No. _____

In the

Supreme Court of the United States

JOSE NINO-CARREON,
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 Guideline error should ordinarily find an effect on the defendant's substantial rights if the district court does not expressly state that it would have imposed the same sentence under different Guidelines?

PARTIES TO THE PROCEEDING

Jose Nino-Carreon 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, Jose Nino-Carreon, 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 17, 2017, and is provided in the Appendix to the Petition. [Appendix A]. The published opinion of the United States Court of Appeals for the Fifth Circuit is captioned as *United States v. Nino-Carreon,* 910 F.3d 194 (5th Cir. December 3, 2018, 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 December 3, 2018. [Appx. B]. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

RULE INVOLVED

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 Jose Nino-Carreon pleaded guilty to one count of entering the United States following a prior removal. *See* (ROA.34-35).[1] The Presentence Report (PSR) concluded that there was no evidence he re-entered prior to August 17, 2016. *See* (ROA.109). That document calculated the defendant's Guideline range as 24-30 months imprisonment, the product of a criminal history score of 13, a criminal history category of VI, and a final offense level of ten. *See* (ROA.117, 123). The criminal history calculation depended on the PSR's decision to assess one criminal history point for each of three Oklahoma sentences imposed more than ten years prior to August 17, 2016. These included a three year term of "deferred probation" imposed November 1, 2001, *see* (ROA.111), a one year suspended sentence imposed April 2, 2003, *see* (ROA.113), and a one year suspended sentence imposed December 1, 2004, *see* (ROA.113).

At sentencing, the district court recounted the defendant's criminal history and imposed a sentence of 50 months imprisonment. *See* (ROA.94-100). It did not,

[1] References to the record in the court of appeals are included in hopes they are of use to the government in answering the Petition or this Court in evaluating it.

however, suggest that the sentence would have been the same under different Guidelines. *See* (ROA.94-100).

B. Proceedings in the Court of Appeals

On appeal, Petitioner argued that the district court plainly erred in determining his Guideline range, because the record lacked any evidence that his current offense commenced within ten years of the Oklahoma convictions. *See* USSG §4A1.2(e)(2). The court of appeals agreed that the district court plainly erred in determining the defendant's Guideline range. *See United States v. Nino-Carreon*, 910 F.3d 194, 196-197 (5th Cir. December 3, 2018). Yet it affirmed because it did not think he made a sufficient showing that the error affected his substantial rights. *See Nino-Carreon*, 910 F.3d at 196-197. It reasoned:

> There is no reasonable probability that Nino-Carreon's sentence would have been different had the district court used the correct range. Even before the sentencing hearing, the court expressed a "tentative conclusion that the defendant should receive a sentence of imprisonment significantly above the top of the advisory guideline range." During the hearing, the court emphasized Nino-Carreon's criminal history through a comprehensive recitation filling six transcript pages. The court devoted particular attention to Nino-Carreon's two 2016 assaults resulting in bodily injury on a family member, describing in detail what he had done. The court added, "And I have concluded a sentence of imprisonment of 50 months is absolutely necessary to satisfy those [sentencing] factors." In its statement of reasons, the court specified that those factors were "the history and characteristics of the defendant, the nature and circumstances of the offense, . . . [the need for the sentence imposed to reflect] the seriousness of the offense[,] to promote respect for the law, and [to] protect the public from further crimes by the defendant.

Id.

REASONS FOR GRANTING THE PETITION

THE DECISION BELOW CONFLICTS WITH THE PRECEDENT OF THIS COURT AND MULTIPLE RECENT DECISIONS OF OTHER CIRCUITS.

In the absence of an objection, Federal Rule of Criminal Procedure 52(b) requires a defendant seeking relief to show a plain error that affects his or her substantial rights. A series of decisions in the court below have formulated special rules to limit relief under plain error; most of these decisions have been abrogated by this Court. That tradition dates back at least twenty years.

In *United States v. Ravitch*, 128 F.3d 865, 869 (5th Cir. 1997), the court below held that plain Guideline error could would not be reversed if "the trial judge could reinstate the same sentence" on remand. *Ravitch*, 128 F.3d at 869. Then, in *United States v. Jackson*, 549 F.3d 963, 977 (5th Cir. 2008), the court below held that a defendant may not rely on decisions post-dating the sentencing to show plain error. *See Jackson*, 549 F.3d 963, 977. But that proposition was abrogated by this Court's contrary holding in *Henderson v. United States*, 568 U.S. 266 (2013). In *United States v. Blocker*, 612 F.3d 413 (5th Cir. 2010), the court below held when a defendant is sentenced within the true Guideline range, he or she could not rely solely on the numerical change in the Guidelines to show an effect on substantial rights. *See Blocker*, 612 F.3d 413, at 416. But in *Molina-Martinez v. United States*, __U.S.__, 136 S.Ct. 1338 (2016), this Court held directly to the contrary. Finally, in *United States v. Rosales-Mireles*, 850 F.3d 246 (5th Cir. 2017), the court below held that it could not exercise its discretion to correct plain error unless that error constituted a

miscarriage of justice that shocked the conscience and called into question the competence of the district judge. This Court again granted *certiorari* and reversed, reiterating that the mere fact of plain Guideline error will ordinarily merit remand. *See Rosales-Mireles v. United States*, __U.S.__, 138 S.Ct. 1897 (2018).[2]

The decision below falls within this tradition of Fifth Circuit hostility to plain error review. Its published holding should also be corrected. Though it cites and purports to follow *Molina-Martinez*, the decision below in fact clearly conflicts with that decision. A closer examination of *Molina-Martinez* will help elucidate the conflict.

The defendant in *Molina-Martinez* suffered a seven month Guideline error. *See Molina-Martinez*, 136 S.Ct. at 1344. The sentence imposed, however, fell within the middle of the range that would have applied but for the error. *See id*. at 1344-1345.

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[2] The court below has also held that factual error is categorically immune from plain error review. *See United States v. Lopez*, 923 F.2d 47, 50 (5th Cir. 1991.) An opinion respecting the denial of certiorari criticized this special, extra-textual rule, and urged the Fifth Circuit to reconsider the practice. *See Carlton v. United States*, __U.S.__, 135 S. Ct. 2399 (2015)(Sotomayor, J., concurring). It has instead continued to apply the rule with unblinking regularity. *See United States v. Maxey*, 699 F. App'x 435 (5th Cir. Nov. 1, 2017); *United States v. Glaze*, 699 F. App'x 311, 311 (5th Cir. Oct. 16, 2017); *United States v. Oti*, 872 F.3d 678, 694 (5th Cir. Oct. 3, 2017); *United States v. Reynolds*, __ F. App'x __, 2017 WL 3328154, at *3 n.6 (5th Cir. Aug. 3, 2017*); United States v. Sphabmisai*, __ F. App'x __, 2017 WL 3271060, at *1 (5th Cir. Aug. 1, 2017*); United States v. Bookout*, 693 F. App'x 332, 333 (5th Cir. July 13, 2017); *United States v. McCain-Sims*, 695 F. App'x 762, 766 (5th Cir. Jun. 12, 2017); *United States v. Ramirez-Castro*, 687 F. App'x 400, 400 (5th Cir. Apr. 25, 2017*); United States v. Cooper*, 669 F. App'x 243, 244 (5th Cir. Oct. 4, 2016); *United States v. Rios*, 669 F. App'x 193, 194 (5th Cir. Sept. 20, 2016); *United States v. Ayala*, 667 F. App'x 840, 840 (5th Cir. Aug. 1, 2016*); United States v. Chavira*, 647 F. App'x 503, 503 (5th Cir. May 10, 2016).

The court below therefore concluded that the defendant had not met his burden to show an effect on his substantial rights. *See id.*

This Court held, however, that a Guideline error will ordinarily show an effect on substantial rights and a reasonable probability of a different outcome. *See id*. at 1349. In so holding, this Court noted the pervasive, structuring influence of the sentencing Guidelines on the federal sentencing process. *See id.* at 1345-1346. The Guidelines are the required "starting point and benchmark" of federal sentencing. *Id*. at 1345 (quoting *Gall v. United States*, 552 U. S. 38, 49 (2007)). They set "the framework for sentencing," and "anchor the district court's discretion." *Id.* (quoting *Peugh v. United States*, __U.S.__, 133 S. Ct. 2072, 2076 (2013)). Further, there are strong statistical and empirical arguments for the proposition that Guideline calculations affect the sentencing process. *Id*. at 1346 (citing USSC, Final Quarterly Data Report, FY 2014, pp. 32-37 (Figures C to H)). As such, this Court held that "when a Guidelines range moves up or down, offenders' sentences [tend to] move with it." *Id*. (quoting *Peugh*, 133 S. Ct. at 2084).

These observations supported this Court's holding a defendant need not point to any fact in the record other than the changed Guideline range to lay out a *prima facie* case for remand. Further, this Court noted that:

> Nothing in the text of Rule 52(b), its rationale, or the Court's precedents supports a requirement that a defendant seeking appellate review of an unpreserved Guidelines error make some further showing of prejudice beyond the fact that the erroneous, and higher, Guidelines range set the wrong framework for the sentencing proceedings.

Id. at 1345.

The decision below did not heed this guidance. Rather, it relied on the district court's prehearing notice of a contemplated above-range sentence, together with a recitation of the defendant's criminal history. *See Nino-Carreon*, 910 F.3d at 196-197. According to the court below, this evidence rebutted the Guideline error's presumptive effect on the sentence imposed.[3]

To be sure, this Court contemplated in *Molina-Martinez* that the tendency of Guideline error to affect the sentence imposed might not always carry the day for the defendant. *See Molina-Martinez*, 136 S.Ct. at 1346-1347. It noted that "[t]he record in a case may show, for example, that the district court thought the sentence it chose was appropriate irrespective of the Guidelines range." *Id.* But the record in this case hardly shows that. Rather, it merely shows that the district court believed that a harsh sentence above the Guidelines would be necessary in light of the defendant's criminal history. Those considerations do not point with any clarity to a ***particular*** sentence, chosen irrespective of the Guidelines. The record contains no explicit statement discounting the influence over the Guidelines. This is not a case where some factor independent of the Guidelines suggests a particular number, such as a sentence imposed on a co-defendant, a prior sentence imposed on the defendant for

[3] This published opinion had already been cited by the court below to avoid review of an asserted plain Guideline error. *See United States v. Smock*, 2019 U.S. App. LEXIS 5175 (5th Cir. February 21, 2019)(unpublished). It has been cited by the government in an effort to secure the affirmance of an alleged Guideline error that affected the advisory range by 83 years. *See* Government's Correspondence Pursuant to Fed. R. App. P. 28(j) in *United States v. Randall*, 17-11403 (Filed in the Fifth Circuit January 24, 2019)(pending).

the same conduct, or the maximum or minimum of the statutory range. *Cf. United States v. Tavares*, 705 F.3d 4, 27 (1st Cir. 2013)(Guideline error found not to affect substantial rights where district court appeared committed to a sentence at the statutory maximum).

In the case where the record is simply silent about the sentence that would have been imposed absent the Guideline error, this Court's holding is clear. That silence should be resolved in favor of remand:

> Where … the record is silent as to what the district court might have done had it considered the correct Guidelines range, the court's reliance on an incorrect range in most instances will suffice to show an effect on the defendant's substantial rights.

Id. at 1347. By relying solely on the district court's inclination to impose an above-range sentence, and its concerns about the defendant's criminal history, the court below gave little or no weight to the anchoring and structuring effects of the Guidelines on the sentence imposed. And in direct conflict with *Molina-Martinez*, it resolved silence in favor of affirmance rather than remand.

Unsurprisingly, the decision below also conflicts with several of its sister circuits' interpretations of *Molina-Martinez*. The First Circuit, for example, has held that a Guideline error affects the defendant's substantial rights absent "**a clear statement** by the [sentencing] court' that would be sufficient to diminish the potential of the [Guideline Sentencing Range] to influence the sentence actually imposed." *United States v. Taylor,* F.3d 848 F.3d 476, 498 (1st Cir. 2017)(emphasis added)(internal quotations omitted)(citing *United States v. Hudson*, 823 F.3d 11, 19 (1st Cir. 2016)(quoting *United States v. Marchena-Silvestre*, 802 F.3d 196, 201 (1st

Cir. 2015)). And in the First Circuit a "clear" statement must be very clear. Thus, in *Taylor* a district court's plain error in treating the defendant as a "career offender" was reversed even though the court expressly stated that the sentence would have been the same in the absence of this determination. *See Taylor*, F.3d 848 F.3d 476, 498. That statement was found inadequate because the district court may not have understood that the career offender designation affected both the offense level and the criminal history category. *See id.* Plainly, the result below would have been different in the First Circuit.

Similarly, the Second Circuit has vacated a misapplication of the Policy Statements governing supervised release. *See United States v. Avery*, __Fed. Appx. __, 2019 U.S. App. LEXIS 4854 (2d Cir. February 20, 2019)(unpublished). It did so notwithstanding a statement by the district court suggesting that it had an aggregate sentence of 120 months in mind at the beginning of the sentencing hearing. *See Avery*, 2019 U.S. App. LEXIS 4854, at *3-4. As in the First Circuit, the Second Circuit required greater clarity before overlooking a Guideline error.

The law of the Eighth Circuit is also flatly contrary to the decision below. In that jurisdiction, the district court must make an explicit statement that the sentence would have been the same on different Guidelines. *See United States v. Harris*, 908 F.3d 1151, 1156 (8th Cir. 2018). This is so even when the district court imposes sentence at the high end of an erroneously high Guideline range. *See Harris*, 908 F.3d at 1156. The Eighth Circuit is simply not willing to indulge "assumptions" about how

the district court would have sentenced when the Guidelines are wrong. *Id*. It has explained:

> The government argues, with considerable force, that there is no reasonable probability that Harris would have received a lower sentence had his criminal history been properly calculated because the district court sentenced Harris to the top of the higher range, commenting that Harris's criminal history category substantially under-represented the seriousness of his prior convictions**. However, the court did not expressly state that it would have alternatively imposed the same sentence even if a lower guideline range applied**, as in *United States v. Dace*, 842 F.3d 1067, 1069-70 (8th Cir. 2016). **We read *Molina-Martinez* and *Rosales-Mireles* as strongly cautioning courts of appeals not to make such assumptions** when "the record is silent as to what the district court might have done had it considered the correct Guidelines range." *Molina-Martinez*, 136 S. Ct. at 1347.

Id. (emphasis added).

The law of the Tenth Circuit is to like effect. That court has vacated a plain Guideline error even though the district court suggested that the sentence was imposed in chosen based on comparisons with a co-defendant. *See United States v. Smith*, __Fed. Appx. __, 2018 U.S. App. LEXIS 34059, at *5-6 (10th Cir. December 4, 2018)(unpublished). District courts in that jurisdiction, like those of the First, Second, Eighth Circuits, cannot escape reversal unless they speak clearly about the sentence that would be imposed on different Guidelines.

In short, the published decision of the court below stands in stark conflict with this Court's precedent and the recent decisions of at least four other circuits. It is not correct, and should be vacated.

CONCLUSION

This Court should grant certiorari, vacate the judgment below, and order resentencing.

Respectfully submitted this 4th day of March, 2019,

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