

No. 18-_____

In the

Supreme Court of the United States

JOSE ANTONIO RAMIREZ-JARAMILLO,
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

Whether an error in selecting the defendant's statutory range of imprisonment affects his or her substantial rights within the meaning of Federal Rule of Criminal Procedure 52?

PARTIES TO THE PROCEEDING

Jose Antonio Ramirez-Jaramillo 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, Jose Antonio Ramirez-Jaramillo, 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 May 4, 2018, 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 The unpublished opinion of the United States Court of Appeals for the Fifth Circuit is captioned as *United States v. Ramirez-Jaramillo*, 753 Fed. Appx. 338 (5th Cir. February 19, 2019)(unpublished), and is also provided in the Appendix to the Petition.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 was issued on February 19, 2019. [Appendix 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 Jose Antonio Ramirez-Jaramillo entered the United States when he was eight years old, and lived here until he was 25 years old. When he was 22, he sustained a conviction for arson, and suffered removal three years later, because he had never obtained citizenship. He then re-entered the country, where immigration authorities found him in 2017, at age 25.

The government obtained an indictment for illegal re-entry under 8 U.S.C. §1326, to which he pleaded guilty. A Presentence Report (PSR) noted a Texas Arson conviction, and two convictions for “Racing on Highway Causing Serious Bodily Injury,” all of which preceded his removal. The PSR determined that his Guideline range should 30-37 months imprisonment, and that his statutory range should be zero to 20 years imprisonment, the range applicable to a defendant who re-enters the country after an “aggravated felony.”

At sentencing, the court expressly adopted the legal conclusions of the PSR. The court imposed 34 months imprisonment, and three years of supervised release. It issued a judgment that named 8 U.S.C. §1326(b)(1) as the statute of conviction.

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 neither his racing conviction nor his arson conviction constituted an “aggravated felony” after *Sessions v. Dimaya*, __U.S.__, 138 S.Ct 1204 (2018) invalidated 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 imprisonment (pursuant to 8 U.S.C. §1326(b)(2)) rather than ten years imprisonment (pursuant to 8 U.S.C. §1326(b)(1)). The district court's view of the statutory maximum, argued the defendant, was supported by its decision explicitly to adopt the PSR, which named twenty years as the statutory maximum.

The court of appeals did not reach the question of whether the district court erred in determining his statutory maximum. *See* [Appendix B]. Yet it declined to order resentencing, for the sole reason that, in its view, “[t]he record does not show the court's selection of the within-Guidelines 34-month sentence was affected in any way by a belief that the statutory maximum sentence was 20 years, pursuant to § 1326(b)(2), rather than 10 years, pursuant to § 1326(b)(1) ... [Appendix B][citing *United States v. Mondragon-Santiago*, 564 F.3d 357, 368-69 (5th Cir. 2009), and *United States v. Rodriguez-Garcia*, 748 Fed. Appx. 597, 2018 U.S. App. LEXIS 25565, 2018 WL 4339799, at *1 (5th Cir. 2018].

REASONS FOR GRANTING THE PETITION

THE COURTS OF APPEALS ARE DIVIDED AS TO WHETHER AN ERROR DETERMINING A DEFENDANT'S STATUTORY RANGE OF IMPRISONMENT AFFECTS HIS OR HER "SUBSTANTIAL RIGHTS" WITHIN THE MEANING OF FEDERAL RULE OF CRIMINAL PROCEDURE 52, WHERE THE SENTENCE IS WITHIN THE CORRECT STATUTORY RANGE, AND THE GUIDELINES ARE NOT ALTERED. THE POSITION OF THE COURT BELOW DISREGARDS THE STATUTORY TEXT AND RECENT GUIDANCE FROM THIS COURT.

Federal Rule of Criminal Procedure 52(b) authorizes the courts of appeals to correct both preserved and unpreserved errors that affect 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). The court below, however, has limited *Molina-Martinez* to the Guideline context. Thus in the court below an error in determining the defendant's statutory range of imprisonment will generally not affect his or her substantial rights. This was the conclusion of the opinion below, *see* [Appendix B], and it is that court's consistent holding, *see United States v. Mondragon-Santiago*, 564 F.3d 357 (5th Cir. 2009); *United States v. Rodriguez-Garcia*, 748 Fed. Appx. 547 (5th Cir. September 10, 2018)(unpublished); *United States v. Reyes-Hernandez*, 727 Fed. Appx. 90 (June 15, 2018)(unpublished); *United States v. Hermoso*, 484 Fed. Appx. 970 (August 8, 2012)(unpublished).

This position is inconsistent with that of the Tenth Circuit. In *United States v. Marquez*, 258 Fed. Appx. 184 (10th Cir. 2007), the district court erroneously characterized the defendant's prior conviction as an "aggravated felony," and accordingly believed that his statutory maximum for re-entering the country was 20 years rather than ten years imprisonment. *See Marquez*, 258 Fed. Appx. at 188. As here, however, the error did not affect the defendant's Guideline range. *See id.* The government contended that the absence of any effect on the Guidelines rendered the error harmless. *See id.* But the Tenth Circuit rejected that argument, concluding that the error may have played a role in the district court's decision to reject a below-range sentence:

We initially observe that the district court specifically emphasized that Marquez "illegally reentered the United States subsequent to an aggravated felony conviction." Thus, the "fact" that Marquez had a prior aggravated felony conviction was front and center in the district court's thought process in imposing a sentence. That erroneously characterized aggravated felony conviction exposed Marquez to a statutory maximum of twenty years' imprisonment, instead of the ten years he faced under the proper characterization of his prior conviction as simply a felony. Thus, we agree with Marquez that it is highly likely the district court was less inclined to sentence him below the advisory Guideline range of forty-six to fifty-seven months, because the court believed that Marquez was exposed to a twenty-year statutory sentence.

Id.

The Tenth Circuit's view is more faithful to the text of 18 U.S.C. 3553(a). And though it was decided before *Molina-Martinez*, it is more consistent with this Court's guidance in that opinion.

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 34 months sentence is 34% of his true statutory range, but only 17% 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. *Cf. United States v. Paladino*, 401 F.3d 471, 482 (7th Cir. 2005)(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).

The statutory language thus suggests that remand is appropriate when the district court misunderstands the statutory maximum. And the guidance of this Court is to like effect. In *Molina-Martinez*, this Court addressed the role that an altered Sentencing Guideline range may play in the defendant's showing of prejudice. In that case, the defendant appealed an unpreserved Guideline error that increased his Guideline minimum by seven months, and his Guideline maximum by nine months. *See Molina-Martinez*, 136 S.Ct. at 1344. The sentence received by the defendant was within the correctly determined Guideline range. *See id.* Nonetheless, this Court held that this modest miscalculation of the advisory range could satisfy the defendant's showing of substantial rights – no additional evidence was needed

that the district court would be inclined to adjust the sentence on remand. *See id.* at 1345.

The *Molina-Martinez* court reasoned that an “erroneous, and higher, Guidelines range set the wrong framework for the sentencing proceedings.” *Id.* The Guidelines, this Court emphasized, are a “starting point and initial benchmark,” which the district court is required by statute to keep in mind throughout the sentencing proceedings. *Id.* (quoting *Gall v. United States*, 552 U.S. 38, 49 (2007)). After noting statistical evidence that a defendant’s Guideline range tends to affect the sentence imposed, the Court concluded that a bare mathematical change of the advisory sentencing range would generally satisfy the defendant’s burden of persuasion. *See id.* at 1346. This is so even if the defendant’s ultimate sentence is within the correctly determined range. *See id.* A contrary rule, this Court noted, would saddle defendants with the difficult burden of showing the effect of an uncontested range on the sentence chosen, though “sentencing judges often say little about the degree to which the Guidelines influenced their determination.” *Id.* at 1347. In short, “a defendant can rely on the application of an incorrect Guidelines range to show an effect on his substantial rights.” *Id.* at 1348.

An error in the statutory sentencing range is analogous, even if the defendant’s sentence is within the correctly determined statutory range. Accordingly, the appealing party should be able to “rely on the application of an incorrect [statutory] range to show an effect on his substantial rights.” *Id.* The mandatory sentencing range, perhaps to an even greater degree than the Guideline range, sets “the

framework” for sentencing. Indeed, the sentencing range creates the framework for the Commission’s choice of Guidelines, not merely for the district court’s choice of sentence. *See USSG Ch. 1, Pt. A(4)(g)* (“In determining the appropriate sentencing ranges for each offense, the Commission estimated the average sentences served within each category under the pre-guidelines sentencing system. It also examined the sentences specified in federal statutes, in the parole guidelines, and in other relevant, analogous sources.”). Like the Guideline range, §3553(a)(3)’s command to consider “the kinds of sentences available,” means that district courts “must remain cognizant of” the statutory minimums and maximums “throughout the sentencing process.” *Id.* at 1345 (quoting *Peugh v. United States*, __U.S.__, 133 S.Ct. 2072 (2013)). The close analogy between the mandatory and advisory ranges compels the conclusion that an erroneous determination of the sentencing range may be sufficient to show a reasonable probability of a different result.

The present case is an appropriate vehicle. The court below directly addressed the question presented, finding that errors in the determination of a statutory maximum may be disregarded if they do not also affect the Guidelines. *See* [Appendix B]. It provided no alternative ground of decision. *See* [Appendix B]. As such, this Court may review the question presented without reaching any other question, and remand if it determines that errors in a statutory maximum generally affect substantial rights.

CONCLUSION

This Court should grant certiorari on the question presented. Alternatively, Petitioner prays for such relief as to which he may justly entitled.

Respectfully submitted this 20th day of May, 2019,

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