

No. _____

**In The
Supreme Court of the United States**

LUIS SAMAYOA-CASTILLO,
Petitioner,
v.

UNITED STATES,
Respondent.

*On Petition for a Writ of Certiorari to the United
States Court of Appeals for the Eleventh Circuit*

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The district court expressly and repeatedly explained that it selected Mr. Samayoa-Castillo's 60-month, total sentence in consideration of the "substantial" and "significant" nature of the 15-month "break" it erroneously believed it awarded Mr. Samayoa-Castillo in 2016. In reality it awarded Mr. Samayoa-Castillo a "break" of less than three months. It is undisputed that the district court relied on upon this clearly erroneous fact in selecting Mr. Samayoa-Castillo's total sentence in 2018.

The Eleventh Circuit Court of Appeals (1) acknowledged that the district court committed procedural error when it relied on the incorrect 2016 guideline range in imposing the 2018 sentences; but (2) found that the error was harmless because there was another basis in the record for determining that "another below-guideline sentence was unwarranted." The issue before this Court is:

When the district court expressly relies upon a clearly erroneous fact in selecting its sentence, is the error harmless if there are other factors in the record that would support the overall sentence? Did the Eleventh Circuit misapply harmless error review under Fed. R. Crim. P. 52(a) in a manner that is contrary this Court's precedent announced in *Gall v. United States*, 552 U.S. 38 (2007), *Williams v. United States*, 503 U.S. 193, 203 (1992), *Molina-Martinez v. United States*, 136 S. Ct. 1338 (2016), and *Rosales-Mireles v. United States*, 138 S. Ct. 1897 (2018)?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED CASES

- *United States v. Samayoa-Castillo*, No. 15-cr-192, U.S. District Court for the Middle District of Alabama. Judgment entered on Mar. 2, 2016. Judgment on revocation entered on Apr. 30, 2018.
- *United States v. Samayoa-Castillo*, No. 17-cr-443, U.S. District Court for the Middle District of Alabama. Judgment entered on Apr. 30, 2018.
- *United States v. Samayoa-Castillo*, Nos. 18-11874 & 18-11879, U.S. Court of Appeals for the Eleventh Circuit. Judgment entered on Mar. 6, 2019. Rehearing denied on May 13, 2019.

TABLE OF CONTENTS

QUESTION PRESENTED.....	ii
LIST OF PARTIES	iii
RELATED CASES.....	iii
TABLE OF CONTENTSiv
PETITION FOR A WRIT OF CERTIORARI.....	1
JURISDICTION	1
RELEVANT STATUTORY PROVISIONS	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	9
I. The Eleventh Circuit’s decision conflicts with this Court’s precedent, as announced in <i>Gall</i> , <i>Williams</i> , <i>Molina-Martinez</i> , and <i>Rosales-Mireles</i> ... 10	
CONCLUSION	18
APPENDIX	

TABLE OF AUTHORITIES

Cases:

<i>Gall v. United States</i> , 552 U.S. 38 (2007)	10, 18
<i>Molina-Martinez v. United States</i> , 136 S. Ct. 1338 (2016).....	<i>passim</i>
<i>Rosales-Mireles v. United States</i> , 138 S. Ct. 1897 (2018).....	<i>passim</i>
<i>United States v. Samayoa-Castillo</i> , 762 F. App'x 846 (11th Cir. 2019).....	1, 17
<i>Williams v. United States</i> , 503 U.S. 193 (1992).....	10, 15, 17

Statutes

8 U.S.C. § 1326(a)	2, 3
18 U.S.C. § 3231(g).....	9
18 U.S.C. § 3583(e)	9
28 U.S.C. § 1254(1).....	1
28 U.S.C. § 1291.....	9
Federal Rule of Criminal Procedure 52.....	<i>passim</i>
United States Sentencing Guideline Section 2L1.2(b)(1)(A)(ii).....	2

PETITION FOR A WRIT OF CERTIORARI

Mr. Luis Samayoa-Castillo respectfully requests that this Court grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

LIST OF PROCEEDINGS BELOW

The Eleventh Circuit's decision is unpublished. *United States v. Samayoa-Castillo*, 762 F. App'x 846 (11th Cir. 2019) (unpublished). The opinion is included in Petitioner's Appendix. Pet. App. 1a.

The Eleventh Circuit's order denying Mr. Samayoa-Castillo's petition for panel rehearing and rehearing en banc is unreported, but reproduced in the Petitioner's Appendix. Pet. App. 1b.

JURISDICTION

The Eleventh Circuit's opinion was issued on March 6, 2019. Mr. Samayoa-Castillo timely filed a petition for rehearing and rehearing en banc. The Eleventh Circuit denied the petitions on May 13, 2019, rendering Mr. Samayoa-Castillo's Petition for Writ of Certiorari due in this Court on August, 12, 2019. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Federal Rule of Criminal Procedure 52 provides:

(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

In April 2015, Mr. Luis Samayoa-Castillo pled guilty, in Case No. 3:15-cr-192, to a single count of illegal reentry by a deported alien convicted of an aggravated felony, in violation of 8 U.S.C. §§ 1326(a), (b)(2).

In preparing the Presentence Investigation Report (“PSI”) for Case No. 15-cr-192, the probation officer assigned Mr. Samayoa-Castillo a total offense level of 17 and a criminal history category of II, corresponding to an advisory guideline range of 27-33 months. However, in calculating Mr. Samayoa-Castillo’s offense level, the probation officer applied a 12-level enhancement under U.S.S.G. § 2L1.2(b)(1)(A)(ii), because, allegedly, Mr. Samayoa-Castillo had previously been convicted of a felony “crime of violence” that did not receive criminal history points under Chapter Four.¹ Prior to sentencing, Mr. Samayoa-Castillo objected to the 12-level enhancement.

At the sentencing hearing in Case No. 15-cr-192, the district court sustained Mr. Samayoa-Castillo’s objection to the 12-level enhancement, applying instead an eight-level enhancement under § 2L1.2(b)(1)(C). The court then performed its own calculation of the Guidelines, “with specific findings that the offense level is 13, the criminal history category is II, [and] the guideline range is from 15-21 months.” The district court sentenced Mr.

¹ Section 2L1.2 has been amended since Mr. Samayoa-Castillo’s initial sentencing hearing in 2016.

Samayoa-Castillo to one year and one day in prison, to be followed by two years' supervised release.

After completing his custodial sentence, Mr. Samayoa-Castillo was remanded to the custody of the Bureau of Immigration and Customs Enforcement ("ICE") for deportation proceedings. He began his term of supervised release—and was physically removed from the United States—on May 11, 2016.

On October 6, 2017, the United States Probation Office filed a petition with the district court, recommending revocation of Mr. Samayoa-Castillo's supervised release based on two alleged violations. Specifically, the probation officer alleged that Mr. Samayoa-Castillo violated federal law and the conditions of his supervised release by reentering the United States and failing to report to the United States Probation Office within 72 hours of his arrival.

Separate criminal proceedings were initiated against Mr. Samayoa-Castillo based on the same conduct underlying the revocation petition. Accordingly, on October 17, 2017, a federal grand jury returned an indictment against Mr. Samayoa-Castillo, charging him, in Case No. 17-cr-443, with illegal reentry by a deported alien convicted of an aggravated felony, in violation of 8 U.S.C. §§ 1326(a), (b)(2).

Shortly thereafter, the parties negotiated a written Fed. R. Crim. P. 11(c)(1)(C) agreement addressing both the supervised release violation in Case No. 15-cr-192 and the indictment in Case No. 17-cr-443. Specifically, the

government agreed that the appropriate sentence for Case No. 15-cr-192, was “no higher than the bottom of the advisory Guidelines,” provided Mr. Samayoa-Castillo pled guilty to violating the conditions of his supervised release. It likewise agreed that a sentence at the bottom of the advisory guideline range was appropriate in Case No. 17-cr-443. Mr. Samayoa-Castillo reserved his right to request concurrent sentences, but agreed that he would not otherwise pursue a downward variance.

A magistrate judge accepted the guilty plea, and adjudged Mr. Samayoa-Castillo guilty. The PSI prepared for Case No. 17-cr-443 calculated a total offense level of 10, a criminal history category of IV, and a guideline range of 15-21 months.

The district court conducted a consolidated sentencing and final revocation hearing in April 2018. The district court noted, as a preliminary matter, that it would not accept the Fed. R. Crim. P. 11(c)(1)(C) agreement negotiated by the parties. The court explained that its decision to reject the plea agreement was based on: (1) Mr. Samayoa-Castillo’s criminal history; and (2) the fact that the court “gave him a *substantial* break [in Case No. 15-cr-192] by following the plea agreement for one year and one day *when the guidelines called for a 27- to 33-month sentence.*” (emphasis added). The court offered Mr. Samayoa-Castillo the opportunity to withdraw his guilty plea, but Mr. Samayoa-Castillo declined, and elected to proceed to sentencing in Case No. 17-cr-443.

The district court addressed Case No. 15-cr-192 first, and inquired how Mr. Samayoa-Castillo wanted to plead with respect to the two alleged violations of the terms of his supervised release. Mr. Samayoa-Castillo indicated that he wanted to plead guilty, and the court accepted his guilty plea as to both violations. The court calculated the Guidelines for the supervised release violation, noting that, based on a violation grade of B and a criminal history category of II, the resulting guideline range was 6-12 months.

The district court revoked Mr. Samayoa-Castillo's supervised release in Case No. 15-cr-192, and then returned its attention to the illegal reentry offense in Case No. 17-cr-443. The district court adopted the factual findings and guideline calculations contained in the 2018 PSI, noting that, based on a total offense level of 10 and a criminal history category of IV, the resulting guideline range was 15-21 months.

Mr. Samayoa-Castillo requested that the court sentence him within the applicable guideline range for Case No. 17-cr-443 and Case No. 15-cr-192, and run the two sentences concurrently. The government, in turn, requested that the court sentence Mr. Samayoa-Castillo to the bottom of the Guidelines, and run the two sentences consecutively.

The district court denied Mr. Samayoa-Castillo's request for concurrent sentences. The court explained that, although it would ordinarily run the two sentences concurrently, it was going to impose consecutive sentences in this case:

So the sentence that I give is going to be consecutive. *Because I did give the defendant a significant break in the prior case and because he violated on that case, I sentence him to 24 months' incarceration, which is a variance upward in consideration of the fact that he was given a significant variance downward when I complied with his attorney's request and the government's request for a one-year-and-one-day sentence in the 2015 case when the guidelines were 27 to 33 months.* So that's what that sentence will be, and it will run consecutive to any sentence I give in the current case.

(emphasis added).

The district court sentenced Mr. Samayoa-Castillo to 36 months' imprisonment as to Case No. 17-cr-443, and 24 months' imprisonment as to Case No. 15-cr-192, to be served consecutively. The court stated that, in selecting this 60-month total sentence, it had taken into account: (1) the fact that the court had given Mr. Samayoa-Castillo a "lighter sentence" in the 2015 illegal reentry case to account for the fact that he received a 100-month sentence for his 2001 illegal reentry offense; (2) Mr. Samayoa-Castillo's motivations in returning to the United States to be with his family; and (3) Mr. Samayoa-Castillo's criminal conduct, which "continue[d] to be an issue." The court recited that it had considered the Guidelines, and deemed its 60-month total sentence reasonable considering the nature and circumstances of the offense and the need to reflect the seriousness of the offense, promote respect for the law, provide just punishment for the offense, afford adequate deterrence to criminal conduct, protect the public from further crimes, and provide the defendant with needed correctional treatment.

Mr. Samayoa-Castillo objected to the sentence as both procedurally and substantively unreasonable.

The district court prepared separate judgments, and Mr. Samayoa-Castillo timely filed a notice of appeal for each one. This Court docketed Mr. Samayoa-Castillo’s appeal from the judgment of conviction in Case No. 17-cr-443 as Appeal No. 18-11874, and his appeal from the judgment on revocation in Case No. 15-cr-192 as Appeal No. 18-11879. Mr. Samayoa-Castillo filed a motion to consolidate the two appeal numbers, which the Eleventh Circuit granted.

In his briefing to the Eleventh Circuit, Mr. Samayoa-Castillo argued, *inter alia*, that his 24-month, consecutive sentence in Case No. 15-cr-192 was procedurally unreasonable because the district court relied upon clearly erroneous facts in selecting it. He pointed out that the district court varied upward from the Guidelines—and denied his request for concurrent sentences—specifically “in consideration of the fact that he was given a *significant* variance downward when I complied with his attorney’s request and the government’s request for a one-year-and-one-day sentence in the 2015 case *when the guidelines were 27 to 33 months.*” (emphasis added). Mr. Samayoa-Castillo pointed out that this was a factually erroneous description of what occurred at the 2016 sentencing hearing in Case No. 15-cr-192, and the court simply did not impose the “significant downward variance” of approximately 15 months that it apparently thought it did. Mr. Samayoa-

Castillo argued that the error could not be deemed harmless, because: (1) the extent of the upward variance in the 2018 revocation case was roughly proportional to the extent of the downward variance the court mistakenly believed it awarded Mr. Samayoa-Castillo in 2016; and (2) the district court expressly and repeatedly tethered its above-guideline sentence in the 2018 revocation case to the “substantial” and “significant” extent of the “break” it believed Mr. Samayoa-Castillo received in 2016.

The Eleventh Circuit rejected Mr. Samayoa-Castillo’s procedural reasonableness argument. *United States v. Samayoa-Castillo*, 762 F. App’x 846, 851-52 (11th Cir. 2019) (unpublished). Notably, in reaching this conclusion, the panel agreed that the district court based its sentence in part upon a clearly erroneous fact:

As for procedural reasonableness, it appears that the district court relied on an unrevised version of the presentence investigation report in the Revocation Case, and incorrectly said that Samayoa-Castillo’s advisory guideline range at his original sentencing proceeding in 2016 was 27 to 33 months’ imprisonment, even though the correct guideline range was 15 to 21 months’ imprisonment. Accordingly, when the district court noted in 2018 that it was now imposing a 24-month sentence in the Revocation Case because it had given Samayoa-Castillo “a significant variance downward when [at the original 2016 sentencing hearing, it] complied with [the parties’] request for a one year and one day sentence in the [Revocation] [C]ase when the guidelines were 27 to 33 months,” it relied on the incorrect guideline range.

However, the panel determined that “the district court’s reliance on the incorrect guideline range was harmless.” According to the panel, the district court selected its 24-month, above-guideline sentence in the 2018 revocation

case “because it concluded that another below-guideline sentence was unwarranted.” The panel further reasoned that “the district court did not base the 24-month sentence on the extent of the downward variance that it erroneously believed Samayoa-Castillo received in 2016. Rather, the district court calculated the 2018 sentence based on its findings that Samyaoa-Castillo remained undeterred from entering the country illegally.”

The panel rejected Mr. Samayoa-Castillo’s remaining arguments, and concluded that his 60-month total sentence was substantively and procedurally reasonable. It then affirmed his sentences. Mr. Samayoa-Castillo timely filed a petition for rehearing and rehearing en banc, which the Eleventh Circuit denied.

This petition for a writ of certiorari follows.

The district court had jurisdiction over this matter pursuant to 18 U.S.C. § 3231 and 18 U.S.C. § 3583(e). The Eleventh Circuit had jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

REASONS FOR GRANTING THE WRIT

In the opinion below, the Eleventh Circuit Court of Appeals (1) acknowledged that the district court committed procedural error when it relied on the incorrect 2016 guideline range in imposing the 2018 sentences; but (2) found that the sentencing court’s reliance on the incorrect guideline range was harmless because there was another basis in the record for determining that “another below-guideline sentence was unwarranted.”

This practice misapplies harmless error review under Fed. R. Crim. P. 52(a), and pretermits any and all meaningful appellate review concerning whether the district court committed significant procedural error by selecting its sentence based on clearly erroneous facts. It is therefore contrary to this Court’s precedent in *Gall v. United States*, 552 U.S. 38 (2007), *Williams v. United States*, 503 U.S. 193, 203 (1992), *Molina-Martinez v. United States*, 136 S. Ct. 1338 (2016), and *Rosales-Mireles v. United States*, 138 S. Ct. 1897 (2018).

Therefore, Mr. Samayoa-Castillo respectfully submits that certiorari is appropriate in this case.

I. The Eleventh Circuit’s decision conflicts with this Court’s precedent, as announced in *Gall*, *Williams*, *Molina-Martinez*, and *Rosales-Mireles*.

This Court’s precedent is clear. Appellate review of the reasonableness of a sentence is a two-part process. *See Gall v. United States*, 552 U.S. 38, 51 (2007). The appellate court “must *first* ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, *selecting a sentence based on clearly erroneous facts*, or failing to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range.” *Id.* at 51 (emphasis added). Then, “[a]ssuming that the district court’s sentencing decision is procedurally sound,” the appellate court should proceed to step two,

and “consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard.” *Id.*

Against this doctrinal backdrop, this Court has recently decided two cases dealing with the interpretation of Rule 52 and the scope of appellate review of an unpreserved procedural error concerning the calculation of the Guidelines.

In the first of these cases, *Molina-Martinez*, the sentencing court miscalculated the Guidelines, and sentenced the defendant to the bottom of the erroneous guideline range. The defendant argued—for the first time on appeal—that by incorrectly calculating the Guidelines, the district committed an error that was plain, that affected his substantial rights, and that impugned the fairness, integrity, and public reputation of the judicial proceedings. The Fifth Circuit disagreed, concluding that the error did not affect the defendant’s substantial rights because his ultimate sentence was within the correctly calculated guideline range. The Fifth Circuit reasoned that, when a correct sentencing range overlaps with an incorrect range, the appellant cannot demonstrate a reasonable probability of a different result unless he can put forth additional evidence in the record showing that the Guidelines had an effect on the district court’s selection of its sentence.

Reversing, this Court explained that, “[t]he Guidelines inform and instruct the district court’s determination of an appropriate sentence.” *Molina-Martinez*, 136 S.Ct. at 1346. Accordingly, in the usual case, “the systemic

function of the selected Guidelines range will affect the sentence. This fact is essential to the application of Rule 52(b) to a Guidelines error. From the centrality of the Guidelines in the sentencing process it must follow that, when a defendant shows that the district court used an incorrect range, he should not be barred from relief on appeal simply because there is no other evidence that the sentencing outcome would have been different had the correct range been used.” *Id.*

This Court emphasized that its decision was intended to preclude appellate courts reviewing sentencing errors from applying a categorical rule requiring additional evidence under similar circumstances. *Id.* at 1348. Rejection of this categorical rule “means only that the defendant can rely on the application of an incorrect Guidelines range to show an effect on his substantial rights.” *Id.* Notably, in distinguishing between harmless error under Rule 52(a) and plain error under Rule 52(b), the court was careful to note the following: “Although Rules 52(a) and (b) both require an inquiry into whether the complained-of error was prejudicial there is one important difference between the subparts—under (b), but not (a), it is the defendant rather than the government who bears the burden of persuasion with respect to prejudice.” *Id.* at 1348 (internal quotations omitted).

In the second of the above-referenced cases, *Rosales-Mireles*, this Court once again reversed the Fifth Circuit for its erroneous interpretation of Rule 52 in the context of an unpreserved Guidelines error. Like in *Molina-Martinez*,

the sentencing court committed procedural error by incorrectly calculating the Guidelines, and then sentenced the defendant within the erroneously calculated guideline range. *Rosales-Mireles*, 138 S. Ct. at 1905. The defendant did not object in the district court, but argued on appeal that the district court committed plain error by miscalculating his guideline range. *Id.* The Fifth Circuit agreed that the sentencing court committed plain error affecting the defendant's substantial rights, but nevertheless declined to remand based on its determination that the error did not affect the fairness, integrity, or public reputation of the judicial proceedings. *Id.* Applying a heightened Rule 52(b) standard, the Fifth Circuit reasoned that neither the error nor the resulting sentence—which was within the correctly calculated guideline range—was so egregious as to “shock the conscience of the common man.” *Id.* at 1905-06.

Reversing, this Court explained that “an error resulting in a higher range than the Guidelines provide usually establishes a reasonable probability that a defendant will serve a prison sentence that is more than ‘necessary’ to fulfill the purposes of incarceration.” *Id.* at 1907. Because the possibility of additional jail time has severe consequences for the incarcerated individual, it warrants serious consideration in the appellate court’s decision to correct a forfeited error under Rule 52(b). *Id.* Therefore, in the ordinary case, “the failure to correct a plain Guidelines error that affects a defendant’s substantial rights will seriously affect the fairness, integrity, and public reputation of judicial proceedings.” *Id.* at 1911.

As in *Molina-Martinez*, this Court emphasized the inescapable impact of the Guidelines in federal sentencing: “even in an advisory capacity, the Guidelines serve as a meaningful benchmark in the initial determination of a sentence *and through the process of appellate review.*” *Id.* at 1904 (emphasis added). Unlike cases where a particular trial strategy might lead to a harsher sentence, Guidelines miscalculations result directly from judicial error. *Id.* at 1908. Therefore, ensuring the accuracy of the Guidelines determinations serves to promote certainty and fairness in sentencing, and the appellate court may abuse its discretion by failing to correct such an error under Rule 52(b).

Id.

Notably, in reaching this conclusion, this Court specifically rejected the government’s argument that the defendant could not establish the fourth prong of plain error because his sentence was within the correctly calculated guideline range. *Id.* at 1910. “A substantive reasonableness determination, however, is an entirely separate inquiry from whether an error warrants correction under plain-error review.” *Id.* Thus, “[b]efore a court of appeals can consider the substantive reasonableness of a sentence, [i]t must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range.” *Id.* (quoting *Gall*, 552 U.S., at 51) (emphasis added) (first brackets added).

Finally, as this Court has explained in the context of harmless error review under Fed. R. Crim. P. 52(a), “the party challenging the sentence on

appeal, although it bears the initial burden of showing that the district court relied upon an invalid factor at sentencing, does not have the additional burden of proving that the invalid factor was determinative in the sentencing decision. Rather, *once the court of appeals has decided that the district court misapplied the Guidelines, a remand is appropriate unless the reviewing court concludes, on the record as a whole, that the error was harmless, i.e., that the error did not affect the district court's selection of the sentence imposed.*" *Williams v. United States*, 503 U.S. 193, 203 (1992) (emphasis added).

As previously noted, the Eleventh Circuit: (1) agreed that the district court committed procedural error when it relied on the incorrect guideline range; but (2) found that the sentencing court's reliance on the incorrect guideline range was harmless. In doing so, the Court misapplied harmless error review under Fed. R. Crim. P. 52(a).

Once Mr. Samayoa-Castillo demonstrated that the district court relied upon an invalid factor at sentencing, the burden of demonstrating harmless error should have shifted to the government. *See Williams*, 503 U.S. at 203; *Molina-Martinez*, 136 S. Ct. at 1348. However, the Eleventh Circuit never shifted the burden away from Mr. Samayoa-Castillo, nor required *the government* to make any particular showing that Mr. Samayoa-Castillo would have received the same sentence absent the court's consideration of a clearly erroneous fact.

Indeed, such a showing is simply not possible on this record. In this case, the district court rejected Mr. Samayoa-Castillo’s plea agreement—in which the parties agreed that the appropriate sentence for Case No. 15-cr-192, was “no higher than the bottom of the advisory Guidelines” range of 6-12 months—specifically in consideration of the fact “that the last time he was before me about three years ago, I have – or two and a half years ago, *I gave him a substantial break by following the plea agreement for one year and one day when the guidelines called for a 27- to 33-month sentence.*” (emphasis added). The court expressly stated that this erroneous fact, coupled with Mr. Samayoa-Castillo’s criminal history, provided “the reasons that I rejected the plea agreement” and the within-guideline sentence.

Furthermore, the district court varied upward from the Guidelines—and denied Mr. Samayoa-Castillo’s request for concurrent sentences—specifically “because” of the same demonstrably erroneous fact. The sentencing court stated that, “although ordinarily I would probably run these concurrent. . . the sentence that I give is going to be consecutive. Because I did give the defendant a significant break in the prior case and because he violated on that case, I sentence him to 24 months’ incarceration, which is a variance upward in consideration of the fact that he was given a significant variance downward when I complied with is attorney’s request and the government’s request for a one-year-and-day sentence in the 2015 case when the guidelines were 27 to 33 months.”

Accordingly, the district court expressly stated that its mistaken belief that it gave Mr. Samayoa-Castillo a “substantial” 15-month downward variance in 2016 was a factor it relied on in: (1) running Mr. Samayoa-Castillo’s 24-month sentence in Case No. 15-cr-192 consecutively (even though it would ordinarily impose concurrent sentences under these circumstances); and (2) varying upward from the 6-12 month guideline range (in an amount roughly proportional to the extent of the downward variance the court mistakenly believed it previously awarded Mr. Samayoa-Castillo). In short, the district court expressly and repeatedly explained that it selected its sentence in consideration of the “substantial” and “significant” nature of the 15-month “break” it erroneously believed it awarded Mr. Samayoa-Castillo in 2016.

Therefore, the Eleventh Circuit’s application of harmless error review misapplied this Court’s precedent, as it is simply not possible to conclude, based upon the record as a whole, that “the error did not affect the district court’s selection of the sentence imposed.” *Williams*, 503 U.S. at 203. The district court told us more than once that it did.

Furthermore, the Eleventh Circuit opinion permits a district court to select its sentence based on clearly erroneous facts, provided there is some other basis for concluding that “another below-guideline sentence was unwarranted.” *Samayoa-Castillo*, 762 F. App’x at 851. This practice entirely pretermits meaningful appellate review with respect to the *procedural reasonableness* of the sentence. It is therefore in conflict with this Court’s

precedent, as both *Gall* and *Rosales-Mireles* unequivocally provide that the appellate court must ensure *first* that the sentencing court committed no significant procedural error, and then, second—and assuming that the sentencing court’s sentencing decision is procedurally sound—that the sentence is substantively reasonable.

Moreover, the Eleventh Circuit has effectively established a categorical rule that a sentence can never be procedurally unreasonable because it is based on clearly erroneous facts, as long as: (1) the district court also relied on facts supported by the record; and (2) the overall sentence is otherwise substantively reasonable. This is exactly the type of categorical rule that this Court disclaimed in *Molina-Martinez*.

Thus, the Eleventh Circuit’s opinion overlooked and ignored relevant facts, and applied harmless error review in a manner inconsistent with this Court’s precedent.

CONCLUSION

For the above reasons, this Court should grant this petition for writ of *certiorari*.

Respectfully submitted,

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-11874
Non-Argument Calendar

D.C. Docket No. 2:17-cr-00443-WKW-WC-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LUIS SAMAYOA-CASTILLO,

Defendant-Appellant.

No. 18-11879
Non-Argument Calendar

D.C. Docket No. 3:15-cr-00192-WKW-CSC-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LUIS SAMAYOA-CASTILLO,

Defendant-Appellant.

Appeals from the United States District Court
for the Middle District of Alabama

(March 6, 2019)

Before TJOFLAT, MARCUS and JORDAN, Circuit Judges.

PER CURIAM:

Luis Samayoa-Castillo appeals the sentences imposed in 2018, following his third conviction for illegal reentry, in violation of 8 U.S.C. § 1326(a) and (b)(2) (“Illegal Reentry Case”), and the revocation of his supervised release (“Revocation Case”). On appeal, Samayoa-Castillo argues that: (1) the district court erred in holding that his prior Massachusetts conviction for assault with a dangerous weapon (“ADW”) qualified as an “aggravated felony” to support the 20-year statutory maximum sentence provided in § 1326(b)(2); and (2) his total 60-month sentence is procedurally and substantively unreasonable. After careful review, we affirm.

We review questions of statutory interpretation, including whether an offense qualifies as an aggravated felony, *de novo*. United States v. Maturin, 499 F.3d 1243, 1245 (11th Cir. 2007). We review the sentence a district court imposes for “reasonableness,” which “merely asks whether the trial court abused its discretion.” United States v. Pugh, 515 F.3d 1179, 1189 (11th Cir. 2008) (quotation omitted). Where a defendant fails to clearly articulate an objection on procedural grounds at

the time of sentencing, he waives the objection and plain error review applies. United States v. Zinn, 321 F.3d 1084, 1087 (11th Cir. 2003). To establish plain error, the defendant must show (1) an error, (2) that is plain, and (3) that affected his substantial rights. United States v. Turner, 474 F.3d 1265, 1276 (11th Cir. 2007). If the defendant satisfies these conditions, we may exercise our discretion to recognize the error only if it seriously affects the fairness, integrity, or public reputation of judicial proceedings. Id. We deem arguments not raised by a defendant in his initial brief to be waived. United States v. Levy, 379 F.3d 1241, 1244 (11th Cir. 2004).

First, we are unpersuaded by Samayoa-Castillo's claim that his prior conviction for assault with a dangerous weapon qualified as an aggravated felony for purposes of § 1326(b)(2). Any alien who has been deported or removed from the United States, and thereafter is found in the United States, shall be fined or imprisoned not more than two years, or both. 8 U.S.C. § 1326(a). Notwithstanding the provisions of § 1326(a), any alien whose removal was subsequent to a conviction for commission of a felony shall be fined or imprisoned not more than ten years. Id. § 1326(b)(1). Any alien described in (a) whose removal was subsequent to a conviction for the commission of an aggravated felony shall be fined or imprisoned not more than 20 years. Id. § 1326(b)(2). An "aggravated felony" includes a crime of violence, as defined in 18 U.S.C. § 16, or a conviction for illegal reentry by an alien who was previously deported on the basis of an aggravated felony. Id. §

1101(a)(43)(F), (O). An alien who has been removed based on a conviction for an aggravated felony is permanently inadmissible to the United States. See id. § 1182(a)(9)(A)(i).

A crime of violence, for purposes of the illegal reentry statute, is defined as “an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another.” 18 U.S.C. § 16(a). The definition of a crime of violence under § 16(a) is virtually identical to the definition of a “violent felony” under the ACCA, as both definitions include any felony offense that “has as an element the use, attempted use, or threatened use of physical force against” the person of another. Compare 18 U.S.C. § 16(a), with 18 U.S.C. § 924(e)(2)(B)(i); see also *Johnson v. United States*, 559 U.S. 133, 140 (2010) (noting that the definition of crime of violence in § 16 is “very similar” to § 924(e)(2)(B)(i)’s definition of violent felony).

In Massachusetts, a crime punishable by death or imprisonment in the state prison is a felony and all other crimes are misdemeanors. M.G.L.A. ch. 274, § 1. The Massachusetts assault-with-a-dangerous-weapon statute provides, in part, that:

(a) Whoever, by means of a dangerous weapon, commits an assault upon a person sixty years or older, shall be punished by imprisonment in the state prison for not more than five years or by a fine of not more than one thousand dollars or imprisonment in jail for not more than two and one-half years

(b) Whoever, by means of a dangerous weapon, commits an assault upon another shall be punished by imprisonment in the state prison for

not more than five years or by a fine of not more than one thousand dollars or imprisonment in jail for not more than two and one-half years.

Id. ch. 265, § 15B. The Massachusetts common law recognizes two theories of assault: attempted battery and threatened battery. Commonwealth v. Porro, 939 N.E.2d 1157, 1163 (Mass. 2010). The Massachusetts Supreme Judicial Court has defined battery as “harmful and offensive touching[],” Commonwealth v. Burke, 457 N.E.2d 622, 624 (Mass. 1983), and assault as “either an attempt to use physical force on another, or as a threat of use of physical force.” Commonwealth v. Gorassi, 733 N.E.2d 106, 110 (Mass. 2000). “The crime of [ADW] adds one additional element, namely, that the assault was perpetrated by means of a dangerous weapon.” Commonwealth v. Melton, 763 N.E.2d 1092, 1096 (Mass. 2002).

While our Court has not resolved whether a conviction for Massachusetts ADW constitutes a crime of violence under 18 U.S.C. § 16(a), the First Circuit has held that a prior Massachusetts ADW conviction qualifies as a predicate violent felony under the ACCA. See United States v. Am, 564 F.3d 25, 33 (1st Cir. 2009); United States v. Whindleton, 797 F.3d 105, 112-13 (1st Cir. 2015). In Am, the First Circuit rejected a defendant’s argument that his prior conviction for assault with a knife did not qualify as a predicate offense under the ACCA because the Massachusetts ADW statute lacked an express element requiring force. 564 F.3d at 33. The First Circuit held that, “[b]y its terms, the Massachusetts [ADW] statute . . . which criminalizes an assault upon another by means of a dangerous weapon has

as an element the use, attempted use, or threatened use of physical force as required by ACCA.” Id. (quotations omitted); see also Whindleton, 797 F.3d 105, 112-13 (1st Cir. 2015) (holding that a defendant’s prior conviction under the Massachusetts ADW statute qualified as a violent felony for purposes of the ACCA).

For starters, although Samayoa-Castillo was initially charged with assault and battery with a dangerous weapon (“ABDW”), M.G.L.A. ch. 265, § 15A, the record shows that he was ultimately convicted of the amended charge of ADW, M.G.L.A. ch. 265, § 15B, which has different elements and case law. On appeal, Samayoa-Castillo continues to refer to his prior conviction as a conviction under Massachusetts’s ABDW statute. This means that Samayoa-Castillo has arguably waived any argument challenging the application of the 20-year statutory maximum term of imprisonment under § 1326 by arguing on appeal that his prior Massachusetts ABDW is not a qualifying aggravated felony conviction, instead of making an argument concerning ADW. See Levy, 379 F.3d at 1244.

But, in any event, even if we were to consider the merits of his claim, it would fail. The United States Court of Appeals for the First Circuit, which includes Massachusetts, has squarely held that a Massachusetts ADW conviction constitutes a crime of violence under § 16(a), and we are persuaded by these decisions. See 18 U.S.C. § 16(a); Whindleton, 797 F.3d at 112-13; Am, 564 F.3d at 33. Moreover, to the extent Samayoa-Castillo says the ADW statute does not require the intentional

use of force needed to qualify as a crime of violence, the First Circuit has disagreed, holding that the ADW statute requires the defendant to have acted intentionally. Am, 564 F.3d at 33-34. Thus, applying persuasive First Circuit precedent, we conclude that the district court correctly held that Samayoa-Castillo's 1995 Massachusetts ADW conviction constitutes an aggravated felony for purposes of § 1326.

We also reject Samayoa-Castillo's claim that his sentence is unreasonable. In reviewing sentences for reasonableness, we perform two steps. Pugh, 515 F.3d at 1190. First, we “ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence -- including an explanation for any deviation from the Guidelines range.” Id. (quoting Gall v. United States, 552 U.S. 38, 51 (2007)).¹ If a district court selects a sentence based on a fact for which no record evidence exists, that finding is clearly erroneous, and the sentence is procedurally unreasonable. United States v. Barner, 572 F.3d 1239, 1251 (11th Cir. 2009). However, the district

¹ The § 3553(a) factors include: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (3) the need for the sentence imposed to afford adequate deterrence; (4) the need to protect the public; (5) the need to provide the defendant with educational or vocational training or medical care; (6) the kinds of sentences available; (7) the Sentencing Guidelines range; (8) the pertinent policy statements of the Sentencing Commission; (9) the need to avoid unwanted sentencing disparities; and (10) the need to provide restitution to victims. 18 U.S.C. § 3553(a).

court need not explicitly say that it considered the § 3553(a) factors, as long as the court's comments show it considered the factors when imposing sentence. United States v. Dorman, 488 F.3d 936, 944 (11th Cir. 2007).

Where the district court procedurally errs, “a remand is appropriate unless the reviewing court concludes, on the record as a whole, that the error was harmless, i.e., that the error did not affect the district court’s selection of the sentence imposed.” Williams v. United States, 503 U.S. 193, 203 (1992) (addressing proper standard of review when district court misapplies the Guidelines). Therefore, where the district court relies on both proper and improper factors in making a sentencing decision, “we may affirm so long as the record reflects that the improper factors did not affect or influence the district court’s conclusion.” United States v. Kendrick, 22 F.3d 1066, 1069 (11th Cir. 1994).

If we conclude that the district court did not procedurally err, we consider the “substantive reasonableness of the sentence imposed under an abuse-of-discretion standard,” based on the “totality of the circumstances.” Pugh, 515 F.3d at 1190 (quotation omitted). “[W]e will not second guess the weight (or lack thereof) that the [court] accorded to a given [§ 3553(a)] factor . . . as long as the sentence ultimately imposed is reasonable in light of all the circumstances presented.” United States v. Snipes, 611 F.3d 855, 872 (11th Cir. 2010) (quotation, alteration and emphasis omitted). However, a court may abuse its discretion if it (1) fails to

consider relevant factors that are due significant weight, (2) gives an improper or irrelevant factor significant weight, or (3) commits a clear error of judgment by balancing a proper factor unreasonably. United States v. Irey, 612 F.3d 1160, 1189 (11th Cir. 2010) (en banc). Also, a court’s unjustified reliance on any one § 3553(a) factor may be a symptom of an unreasonable sentence. United States v. Crisp, 454 F.3d 1285, 1292 (11th Cir. 2006). A sentence imposed well below the statutory maximum is an indicator of a reasonable sentence. See United States v. Gonzalez, 550 F.3d 1319, 1324 (11th Cir. 2008).

“If, after correctly calculating the guidelines range, a district court decides that a sentence outside that range is appropriate, it must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance.” United States v. Williams, 526 F.3d 1312, 1322 (11th Cir. 2008) (quotations omitted). If the district court imposes a sentence outside the guidelines range, “[we] may consider the deviation, but must give due deference to the district court’s decision that the § 3553(a) factors, on a whole, justify the extent of the variance.” Id. (quotations omitted). A district court is “free to consider any information relevant to [a defendant’s] background, character, and conduct in imposing an upward variance.” United States v. Tome, 611 F.3d 1371, 1379 (11th Cir. 2010) (quotations omitted). The party challenging a sentence has the burden of

showing that the sentence is unreasonable. United States v. Barrington, 648 F.3d 1178, 1204 (11th Cir. 2011).

“Under 18 U.S.C. § 3583(e), a district court may, upon finding by a preponderance of the evidence that a defendant has violated a condition of supervised release, revoke the term of supervised release and impose a term of imprisonment after considering certain factors in 18 U.S.C. § 3553(a).” United States v. Sweeting, 437 F.3d 1105, 1107 (11th Cir. 2006) (per curiam). If a district court revokes a term of supervision, it may require the defendant to serve in prison all or part of the term of release that is statutorily authorized for the offense that resulted in the term of release. 18 U.S.C. § 3583(e)(3). A prison term of up to two years may be imposed if the underlying offense is a Class C felony. Id. Violations of 8 U.S.C. § 1326(a), (b)(2) are Class C felonies. See id. § 3559(a)(3); 8 U.S.C. § 1326(a), (b)(2).

Here, Samayoa-Castillo has not shown that his total 60-month sentence -- in which the district court imposed 36 months’ imprisonment in the Illegal Reentry Case, followed by 24 months’ imprisonment in the Revocation Case -- is either procedurally or substantively unreasonable. As for procedural reasonableness, it appears that the district court relied on an unrevised version of the presentence investigation report in the Revocation Case, and incorrectly said that Samayoa-Castillo’s advisory guideline range at his original sentencing proceeding in 2016 was

27 to 33 months' imprisonment, even though the correct guideline range was 15 to 21 months' imprisonment. Accordingly, when the district court noted in 2018 that it was now imposing a 24-month sentence in the Revocation Case because it had given Samayoa-Castillo "a significant variance downward when [at the original 2016 sentencing hearing, it] complied with [the parties'] request for a one year and one day sentence in the [Revocation] [C]ase when the guidelines were 27 to 33 months," it relied on the incorrect guideline range. See Barner, 572 F.3d at 1251.

However, the district court's reliance on the incorrect guideline range was harmless. See Williams, 503 U.S. at 203. The record shows that the district court imposed a 24-month sentence in the 2018 Revocation Case because it concluded that another below-guideline sentence was unwarranted. The district court, bothered by Samayoa-Castillo's record of illegal reentry after removal, explained that it had imposed a lighter sentence in 2016, following his second conviction for illegal reentry, because he had previously served a sentence of 100 months' imprisonment after his first illegal reentry conviction in 2002 and it "thought that . . . giv[ing] a lighter sentence after having served a 100-month sentence would be sufficient incentive for [Samayoa-Castillo] not to reenter the country illegally." These comments reveal that the district court did not base the 24-month sentence on the extent of the downward variance that it erroneously believed Samayoa-Castillo received in 2016. Rather, the district court calculated the 2018 sentence based on its

findings that Samayoa-Castillo remained undeterred from entering the country illegally, despite having served both long and short sentences on his prior illegal reentry convictions, and that an upward variance upon the revocation of his supervised release was necessary to adequately address his record of non-compliance. See Kendrick, 22 F.3d at 1069.

Nor can we say that Samayoa-Castillo's 24-month sentence in the Revocation Case is otherwise procedurally unreasonable. As the record reveals, the district court considered the relevant § 3553(a) factors and adequately explained that a consecutive sentence was necessary to deter Samayoa-Castillo from further criminal conduct since he had violated his supervised release despite receiving a lenient sentence in 2016. See 18 U.S.C. §§ 3553(a)(2), 3583(e); Dorman, 488 F.3d at 944; Sweeting, 437 F.3d at 1107.

Samayoa-Castillo's sentence is also substantively reasonable. Samayoa-Castillo failed to demonstrate that the district court either ignored the § 3553(a) factors or committed a clear error of judgment in weighing the relevant § 3553(a) factors. See Irey, 612 F.3d at 1189. The district court listened to the parties' arguments and acknowledged Samayoa-Castillo's family-based motivations for wanting to return to the United States. The district court explained that it had considered the seriousness of the offense, Samayoa-Castillo's criminal history, and the need for the sentence imposed to promote deterrence, especially since the

sentences imposed following his prior illegal reentry convictions failed to adequately deter him from reentering the country illegally. See id. § 3553(a)(1), (a)(2)(A)-(B). Further, it was entirely within the district court's discretion to place emphasis on Samayoa-Castillo's criminal history, illegal reentry convictions, and supervised release violations and find that Samayoa-Castillo's mitigating evidence was insufficient to impose concurrent sentences. See Snipes, 611 F.3d at 872. Moreover, Samayoa-Castillo's 36-month sentence in the Illegal Reentry Case was also well below the statutory maximum penalty of 20 years' imprisonment under 18 U.S.C. § 1326(b)(2), suggesting substantive reasonableness. See 18 U.S.C. § 1326(b)(2); Gonzalez, 550 F.3d at 1324. Accordingly, Samayoa-Castillo has not shown that his total 60-month sentence is procedurally or substantively unreasonable.

AFFIRMED.

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

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March 06, 2019

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 18-11874-CC ; 18-11879 -CC

Case Style: USA v. Luis Samayoa-Castillo

District Court Docket No: 2:17-cr-00443-WKW-WC-1

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursuant to FRAP 36. The court's mandate will issue at a later date in accordance with FRAP 41(b).

The time for filing a petition for rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing en banc is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing or for rehearing en banc is timely only if received in the clerk's office within the time specified in the rules. Costs are governed by FRAP 39 and 11th Cir.R. 39-1. The timing, format, and content of a motion for attorney's fees and an objection thereto is governed by 11th Cir. R. 39-2 and 39-3.

Please note that a petition for rehearing en banc must include in the Certificate of Interested Persons a complete list of all persons and entities listed on all certificates previously filed by any party in the appeal. See 11th Cir. R. 26.1-1. In addition, a copy of the opinion sought to be reheard must be included in any petition for rehearing or petition for rehearing en banc. See 11th Cir. R. 35-5(k) and 40-1 .

Counsel appointed under the Criminal Justice Act (CJA) must submit a voucher claiming compensation for time spent on the appeal no later than 60 days after either issuance of mandate or filing with the U.S. Supreme Court of a petition for writ of certiorari (whichever is later) via the eVoucher system. Please contact the CJA Team at (404) 335-6167 or cja_evoucher@ca11.uscourts.gov for questions regarding CJA vouchers or the eVoucher system.

For questions concerning the issuance of the decision of this court, please call the number referenced in the signature block below. For all other questions, please call Carol R. Lewis, CC at (404) 335-6179.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Jeff R. Patch
Phone #: 404-335-6161

OPIN-1 Ntc of Issuance of Opinion

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-11874-CC; 18-11879 -CC

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

LUIS SAMAYOA-CASTILLO,

Defendant - Appellant.

Appeal from the United States District Court
for the Middle District of Alabama

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: TJOFLAT, MARCUS and JORDAN, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:


UNITED STATES CIRCUIT JUDGE

ORD-42