

No. _____

In the
Supreme Court of the United States

EZER ROSEMBEL BARRIENTOS-OSORIO,
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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QUESTION PRESENTED

- I. Where a district court commits plain error by failing to follow Section 5D1.1(c) of the United States Sentencing Guidelines by imposing, without explanation, a term of supervised release on a defendant whose offense did not require such it and who will likely be deported after imprisonment, are the defendant's substantial rights affected for purposes of obtaining relief under Federal Rule of Criminal Procedure Rule 52(b)?

PARTIES TO THE PROCEEDING

Petitioner is Ezer Rosembel Barrientos-Osorio, who was the Defendant-Appellant in a court of appeals below. Respondent, the United States of America, was the Plaintiff-Appellee in a court of appeals 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
PROVISIONS OF THE UNITED STATES SENTENCING GUIDELINES	2
STATUTORY AND CONSTITUTIONAL RULES AND PROVISIONS.....	3
RELATED PROCEEDINGS.....	4
STATEMENT OF THE CASE.....	4
REASONS FOR GRANTING THIS PETITION.....	9
I. Where a district court commits plain error by failing to follow Section 5D1.1(c) of the United States Sentencing Guidelines by imposing, without explanation, a term of supervised release on a defendant whose offense did not require such it and who will likely be deported after imprisonment, are the defendant's substantial rights affected for purposes of obtaining relief under Federal Rule of Criminal Procedure Rule 52(b)?.....	9
CONCLUSION.....	13

INDEX OF 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

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

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Anders v. California</i> , 386 U.S. 738 (1967)	6, 7
<i>Braxton v. United States</i> , 500 U.S. 344 (1991)	12
<i>Buford v. United States</i> , 532 U.S. 59 (2001)	12
<i>Molina-Martinez v. United States</i> , ___ U.S. ___, 136 S.Ct. 1338 (2016)	7, 8, 12
<i>Puckett v. United States</i> , 556 U.S. 129, 129 S.Ct. 1423 (2009)	8
<i>Rosales-Mireles v. United States</i> , ___ U.S. ___, 138 S.Ct. 1897–05 (2018)	12
<i>United States v. Barrientos-Osorio</i> , 812 F. App’x 282 (5th Cir. 2020)	1, 7, 8, 10
<i>United States v. Benitez Alvarado</i> , 622 F. App’x 215 (3d Cir. 2015)	9, 10, 11
<i>United States v. Ezer Barrientos-Osorio</i> , 788 F. App’x 272 (5th Cir. 2019)	4
<i>United States v. Olano</i> , 507 U.S. 725 (1993)	7
<i>United States v. Price</i> , 777 F.3d 700 (4th Cir. 2015)	11
Statutes	
8 U.S.C. § 1326	4
28 U.S.C. § 1254	1
Rules	
Fed. R. Crim. P. Rule 52	ii, iv, 3, 12
United States Sentencing Guidelines	
USSG § 2B1.1	2
USSG § 2D1.1	9
USSG § 5D1.1	<i>passim</i>

PETITION FOR A WRIT OF CERTIORARI

Petitioner Ezer Barrientos-Osorio 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 *United States v. Barrientos-Osorio*, 812 F. App'x 282 (5th Cir. 2020). It is reprinted in Appendix A to this Petition. The district court's underlying judgment is attached as Appendix C. The district court's judgment of revocation and sentence is attached as Appendix B.

JURISDICTION

The opinion and judgment of the Fifth Circuit were entered on July 17, 2020. On March 19, 2020, the Court extended the 90-day deadline to file a petition for certiorari to 150 days.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PROVISIONS OF THE UNITED STATES SENTENCING GUIDELINES

This Petition concerns Section 5D1.1 of the United States Sentencing Guidelines, which states in part:

2B1.1. Imposition of a Term of Supervised Release

...

(c) The court ordinarily should not impose a term of supervised release in a case in which supervised release is not required by statute and the defendant is a deportable alien who likely will be deported after imprisonment.

Additionally, the commentary to Section 2B1.1 contains application notes that state, in part:

5. Application of Subsection (c).—In a case in which the defendant is a deportable alien specified in subsection (c) and supervised release is not required by statute, the court ordinarily should not impose a term of supervised release. Unless such a defendant legally returns to the United States, supervised release is unnecessary. If such a defendant illegally returns to the United States, the need to afford adequate deterrence and protect the public ordinarily is adequately served by a new prosecution. The court should, however, consider imposing a term of supervised release on such a defendant if the court determines it would provide an added measure of deterrence and protection based on the facts and circumstances of a particular case.

STATUORY PROVISIONS

This Petition also implicates Federal Rule of Criminal Procedure 52, which states:

Rule 52. 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.

LIST OF PROCEEDINGS BELOW

1. *United States v. Ezer Barrientos-Osorio*, 4:17-CR-00211-O, United States District Court for the Northern District of Texas. Judgment sentence entered on March 9, 2018. (Appendix C).
2. *United States v. Ezer Barrientos-Osorio*, 4:17-CR-00211-O, United States District Court for the Northern District of Texas. Judgment of revocation and sentence entered on July 26, 2019. (Appendix B).
3. *United States v. Ezer Barrientos-Osorio*, 788 F. App'x 272 (5th Cir. 2019), CA No. 19-10292, Court of Appeals for the Fifth Circuit. Judgment affirmed on December 16, 2019. (Appendix A).

STATEMENT OF THE CASE

On March 5, 2018, Barrientos-Osorio was convicted in the Northern District of Texas on one count of illegal reentry after deportation, in violation of 8 U.S.C. § 1326(a) and (b)(1). (Record in the Court of Appeals, at 85). He was sentenced to 10 months' imprisonment and one year of supervised release. (Record in the Court of Appeals, at 85–86). Barrientos-Osorio began serving that term of supervised release on August 3, 2018, and he was deported from the United States thirteen days later. (Record in the Court of Appeals, at 72, 130).

On January 16, 2019, Barrientos-Osorio was arrested in Laredo, Texas, by a border patrol agent. (Record in the Court of Appeals, at 142). Barrientos-Osorio was subsequently charged in the Southern District of Texas with illegal reentry after deportation in cause number 5:19-CR-0128. (Record in the Court of Appeals, at 133–34).

On April 16, 2019, Barrientos-Osorio’s probation officer filed a petition for action in the Northern District of Texas, alleging that Barrientos-Osorio had violated the terms of his supervised release by illegally reentering the United States. (Record in the Court of Appeals, at 64–66). That petition calculated an imprisonment range of 8 to 14 months, based on a violation grade of B and Barrientos-Osorio’s Criminal History Category of III (Record in the Court of Appeals, at 65); *see also* (Record in the Court of Appeals, at 114–15) (Barrientos-Osorio’s 2018 Presentence Report showing only three prior convictions). The petition correctly concluded that Barrientos-Osorio’s statutory maximum sentence was two years and that his maximum term of supervised release was three years, less the term of any revocation sentence of imprisonment. (Record in the Court of Appeals, at 65). An addendum later informed the court in the Northern District of Texas that Barrientos-Osorio had been convicted of the new illegal reentry charge in the Southern District of Texas and was sentenced to 18 months’ imprisonment and three years of supervised release. (Record in the Court of Appeals, at 133–34). However, the addendum alleged no changes to Barrientos-Osorio’s statutory provisions or guideline range. (Record in the Court of Appeals, at 134). There was no allegation that revocation was mandatory or that a term of supervised release was required to be imposed upon revocation. *See* (Record in the Court of Appeals, at 64–66, 133–34).

Barrientos-Osorio appeared with counsel at a revocation hearing. (Record in the Court of Appeals, at 98–106). There, Barrientos-Osorio admitted to the truth of the allegations against him. (Record in the Court of Appeals, at 100). Barrientos-

Osorio's counsel asked the court to "consider a Guideline sentence to run concurrently" with the 18-month sentence he received on his new illegal reentry case in the Southern District of Texas. (Record in the Court of Appeals, at 101). Later, counsel discussed the punishment and supervised release term imposed by the Southern District of Texas in the separate case:

It is of note that the Court in the Southern District of Texas imposed a 3 year term of supervised release as a deterrent.

Mr. Barrientos is aware of the deterrent aspect of this punishment. He will not return to the United States. He no longer has a reason to return to the United States.

For this reason, Your Honor, we would ask that whatever punishment you are going to impose in this case, that you please run it concurrently with the [18-month term of] imprisonment that he's serving out of the Southern District of Texas.

(Record in the Court of Appeals, at 102).

The district court found that Barrientos-Osorio had violated the terms of his supervised release, and it imposed a 14-month term of imprisonment to run consecutively to the sentence imposed by the Southern District of Texas. (Record in the Court of Appeals, at 104). The district court also imposed "a new term of supervised release of 22 months." (Record in the Court of Appeals, at 104). The court provided very limited insight into its choice of sentence, stating only: "I've consulted with the policy statements . . ." (Record in the Court of Appeals, at 104). Neither the government nor the defense objected to the sentence. (Record in the Court of Appeals, at 104).

Initially, Barrientos-Osorio's counsel found no non-frivolous basis for appeal and filed an initial brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), along with a motion to withdraw. Appellant's Initial Brief Pursuant to *Anders v. California*,

386 U.S. 738 (1967), *United States v. Barrientos-Osorio*, 812 F. App'x 282 (5th Circuit 2020) (No. 19-10888) (filed Oct. 15, 2019); Motion to Withdraw as Counsel, *United States v. Barrientos-Osorio*, 812 F. App'x 282 (5th Circuit 2020) (No. 19-10888) (filed Oct. 15, 2019). The Fifth Circuit, however, ordered additional briefing on the issue of whether the district court plainly erred by imposing a term of supervised release on a deportable alien without explanation. Order, *United States v. Barrientos-Osorio*, 812 F. App'x 282 (5th Circuit 2020) (No. 19-10888) (entered Feb. 3, 2020).

In later briefing, Mr. Barrientos-Osorio's counsel argued that the district court had committed reversible plain error by imposing a term of supervised release on Barrientos-Osorio, an alien facing certain removal from the United States, without explaining why a term of supervised release was required in order to provide additional deterrence. Appellant's Initial Brief at 7–13, *United States v. Barrientos-Osorio*, 812 F. App'x 282 (5th Circuit 2020) (No. 19-10888) (filed Feb. 11, 2020). As to the required showing on plain error review that the error affected his substantial rights, *see United States v. Olano*, 507 U.S. 725, 735–36 (1993), Barrientos-Osorio cited the Court's decision in *Molina-Martinez v. United States*, ___ U.S. ___, 136 S.Ct. 1338 (2016) to argue that the district court's failure to explain its decision not to follow the Sentencing Guidelines affected his substantial rights and merited the exercise of the discretion of the court of appeals to correct the error. Appellant's Initial Brief, at 11–12.

The Fifth Circuit, however, affirmed the district court's decision. *United States v. Barrientos-Osorio*, 812 F. App'x 282, 283 (5th Cir. 2020). Without deciding whether

the district court had plainly erred, as Barrientos-Osorio alleged, the court of appeals concluded that he had not demonstrated that any such error had affected his substantial rights or that the court of appeals should remedy the error because it “seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.” *Id.* (citing *Puckett v. United States*, 556 U.S. 129, 135, 129 S.Ct. 1423 (2009)). The Fifth Circuit also rejected Barrientos-Osorio’s argument that the *Molina-Martinez* established that his substantial rights were affected by the district court’s failure to abide by the Guidelines. *Id.* The Fifth Circuit concluded, “Because Barrientos-Osorio has not met his affirmative burden to establish each plain error prong . . . we AFFIRM the judgment.” *Id.* (citation to *Molina-Martinez*, 136 S.Ct. at 1343, omitted).

REASONS FOR GRANTING THIS PETITION

- I. **There is a split of authority between the Third and Fifth Circuit Courts of Appeals over the question of whether a defendant's substantial rights are violated by a district court's failure to explain why the imposition of a term of supervised release is necessary, even when it is not required by statute and the defendant is an alien facing post-incarceration deportation.**

Section 5D1.1(c) of the United States Sentencing Guidelines dictate that sentencing courts “ordinarily should not impose a term of supervised release” where it is not required by statute and the defendant is an alien facing post-incarceration deportation. U.S. Sentencing Guidelines Manual § 2D1.1(c) (U.S. Sentencing Comm'n 2018); *United States v. Benitez Alvarado*, 622 F. App'x 215, 217 (3d Cir. 2015). Typically, “a new prosecution” “adequately serve[s]” to meet the “need to afford adequate deterrence and protect the public. § 5D1.1(c) cmt. n. 5; *Benitez Alvarado*, 622 F. App'x at 217. Nonetheless, “[t]he court should . . . consider imposing a term of supervised release on such a defendant if the court determines it would provide an added measure of deterrence and protection based on the facts and circumstances of a particular case.” § 5D1.1(c) cmt. n. 5; *Benitez Alvarado*, 622 F. App'x at 217.

This case reveals a split of authority between the Third and Fifth Circuits regarding whether the district court's failure to explain its decision to impose supervised release in such circumstances affect the defendant's substantial rights. According to the approach taken by the Fifth Circuit, a defendant must make a showing of more than merely an explanation-free imposition of supervised release in these circumstances, despite the instructions of § 5D1.1(c). The Third Circuit,

however, has concluded that the district court’s failure to explain such an imposition, alone, is sufficient to show that a defendant’s substantial rights were affected.

Here, the Fifth Circuit refused to consider whether the district court had plainly erred because it concluded in part that Barrientos-Osorio had not demonstrated that any such error affected his substantial rights. *Barrientos-Osorio*, 812 F. App’x at 283. In his briefing to the court of appeals, Barrientos-Osorio relied on *Molina-Martinez* for the premise that such a Guideline error—on its own—affects a defendant’s substantial rights and, thus, should justify the appellate court’s exercise of its judicial discretion to correct the error. See Appellant’s Initial Brief at 11–12, *United States v. Barrientos-Osorio*, 812 F. App’x 282 (5th Circuit 2020) (No. 19-10888). But the Fifth Circuit rejected this argument, holding that *Molina-Martinez* was not dispositive on the point. *Barrientos-Osorio*, 812 F. App’x at 283. In doing so, the Fifth Circuit imposed on Petitioner a burden to establish something more than Guideline error alone to demonstrate an effect on his substantial rights.

In contrast, the Third Circuit has concluded that a defendant’s substantial rights were affected where the district court failed to provide any specific explanation for imposing a term of supervised release on an alien who was facing post-incarceration deportation and where no statute required the court to impose a term of supervised release. *Benitez Alvarado*, 622 F. App’x 215 (3d Cir. 2015). In *Benitez Alvarado*, the defendant was convicted of illegal reentry of a removed alien. *Id.* at 216–17. At sentencing, the government began to explain how Section 5D1.1(c) of the Sentencing Guidelines generally advises against imposing supervised release in such

circumstances, but the district court interjected by explaining: “I do that anyway. It seems to me it’s an additional incentive not to come back.” *Id.* at 217. Without any further discussion of the propriety of imposing a term of supervised release, the district court imposed on Benitez Alvarado a sentence that included a three-year term of supervised release. *Id.* Benitez Alvarado did not object. *Id.*

On appeal, Benitez Alvarado argued that the district court committed reversible plain procedural error when it sentenced him to a term of supervised release without a proper explanation. *Id.* at 216. The Third Circuit agreed. *Id.* The appellate court explained that the district court had erred by implying that it always ordered supervised release on deportable aliens and, thus, failed to consider the defendant’s specific circumstances before imposing such a term on that particular defendant. *Id.* at 218.

Regarding the question of whether such error affected the defendant’s substantial rights, the Third Circuit required nothing more of the defendant than a showing of Guideline error: “[W]e conclude that this error affected Benitez Alvarado’s substantial rights.” *Id.* (citing *United States v. Price*, 777 F.3d 700, 712 (4th Cir. 2015), for “holding Guidelines error affected defendant’s substantial rights because he was sentenced to longer term of supervised release”).

The approaches of the Third and Fifth Circuits are in stark contrast. In the Third Circuit, a defendant’s substantial rights were automatically affected by a district court’s plain error of failing to explain its particularized reason for imposing a term of supervised release, despite the instructions of the Section 5D1.1(c) of the

Guidelines. The Fifth Circuit has required Mr. Barrientos-Osorio to show something more than Guideline error to establish any such effect on his substantial rights.

Certainly, this Court has previously said that it disfavors the resolution of Guideline issues in its *certiorari* docket, especially in light of the Commission's power to resolve questions of Guideline application. *See Braxton v. United States*, 500 U.S. 344, 348 (1991). However, given that the United States Sentencing Commission currently has an insufficient number of commissioners to make a quorum capable of amending the Guidelines, the Court's usual deference to that body's congressionally-intended power to resolve conflicts regarding the guidelines, *see Buford v. United States*, 532 U.S. 59, 66 (2001), is not warranted at this time. Moreover, the issue presented in this Petition primarily concerns the application of Federal Rule of Criminal Procedure Rule 52, rather than a question concerning the application of the Sentencing Guidelines. *Cf. Molina-Martinez*, 136 S.Ct. at 1342–43; *Rosales-Mireles v. United States*, ___ U.S. ___, 138 S.Ct. 1897, 1904–05 (2018).

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.

Respectfully submitted this 14th day of December, 2020.

Respectfully submitted,

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