No. __-_____

IN THE SUPREME COURT OF THE UNITED STATES

PEDRO MARTINEZ-NEGRETE,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

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

PETITION FOR A WRIT OF CERTIORARI

JASON D. HAWKINS
Federal Public Defender
NORTHERN DISTRICT OF TEXAS

KEVIN J. PAGE
Counsel of Record
ASSISTANT FEDERAL PUBLIC DEFENDER
525 S. GRIFFIN ST., SUITE 629
DALLAS, TX. 75202
214-767-2746

QUESTIONS PRESENTED

I. Where a criminal defendant shows that the district court made a clear legal error when applying the U.S. Sentencing Guidelines, but the government responds with an alternative, debatable route through which the district court might have reached the same advisory guideline range, has the defendant satisfied the second prong of plain-error review by showing a clear or obvious error?

PARTIES

Pedro Martinez-Negrete is the Petitioner; he was the defendant-appellant below.

The United States of America is the Respondent; it was the plaintiff-appellee below.

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Miscellaneous

United States Sentencing Guidelines

PETITION FOR A WRIT OF CERTIORARI

Petitioner Pedro Martinez-Negrete 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The unpublished opinion of the United States Court of Appeals for the Fifth Circuit is captioned as *United States v. Martinez-Negrete,* No. 17-11387, 747 Fed. Appx. 967 (5TH Cir. January 10, 2019)(unpublished), and is provided in the Appendix to the Petition. [Appx. A].

JURISDICTIONAL STATEMENT

The instant Petition is filed within 90 days of an opinion affirming the judgment, which was entered on January 10, 2019. *See* SUP. CT. R. 13.1. This Court's jurisdiction to grant *certiorari* is invoked under 28 U.S.C. § 1254(1).

RULE INVOLVED

Federal Rule of Criminal Procedure 52(b) provides:

> **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

This appeal arises from a prosecution for illegal reentry after deportation. Petitioner Pedro Martinez-Negrete was removed from the United States on October 1, 2012. 5th Cir. R. 91. On September 15, 2016, he was "found" in the country. Specifically, he was screened by ICE Agents while in state custody and determined to be illegally present in the United States. *Ibid*. Then, on October 22, 2016, he was convicted in Texas of evading arrest with a vehicle and received two years imprisonment. *Ibid*.

After Petitioner completed service of the Texas sentence, federal authorities indicted him for illegally re-entering the country, asserting that he had violated 8 U.S.C. §1326(b)(1) (the felony, not aggravated felony version of the offense). 5th Cir. R. 7. Petitioner pleaded guilty. 5th Cir. R. 32–33. According to the district court's judgment, his illegal reentry offense ended on September 15, 2016. App. B; 5th Cir. R. 52.

Between the date the offense ended in October of 2016 and Petitioner's sentencing in November of 2017, a new version of the Federal Sentencing Guidelines went into effect. It is undisputed that Petitioner's Guideline range under the November 1, 2016 manual was 18–24 months. 5th Cir. R. 92, 102. But Petitioner was entitled to application of the November 2015 Guidelines (those in effect on the date of his offense) if they were more favorable. *See* U.S.S.G. § 1B1.11(b)(1); *see also Peugh v. United States*, 569 U.S. 530 (2013).

Like the 2016 version, the 2015 version of Guideline 2L1.2 provided a base offense level of eight. *See* USSG §2L1.2(a)(2015). It provided an eight level adjustment if the defendant's last removal was subsequent to an "aggravated felony" conviction, as defined in 8 U.S.C. §1101(a)(43).

USSG §2L1.2(b)(1)(C) (2015). But it only provided a four level adjustment if the defendant's last removal was subsequent to a "felony." USSG §2L1.2(b)(1)(D) (2015). At sentencing, the district court concluded that the defendant's 2016 evading-arrest offense was an "aggravated felony":

> On August 22, 2016, Martinez-Negrete was convicted of Evading Arrest Detention With a Vehicle, in Case No. 1462340D, in the 372nd District Court of Tarrant County and was sentenced to 2 years imprisonment. This offense qualifies as an aggravated felony pursuant to USSG §2Ll.2(b)(l)(C) of the 2015 Guidelines Manual and 8 U.S.C. § 1101(a)(43)(F).

5th Cir. R. 91. But this is plainly erroneous assessment. The evading conviction arose after Petitioner's removal. The Guideline in question considered only those convictions before removal. *See* U.S.S.G. § 2L1.2(b)(1).

Petitioner did not object to the PSR's calculations, and the district court adopted them in full at sentencing. 5th Cir. R. 81–82. The court imposed sentence of 60 months in prison. *Ibid.* The court's thorough sentencing explanation offered at the hearing did not say that the punishment would have been the same irrespective of the Guidelines. *See* 5th Cir. R. 81–84. But the court did insert a sentence into the written Statement of Reasons to that effect: "[e]ven if the guideline calculations are not correct, this is the sentence the Court would otherwise impose under 18 U.S.C. § 3553." (ROA.126).

On appeal, Petitioner argued that the district court "plainly erred in concluding that an aggravated felony post-dating the defendant's last removal called for an eight level enhancement under the 2015 version of USSG §2L1.2." Appellant's Initial Brief *in United States v. Martinez-Negrete*, No. 17-11387, 2018 WL 1403143, at *8 (5th Cir. Filed March 12, 2018) ("Initial Brief"). He conceded that he had failed to object in district court, but maintained that he nonetheless merited

relief under the plain error standard of review, which requires a showing of clear or obvious error, that affects substantial rights and the fairness, integrity, or public reputation of judicial proceedings. *See* Initial Brief, at *8.

As he noted, the 2015 version of the Guidelines provided for an eight level enhancement only when "the defendant previously was deported, or unlawfully remained in the United States, after" the relevant conviction. *See* USSG §2L1.2(b)(1) (2015) (emphasis added). The district court committed clear or obvious error in applying an eight-level adjustment under the 2015 Guidelines for a post-removal "aggravated felony." *See* Initial Brief, at *8. Further, he maintained that there was a reasonable probability of a different result in the absence of this error. *See* Initial Brief, at **10-22. Although Petitioner had sustained some pre-removal convictions, none of them constituted an "aggravated felony" under the correct legal principles. *See* Initial Brief, at **10-17. As such, he maintained that his 2015 Guidelines merited no eight level adjustment for a pre-removal "aggravated felony," that application of the 2016 Guidelines would violate the ex post facto clause, and that a different Guideline range would produce at least a reasonable probability of a different result. *See Peugh v. United States*, 569 U.S. 530, 533 (2013); *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1339 (2018).

In response, the government argued that Petitioner's pre-removal conviction for Utah forgery constituted an aggravated felony. *See* Appellee's Brief in *United States v. Martinez-Negrete*, No. 17-11387, 2735207, at **4-7 (5th Cir. Filed May 22, 2018). The court of appeals agreed with Petitioner that the district court erred in using a post-removal conviction to enhance his Guideline range under the 2015 Guidelines, but nonetheless denied relief. Appx. A; *United States v. Martinez-Negrete*, No.

17-11387, 747 Fed. Appx. 967, 967 (5th Cir. 2019). The court did not resolve whether the Utah offense was truly an aggravated felony; in the Fifth Circuit's view, Petitioner would have to show that all possible paths to the same guideline range were plainly wrong. *Martinez-Negrete*, 747 Fed. Appx. at 967-968 ("However, Martinez-Negrete fails to show that it is clear that his Utah forgery conviction does not qualify as an aggravated felony."). And as it understood plain error review, this uncertainty regarding the proper treatment of a different conviction the district court never considered was sufficient to defeat Petitioner's claim for relief. *See* Appx. A; *Martinez-Negrete*, 747 Fed. Appx. at 967-968.

REASONS FOR GRANTING THE WRIT

I. The lower courts are divided on the question presented.

Federal Rule of Criminal Procedure 52(b) permits a court of appeals to notice plain errors affecting the parties' substantial rights even in the absence of objection. This Court has held that reversal under this standard requires the appealing party to show: 1) error, 2) that is clear or obvious, 3) that affects substantial rights, and 4) that seriously affects the fairness, integrity, or public reputation of judicial proceedings. *United States v. Olano*, 507 U.S. 725, 732 (1993); *Puckett v. United States*, 556 U.S. 129, 135 (2009).

The second prong of plain error imposes a more difficult burden of persuasion on the appealing party than the third. The second prong requires the appellant to defeat any reasonable dispute as to the existence of an error. *See Puckett*, 556 U.S. at 135. But the third prong – a showing that the error affected substantial rights – requires the appealing party to show only "a reasonable probability" of a different outcome in the absence of the error. *See Molina-Martinez v. United States*, __U.S.__,136 S. Ct. 1338, 1339 (2018). "The reasonable probability standard [on plain error] is not the same as, and should not be confused with, a requirement that a defendant prove by a preponderance of the evidence that but for the error things would have been different." *United States v. Dominguez-Benitez*, 542 U.S. 74, 83 n. 9 (2004) (citing *Kyles v. Whitley*, 514 U.S. 419, 434 (1995)). To satisfy the third prong of plain error, a party need only "undermine confidence" that the outcome would have been the same. *Dominguez-Benitez*, 542 U.S. at 83, n. 9.

Here, the district court concluded that under the 2015 Guidelines, Petitioner's offense level would have been enhanced eight levels because his 2016 conviction for evading arrest with a vehicle constituted an "aggravated felony." But this is plainly erroneous. The 2015 version of USSG §2L1.2

provided for an eight level enhancement only when the defendant's aggravated felony conviction preceded his removal. *See* USSG §2L1.2(b)(1)(C). The court of appeals did not hold otherwise. Indeed, it recognized that "Martinez-Negrete's 2016 Texas conviction for evading arrest does not qualify as an aggravated felony under U.S.S.G. § 2L1.2(b)(1)(C) (2015) because this conviction did not precede a prior removal." [Appx. A]; *United States v. Martinez-Negrete*, 747 Fed. Appx. 967, 967 (5th Cir. January 10, 2019)(unpublished). But it held that Petitioner failed to satisfy the second prong of plain error because he failed to show that another conviction (Utah Forgery) ***not*** considered by the district court fell outside the definition of an "aggravated felony." *See* [Appx. A]; *Martinez-Negrete*, 747 Fed. Appx. at 967-968 (denying relief because "Martinez-Negrete fails to show that it is clear that his Utah forgery conviction does not qualify as an aggravated felony.").

Accordingly, the position of the court below is that a party seeking to correct unpreserved error related to a Guideline calculation must show not only that the district court committed some clear or obvious error, but that the ultimate Guideline range selected by the district court was also clearly or obviously incorrect. This is a significant difference, as the present case illustrates. The court of appeals did not hold that Utah Forgery constitutes an aggravated felony, only that it does not clearly or obviously fall outside the definition. And there is good reason to believe that it does not constitute an aggravated felony. While certain "offenses related to forgery" are defined as aggravated felonies, *see* 8 U.S.C. 1101(a)(43)(R), the Utah offense lacks an important element of "forgery" as the term is used in its generic, contemporary sense. Generic "forgery" describes an offense in which the actor "makes, completes, executes, authenticates, issues or transfers any writing so that it purports to be the act of another who did not authorize that act…" Model Penal Code §224.1(1)(quoted in *United States v. Villafana*, 577 Fed. Appx. 248, 251 (5th Cir. 2014)). But the

Utah forgery offense permits conviction even if the purported author consented to the use of his or her name. *See State v. Collins*, 597 P.2d 1317 (Utah 1979).

In short, while it is not *clear or obvious* that Petitioner lacks any pre-removal "aggravated felony," that conclusion was at least *reasonably probable* in the absence of the district court's plain legal error regarding the evading arrest conviction. Further, it is reasonably probable that an altered Guideline range would have produced a different sentence. *See Molina-Martinez v. United States*, __U.S.__, 136 S.Ct. 1338, 1346 (2016)(fact of a different Guideline range may satisfy the substantial rights prong, even if defendant sentenced within correct range); *United States v. Wikkerink*, 841 F.3d 327, 337-338 (5th Cir. 2016)(applying the presumption of a different result to sentences outside the range believed applicable by the district court). The decision of the court of appeals that all Guideline questions must be resolved pursuant to the second rather than the third prong of plain error likely determined the outcome below. And it has taken a similar position in prior published precedent. *See United States v. Martinez-Vega*, 471 F.3d 559, 562-563 (5th Cir. 2006)(district court's erroneous reliance on Presentence Report in support of a criminal history enhancement did not satisfy the first and second prongs of plain error, where other documents not before the district court arguably supported the same enhancement).

Further, this conclusion about the proper application of the plain error doctrine conflicts quite directly with multiple decisions of the Ninth Circuit. In *United States v. Pimentel-Flores*, 339 F.3d 959 (9th Cir. 2003), a district court applied a Guideline enhancement for having sustained a prior "aggravated felony." *See Pimentel-Flores*, 339 F.3d at 967. The enhancement was premised on the defendant's prior assault conviction, and, more particularly, on a PSR's description of the assault. *See id.* at 967-968. The Ninth Circuit found clear or obvious error in the district court's reliance on

the PSR's description of the offense, rather than judicial records of conclusive significance. *See id.* But it recognized that the offense's proper classification as an "aggravated felony," *vel non*, represented a close legal question. *See id.* at *968. Still, it did not see the need to resolve that question, because it found a reasonable probability that it would be resolved in the defendant's favor. *See id.* ("Whether on this record defendant met his burden of demonstrating that his substantial rights were affected is, however, a closer question. But we are convinced there is a plausible prospect that the outcome might have been different had the government done its job.") Thus, in the Ninth Circuit, a showing of any clear or obvious error satisfies the second prong of plain error, even if it is not clear or obvious that the ultimate Guideline range would have been different but for the error. It followed the same reasoning in *United States v. Castillo-Marin*, 684 F.3d 914 (9th Cir. 2012), and again afforded relief. *See Castillo-Marin*, 684 F.3d at 919–27.

The position of the court below is also contrary to a recent decision of the Eleventh Circuit. In *United States v. Newton*, 2019 WL 1077681 (11th Cir. March7, 2019)(unpublished). In *Newton*, the defendant maintained that a district court plainly erred by using one year's version of Guideline 2B1.1 to determine the application of a financial loss enhancement and another year's version of the Guideline to determine the application of an enhancement for the number of victims. *See Newton*, 2019 WL 1077681, at *8. The court of appeals agreed that the defense had shown plain or obvious error. *See id.* at *10 ("We conclude that the district court committed error, that was plain, by applying the 2014 version of the Guidelines with respect to the number-of-victims enhancement instead of the 2015 Manual."). Notably, it found the defendant to have satisfied the second prong even though "he … failed to show that the outcome of the proceedings—that is, his sentencing range under the Guidelines—would have been any different had the district court applied the [correct

year's] Guidelines…" *Id.* This is the opposite of the position taken by the court below, which holds that all issues necessary to determine the correct Guideline range must be evaluated under prong two before the appealing party may proceed to prong three.

The approach of the Ninth and Eleventh Circuits is more faithful to the text of Rule 52. That Rule permits a court of appeals to notice "a plain error." The Rule's use of the indefinite article communicates that *any* error may be noticed, provided it is clear or obvious, and affects the party's substantial rights. *See Citizens for Responsibility & Ethics in Wash. v. FEC*, 316 F. Supp. 3d 349, 390 (D.D.C. 2018)("As relevant here, the term 'an,' like the term 'a,' is an '[i]ndefinite article' that ordinarily refers to 'one, some, any' with 'the oneness, or indefiniteness, being implied rather than asserted,'")(quoting OED 4 (2d ed. 1989)). Certainly, the Rule does not require a showing that the district court has clearly or obviously selected the wrong Guideline range. Indeed, the Rule applies to all manner of errors, including errors in the trial phase. *See Rosales-Mireles v. United States*, __U.S.__,138 S.Ct. 1897, 1909 (2018)(so observing). The position of the court below is simply indefensible in terms of the Rule's plain language.

The issue is subtle, but it is potentially present in all manner of cases involving the Sentencing Guidelines, which frequently generate plain errors. *See Molina-Martinez*, 136 S.Ct. at 1342-1342 ("The Guidelines are complex, and so there will be instances when a district court's sentencing of a defendant within the framework of an incorrect Guidelines range goes unnoticed."). And it is well-presented here. Here, the difference between addressing Utah forgery under the second rather than the third prongs of plain error was the difference between relief and affirmance. The issue should be resolved by the Court in this case.

Conclusion

Petitioner respectfully prays that this Honorable Court grant *certiorari*, vacate the judgment below and either determine whether Petitioner is entitled to relief from a plain error in the treatment of his evading arrest conviction, or remand to the court of appeals for such proceedings as it may deem appropriate.

Respectfully submitted this 10th day of April, 2019.

/s/ Kevin Joel Page
Kevin Joel Page
Counsel of Record
FEDERAL PUBLIC DEFENDER'S OFFICE
NORTHERN DISTRICT OF TEXAS
525 S. GRIFFIN ST., SUITE 629
DALLAS, TEXAS, 75202