court noted that while petitioner's appeal was pending, it had concluded in a different case that Texas Penal Code Ann. § 30.02(a)(1) and (3) (West 2003) are not divisible into separate crimes and that Subsection (a)(3) is broader than generic burglary. See United States v. Herrold, 883 F.3d 517, 529 (2018) (en banc), petitions for cert. pending, No. 17-1445 (filed Apr. 18, 2018); No. 17-9127 (filed May 21, 2018). The court thus agreed with petitioner that the district court erred in relying on the 2010 Texas conviction to support the Guidelines enhancement and that the error was plain. Pet. App. 2-3; see Henderson v. United States, 568 U.S. 266, 269 (2013) ("[A]s long as the error was plain as of * * * the time of appellate review * * * the error is 'plain' within the meaning of the Rule"). The court also assumed, without deciding, that the error had affected substantial rights. Pet. App. 4.

The court of appeals found it inappropriate, however, to exercise its discretion under the fourth requirement of the plain-

error standard. The court recognized that, under this Court's decision in Rosales-Mireles v. United States, 138 S. Ct. 1897 (2018), "in the ordinary case," the district court's reliance on a miscalculated Guidelines range will warrant relief under the fourth prong. Pet. App. 4 (quoting Rosales-Mireles, 138 S. Ct. at 1909)). But it observed that Rosales-Mireles had anticipated "instances where countervailing factors satisfy the court of appeals that the fairness, integrity, and public reputation of the proceedings will be preserved absent correction." Ibid. (quoting Rosales-Mireles, 138 S. Ct. at 1909). The court found that "[t]his [wa]s such a case," because although petitioner's prior burglary conviction was not categorically a "crime of violence" under the Sentencing Guidelines, the state court records "reveal[ed] that the state-court jury necessarily found (based on the state court's instructions and charge) that [petitioner] committed generic burglary or generic aggravated assault or both." Ibid. The court also noted that the "unchallenged and unrebutted" evidence in the presentence report -- that petitioner entered his ex-wife's home without permission, held three knives to her abdomen, and threatened to kill her -- similarly provided "compelling evidence" that petitioner "did commit the generic crime of burglary and used a deadly weapon in the process." Id. at 6. The court stated that petitioner's sentence was not "'more than "necessary" to fulfill the purposes of incarceration,'" because petitioner "actually committed a crime just as serious as, if not more serious than,

generic burglary." Id. at 15. And it determined that leaving petitioner's sentence in place would not call into question the integrity or public reputation of judicial proceedings in the circumstances of this case. Ibid. (quoting Rosales-Mireles, 138 S. Ct. at 1907).

ARGUMENT

Petitioner contends (Pet. 6-8) that the court of appeals erred in declining to grant relief on his forfeited claim of error in the calculation of his advisory Guidelines range. Petitioner's challenge to his sentence is now moot because he has been released from prison. And even assuming the case presents a live controversy, the court did not abuse its discretion under Federal Rule of Criminal Procedure 52(b), and its decision does not conflict with any decision of this Court or of another court of appeals.

1. This case is moot because petitioner's 50-month term of imprisonment has already expired and petitioner has been removed from the United States.

a. When petitioner filed this petition on September 6, 2018, he was scheduled to be released just two months later, on December 8, 2018. The government promptly waived its response on September 20, 2018, and this Court called for a response on October 9, 2018. Even without any extension of the time for filing a response, petitioner would have been released from prison nearly a month before the Court's consideration of the petition at its

January 4, 2019 Conference. And according to the Federal Bureau of Prisons, petitioner was, in fact, released on December 8, 2018. See Fed. Bureau of Prisons, U.S Dep't of Justice, Find an Inmate, https://www.bop.gov/inmateloc (search for register number 87313-379) (last visited Feb. 8, 2019). Because petitioner's Guidelines challenge affects only the length of his sentence rather than his underlying conviction, the case became moot on that date. See Lane v. Williams, 455 U.S. 624, 631 (1982) ("Since respondents elected only to attack their sentences, and since those sentences expired during the course of these proceedings, this case is moot.").

The completion of a criminal defendant's sentence will not normally moot an appeal challenging the conviction because criminal convictions generally have "continuing collateral consequences" beyond just the sentences imposed. Spencer v. Kemna, 523 U.S. 1, 8 (1998). But a "presumption of collateral consequences" does not extend beyond criminal convictions. Id. at 12. When a defendant challenges only the length of his term of imprisonment, his completion of that prison term thus moots an appeal, unless the defendant can show that the challenged action continues to cause "collateral consequences adequate to meet Article III's injury-in-fact requirement," id. at 14, and that those consequences are "likely to be redressed by a favorable judicial decision," id. at 7 (citation omitted).

Petitioner has not made that showing here. The only portion of petitioner's sentence to which he is still subject is his term of supervised release. And in United States v. Johnson, 529 U.S. 53, 54 (2000), this Court held that a prisoner who serves too long a term of incarceration is not entitled to receive credit against his term of supervised release. The Court in Johnson recognized that a prisoner who has been incarcerated beyond his proper term of imprisonment might be able to persuade the sentencing court to exercise its discretion to shorten the duration of the prisoner's term of supervised release under 18 U.S.C. 3583(e)(1), which permits a court to do so "if it is satisfied that such action is warranted by the conduct of the defendant released and the interest of justice." 529 U.S. at 60 (citation omitted). But, as the Third Circuit has explained, "[t]he possibility that the sentencing court will use its discretion to modify the length of [a defendant's] term of supervised release * * * is so speculative" that it does not suffice to present a live case or controversy. Burkey v. Marberry, 556 F.3d 142, 149, cert. denied, 558 U.S. 969 (2009).[1]

[1] Other courts of appeals have concluded that the possibility that the sentencing court would exercise its discretion to reduce a defendant's supervised-release term is sufficient to prevent his sentencing challenge from becoming moot upon completion of his prison term. See Tablada v. J.E. Thomas, 533 F.3d 800, 802 n.1 (9th Cir. 2008), cert. denied, 560 U.S. 964 (2010); Levine v. Apker, 455 F.3d 71, 77 (2d Cir. 2006); Dawson v. Scott, 50 F.3d 884, 886 n.4 (11th Cir. 1995). Those decisions, however, failed to address this Court's decision in Johnson.

b. Moreover, petitioner has now been removed from the United States. As the Tenth Circuit has explained, where "deportation has eliminated all practical consequences associated with serving a term of supervised release," a defendant's "liberty is in no way affected by any [alleged] sentencing error." United States v. Vera-Flores, 496 F.3d 1177, 1181 (2007). While he remains outside the United States, petitioner has no obligation to report to a probation officer and is not under the supervision or control of the United States Probation Office. C.A. ROA 38, 102-104.[2] Petitioner thus "does not * * * have an actual injury likely to be redressed by a favorable judicial decision, even assuming arguendo that [he] states valid claims on appeal which would be likely to result in the modification or elimination of his supervised release term on remand." Vera-Flores, 496 F.3d at 1181; see also United States v. Frook, 616 F.3d 773, 778 (8th Cir.), cert. denied, 562 U.S. 1096 (2010); Okereke v. United States, 307 F.3d 117, 121 (3d Cir.), cert. denied, 537 U.S. 1038 (2002); United States v. Mercurris, 192 F.3d 290, 294 (2d Cir.

[2] Petitioner's only continuing obligation is "not to return to the United States" until his three-year term of supervised release expires. C.A. ROA 38. Petitioner, however, is already subject to the same prohibition by operation of law. See 8 U.S.C. 1182(a)(9)(A). To the extent that a case involving a removed alien might in some circumstances present a live controversy, see United States v. Campos-Serrano, 404 U.S. 293, 294 n.2 (1971), no such circumstance is present here. See ibid. (finding no mootness where government sought to reinstate conviction of removed defendant).

1999).[3] Further review is therefore unwarranted for that reason as well.

2. Even assuming that this case presents a live controversy, the court of appeals did not abuse its discretion in declining to grant relief on petitioner's forfeited claim of error, and its discretionary determination does not warrant this Court's review.

a. In Rosales-Mireles v. United States, 138 S. Ct. 1897 (2018), this Court held that a miscalculation of the Sentencing Guidelines that is plain and affects a defendant's substantial rights "ordinarily" will warrant relief under Rule 52(b). Id. at 1907. The Court also explained, however, that "any exercise of discretion at the fourth prong of Olano inherently requires 'a case-specific and fact-intensive' inquiry," and it accordingly recognized that "[t]here may be instances where countervailing factors satisfy the court of appeals that the fairness, integrity, and public reputation of the proceedings will be preserved absent correction." Id. at 1909 (quoting Puckett v. United States, 556 U.S. 129, 142 (2009)).

The court of appeals' decision in this case is consistent with Rosales-Mireles. Unlike in Rosales-Mireles, in which the

[3] Although the Fifth Circuit has held that removal does not render moot a defendant's challenge to "a term of an existing supervised release," United States v. Heredia-Holguin, 823 F.3d 337, 343 (2016) (en banc), it specifically distinguished cases such as this one, in which the defendant challenges only his term of incarceration, id. at 342 n.3.

Probation Office double counted a single conviction in calculating Rosales-Mireles's criminal history category, any error in this case was based solely on the Probation Office's failure to anticipate the future circuit case law under which the Texas burglary statute underlying petitioner's prior conviction does not categorically define a "crime of violence." Even if that case law were correct,[4] the court acted within its discretion to find that in the specific circumstances of this case, the error did not warrant plain-error relief because the jury instructions for petitioner's 2010 conviction make clear that the Texas jury necessarily found that petitioner actually had committed a "crime of violence" within the meaning of the Sentencing Guidelines. See Pet. App. 4 ("A careful review of [petitioner's] conviction for

[4] In United States v. Herrold, supra, the Fifth Circuit determined that a conviction under Texas Penal Code Ann. § 30.02(a)(1) and (3) (West 2003) does not qualify as generic burglary because Subsection (a)(3) does not require proof of an intent to commit a crime inside the structure at the time of entry. See 883 F.3d at 530-537. As the government explained in its petition for a writ of certiorari to review the Herrold decision, that determination was incorrect because generic burglary does not require proof of an intent to commit a crime at the time of entry. See Pet. at 9-12, Herrold, supra (No. 17-1445). The government's petition remains pending, and the Court has now granted a petition for certiorari in another case to decide the same question, which has divided the circuits. See Quarles, supra. Because a ruling in the government's favor in Quarles would mean that the petitioner's forfeited claim of error fails at the first prong of plain-error review, this case would be an unsuitable vehicle for providing any further guidance on the fourth prong of the plain-error standard. Holding this petition for the Court's disposition of Quarles is not necessary, however, both because this case is moot and because the court of appeals did not abuse its discretion in applying the fourth prong of the plain-error standard even if the Fifth Circuit's determination in Herrold were correct.

burglary reveals that the state-court jury necessarily found (based on the state court's instructions and charge) that [petitioner] committed generic burglary or generic aggravated assault or both."). While those jury instruction may be irrelevant for purposes of calculating petitioner's Guidelines range, see Herrold, 883 F.3d at 522-523 (concluding that Texas Penal Code Ann. § 30.02(a)(1) and (3) (West 2003) define one indivisible crime), the court of appeals permissibly determined that leaving petitioner's existing sentence in place would not adversely affect the "'fairness, integrity, or public reputation of judicial proceedings'" where petitioner "who, as a factual matter (beyond a reasonable doubt in this case), committed a generic crime of violence has been treated the same as similarly situated defendants convicted of a generic crime of violence." Pet. App. 4 (citation omitted).

b. Contrary to petitioner's contention (Pet. 7-8), the court of appeals did not "in essence" affirm petitioner's sentence merely because it is substantively reasonable. Rather, the court considered the underlying goal of the Guidelines to achieve "uniformity and proportionality in sentencing," Pet. App. 6 (quoting Rosales-Mireles, 138 S. Ct. at 1902), and the particular circumstances of this case, in which a Texas jury had found that petitioner "actually committed a crime just as serious as, if not more serious than, generic burglary," ibid. On that basis, the court declined to vacate a sentence "that would be imposed in the

mine run of cases in which the defendant was previously convicted of generic burglary." Ibid. Rosales-Mireles instructs that the fourth-requirement analysis is a "case-specific and fact-intensive inquiry," 138 S. Ct. at 1909 (citation omitted), and petitioner errs in suggesting otherwise (Pet. 7-8). The court thus did not exceed the bounds of its discretion in considering the circumstances of the specific prior conviction at issue and determining that petitioner's current sentence treated him similarly to other similarly situated defendants. See Pet. App. 7 ("The 50-month sentence that [petitioner] received is comparable to sentences that would be imposed on those who committed a comparable prior offense.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

BRIAN A. BENCZKOWSKI
Assistant Attorney General

KIRBY A. HELLER
Attorney

FEBRUARY 2019