

No. __ - _____

IN THE SUPREME COURT OF THE UNITED STATES

EDDIE ESTUARDO GALINDO-MENDEZ,

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

KEVIN J. PAGE
Counsel of Record
FEDERAL PUBLIC DEFENDER'S OFFICE
NORTHERN DISTRICT OF TEXAS
525 GRIFFIN STREET, SUITE 629
DALLAS, TEXAS 75202
(214) 767-2746

QUESTION PRESENTED

Whether factual error is categorically immune from plain error review?

PARTIES

Eddie Estuardo Galindo-Mendez is the petitioner; he was the defendant-appellant below. The United States of America is the respondent; it was the plaintiff-appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Eddie Estuardo Galindo-Mendez 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 district court entered judgment on November 9, 2018, which judgment is attached as an appendix. *See* [Appendix B]. The unpublished opinion of the United States Court of Appeals for the Fifth Circuit is captioned as *United States v. Galindo-Mendez*, 777 Fed. Appx. 769 (5th Cir. September 26, 2019)(unpublished), and is provided as an appendix to the Petition. *See* [Appendix B].

JURISDICTIONAL STATEMENT

The instant Petition is filed within 90 days of an opinion affirming the judgment, which was entered on September 26, 2019. This Court's jurisdiction to grant *certiorari* is invoked under 28 U.S.C. § 1254(1).

FEDERAL RULES AND SENTENCING GUIDELINES INVOLVED

Federal Rule of Criminal Procedure 52(b) provides:

(b) PLAIN ERROR. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

Federal Sentencing Guideline 1B1.1, comment. (n. (1)(J)) provides:

“Otherwise used” with reference to a dangerous weapon (including a firearm) means that the conduct did not amount to the discharge of a firearm but was more than brandishing, displaying, or possessing a firearm or other dangerous weapon.

Federal Sentencing Guideline 2B3.1(b)(2) provides:

(A) If a firearm was discharged, increase by 7 levels; (B) if a firearm was otherwise used, increase by 6 levels; (C) if a firearm was brandished or possessed, increase by 5 levels; (D) if a dangerous weapon was otherwise used, increase by 4 levels; (E) if a dangerous weapon was brandished or possessed, increase by 3 levels; or (F) if a threat of death was made, increase by 2 levels.

STATEMENT

A. Facts and Proceedings in District Court

After Petitioner Eddie Estuardo Galindo-Mendez's wife suffered a costly cancer diagnosis, he robbed bank to pay his family's bills. See (Record in the Court of Appeals, 90). Pleading guilty, Mr. Galindo-Mendez admitted the following conduct inside the bank:

a male dressed in a large coat, a beanie, gloves, and wearing sunglasses, approached one of the tellers at Happy State Bank, 4402 19th Street, Lubbock, Texas, and handed the teller a note. The note had words to the effect of: "There is a bomb. It is activated. Don't push the button. No bait money. No ink." The male placed an item that appeared to be a pipe bomb next to the teller's computer. The item is further described as galvanized pipes with caps on both ends and duct tape around them with a cell phone on the pipes and wires going from the phone to the pipes. Based upon the male's demand, the teller surrendered money that belonged to, or was in the care, custody, control, management, or possession of Happy State Bank to the male. The male left the item that appeared to be a pipe bomb, took the note, and fled the scene. A later examination of the item that appeared to be a pipe bomb by the LPD Bomb Squad revealed that it was inert.

(Record in the Court of Appeals, 49)(emphasis added).

A Presentence Report (PSR) provided a less detailed account of the robbery, *see* (Record in the Court of Appeals, 108), and applied a four point adjustment to the Guideline offense level for "otherwise using" a dangerous weapon, *see* (Record in the Court of Appeals, 111). After the PSR applied additional adjustments, it identified a final offense level of 23. *See* (Record in the Court of Appeals, 111). Because the defendant had no criminal history points, his Guideline range became 46-57 months. *See* (Record in the Court of Appeals, 116). If the PSR had instead applied a three level adjustment for "brandishing or possessing" a dangerous weapon, *see* USSG §2B3.1, the Guideline range would have been 41-51 months imprisonment, the product of a final offense level of 22, and a criminal history category I, *see* USSG Ch. 5A.

The district court imposed sentence at the high end of the Guideline range it believed applicable, or 57 months imprisonment. *See* (Record in the Court of Appeals, 92). It gave no suggestion that the sentence would have been the same under different Guidelines. *See* (Record in the Court of Appeals, 92-94).

B. Proceedings on Appeal

Petitioner appealed, asserting that his conduct did not satisfy the definition of “otherwise used” provided in USSG 1B1.1, and utilized in §2B3.1 as a Guideline enhancement. Specifically, he argued that his conduct did not amount to any more than “brandishing, displaying, or possessing” a weapon. Under USSG §1B1.1, comment. (n. (1)(J)), such conduct does not merit the “otherwise use” enhancement. He conceded that the error was unpreserved, but maintained that it was plain or obvious, meriting relief under Federal Rule of Criminal Procedure 52(b).

In response, the government argued, *inter alia*, that “a finding of fact capable of resolution by the district court upon proper objection ‘cannot meet the plain-error standard of review.’” *See* Appellee’s Brief in *United States v. Galindo-Mendez*, No. 18-11516, 2019 WL 1960887, at *9 (5th Cir. Filed 2019)(quoting *United States v. Santillan*, 754 F. App’x 296, 297 (5th Cir. April 23, 2019), and citing *United States v. Lopez*, 923 F.2d 47, 50 (5th Cir. 1991)).

The court of appeals did not reference the government’s argument that factual findings may never be plain, neither to embrace nor to reject it. It offered the following rationale:

Section 2B3.1(b)(2) provides for a four-level increase if a “dangerous weapon was otherwise used.” “‘Otherwise used’ ... means that the conduct did not amount to the discharge of a firearm but was more than brandishing, displaying, or possessing a firearm or other dangerous weapon.” U.S.S.G. § 1B1.1, comment. (n.1(I)); see § 2B3.1, comment. (n.1). In light of the location of the apparent bomb and the nature of the specific threat indicated by the note that Galindo-Mendez handed to the bank teller, he has not shown clear or obvious error in the district court’s application of the enhancement under § 2B3.1(b)(2)(D).

[Appendix B, at p.2][citing *Puckett v. United States*, 556 U.S.129, 135 (2009), and *United States v. Dunigan*, 555 F.3d 501, 505-06 (5th Cir. 2009)].

REASONS FOR GRANTING THE WRIT

There is a reasonable probability that the court below used a categorical prohibition on factual plain error to deny relief; if this Court grants certiorari to determine the propriety of such a prohibition, it should hold the instant petition pending the result of that case.

Federal Rule of Criminal Procedure 51 requires appealing parties to preserve error by timely objection. Federal Rule 52(b) provides an exception for plain error, which may be reversed when it affects substantial rights. The court below, however, has held that factual errors may never be plain. *See United States v. Lopez*, 923 F.2d 47, 50 (5th Cir. 1991); *United States v. Owens*, 738 F. App'x 299, 299 (5th Cir. Sept. 19, 2018); *United States v. Ables*, 728 F. App'x 394, 394 (5th Cir. June 25, 2018); *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*, 703 F. App'x 295, 298 n.6 (5th Cir. Aug. 3, 2017); *United States v. Sphabmisai*, 703 F. App'x 275 (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)). Further, it has often extended that categorical rule to questions involving the legal characterization of undisputed facts. *See United States v. Rogers*, 599 Fed. Appx. 223, 225 (5th Cir. April 14, 2015); *Glaze*, 2017 U.S. App. LEXIS 20173, at *2; *McCain-Sims*, 695 Fed. Appx. at 767.

That categorical rule conflicts with the great majority of out-of-circuit practice, and has been criticized as an unwarranted addition to the text of Rule 52(b). *See Carlton v. United States*, 135 S.Ct. 2399, 2400 (2015) (Sotomayor, J., opinion respecting the denial of certiorari). As such, this Court should address this division of authority by granting certiorari in the appropriate case to decide whether factual error may ever be plain within the meaning of Rule 52.

In the present case, the court of appeals declined to find plain error “[i]n light of the location of the apparent bomb and the nature of the specific threat indicated by the note that Galindo-Mendez handed to the bank teller.” [Appendix B, at p.2]. The court below might have meant either of two things in this passage. First, it might have meant that the location and text of the note arguably

satisfied the Guideline standard for “otherwise using” a deadly weapon. If this were the court’s meaning, overturning the rule that factual error may never be plain would not be of much assistance to Petitioner.

Alternatively, however, the court might have meant that plain error could not be shown because these issues were of a factual nature. That interpretation, while not inevitable, is at least reasonably probable in light of the government’s argument in the court of appeals that factual error is categorically non-plain. *See* Appellee’s Brief in *United States v. Galindo-Mendez*, No. 18-11516, 2019 WL 1960887, at *9 (5th Cir. Filed 2019)(quoting *United States v. Santillan*, 754 F. App’x 296, 297 (5th Cir. April 23, 2019), and citing *United States v. Lopez*, 923 F.2d 47, 50 (5th Cir. 1991)). If this is what the court of appeals meant to say, overruling the categorical prohibition on plain factual error would destroy the sole basis for the decision below.

This ambiguity in the decision below admittedly renders the instant case a poor candidate for a plenary grant of certiorari. However, if this Court grants certiorari to decide the validity of the Fifth Circuit’s categorical rule,¹ and discards that rule, this will reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration.” *Lawrence v. Chater*, 516 U.S. 163, 167 (1996). A “reasonable probability,” after all, is not a showing by a preponderance of the evidence. *See United States v. Dominguez-Benitez*, 542 U.S. 74, 83, n.9 (2004). When this Court grants certiorari. When this Court grants certiorari on a case whose outcome may reveal error in the decision below, the appropriate course is to hold the petition, and, depending on the outcome, grant certiorari, vacate the judgment below, and remand for reconsideration. *See Stutson v. United States*, 516 U.S. 163, 181 (1996)(Scalia, J., dissenting)(“We regularly hold cases that involve the same issue as a case on which certiorari has been granted and plenary review is being conducted in order that (if appropriate) they may be

¹Requests to do so are before the Court in *Davis v. United States*, 19-5421, and *Bazan v. United States*, 19-6113, 19-6431, and another is likely forthcoming in *United States v. Lindsey*, 774 Fed. Appx. 261 (5th Cir. August 8, 2019)(unpublished), Application for Extension of Time to File Petition for Certiorari, No. 19A637.

‘GVR’d’ when the case is decided. More recently, we have indulged in the practice of vacating and remanding in light of a decision of ours that preceded the judgment in question, but by so little time that the lower court might have been unaware of it.”) Petitioner requests as much here.

CONCLUSION

FOR THESE REASONS, Petitioner asks that this Honorable Court grant a writ of *certiorari*. Respectfully submitted this 26th day of December, 2019.

/s/ Kevin Joel Page
Kevin J. Page
Counsel of Record
FEDERAL PUBLIC DEFENDER’S OFFICE
NORTHERN DISTRICT OF TEXAS
525 GRIFFIN STREET, SUITE 629
DALLAS, TEXAS 75202
(214) 767-2746