

No. 18 --

IN THE
SUPREME COURT OF THE UNITED STATES

JIMMY WALTER FUENTES,

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

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

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a court of appeals that finds a plain error in the district court's selection of a statutory maximum should ordinarily order a limited remand for the sole purpose of determining whether this error affected substantial rights?

PARTIES

Jimmy Walter Fuentes is the Petitioner, who was the defendant-appellant below. The United States of America is the Respondent, who was the plaintiff-appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Jimym Walter Fuentes, respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The judgment of conviction and sentence was entered November 22, 2017, and is provided in the Appendix to the Petition. [Appendix A]. The unpublished opinion of the United States Court of Appeals for the Fifth Circuit is captioned as *United States v. Fuentes*, 735 Fed. Appx. 161 (5th Cir. August 23, 2018)(unpublished), and is also provided in the Appendix to the Petition. [Appendix B].

JURISDICTIONAL STATEMENT

The opinion order of the United States Court of Appeals for the Fifth Circuit affirming the sentence as modified were issued on August 23, 2018. [Appx. B]. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

The case will not be moot, even if this Court's decisional process extends into next term. Petitioner is slated for release April 12, 2019. But he will remain subject to a three year term of supervised release, which the district court may modify in the even that a higher court finds error in the term of imprisonment. *See Johnson v. United States*, 529 U.S. 53, 60 (2000).

STATUTES, RULES, AND GUIDELINES INVOLVED

8 U.S.C. §1326 provides in part:

(a) In general

Subject to subsection (b), any alien who—

(1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,
shall be fined under title 18, or imprisoned not more than 2 years, or both.

(b) Criminal penalties for reentry of certain removed aliens

Notwithstanding subsection (a), in the case of any alien described in such subsection—

(1) whose removal was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony), such alien shall be fined under title 18, imprisoned not more than 10 years, or both;

(2) whose removal was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such title, imprisoned not more than 20 years, or both...

18 U.S.C. §3553(a) provides in part:

(a) Factors To Be Considered in Imposing a Sentence.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing

Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

Federal Rule of Criminal Procedure 52 provides:

Harmless and Plain Error

(a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

(b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

STATEMENT OF THE CASE

A. Prior Re-Entry Case

In November 2013, Petitioner Jimmy Walter Fuentes was convicted by a federal district court in Maryland of illegal re-entry to the United States following deportation. *See* (ROA.137-138). In that Maryland case, the government sought to enhance his sentence based on a prior conviction. *See* (ROA.248-259). It maintained that conviction to be a felony, an aggravated felony, and a “crime of violence” under then-applicable USSG §2L1.2. *See* (ROA.248-259). The Maryland district court rejected all of the government’s claims. *See* (ROA.212-213, 219).

The Maryland court’s ruling on the aggravated felony question was in the alternative. The court stated that it had “two problems” with the government’s contention that the prior conviction was an aggravated felony. (ROA.219). First, it thought its legal position doubtful, and resolved that doubt in favor of the defendant. *See* (ROA.219). Second, the court thought that a lesser sentence would be warranted in any case. *See* (ROA.219). The court entered sentence of time served (reflecting less than a year of imprisonment), and described the offense on the judgment as a violation of 8 U.S.C. §1326(a). *See* (ROA.137-138). Subsection (a) of 1326 governs illegal re-entry in the absence of a prior felony or aggravated felony.

B. District Court Proceedings in the Instant Case

After his removal, Petitioner returned to the United States and was found in the Northern District of Texas. *See* (ROA.34). A grand jury indicted him for illegal re-entry, naming 8 U.S.C. §1326(a) and (b)(2) as the statute violated. *See* (ROA.9). Section 1326(b)(2) applies to defendants who re-enter the country following an aggravated felony.

Petitioner pleaded guilty, *see* (ROA.31-34), and Probation generated a Presentence Report (PSR). The PSR applied the 2016 version of USSG §2L1.2, and included a four level enhancement for a pre-removal “conviction for any ... felony offense (other than an illegal reentry offense)...” *See* (ROA174-175); USSG §2L1.2(b)(2)(D). It also concluded that the statutory maximum was twenty

years, the applicable punishment for defendants who re-enter the country following an aggravated felony. *See* (ROA183).

The sentencing hearing was adjourned so that the parties could locate the pleadings and transcript of the Maryland proceedings. *See* (ROA.102-106). When it reconvened, the court below concluded that it was bound by the Maryland court's findings. *See* (ROA.113-114). Specifically, it deferred to the Maryland court's finding that Petitioner had never sustained a felony other than his last illegal re-entry. *See* (ROA.113-114). It thus found that the Guidelines were 24-30 months imprisonment, and sentenced at the top of this range. *See* (ROA.116, 124).

Yet the court did not overrule the PSR's finding that Petitioner had been previously convicted of an aggravated felony. *See* (ROA.116). To the contrary, it stated that it was adopting the PSR save only its Guideline calculation. *See* (ROA.291). And the court named the statute of conviction on the judgment as 8 U.S.C. §1326(b)(2). *See* (ROA.49).

C. Proceedings in the Court of Appeals

On appeal, Petitioner argued that the district court plainly erred in determining his statutory maximum. Under Fifth Circuit law, he argued, the district court was bound by a prior court's determination that his convictions lacked an aggravated felony at that time. *See United States v. Gamboa-Garcia*, 620 F.3d 546, 548-549 (5th Cir. 2010); *United States v. Piedra-Morales*, 843 F.3d 623, 624-625 (5th Cir. 2016); *United States v. Solano-Hernandez*, 847 F.3d 170, 179 (5th Cir. 2017); *United States v. Larios-Villatoro*, 684 Fed. Appx. 411, 411-412 (5th Cir. 2017); *United States v. Blancas-Rosas*, 637 Fed. Appx. 855, 856 (5th Cir. 2016)(unpublished); *United States v. Galindo*, 606 Fed. Appx. 140, 141 (5th Cir. 2014)(unpublished). He thus argued that the district court had sentenced him under the mistaken impression that his statutory maximum was 20 years rather than ten.

The court of appeals found plain error, and, indeed, amended the judgment to strike any reference to 8 U.S.C. §1326(b)(2). [Appendix B]. Yet it declined to order resentencing, for the sole reason "that nothing in the record suggests that the 20-year maximum sentence for a violation of §

1326(b)(2) influenced the district court's sentencing decision." [Appendix B]. It did not ask the district court whether it would have imposed a lesser sentence if it were aware of the lesser statutory range. [Appendix B].

REASON FOR GRANTING THE PETITION

The decision below conflicts with that of four courts of appeals and neglects recent guidance from this Court.

Federal Rule of Criminal Procedure 52(b) authorizes the courts of appeals to notice plain error even in the absence of an objection if it affects a party's substantial rights. *See Fed. R. Crim. P.* 52(b). This Court has recognized that plain error affecting the Federal Sentencing Guideline range will generally affect the parties' substantial rights. *See Molina-Martinez v. United States*, __ U.S. __, 136 S.Ct. 1338 (2016). Further, it has authorized the courts of appeals to ask district courts – through a limited remand – whether they would have likely imposed a different sentence but for a plain error. *See Molina-Martinez*, 136 S.Ct. at 1348 (noting with approval that “[c]ourts have, for example, developed mechanisms short of a full remand to determine whether a district court in fact would have imposed a different sentence absent the error.”)(citing *United States v. Currie*, 739 F. 3d 960, 967 (7th Cir. 2014)). This comports with 28 U.S.C. §2106, which provides the courts of appeals broad discretion to “direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.”

The court below found a plain error in the determination of the defendant's statutory sentencing range. [Appendix B]. Yet it declined to order resentencing, evidently finding no presumption of a different outcome in the absence of Guideline error. [Appendix B]. Nor did it follow the guidance of this Court in *Molina-Martinez* regarding a limited remand. [Appendix B]. Rather, it simply observed that the record as currently composed showed no affect on the sentence imposed, and concluded that this precluded all forms of relief. [Appendix B]

In this respect, the decision below conflicts with the conduct of multiple other courts of appeals. As this Court recognized in *Molina-Martinez*, the Seventh Circuit undertakes a limited remand to resolve uncertainty regarding the substantial rights question. *See Currie*, 739 F. 3d at 967. The Second, Seventh, Ninth, and D.C. Circuits, moreover, have all ordered limited remands to resolve the substantial rights question in cases of plain error under *United States v. Booker*, 543 U.S. 220 (2005). *See United States v. Ameline*, 409 F.3d 1073 (9th Cir. 2005); *United States v. Paladino*,

401 F.3d 471, 484 (7th Cir. 2005); *United States v. Crosby*, 397 F.3d 103, 120 (2d Cir. 2005); *United States v. Coles*, 403 F.3d 764, 770 (D.C. Cir. 2005); **but see** *United States v. Mares*, 402 F.3d 511, 521-522 (5th Cir. 2005)(rejecting this approach in the *Booker* context); *United States v. Antonakopoulos*, 399 F.3d 68, 80 (1st Cir. 2005)(same); *United States v. Pirani*, 406 F.3d 543, 552-554 (8th Cir. 2005) (en banc)(same); *United States v. Rodriguez*, 398 F.3d 1291, 1301 (11th Cir. 2005)(same).

Booker error – sentencing the defendant in a mandatory Guideline regime – is precisely analogous to the error at issue here. Like the error that affected Petitioner, *Booker* error does not affect the applicable Guideline range. Rather, it exposes the defendant to a different mandatory range of possible imprisonment. Similarly, Petitioner was exposed to a range of zero to twenty years imprisonment as a result of the court’s plain error, but should have been exposed to the lesser range of zero to 10 years imprisonment. Like *Booker* error, the error in this case yielded no necessary effect on the applicable Guideline range. In the wake of *Booker*, at least four circuits thought that a change in the mandatory range of imprisonment created enough uncertainty about substantial rights to justify a limited remand, even if the Guidelines themselves were not affected. To the extent that the decision below forewent such consultation with the district court, it conflicts with those decisions. To the extent that it neglected – by appearances – even to consider a limited remand, it is in tension with *Molina-Martinez*.

The position of the courts that offer a limited remand in the case of a plain error is a sound one. The district court must calibrate the factors enumerated at 18 U.S.C. §3553(a) to the entire sentencing range. So it is reasonably probable that a district court considering a range of zero to twenty years would reach a different result than one considering a range of zero to ten years imprisonment. Petitioner’s 30 months sentence is a fourth of his true statutory range, but only an eighth of the statutory range believed applicable by the district court. It is, in relative terms, twice as severe when the true range is known. The mere choice of a mandatory sentencing range – here the statutory maximum – may affect the sentence ultimately imposed. *See Paladino*, 401 F.3d at 482

(observing that a conscientious judge in the era of mandatory Guidelines would attempt to calibrate the defendant's position in the range to his culpability). Indeed, 18 U.S.C. §3553(a) probably demands that the district court consider the statutory range in deciding the sentence, as it requires consideration of "the kinds of sentences available." 18 U.S.C. §3553(a)(3).

CONCLUSION

This Court should grant *certiorari* to determine whether a court of appeals should ordinary order a limited remand to the district court upon finding a plain error in the determination of the statutory maximum. Alternatively, Petitioner prays for such relief as to which he may justly entitled. Respectfully submitted this 21st day of November, 2018.

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