

No. 18-_____

In the

Supreme Court of the United States

MIGUEL RODRIGUEZ-GARCIA,
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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QUESTIONS PRESENTED

I.

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 TO THE PROCEEDING

Miguel Rodriguez-Garcia 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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Appendix B: Judgment and Opinion of the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Miguel Rodriguez-Garcia, 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 9, 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 The unpublished opinion of the United States Court of Appeals for the Fifth Circuit is captioned as United States v. Rodriguez-Garcia, 2018 U.S. App. LEXIS 25565 (5th Cir. September 10, 2018)(unpublished), and is also provided in the Appendix to the Petition. [Appendix B].

JURISDICTION

The opinion and order of the United States Court of Appeals for the Fifth Circuit affirming the sentence as modified were issued on September 10, 2018. [Appx. B]. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

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. District Court Proceedings

Petitioner Miguel Rodriguez-Garcia was found by ICE agents on November 1, 2018 in the Dallas County Jail. See (ROA.94) Because he had been previously deported, the government secured an indictment for violating 8 U.S.C. §1326. See (ROA.7). He pleaded guilty without a plea agreement. See (ROA.34-38).

Probation prepared a Presentence Report (PSR) which concluded that his proper statutory range of imprisonment was 0-20 years imprisonment pursuant to 8 U.S.C. §1326(b)(2). See (ROA.103). This Subsection of 1326 calls for a higher statutory maximum when the defendant's last removal was subsequent to an "aggravated felony," defined at 8 U.S.C. §1101(a)(43). The sole pre-removal conviction arguably fitting this definition was Mr. Rodriguez-Garcia's 2006 Texas conviction for burglary of a habitation. See (ROA.97-98). The PSR also determined that the Guidelines called for an advisory range of 37-46 months imprisonment. See (ROA.103).

At sentencing, the district court imposed sentence at the top of the Guideline range, 46 months. See (ROA.86). The judgment named the statute of conviction as 8 U.S.C. §1326(b)(2). See (ROA.45).

B. Proceedings in the Court of Appeals

On appeal, Petitioner argued that the district court plainly erred in determining his statutory maximum. Specifically, he argued that his burglary

conviction no longer qualified as an “aggravated felony,” a contention that would ultimately be vindicated by a combination of *United States v. Herrold*, 883 F.3d 517 (5th Cir. 2018)(en banc)(restricting the generic definition of “burglary”), and *Sessions v. Dimaya*, __U.S.__, 138 S.Ct 1204 (2018)(invalidating the “residual clause” of 18 U.S.C. §16). He thus argued that the district court had sentenced him under the mistaken impression that his statutory maximum was 20 years rather than ten. In the Reply Brief, he requested in the alternative that the court of appeals undertake a limited remand so that the district court could simply say whether the altered statutory maximum would have produced a different term of imprisonment.

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].

REASONS 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, even as Petitioner requested as much. [Appendix B].

Rather, it simply observed that the record as currently composed showed no effect 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 46 months sentence is a little more than 38% of his true statutory range, but only a little more than 19% 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 10th day of December, 2018,

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