No. _____

In the

Supreme Court of the United States

_____

Juan Samuel Rodriguez-Huitron,

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

QUESTION PRESENTED

This Court in *Molina-Martinez v. United States* advised that courts of appeals may order a limited remand to assess the impact of clear error on the defendant's substantial rights. The question here is whether this statement is limited to errors affecting the Federal Sentencing Guidelines, or whether it extends to miscalculations of the statutory maximum.

PARTIES TO THE PROCEEDING

Petitioner is Juan Samuel Rodriguez-Huitron, 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

INDEX TO APPENDICES

Table of Authorities

Page(s)

Federal Cases

Federal Statutes

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioner Juan Samuel Rodriguez-Huitron 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The unpublished opinion of the Court of Appeals is reported at *United States v. Rodriguez-Huitron*, 2022 WL 1449182 (5th Cir. May 9, 2022)(unpublished). It is reprinted in Appendix A to this Petition. The district court's judgement and sentence is attached as Appendix B.

JURISDICTION

The unpublished panel opinion and judgment of the Fifth Circuit were entered on May 9, 2022. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

RELEVANT RULES AND STATUTE

Section 2106 of Title 28 reads in relevant part:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

Federal Rule of Criminal Procedure 52 reads as follows:

> (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

A. Facts and Proceedings in District Court

Petitioner Juan Samuel Rodriguez-Huitron pleaded guilty to one count of illegal re-entry following a removal. *See* (Record in the Court of Appeals, at 97-104). A Presentence Report (PSR) calculated a Guideline range of 46-57 months imprisonment, *see* (Record in the Court of Appeals, at 116), and a statutory maximum of 20 years imprisonment under 8 U.S.C. §1326(b)(2), *see* (Record in the Court of Appeals, at 116)(PSR, ¶51). In support of these conclusions, the PSR enumerated one prior conviction sustained before his first removal, namely a 1998 Texas conviction for aggravated assault by injury. *See* (Record in the Court of Appeals, at 113)(PSR, ¶29).

At sentencing, the court stated that "[t]he statutory sentencing range is a term of imprisonment of not more than 20 years" and imposed a sentence of 57 months. (Record in the Court of Appeals, at 87, 93). It disclaimed any impact of the Guidelines on the sentence imposed, but did not disclaim the impact of the statutory range. *See* (Record in the Court of Appeals, at 94). The judgment stated that the defendant had been convicted under 8 U.S.C. §1326(b)(2), which covers illegal re-entry following an aggravated felony. *See* (Record in the Court of Appeals, at 54).

B. Appellate Proceedings

Petitioner appealed, contending that the district court had erred in treating his aggravated assault conviction as an "aggravated felony." *See* Initial Brief in *United States v. Rodriguez-Huitron*, No. 21-10082, 2021 WL 1933697, at *3 (5th

Cir. Filed May 4, 2021)("Initial Brief"). He thus requested that the court remand the case with instructions to strike from the judgment any reference to 8 U.S.C. §1326(b)(2), the portion of the federal illegal re-entry statute applicable when the defendant has been previously convicted of an aggravated felony. *See* Initial Brief, at *6-7, 11. He also asked the court to order a limited remand to the district court. *See id.* at *7-9. He wanted the court of appeals to ask the sentencing judge whether he would have imposed a lesser sentence aware that the statutory maximum was 10 years rather than 20 years imprisonment, and aware that Petitioner had never sustained an "aggravated felony." *See id.* at *9.

The court of appeals ultimately, *see United States v. Rodriguez-Huitron*, 21-10082, 852 Fed. Appx. 146 (5th Cir. July 7, 2021)(unpublished)(denying government's motion for summary affirmance), agreed that the district court had erred in treating Petitioner's prior conviction as an "aggravated felony." *See* [Appx. A]; *United States v. Rodriguez-Huitron*, 2022 WL 1449182, at *1 (5th Cir. May 9, 2022)(unpublished). It thus modified the judgment to strike the reference to 8 U.S.C. 1326(b)(2). *See Rodriguez-Huitron*, 2022 WL 1449182, at *2. But it refused to order a limited remand where the record did not already show that the statutory maximum affected the sentence imposed. *See id*. at *1. It said:

> Yet no remand is warranted. By his own admission, Rodriguez-Huitron seeks a limited remand to determine whether additional relief (i.e., vacatur) is appropriate. But the tail cannot wag the dog. *See, e.g., United States v. Trujillo*, 4 F.4th 287, 291 (5th Cir. 2021) (declining remand to explore the possibility of prejudice). The standard of review requires that Rodriguez-Huitron justify the requested relief. He fails.

Id.

REASONS FOR GRANTING THE PETITION

The circuits have divided as to the proper use of a limited remand to determine whether a plain error affected the defendant's substantial rights. Specifically, the Seventh Circuit has used the limited remand to determine the effect of a plain miscalculation of the statutory maximum on the sentence imposed. On effectively identical facts, the court below declined to use it. The issue is important and recurs frequently in this posture.

Section 2106 of Title 28 confers broad authority to appellate courts to order such further proceedings as may be just in the context of the case. It says that all courts of appellate jurisdiction may:

> affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

28 U.S.C. §2106.

In *Molina-Martinez v. United States*, __U.S. __, 136 S.Ct. 1338 (2016), this Court blessed one such use of this authority, namely a limited remand to determine the extent of prejudice occasioned by a plain Guideline error. *See Molina-Martinez*, 136 S.Ct. at 1348. In *Molina-Martinez*, this Court held that an error in calculating the federal sentencing Guidelines will ordinarily engender a reasonable probability of a different result, and hence satisfy the prejudice prong of plain error review. *See id*. at 1345. But it recognized that in some cases, appellate courts may obtain additional information from the district courts about the likelihood of a different result under the correct Guidelines. *See id*. at 1348. As such, it suggested that courts of appeals may wish to order a limited remand to the district courts, asking

whether they would be inclined to reduce the sentence aware of the true Guideline range. *See id*.

In the instant case, the court below declined to extend this practice beyond cases of Guideline error. Finding the Guidelines correctly calculated, it saw no role for a limited remand in determining the effect of a miscalculated statutory maximum. *See* [Appx. A]; *United States v. Rodriguez-Huitron*, 2022 WL 1449182, at *1-2 (5th Cir. May 9, 2022)(unpublished). Indeed, it has previously held in a published, binding, authority that the limited remand is not available "simply because [the defense] hopes to create a better appellate record." *United States v. Trujillo*, 4 F.4th 287, 291 (5th Cir. 2021). In that case, it said:

> Trujillo nevertheless suggests that we remand so that he can at least ask the district court whether it might have imposed a different sentence. But it is Trujillo's burden on appeal to demonstrate a reasonable probability of a different result on remand. …He cannot do so here. So remand is not warranted. We will not order remand simply because Trujillo hopes to create a better appellate record.

Trujillo, 4 F.4th at 291 (internal citation omitted)(citing *United States v. Lavalais*, 960 F.3d 180, 186 (5th Cir. 2020)).

This view of the limited remand is clearly contrary to the Seventh Circuit's position, as stated in *United States v. Currie*, 739 F.3d 960 (7th Cir. 2014). In *Currie*, the defendant received a sentence at the bottom of the Guidelines. *See Currie*, 739 F.3d at 961. On a plain error appeal, he showed that the district court misunderstood the statutory range, and argued that this might have affected the sentence imposed. *See id.* at 964. The error did not appear to affect the Guideline rage. *See id.* Further, the Seventh Circuit canvassed the record and found only

competing inferences and sources of pervasive uncertainty about what the court would have done under the correct range. *See id*. at 965-966. Notably, it did not find a reasonable probability of a different result on the existing record, at least not explicitly. *See id.* Nonetheless, the *Currie* panel ordered a limited remand to clear up any doubt. S*ee id.* at 966-967. It explained that "a limited remand is the most prudent way to re-solve all doubt on this question." *Id.* at 966.

The issue merits this Court's intervention. The difference between the view of the court below and that of the Seventh Circuit now involves published authority on both sides. Further, their divergence is clear, direct, and precise. The Seventh Circuit will offer a limited remand where the district court miscalculates the statutory maximum, even if the Guidelines are correct, and the record does not offer other evidence about the influence of the statutory range. The court below declined to do so on essentially identical facts. Identical inputs, in other words, produced opposite outputs.

The issue is a significant one. The misapprehension of statutory maximums that do not affect the Guidelines is a thoroughly commonplace event, especially in cases arising under 8 U.S.C. §1326. *See e.g. United States v. Mondragon-Santiago*, 564 F.3d 357, 368-69 (5th Cir. 2009*)*; *United States v. Godoy*, 890 F.3d 531, 542 (5th Cir. 2018); *United States v. Maldonado-Villeda*, 633 Fed. Appx. 243, 244 (5th Cir. 2016)(unpublished*); United States v. Ortiz-Cuevas*, 516 Fed. Appx. 325 (5th Cir. 2013)(unpublished); *United States v. Fuentes*, 506 Fed. Appx. 330, 331-332 (5th Cir. 2013)(unpublished); *United States v. De la Sancha-Villarreal*, 498 Fed. Appx. 451,

453 (5th Cir. 2012)(unpublished); *United States v. Ayala-Nunez*, 714 Fed. Appx. 345, 351-352 (5th Cir. 2017)(unpublished).

And the position of the court below is wrong on the merits. This Court cited *Currie* with approval in *Molina-Martinez*. *See Molina-Martinez*, 136 S.Ct. at 1348. This demonstrates that it did not anticipate the restriction of limited remands to Guidelines errors. *Currie* did not involve a Guideline error at all – it involved precisely the kind of error at issue here.

Finally, the courts of appeals possess ample statutory authority to order such remands, as the broad language of §2106 makes clear. And the open-ended standard provided by that statute – "such further proceedings to be had as may be just under the circumstances" -- justifies the use of a limited remand where the record reflects a plausible chance of a lesser sentence, even if that chance falls short of the "reasonable probability" standard without further development. As the Seventh Circuit pointed out in *Currie*, the limited remand is a remarkably cheap, efficient, and reliable means of determining the effect of an error on the sentence. *See Currie*, 739 F.3d at 966. The district court simply issues an order stating its sentencing intent – there is no need to bring the defendant from prison, nor even to receive briefing, unless it wishes to do so. Provided the error is clear, and otherwise merits relief, justice supports its use in cases like the one at bar.

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 8th day of August, 2022.

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