NO. 18-5969

IN THE SUPREME COURT OF THE UNITED STATES

CARLOS ALBERTO FUENTES-CANALES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITIONER'S REPLY TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION

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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?

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PETITIONER'S REPLY TO THE MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In his petition for a writ of certiorari, Petitioner Carlos Alberto Fuentes-Canales ("Mr. Fuentes-Canales") argued that the Court should grant certiorari in his case to resolve whether the Fifth Circuit erred—to the point of warranting summary reversal—when it denied him relief under the fourth prong of plain-error review based on its own conclusions about the seriousness of his prior burglary offense and the need to avoid unwarranted sentencing disparities among defendants with similar records. Pet. 6-8. Mr. Fuentes-Canales contended that the Fifth Circuit applied the fourth-prong of plain-error review, in a published decision, in a way that conflicts with Rosales-Mireles and also represents a serious departure from the accepted and usual course of judicial proceedings. Pet. 7-8. He also argued that, 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 would be appropriate. Pet. 8.

In response, the government argues that Mr. Fuentes-Canales's challenge to his 50-month sentence is now moot because, since filing his petition for a writ of certiorari, he has been released from prison and deported. Br. in Opp. 7-11. It also contends that the Fifth Circuit's decision in this case is consistent with Rosales-Mireles because (1) "any error in this case was based solely on the Probation Officer's failure to anticipate the future circuit case law under which the Texas burglary statute underlying [Mr. Fuentes-Canales]'s prior

conviction does not categorically define a 'crime of violence'"; and (2) "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 [Mr. Fuentes-Canales]'s 2010 [burglary] conviction make clear that the Texas jury necessarily found that [Mr. Fuentes-Canales] actually had committed a 'crime of violence' within the meaning of the Sentencing Guidelines." Br. in Opp. 11-13.

The government ultimately concludes that the Fifth Circuit "did not exceed the bounds of its discretion in considering the circumstances of the specific prior conviction at issue and determining that [Mr. Fuentes-Canales]'s current sentence treated him similarly to other similarly situated defendants." Br. in Opp. 14. It also suggests, in a footnote, that Mr. Fuentes-Canales's case would be an unsuitable vehicle for providing any further guidance on the fourth prong of plain-error review because "a ruling in the government's favor in Quarles[v. United States, No. 17-778] would mean that [Mr. Fuentes-Canales]'s forfeited claim of error fails at the first prong of plain-error review[.]" Br. in Opp. 12 n. 4. As discussed below, the government's arguments are not persuasive.

A. The question of mootness should be left for the Fifth Circuit to decide in the first instance. In any event, the case is not moot.

Since Mr. Fuentes-Canales is still subject to a three-year term of supervised release, the question whether his challenge to his 50-month sentence is moot, in light of his recent release from prison and deportation, is one that should be left for the Fifth Circuit to decide in the first instance. See, e.g., Villarreal-Garcia v. United States, 138 S. Ct. 2701 (2018)

(remanding to the Fifth Circuit for further consideration in light of Rosales-Mireles, "and for consideration of the question whether the case is moot" in light of the petitioner's release from prison and deportation); Solano-Hernandez v. United States, 138 S. Ct. 2701 (2018) (same). The government is wrong to suggest otherwise.

In any event, Mr. Fuentes-Canales's case is not moot because: (1) he is still subject to a term of supervised release with special conditions that have "deterrent and protective effects after deportation"[1] and, therefore, continue to "have practical consequences," see United States v. Flores-Juarez, 723 Fed. Appx. 84, 87 (3d Cir. 2018) (unpublished) (citing United States v. Heredia-Holguin, 823 F.3d 337, 341 (5th Cir. 2016) (en banc)); and (2) his supervised-release term would not be "immune to modification by the district court" on remand. United States v. Lares-Meraz, 452 F.3d 352, 354 (5th Cir. 2006); United States v. Solano-Hernandez, - Fed. Appx. - , 2019 WL 626151, at *2-*3 (5th Cir. Feb. 13, 2019) (unpublished); United States v. Navarro-Doblado, 697 Fed. Appx. 437, 437 (5th Cir. 2017) (unpublished).[2]

Mr. Fuentes-Canales's three-year term of supervised release is at the statutory and

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[1] Those special conditions include: (1) he may not reenter the United States illegally after deportation; (2) if he reenters (legally or illegally), he must "report to the nearest U.S. Probation Office immediately"; and (3) upon reporting, his supervision by the probation officer will "reactivate[] automatically." If he violates these supervised-release conditions he will be subject to revocation proceedings and reimprisonment. See 18 U.S.C. § 3583(e)(3); Heredia-Holguin, 823 F.3d 342; Flores-Juarez, 723 Fed. Appx. 87 & n. 3.

[2] His presence would not necessarily be required for a modification of supervised release. Flores-Juarez, 723 Fed. Appx. at 87 n.4 (citing Fed. R. Crim. P. 32.1(c)(2)).

Guidelines maximum for the illegal-reentry offense (a Class C felony). See 18 U.S.C. § 3583(b)(2); USSG § 5D1.2(a)(2). On remand, the district court may reduce or eliminate the supervised-release term to account for the over-served time. Solano-Hernandez, 2019 WL 626151, at *3; see also United States v. Solano-Rosales, 781 F.3d 345, 355 (6th Cir. 2015) ("Here, there is no minimum supervised release term and therefore the district court would retain the discretion to reduce or eliminate [the deported] Defendant's supervised release term. The appeal is therefore not moot."), cited with approval in Heredia-Holguin, 823 F.3d at 343 n.5; Flores-Juarez, 723 Fed. Appx. at 86 (noting the parties' agreement that "this appeal raises a possibility of credit against the term of supervised release for improper imprisonment"); Br. in Opp. 9 n. 1 (conceding that "[o]ther courts of appeals[, i.e., the Second, Ninth, and Eleventh Circuits,] 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.").

Also, if on remand the district court resentenced Mr. Fuentes-Canales to a term of less than 50 months in prison for the instant illegal-reentry offense, the Bureau of Prisons would award over-served time credit to any future revocation sentence imposed in this case, as required by 18 U.S.C. § 3585(b).[3] For these reasons, the government is incorrect

[3] See U.S. Department of Justice Policy Form BP-A623, "Notice to United States Probation Office of Over Served Time" (stating that "[i]f the prisoner is returned with a Supervised Release Violator (SRV) Term, the Bureau of Prisons will award the over-served time credit to the revocation sentence as required by 18 U.S.C. [§] 3585(b)"), available at

in arguing that Mr. Fuentes-Canales's challenge to his sentence is now moot.

B. The Fifth Circuit's decision in this case is inconsistent with *Rosales-Mireles*.

In Rosales-Mireles, 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 Mr. Fuentes-Canales's case, therefore, the Fifth Circuit's inquiry into the "circumstances of the specific prior [burglary] conviction at issue" (Br. in Opp. 14), including the jury instructions in that case, ran afoul of Rosales-Mireles; the details of Mr. Fuentes-Canales's criminal history were for *the district court* to consider, in the first instance, under

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https://www.bop.gov/policy/forms/BP_A0623.pdf (last visited 2/12/19); see also BOP Program Statement 5880.28, "Change Notice" to Sentence Computation Manual - CCCA, at Page 1-69 (stating that "[a]ny prior custody time spent in official detention after the date of offense that was not awarded to the original sentence or elsewhere shall be awarded to the revocation term"), available at https://www.bop.gov/policy/progstat/5880_028.pdf (last visited 2/12/19).

18 U.S.C. § 3553(a)(1). So, too, did its inquiry into whether Mr. Fuentes-Canales's "current sentence treated him similarly to other similarly situated defendants" (Br. in Opp. 14); the need to avoid unwarranted sentence disparities among similarly situated defendants was for *the district court* to consider, in the first instance, under 18 U.S.C. § 3553(a)(6).

The Court in Rosales-Mireles did not envision that a probation officer's failure to anticipate "future circuit case law" (Br. in Opp. 12) would be a factor weighing against the exercise of discretion to correct a Guidelines-calculation error that is plain at the time of appeal. The Court instead emphasized that a probation officer's mistake can be "remedied through a relatively inexpensive resentencing proceeding." Rosales-Mireles, 138 S. Ct. at 1909.

Finally, although in Quarles this Court will decide whether generic burglary requires proof that intent to commit a crime was present at the time of unlawful entry or first unlawful remaining, Quarles should have no effect on the timing of this Court's disposition of Mr. Fuentes-Canales's petition for a writ of certiorari. As the respondent in Herrold correctly observes, "[t]here are additional and independent reasons to hold that [Tex. Pen. Code] § 30.02(a)(3) describes a non-generic burglary" — including that the offense may be committed "without any proof of breaking or any similar misconduct." Br. in Opp. 12-14, United States v. Herrold, No. 17-1445. It therefore is not true that "a ruling in the government's favor in Quarles would mean that [Mr. Fuentes-Canales's] forfeited claim of error fails at the first prong of plain-error review[.]" Br. in Opp. 12 n. 4.

For these reasons, the government is incorrect in arguing that Mr. Fuentes-Canales's

petition for a writ of certiorari should be denied.

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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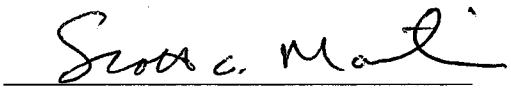

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