

No. \_\_\_\_\_

IN THE SUPREME COURT OF THE UNITED STATES

JOSE NOE CASTRO ORELLANA,  
Petitioner,

v.

UNITED STATES OF AMERICA,  
Respondent.

On Petition for Writ of Certiorari to the United States  
Court of Appeals for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

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## **QUESTION PRESENTED**

The Fifth Circuit Court of Appeals held that Mr. Castro Orellana could not show an effect on his substantial rights on plain-error review even though the district court relied on a clearly erroneous belief concerning the facts of the case because the district court sentenced him within a correctly-calculated range under the federal Sentencing Guidelines. In so holding, did the Fifth Circuit misapply this Court's decision in *Rita v. United States*, 551 U.S. 338 (2007), and *Gall v. United States*, 552 U.S. 38 (2007)?

## **PARTIES TO THE PROCEEDINGS**

All parties to petitioner's Fifth Circuit proceedings are named in the caption of the case before this Court.

## **DIRECTLY RELATED CASES**

- *United States v. Castro Orellana*, No. 20-cr-00107, U.S. District Court for the Southern District of Texas. Judgment entered June 17, 2020.
- *United States v. Castro Orellana*, No. 20-20320, U.S. Court of Appeals for the Fifth Circuit. Judgment entered January 11, 2021.

## TABLE OF CONTENTS

	Page
QUESTION PRESENTED .....	i
PARTIES TO THE PROCEEDINGS .....	ii
DIRECTLY RELATED CASES.....	ii
TABLE OF CONTENTS .....	iii
TABLE OF CITATIONS.....	v
PRAYER .....	1
OPINIONS BELOW .....	1
JURISDICTION .....	1
STATUTORY PROVISION INVOLVED .....	2
8 U.S.C. § 1326. Reentry of removed aliens .....	2
18 U.S.C. § 3553. Imposition of a sentence.....	3
STATEMENT OF THE CASE .....	5
A.    Original proceedings, indictment, and plea. .....	5
B.    The presentence report and Sentencing Guidelines calculations.....	7
C.    Sentencing hearing.....	8
D.    Appeal.....	10
BASIS OF FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT .....	11

## TABLE OF CONTENTS – (cont'd)

	Page	
REASONS FOR GRANTING THE PETITION .....	12	
<p>In <i>Gall v. United States</i>, 552 U.S. 38, 51 (2007), this Court declared that the first step in an appellate court's review of a district court's sentencing decision was to ensure that the district court committed no significant procedural error. This Court classified "selecting a sentence based on clearly erroneous facts" as among such significant procedural errors. The Court has long recognized the significance of the error of relying on erroneous facts as the basis for a criminal sentence. See <i>Townsend v. Burke</i>, 334 U.S. 736, 740-41 (1948). In this case, the district court relied on a clearly erroneous view of the facts concerning the defendant's eligibility for a statutorily-enhanced sentence and whether the prosecutor had unjustifiably failed to seek that enhancement. The Fifth Circuit Court of Appeals, in affirming that sentence, held that Mr. Castro Orellana could not demonstrate an effect on his substantial rights on plain-error review because the district court imposed a sentence of imprisonment within the range established by the Sentencing Guidelines. This Court should grant certiorari in this case because the Fifth Circuit's decision to elevate the presumption of reasonableness applicable to within-Guidelines sentences over clear factual error conflicts with <i>Gall</i> and other decisions of this Court holding that reliance on factual error in imposing sentence violates due process. ....</p>		12
I.    The Court should grant this petition because the Fifth Circuit's decision to credit a presumption of reasonableness over a reliance on clearly erroneous fact misinterprets and misapplies this Court's holding in <i>Gall</i> .....	12	
II.   The Court should grant certiorari to address an apparent conflict among the circuit courts of appeals over the criteria to determine whether to remand a case to the district court when that court relies on erroneous facts to determine sentence. ....	16	
CONCLUSION .....	20	
APPENDIX: Opinion of the Court of Appeals, <i>United States v. Castro Orellana</i> , No. 20-20320 (5th Cir. January 11, 2021).....	21	

## TABLE OF CITATIONS

	<b>Page</b>
<b>CASES</b>	
<i>Gall v. United States</i> , 552 U.S. 38 (2007) .....	<i>passim</i>
<i>Puckett v. United States</i> , 556 U.S. 128 (2009) .....	14
<i>Rita v. United States</i> , 551 U.S. 338 (2007) .....	14
<i>Townsend v. Burke</i> , 334 U.S. 736 (1948) .....	12-13, 15, 19
<i>United States v. Adams</i> , 873 F.3d 512 517 (6th Cir. 2017) .....	13
<i>United States v. Bayfield</i> , 796 Fed. Appx. 19 (2d Cir. 2019) (unpublished) .....	17
<i>United States v. Booker</i> , 543 U.S. 200 (2005) .....	12
<i>United States v. Brito</i> , 979 F.3d 185 (3d Cir. 2020) .....	17-18
<i>United States v. Castro Orellana</i> , 832 Fed. Appx. 923 (5th Cir. 2021) (unpublished) .....	9, 14, 16
<i>United States v. Colón-Maldonado</i> , 953 F.3d 1 (1st Cir. 2020) .....	13
<i>United States v. Corona-Gonzalez</i> , 628 F.3d 336 (7th Cir. 2010) .....	16-18
<i>United States v. Delacruz</i> , 862 F.3d 163 (2d Cir. 2017) .....	13
<i>United States v. Doe</i> , 934 F.2d 353 (D. C. Cir. 1991) .....	13-14
<i>United States v. Fisher</i> , 502 F.3d 293 (3d Cir. 2007) .....	13

## TABLE OF CITATIONS – (Cont'd)

	<b>Page</b>
<b>CASES – (Cont'd)</b>	
<i>United States v. Hill</i> , 915 F.3d 669 (9th Cir. 2019) .....	13
<i>United States v. Propst</i> , 959 F.3d 298 (7th Cir. 2020) .....	13, 16-18
<i>United States v. Richey</i> , 758 F.3d 999 (8th Cir. 2014) .....	13
<i>United States v. Romeo</i> , 385 Fed. Appx. 45 (2d Cir. 2010) (unpublished) .....	17-18
<i>United States v. Warren</i> , 720 F.3d 321 (5th Cir. 2013) .....	13
<i>United States v. Wheeler</i> , 886 F.3d 415 (4th Cir. 2018) .....	13
<b>STATUTES AND RULES</b>	
8 U.S.C. § 1182(a)(3)(B) .....	2
8 U.S.C. § 1225(c) .....	2
8 U.S.C. § 1231(a)(4)(B) .....	3
8 U.S.C. § 1326 .....	2
8 U.S.C. § 1326(a) .....	5
8 U.S.C. § 1326(b)(1) .....	6, 10
18 U.S.C. § 3231 .....	11
18 U.S.C. § 3553 .....	3
18 U.S.C. § 3553(a) .....	9, 15

**TABLE OF CITATIONS – (Cont'd)**

	<b>Page</b>
<b>STATUTES AND RULES – (Cont'd)</b>	
18 U.S.C. § 3742(g) .....	4
28 U.S.C. § 1254(1) .....	1
28 U.S.C. § 994(a)(1) .....	4
28 U.S.C. § 994(a)(2) .....	4
28 U.S.C. § 994(a)(3) .....	4
28 U.S.C. § 994(p) .....	4

## **PRAYER**

Petitioner Jose Noe Castro Orellana prays that a writ of certiorari be granted to review the judgment entered by the United States Court of Appeals for the Fifth Circuit.

## **OPINIONS BELOW**

The opinion of the United States Court of Appeals for the Fifth Circuit in Mr. Castro Orellana's case is attached to this petition as an Appendix. The district court did not issue a written opinion.

## **JURISDICTION**

The Fifth Circuit's judgment was entered on January 11, 2021. *See* Appendix. This petition is filed within 150 days of that date. *See* Sup. Ct. Order of Mar. 19, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## **STATUTORY PROVISION INVOLVED**

### **8 U.S.C. § 1326. Reentry of removed aliens**

#### **(a) In general**

Subject to subsection (b), any alien who--

- (1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter
- (2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to any alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,

shall be fined under Title 18, or imprisoned not more than 2 years, or both.

#### **(b) Criminal penalties for reentry of certain removed aliens**

Notwithstanding subsection (a), in the case of any alien described in such subsection--

- (1) whose removal was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony), such alien shall be fined under Title 18, imprisonment not more than 10 years, or both;
- (2) whose removal was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such title, imprisoned not more than 20 years, or both;
- (3) who has been excluded from the United States pursuant to section 1225(c) of this title because the alien was excludable under section 1182(a)(3)(B) of this title or who has been removed from the United States pursuant to the provisions of subchapter V, and who thereafter, without the permission of the Attorney General, enters the United States, or attempts to do so, shall be fined under Title 18 and imprisoned for a period of 10 years, which sentence shall not run concurrently with any other sentence[;] or

(4) who was removed from the United States pursuant to section 1231(a)(4)(B) of this title who thereafter, without the permission of the Attorney General, enters, attempts to enter, or is at any time found in, the United States (unless the Attorney General has expressly consented to such alien's reentry) shall be fined under Title 18, imprisoned for not more than 10 years, or both.

For the purposes of this subsection, the term "removal" includes any agreement in which an alien stipulates to removal during (or not during) a criminal trial under either Federal or State law.

\* \* \* \*

### **18 U.S.C. § 3553. Imposition of a sentence**

**(a) Factors to be considered in imposing a sentence.**--The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider--

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed--

  - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
  - (B) to afford adequate deterrence to criminal conduct;
  - (C) to protect the public from further crimes of the defendant; and
  - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- (3) the kinds of sentences available;
- (4) the kinds of sentence and the sentencing range established for--

  - (A) the applicable category of offense committed by the applicable category

of defendant as set forth in the guidelines--

- (i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
- (ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement--

- (A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
- (B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced[;]

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

## STATEMENT OF THE CASE

The question presented in this case involves the district court’s reliance in imposing a sentence of imprisonment on its clearly erroneous belief that the United States Attorney’s office had unjustifiably granted Mr. Castro Orellana an underserved benefit by charging an offense of illegal reentry without reference to a prior felony conviction, which would have invoked a higher statutory maximum sentence. The district court was in error in terms of the facts: Mr. Castro Orellana had no prior conviction to raise the statutory maximum. In denying requests for a sentence below the Guidelines range (which was set at the statutory maximum of two years) and in sentencing at that within-Guideline statutory maximum, the district court repeatedly emphasized its mistaken belief that the United States Attorney’s office had limited the available range of statutory options for imprisonment.

### **A. Original proceedings, indictment, and plea.**

On February 19, 2020, José Noé Castro Orellana was indicted for the offense of being found unlawfully present in the United States after having been previously deported, in violation of 8 U.S.C. § 1326(a).

On March 16, 2020, Mr. Castro Orellana pleaded guilty to the sole charge in the indictment, without a plea agreement. To support his plea, the prosecutor offered as the factual basis for the plea that Mr. Castro Orellana was a citizen of Honduras who had been deported in August of 2012. The factual basis also included reference to Mr. Castro Orellana’s conviction in 2015 for the crime of assault of a family member, committed in 2013. For that offense he received deferred adjudication, which was revoked in 2017 for

a sentence of 3 years of imprisonment, shortly after immigration agents found Mr. Castro Orellana (in jail while that revocation and other cases were pending) in February 2017.

After the reading of the factual basis, the district court questioned the prosecutor to confirm its understanding of the factual basis. The district court asked the prosecutor to confirm that Mr. Orellana had been convicted of the felony offense of assault and then deported again. Despite having just read a factual basis that included no reference to any conviction prior to 2012 nor any deportation after 2012, the prosecutor erroneously confirmed that Mr. Castro Orellana had been deported again after conviction for the felony assault crime in 2015. The district court then questioned the prosecutor as to why the United States would not have charged an offense under 8 U.S.C § 1326(b)(1) with a 10-year statutory maximum instead of the 2-year statutory maximum on which the district court had just admonished Mr. Castro Orellana. The prosecutor again mistakenly confirmed that the case file confirmed that Mr. Orellana could have been charged under an indictment referencing the higher statutory maximum, but that the prosecutor chose in an exercise of discretion not to do so. The district court then questioned the prosecutor whether this was the process accepted by the United States Attorney's office and ordered the prosecutor to "take it up the line."

When asked whether these facts were true, Mr. Castro Orellana attempted to protest the obvious error. He first stated, "I am confused with all this conversation," and then attempted to set the record straight: "I just came out of TDC. I have not been deported. I'm just here from TDC, so I don't understand." After conferring with his attorney Mr. Castro Orellana confirmed that the facts as stated were correct.

**B. The presentence report and Sentencing Guidelines calculations.**

The district court ordered the Probation Office to prepare a presentence report (“PSR”) to assist the court in sentencing Mr. Castro Orellana. The PSR confirmed that Mr. Castro Orellana had been deported from the United States only once, in 2012, following a voluntary departure granted to him when he was 17 years old in 2005. The PSR confirmed that *after* the 2012 deportation, Mr. Castro Orellana had been convicted of several felonies and misdemeanors. The PSR showed that the 2015 felony assault conviction about which the district court asked at rearraignment had originally resulted in deferred adjudication, which was later revoked in 2017, when Mr. Castro Orellana was again arrested and charged with another family violence assault, resulting in both the revocation of his prior deferred adjudication and a new sentence of 3 years of imprisonment, and an evading arrest misdemeanor charge, resulting in a 90-day concurrent sentence. The PSR identified no intervening deportation between these various offenses.

Based on that post-deportation criminal history, the PSR calculated Mr. Castro Orellana’s Guideline range of imprisonment as 30-37 months (Criminal History Category V, Offense Level 13). The PSR stated, however, that the Guideline range would be limited to the statutory maximum of 24 months.

**C. Sentencing hearing.**

At sentencing on June 9, 2020, the district court again questioned the prosecutor about why the government was proceeding under a two-year statutory maximum. This time the prosecutor correctly informed the district court that there was no deportation following the 2015 conviction, which the PSR made clear was Mr. Castro Orellana’s first

conviction. The district court still misunderstood: “Yeah. It was an assault on a family member, and he got three years’ probation, and it was revoked, and he was put in the jailhouse. Why isn’t this a ten-year instead of a two-year?” The prosecutor directly addressed the point: “I asked him [the agent], and he said that it must have been that ICE – he just slipped through the cracks and ICE didn’t catch him.” The district court persisted in its belief that the United States Attorney had authorized some beneficial treatment: “So who slipped it through the cracks? Your office?” The district court then made clear its concern with the falsely perceived notion that there was a sweetheart deal:

This is the second time I have had a question about -- not with you, but with one other U.S. attorney. I want you to get the word back to your office, if somebody -- and I am not the charging authority, so I am not starting in with any kind of -- I understand the separation of powers, but I am not the charging authority.

This is the second point I have seen that. I would like you to get through to whoever the supervisor is, that they need to check. If somebody comes back in, and they have got a felony conviction, I don’t think it’s fair to see them subject just to a two-year term. Okay? But I am not about to do anything. I am not the charging authority, but that’s the second time within this past week I have come across that, so, please, let them know at your office. I don’t want to have to let them know. Pass it up there that at least one District Judge is concerned about it.

Counsel for Mr. Castro Orellana moved for a downward variance to a 1-year-and-1-day sentence, based on this being his first prosecution for illegal reentry, the fact that he had been in custody since February 2017, and the dangers of prison during the COVID-19 epidemic. The prosecutor, in turn, asked for the statutory maximum term of 2 years, again explaining to the judge that the two-year maximum was due to the fact that ICE had *not* deported Mr. Orellana in 2015, and pointing to the “violent criminal history” evident in

Mr. Orellana's convictions for assault of a family member.

After the prosecutor's recommendation, the district court again returned to its perception that Mr. Orellana received some undue benefit from the charging decision of the United States Attorney:

All right. But, look. Look. That's right. You passed -- again, I am not jumping you. Okay? You're just sitting here. This is the second time in this week that I have caught something where it looks like -- in other words, there should have been a ten-year term, but I am not -- I am not taking it any further.

In any event, that's where I am.

The district court then imposed the sentence of 24 months in prison. The district court did not discuss Mr. Castro Orellana's criminal history to justify the sentence, but instead again focused on the perception that the government's charging decision – and not the limitations of the law applied to the facts – determined the sentence in the case:

I have considered 18 United States Code, Section 3553(a). I feel that the appropriate sentence would be a good deal above the guidelines; however, due to the charging by the government of just the two-year count, that's the max. And also I do want to note that he scores out 30 to 37 months under the guidelines.

#### **D. Appeal.**

Mr. Castro Orellana filed a timely notice of appeal on June 15, 2020.

On January 11, 2021, the Fifth Circuit issued its opinion affirming the district court's judgment. The court held that Mr. Castro Orellana had failed to show that the district court committed clear or obvious error by relying on clearly erroneous facts to select the sentence. *United States v. Castro Orellana*, 832 Fed. Appx. 923, 924 (5th Cir. 2021) (unpublished). The court further opined, however,

Even if the district court committed an error that was clear or obvious, Orellana has failed to show that the error affected his substantial rights because he has not shown a reasonable probability that, absent any reliance on its belief that Orellana should have been charged under [8 U.S.C.] § 1326(b)(1), the court would have imposed a lesser sentence. . . . The 24-month sentence became the guidelines sentence because it was the statutory maximum sentence and was below the guidelines range of 30 to 37 months that would have otherwise applied and which had been correctly calculated.

*Id.*

Mr. Castro Orellana now requests this Court to resolve the issue of whether the Fifth Circuit misinterpreted and misapplied this Court's holding on *Gall v. United States*, 552 U.S. 38 (2007), and, in doing so, violated due process, when the appellate court held that Mr. Castro Orellana could not show an effect on his substantial rights from the district court's reliance on an error of fact because the district court imposed a sentence within the range established by the Sentencing Guidelines.

**BASIS OF FEDERAL JURISDICTION IN THE  
UNITED STATES DISTRICT COURT**

The district court had jurisdiction pursuant to 18 U.S.C. § 3231.

## REASONS FOR GRANTING THE PETITION

In *Gall v. United States*, 552 U.S. 38, 51 (2007), this Court declared that the first step in an appellate court's review of a district court's sentencing decision was to ensure that the district court committed no significant procedural error. This Court classified "selecting a sentence based on clearly erroneous facts" as among such significant procedural errors. The Court has long recognized the significance of the error of relying on erroneous facts as the basis for a criminal sentence. *See Townsend v. Burke*, 334 U.S. 736, 740-41 (1948). In this case, the district court relied on a clearly erroneous view of the facts concerning the defendant's eligibility for a statutorily-enhanced sentence and whether the prosecutor had unjustifiably failed to seek that enhancement. The Fifth Circuit Court of Appeals, in affirming that sentence, held that Mr. Castro Orellana could not demonstrate an effect on his substantial rights on plain-error review because the district court imposed a sentence of imprisonment within the range established by the Sentencing Guidelines. This Court should grant certiorari in this case because the Fifth Circuit's decision to elevate the presumption of reasonableness applicable to within-Guidelines sentences over clear factual error conflicts with *Gall* and other decisions of this Court holding that reliance on factual error in imposing sentence violates due process.

**I. The Court should grant this petition because the Fifth Circuit's decision to credit a presumption of reasonableness over a reliance on clearly erroneous fact misinterprets and misapplies this Court's holding in *Gall*.**

After *United States v. Booker*, 543 U.S. 200 (2005), federal courts of appeals review sentences for reasonableness. *See Booker*, 543 U.S. at 261-62. Under the reasonableness review mandated by *Booker*, "[r]egardless of whether the sentence imposed is inside or outside the Guidelines range, the appellate court must review the sentence under an abuse-of-discretion standard." *Gall v. United States*, 552 U.S. 38, 51 (2007). Reasonableness review of federal sentences has two components: procedural and substantive. *See Gall*, 552 U.S. at 51. Procedural reasonableness review requires that a court of appeals "first ensure that the district court committed no significant procedural error, such as . . . selecting a

sentence based on clearly erroneous facts . . . ." *Id.*

The *Gall* Court's characterization of reliance on clearly erroneous facts in sentencing as a significant procedural error reflects the Court's long-standing precedent that reliance on erroneous facts violates due process. In *Townsend v. Burke*, 334 U.S. 736 (1948), this Court declared that, where the "prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue," "such a result, whether caused by carelessness or design, is inconsistent with due process. . . ." *Id.* at 741. The Court reached this result without regard to the severity of the sentence:

It is not the duration or severity of this sentence that renders it constitutionally invalid; it is the careless or designed pronouncement of sentence on a foundation of sentence so extensively and materially false, . . . , that renders the proceedings lacking in due process."

*Id.*

While *Townsend* reflected a particular concern with proceedings without counsel, *see id.*, most federal courts of appeals continue to cite *Townsend* for the principle that the determination and imposition of sentence on the basis of an error of fact violates due process in general. *See, e.g., United States v. Colón-Maldonado*, 953 F.3d 1, 10 (1st Cir. 2020); *United States v. Delacruz*, 862 F.3d 163, 175-76 (2d Cir. 2017); *United States v. Fisher*, 502 F.3d 293, 298 (3d Cir. 2007); *United States v. Wheeler*, 886 F.3d 415, 431 (4th Cir. 2018); *United States v. Warren*, 720 F.3d 321, 330-31 (5th Cir. 2013); *United States v. Adams*, 873 F.3d 512 517 (6th Cir. 2017); *United States v. Propst*, 959 F.3d 298, 304 (7th Cir. 2020); *United States v. Richey*, 758 F.3d 999, 1003 (8th Cir. 2014); *United States v. Hill*, 915 F.3d 669, 674 (9th Cir. 2019); *United States v. Doe*, 934 F.2d 353, 3356 (D. C.

Cir. 1991).

In *Rita v. United States*, 551 U.S. 338 (2007), this Court authorized appellate courts reviewing the sentencing decisions of district courts to apply a non-binding “presumption of reasonableness” to a sentence imposed within the range established by “a proper application of the Sentencing Guidelines.” *Rita*, 551 U.S. at 347. Nothing in *Rita*, however, indicated any presumption in favor of reasonableness of a within-Guidelines range sentence when the range was not established by a “proper” application of the Guidelines. As *Gall* made clear, that proper application of the Sentencing Guidelines depends on fundamental principles, namely, that the sentencing court not rely on clearly erroneous facts in determining the Guidelines range or otherwise in imposing sentence.

In its decision in this case, the Fifth Circuit turned that reasoning upside-down. Instead of looking to the degree to which the district court relied on its erroneous view that the United States Attorney had authorized a reduced sentence for Mr. Castro Orellana, despite repeated efforts of the prosecutor to disabuse the court of that notion at sentencing, the Fifth Circuit instead looked only to whether the district court imposed a within-Guidelines sentence. The Fifth Circuit held that Mr. Castro Orellana had failed to show an effect on his substantial rights under the plain-error review standard of *Puckett v. United States*, 556 U.S. 128, 135 (2009) because

[t]he 24-month sentence became the guidelines sentence because it was the statutory maximum sentence and was below the guidelines range of 30 to 37 months that would have otherwise applied and which had been correctly calculated.

*Castro Orellana*, 832 Fed. Appx. at 924.

The Fifth Circuit opinion failed to deal at all with the degree to which the district court repeatedly insisted in tying its sentencing decision to its erroneous view of the facts. In arriving at this decision, the district court had rejected Mr. Castro Orellana's plea for leniency and a sentence of 12 months plus one day, again based on the district court's conclusion that the United States Attorney had made a discretionary charging decision to benefit Mr. Castro Orellana when, in fact, that charging decision was the only charge supported by law.

I have considered 18 United States Code, Section 3553(a). I feel that the appropriate sentence would be a good deal above the guidelines; however, due to the charging by the government of just the two-year count, that's the max. And also I do want to note that he scores out 30 to 37 months under the guidelines.

By ignoring the clear role of erroneous facts in the district court's determination of Mr. Castro Orellana's sentence, the Fifth Circuit gave precedence to the presumption of reasonableness of a within-Guidelines sentence. That is a misapplication of *Gall*, which placed reliance on erroneous facts among the significant procedural errors that would merit correction on appeal, and it is a misapplication of the *Townsend*, which has long stood for the principle that reliance on erroneous facts at sentencing violates due process.

This Court should grant certiorari in this case to clarify that *Gall* and *Townsend* mandate that a defendant's substantial rights are affected by the district court's reliance on erroneous facts in imposing sentence, regardless of whether the sentence ultimately imposed is within the range established by the Sentencing Guidelines.

**II. The Court should grant certiorari to address an apparent conflict among the circuit courts of appeals over the criteria to determine whether to remand a case to the district court when that court relies on erroneous facts to determine sentence.**

In its decision in the instant case, the Fifth Circuit found that Mr. Castro Orellana could not meet the plain-error requirement of showing an effect on his substantial rights by reference only to one factor: the imposition of a sentence within the Sentencing Guideline range, limited, as it was, to a level lower than the calculated range by reason of the statutory maximum sentence of two years. *Castro Orellana*, 832 Fed. Appx. at 924.

This focus on the Guideline range as the criterion for determining whether a sentence based on erroneous facts affects the substantial rights of the defendant on plain-error review is in conflict with the varying approaches taken by the different circuits. The Seventh Circuit, for example, applies plain-error review, and seeks to determine whether a district court's reliance on erroneous facts affected the substantial rights of the defendant by looking to whether "there is a substantial chance that the district court's misapprehension played a significant role in adjudication of the defendant's sentence." *United States v. Corona-Gonzalez*, 628 F.3d 336, 341 (7th Cir. 2010). In making that determination the Seventh Circuit looked to "those factors the judge deemed important or salient" in reaching the sentencing decision, as reflected in the record by the degree of emphasis placed on the erroneous information. *Id.* at 34-41. The Seventh Circuit more recently has clarified that the court looks to whether "the court gives explicit attention to [the erroneous information], finds its sentence at least in part on it, or gives specific consideration to the misinformation in imposing sentence." *United States v. Propst*, 959

F.3d 298, 304 (7th Cir. 2020). The ultimate measure for determining an effect on substantial rights, however, is whether it was “improbable that the trial judge was influenced by improper factors in imposing sentence.” *Corona-Gonzalez*, 628 F.3d at 342.

The Second Circuit has employed a similar mechanism in plain error analysis, determining whether there is an effect on substantial rights by the degree of confidence the appellate court had that the error did not play a role in the sentencing determination and offering a limited remand to make that determination. *See United States v. Romeo*, 385 Fed. Appx. 45, 50 (2d Cir. 2010) (unpublished) (“We cannot be certain on the record before us, however, that the error played no role in the court’s imposition of sentence.”). The Second Circuit uses the same limited remand procedure for plain errors based on Guideline application error. *See United States v. Bayfield*, 796 Fed. Appx. 19, 23 (2d Cir. 2019) (“Since we cannot be certain on the record before us that the district court’s error played no role in the ultimate sentence, we remand with a direction that the district court indicate on the record whether due consideration of the rules . . . would have made a difference in the sentence imposed.”).

Contrary to the Fifth Circuit’s focus on the sentence within the Guidelines range, the Third Circuit has found plain error that affects substantial rights even when the district court imposes a within-Guidelines range sentence. In *United States v. Brito*, 979 F.3d 185 (3d Cir. 2020), the district court sentenced the defendant to a within-Guidelines sentence. *Id.* at 189. In doing so, the district court rejected a plea for leniency based on the district court’s erroneous determination that the defendant had been deported more times than was actually the case. *Id.* at 189-90. Even though the error did not affect the Guidelines

calculation, the Third Circuit still found that the plain error affected the defendant’s substantial rights because, in rejecting the rest for leniency, the district court “reiterated and again emphasized” exactly the erroneous information, so that the “error undermined Brito’s case for leniency.” *Id.* at 191.

The Fifth Circuit’s approach in the instant case accorded with none of the foregoing methods of its sister circuits. In this case, the district court repeatedly emphasized its erroneous view that the prosecution had made a charging decision that limited the court’s statutory sentencing options, a decision that the district court clearly thought was unjustified. In affirming that sentencing decision, however, the Fifth Circuit did not examine the degree of reliance on that error that was clear in the record, as the Seventh Circuit would under *Propst*. Nor did the Fifth Circuit find that it was “improbable” that the district court’s error affected the sentence, a criteria the Seventh Circuit would have applied under *Corona-Gonzalez*. The Fifth Circuit did not seek the level of certainty that the Second Circuit did in *Romeo*, and did not take that court’s path of remanding for clarification. Finally, the Fifth Circuit focused on the fact that the sentence imposed was within the ultimately correct Guidelines range, but this failed to take into account, as the Third Circuit did in *Brito*, that the district court’s repeated focus on the error of fact completely undermined Castro Orellana’s request for leniency.

This Court should grant certiorari in this case to resolve those conflicting standards among the circuits for determining when a clear error of fact meets the plain-error standard of having an effect on substantial rights. This type of error arises frequently, as demonstrated by the cases cited above, spanning more than a decade since the Court’s

decision in *Gall*. As the Court stated in *Townsend* and as other courts of appeals have reiterated for over 70 years, sentencing a defendant on the basis of factually incorrect information is not just a Sentencing Guideline or procedural error: it is a violation of due process. Given the constitutional interests at issue here, the Court should grant certiorari and resolve the proper criteria and method for determining whether a factual error on which the district court relies at sentencing can be said to affect a defendant's substantial rights under plain-error review.

## CONCLUSION

The petition for a writ of certiorari should be granted.

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Respectfully submitted,

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