

No. _____

In the
Supreme Court of the United States

Francisco Javier Gonzalez,
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

Kevin Joel Page
Assistant Federal Public Defender

Federal Public Defender's Office
Northern District of Texas
525 S. Griffin Street, Suite 629
Dallas, TX 75202
(214) 767-2746
Joel_page@fd.org

QUESTIONS PRESENTED

Whether this Court should remand to the court below in light of *United States v. Penn*, 969 F.3d 450 (5th Cir. August 5, 2020)?

PARTIES TO THE PROCEEDING

Petitioner is Francisco Javier Gonzalez, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

TABLE OF CONTENTS

QUESTION PRESENTED	ii
PARTIES TO THE PROCEEDING	iii
INDEX TO APPENDICES	v
TABLE OF AUTHORITIES	vi
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION.....	1
STATUTORY AND RULES PROVISIONS	1
STATEMENT OF THE CASE.....	3
REASONS FOR GRANTING THIS PETITION.....	7
<i>United States v. Penn</i> , 969 F.3d 450 (5th Cir. August 5, 2020), reveals a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and such a redetermination may determine the ultimate outcome of the litigation.....	7
CONCLUSION.....	11

INDEX TO APPENDICES

Appendix A Judgment and Opinion of Fifth Circuit

Appendix B Judgment and Sentence of the United States District Court for the
Northern District of Texas

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Chappell v. United States</i> , 494 U.S. 1075 (1990)	11
<i>Conner v. Simler</i> , 367 U.S. 486, (1961)	10
<i>Lawrence on Behalf of Lawrence v. Chater</i> , 516 U.S. 163 (1996)	10
<i>Louisiana v. Hays</i> , 512 U.S. 1230 (1994)	10
<i>NLRB v. Federal Motor Truck Co.</i> , 325 U.S. 838 (1945)	10
<i>Paroline v. United States</i> , 572 U.S. 434 (2014)	8-9
<i>Polksy v. Wetherill</i> , 403 U.S. 916 (1971)	11
<i>Ramirez v. United States</i> , 510 U.S. 1103 (1994)	11
<i>Reed v. United States</i> , 510 U.S. 1188 (1994)	11
<i>Schmidt v. Espy</i> , 513 U.S. 801 (1994)	10
<i>Sioux Tribe of Indians v. United States</i> , 329 U.S. 685 (1946)	10
<i>United States v. Baymon</i> , 312 F.3d 725 (5th Cir. 2002)	8
<i>United States v. Bevon</i> , 602 F. App'x 147 (5th Cir. 2015)	10
<i>United States v. Espinoza</i> , 677 F.3d 730 (5th Cir. 2012)	10
<i>United States v. Gonzalez</i> , 811 Fed. Appx. 888 (5th Cir. July 6, 2020)	1, 6
<i>United States v. Love</i> , 431 F.3d 477 (5th Cir. 2005)	10
<i>United States v. Nolen</i> , 472 F.3d 362 & n.52 (5th Cir. 2006)	10
<i>United States v. Penn</i> , 969 F.3d 450 (5th Cir. August 5, 2020)	<i>passim</i>
<i>Wells v. United States</i> , 511 U.S. 1050 (1994)	10-11
Statutes	
18 U.S.C. § 3663A	1, 7
28 U.S.C. § 1254	1
Rules	
Fed. R. Crim. P. 52	2
Miscellaneous	
<i>Appellant's Initial Brief in United States v. Gonzalez</i> , 2019 WL 4733291 (5th Cir. Filed Sept. 19, 2019)	5, 7
<i>Appellee's Corrected Initial Brief in United States v. Gonzalez</i> , 2019 WL 7483972 (5th Cir. Filed December 23, 2019)	6, 7-8, 8

PETITION FOR A WRIT OF CERTIORARI

Petitioner Francisco Javier Gonzalez seeks 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 Court of Appeals is reported at *United States v. Gonzalez*, 811 Fed. Appx. 888 (5th Cir. July 6, 2020)(unpublished). It is reprinted in Appendix A to this Petition. The district court's judgement and sentence is attached as Appendix B.

JURISDICTION

The panel opinion and judgment of the Fifth Circuit were entered on July 6, 2020. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

RELEVANT RULES AND STATUTE

Section 3663(a) of Title 18 reads in relevant part:

(1) Notwithstanding any other provision of law, when sentencing a defendant convicted of an offense described in subsection (c), the court shall order, in addition to, or in the case of a misdemeanor, in addition to or in lieu of, any other penalty authorized by law, that the defendant make restitution to the victim of the offense or, if the victim is deceased, to the victim's estate.

(2) For the purposes of this section, the term "victim" means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern. In the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, may assume the victim's

rights under this section, but in no event shall the defendant be named as such representative or guardian....

Federal Rule of Criminal Procedure 52(b) reads:

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. Facts and Proceedings in District Court

Petitioner Francisco Javier Gonzalez worked at a non-profit agency that offered assistance to distressed homeowners in avoiding foreclosure. *See* (Record in the Court of Appeals, at 242). He also founded a business that operated from the same location. *See* (Record in the Court of Appeals, at 243). During this time, Petitioner used this position to obtain fees from his clients in a variety of fraudulent ways. These included taking unauthorized fees for counseling, diverting payments intended for the banks to himself, and filing invalid actions or applications to delay foreclosure and obtain more improper payments. *See* (Record in the Court of Appeals, at 242-250).

Petitioner pleaded guilty to one count of mail fraud for sending a loan modification application to a lender in furtherance of this scheme. *See* (Record in the Court of Appeals, at 229). He entered this plea pursuant to a plea agreement that waived the right to appeal save for “a sentence exceeding the statutory maximum punishment,” and other exceptions not here relevant. (Record in the Court of Appeals, at 233). The agreement acknowledged that restitution might be ordered for all relevant conduct, and not merely for the offense of conviction. *See* (Record in the Court of Appeals, at 229). Further, the factual resume contained the following language:

As a result of his scheme to defraud, Gonzalez defrauded homeowners, the Department of Housing and Urban Development, and certain banks, of \$611,740.55 in total. Gonzalez agrees that this figure represents the

intended loss in this matter for purposes of the United States Sentencing Guidelines.

(Record in the Court of Appeals, at 80).

A Presentence Report (PSR) identified losses to three classes of victims: the defendant's clients, certain banks who lost money in foreclosure, and the Department of Housing and Urban Development (HUD). *See* (Record in the Court of Appeals, at 250). As to the defendant's clients, the losses appear to be fees paid to him or payments intended for the banks that he diverted to his own accounts. *See* (Record in the Court of Appeals, at 250). Those losses were calculated at \$175,610.00. *See* (Record in the Court of Appeals, at 251). The losses to the banks appear to be the difference between the money originally loaned to the homeowners and the money recovered in foreclosure sales. *See* (Record in the Court of Appeals, at 250) ("The losses sustained by the lending banks were the result of the foreclosure and resale of certain properties."). The PSR calculated \$161,826.60 in losses of those kind. *See* (Record in the Court of Appeals, at 251). And the losses to HUD appear to be insurance payments to compensate banks for their losses in foreclosure. *See* (Record in the Court of Appeals, at 250). That loss was calculated at \$274,303.95. *See* (Record in the Court of Appeals, at 251).

The PSR reflects a request made by the defense to Probation to "calculat[e] the loss for guideline and restitution purposes using only the money paid to the defendant by the individual homeowners." (Record in the Court of Appeals, at 250). The PSR rejected that request. *See* (Record in the Court of Appeals, at 250).

At sentencing, defense counsel argued that the losses to the banks and to HUD were largely a result of the homeowners' underlying financial condition, not his own conduct. *See* (Record in the Court of Appeals, at 196-198). He explained:

There's a percentage causation. There's a preexisting -- there's a preexisting condition of the victim homeowners that they were in foreclosure proceedings already prior to meeting Mr. Gonzalez.

As the testimony was, in some cases he was able to delay foreclosure, allow these people to stay in their homes a little longer. But what the \$600,000 -- which did not go into his pocket. What the \$600,000 loss amount does, is basically say that the loss amount to the banks had no responsibility whatsoever in that in their -- whether it's their original loan criteria, whether it's reaching the customer first and contacting them directly to modify their loan on their own, basically giving Mr. Gonzalez 100 percent of the causation of the foreclosure for people that were already in foreclosure...

(Record in the Court of Appeals, at 198).

The district court imposed 60 months imprisonment and the full restitution award recommended by the PSR, including all losses ostensibly sustained by HUD and the banks. *See* (Record in the Court of Appeals, at 219-220).

B. Appellate Proceedings

Petitioner appealed, contending that the district court erred in ordering restitution to the banks and HUD beyond the amounts proximately caused by his scheme. In particular, he argued that most losses sustained by these entities at foreclosure resulted from the distressed financial conditions of the homeowners, and not from Petitioner's fraud. *See* Appellant's Initial Brief in *United States v. Gonzalez*, 18-10926, 2019 WL 4733291 (5th Cir. Filed Sept. 19, 2019). The government contended that the waiver barred the appeal, that the Petitioner's objection was

insufficiently specific to avoid plain error review, that no clear or obvious error could be shown, and that the court did not err in any event. *See Appellee's Corrected Initial Brief in United States v. Gonzalez*, 18-10926, 2019 WL 7483972, at *13-16 (5th Cir. Filed December 23, 2019).

The court of appeals affirmed but did not make clear which of the government arguments formed the basis for its decision. The opinion in its entirety reads as follows:

Francisco Gonzalez orchestrated a scheme to defraud financially distressed homeowners by pretending to offer foreclosure assistance. He falsified paperwork, stole mortgage payments, and extracted large payments from the rightful homeowners in a false effort to “save” their homes from foreclosure. The indictment alleged that as a result of his fraud, “these homeowners were defrauded of tens of thousands of dollars, many ... lost their homes, and the total loss to these victims, as well as HUD and the banks exceeded \$600,000.”

Gonzalez signed an agreement to plead guilty to a single count of mail fraud. In return, the Government agreed to drop the remaining twenty counts on the indictment and to refrain from bringing new charges related to the same conduct. The district court sentenced Gonzalez to a sixty-month sentence and ordered restitution. Gonzalez now appeals his sentence.

He argues on appeal that the restitution amount is too high given the losses that resulted from his fraud. The Government responds that he waived his right to challenge the restitution order on appeal, and that his arguments concerning loss amount and proximate causation are meritless in any event.

Having duly considered our precedents, the arguments in the briefs, and the opinion of the district court, we affirm.

[Appendix A]; *United States v. Gonzalez*, 811 Fed. Appx. 888, 889 (July 6, 2020)(unpublished)

REASONS FOR GRANTING THE PETITION

United States v. Penn, 969 F.3d 450 (5th Cir. August 5, 2020), reveals a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and such a redetermination may determine the ultimate outcome of the litigation.

Below, Petitioner argued that the restitution order exceeded the district court's statutory authority under 18 U.S.C. §3663A. *See* Appellant's Initial Brief in *United States v. Gonzalez*, 18-10926, 2019 WL 4733291, at *7-12 (5th Cir. Filed Sept. 19, 2019) ("Appellant's Initial Brief") Specifically, he contended that §3663A limits compensable losses to those proximately caused by the defendant's criminal conduct. *See* Appellant's Initial Brief, at *8. The district court's assessment of restitution to banks and HUD, argued Petitioner, almost certainly overstated the losses proximately caused by his conduct. *See id.* at *8-11. The sentencing court determined restitution owed to these parties by subtracting amounts obtained in foreclosure from moneys lent to homeowners. *See* (Record in the Court of Appeals, at 250). But this ignored a contributing – indeed, the dominant – causal factor in these losses, which was the homeowners' original distressed financial condition.

The government sought to avoid relief on many grounds, among them that Petitioner failed to object to the district court's restitution award in sufficiently specific terms. *See* Appellee's Corrected Initial Brief in *United States v. Gonzalez*, 18-10926, 2019 WL 7483972, at *13-16 (5th Cir. Filed December 23, 2019) ("Appellee's

Brief"). It thus contended that Petitioner's claim was subject to plain error review, and that he had made an insufficiently clear or obvious showing of error to justify relief. *See* Appellee's Brief, at *21-22 ("Even if the district court did err, the error was not clear and obvious.") In addition, the government contended that the waiver of appeal precluded review of the merits, *see id.* at *17-20, and that Petitioner had failed to establish any error at all, *see id.* at *9-13.

The court of appeals affirmed, but its opinion provides little information about the rationale. *See* [Appx. A]. Its choice to affirm the sentence rather than dismissal the appeal does suggest, however, that it rejected the government's waiver argument. *See United States v. Baymon*, 312 F.3d 725, 730 (5th Cir. 2002)(where court found that defendant "waived his appeal as to sentencing" but that waiver did not apply to conviction concluding that it should "DISMISS THE APPEAL as to sentencing, and AFFIRM his conviction.")(caps in original). This leaves one of two rationale: 1) that Petitioner failed to show error, or 2) that he failed adequately to object and failed to show clear error.

The latter is more likely. The district court ordered extensive restitution to HUD and lending institutions. Specifically, it compensated banks for the "result of the foreclosure and resale of certain properties," and HUD for "payments of mortgage insurance to the mortgage holders." (Record in the Court of Appeals, at 250). These losses were not directly or proximately caused by the defendant's conduct.

As this Court has explained, "[e]very event has many causes ... and only some of them are proximate, as the law uses that term." *Paroline v. United States*, 572 U.S.

434, 444 (2014). Here, the direct and predominate cause of the foreclosures was the dire financial conditions of the people who sought Petitioner’s help. *See* (Record in the Court of Appeals, at 242-250). We may imagine that in some cases his conduct – collecting fees and filing invalid requests to forestall foreclosure – contributed to this ultimate outcome. Indeed, the plea agreement admitted as much when it said that the defendant “defrauded” the banks and HUD of a sum of money. *See* (Record in the Court of Appeals, at 80). But there is no evidence in the record that any one victim would have avoided foreclosure under other circumstances. As such, the defendant’s contribution to this outcome was attenuated and collateral, in relation to the primary underlying cause: the homeowners’ simple inability to pay their mortgages.

Although the opinion below does not favor us with any reasoning, it is most likely, and at least reasonably probable, that the opinion relies on a plain error rationale. After the opinion below, and after the time for rehearing had elapsed, the Fifth Circuit issued a published, precedential opinion in *United States v. Penn*, 969 F.3d 450 (August 5, 2020), which reversed a restitution award. Though the government invoked the plain error standard to avoid relief in that case, the *Penn* panel rejected its argument with the following language:

Third, Penn contends that the district court lacked authority to order restitution for damages that occurred during the shootout and police chase because those losses weren’t caused by his felon-in-possession conviction. A district court can order restitution only “when authorized by statute.” **Because a restitution order that exceeds the court’s statutory authority is an illegal sentence, which always constitutes plain error**, we review de novo the legality of a restitution order, regardless of whether the defendant raised this objection at sentencing.

Penn, 969 F.3d at 458 (emphasis added)(internal citations omitted)(quoting *United States v. Espinoza*, 677 F.3d 730, 732 (5th Cir. 2012) (quoting *United States v. Love*, 431 F.3d 477, 479 (5th Cir. 2005)), and citing *United States v. Nolen*, 472 F.3d 362, 382 & n.52 (5th Cir. 2006); *United States v. Bevon*, 602 F. App'x 147, 151 (5th Cir. 2015) (unpublished)). In holding that a restitution award exceeding statutory authority “always constitutes plain error,” *Penn* eliminates what is the most likely rationale for the decision below.

At the very least, there is a reasonable probability that *Penn* would invalidate the premise of the decision below. And:

[w]here intervening developments, or recent developments that we have reason to believe the court below did not fully consider, 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, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is, we believe, potentially appropriate.

Lawrence on Behalf of Lawrence v. Chater, 516 U.S. 163, 167 (1996). These intervening events:

may include a wide range of developments, including our own decisions, State Supreme Court decisions, new federal statutes, administrative reinterpretations of federal statutes, new state statutes, , changed factual circumstances, and confessions of error or other positions newly taken by the Solicitor General, and state attorneys general.

Lawrence, 516 U.S. at 166–67 (internal citations omitted)(citing *Conner v. Simler*, 367 U.S. 486, (1961); *Schmidt v. Espy*, 513 U.S. 801 (1994); *Sioux Tribe of Indians v. United States*, 329 U.S. 685 (1946); *Louisiana v. Hays*, 512 U.S. 1230 (1994); *NLRB v. Federal Motor Truck Co.*, 325 U.S. 838 (1945); *Wells v. United States*, 511 U.S. 1050

(1994); *Reed v. United States*, 510 U.S. 1188 (1994); *Ramirez v. United States*, 510 U.S. 1103 (1994); *Chappell v. United States*, 494 U.S. 1075 (1990); *Polsky v. Wetherill*, 403 U.S. 916 (1971)). *Penn*, a controlling and likely material decision of a lower court, falls comfortably within this framework. This Court should grant certiorari, vacate the judgment below, and remand for reconsideration in light of *Penn*.

CONCLUSION

Petitioner respectfully submits that this Court should grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit, and that it vacate the judgment below and remand for reconsideration in light of *United States v. Penn*, 969 F.3d 450 (5th Cir. August 5, 2020). In the alternative, he respectfully requests such relief as to which he may be justly entitled.

Respectfully submitted this 3rd day of December, 2020.

**JASON D. HAWKINS
Federal Public Defender
Northern District of Texas**

/s/ Kevin Joel Page
Kevin Joel Page
Assistant Federal Public Defender
Federal Public Defender's Office
525 S. Griffin Street, Suite 629
Dallas, Texas 75202
Telephone: (214) 767-2746
E-mail: joel_page@fd.org

Attorney for Petitioner