No. _____

In The
Supreme Court of the United States

JOSE ANTONIO DELEON-JUAREZ,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under plain error review, does a prosecutor's breach of a plea agreement affect a defendant's substantial rights unless the record contains evidence that the judge would have imposed the same sentence absent the breach as the Fourth, Fifth, and Seventh Circuits have held?

RELATED PROCEEDINGS

United States v. Deleon-Juarez, No. 21-50243 (9th Cir. Feb. 22, 2023).

United States v. Deleon-Juarez, No. 3:20-cr-02034-LAB-1 (S.D. Cal. Oct. 20, 2021).

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Petitioner Jose Antonio Deleon-Juarez respectfully prays that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

INTRODUCTION

Our criminal system depends upon the orderly and uniform administration of plea agreements. It is therefore critical that there also exists an orderly and uniform standard regarding what to do when plea agreements go wrong. But a circuit split has developed about what a defendant must show in order to get relief when the government breaches its agreement and the defendant fails to object before sentencing. In the Eighth, Ninth, and Eleventh Circuits, in order to show

that a breach affected his substantial rights, a defendant must prove that the sentence would have been different absent the government's breach. The Fourth, Fifth, and Seventh Circuits, however, hold that a breach affects substantial rights unless the record is clear that the outcome would have been the same regardless of whether the prosecutor breached.

This circuit split warrants resolution to ensure that the almost 90% of defendants who resolve their federal cases through a plea can rely on a single, uniform national standard.

This case is a suitable vehicle to resolve the split. The panel denied petitioner's appeal because even though the sentencing judge expressly relied on the prosecutor's violative statements in justifying the sentence, it found petitioner had failed to prove that he would have gotten a lower sentence had the prosecutor not made those statements. In so holding, it relied on Ninth Circuit precedent holding that the defendant must prove that the breach was prejudicial.

The Ninth Circuit's standard is wrong and contrary the policy goals motivating plea bargaining.

OPINION BELOW

The Ninth Circuit held that any breach of Mr. Deleon's plea agreement was harmless because it did not affect Mr. Deleon's substantial rights. *See* Appendix to the Petition ("Pet. App.") at 1a–3a.

JURISDICTION

The Court of Appeals entered judgment on February 22, 2023. It then denied Mr. Deleon's petition for rehearing on April 18, 2023. The Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS AND RULES

The Fifth Amendment provides that no person shall "be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

Rule 52(b) of the Federal Rules of Criminal Procedure provides in pertinent part: "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

Mr. Deleon pleaded guilty to one count of attempting to illegally reenter the United States in violation of 8 U.S.C. § 1326(a) and (b). In return for his guilty plea, the government promised to recommend a within-Guidelines sentence after application of a 2-level downward variance. Mr. Deleon's ultimate Guidelines range after application of the recommended variance would have been 41 to 51 months.

Before sentencing, the government submitted a sentencing summary chart that nominally recommended a sentence of 51 months. But the government appended to the sentencing summary chart uninvited, gratuitous, scathing commentary about Mr. Deleon's criminal and immigration history. It also characterized Mr. Deleon's attitude towards the present offense as "brazen," and it repeated certain of these remarks at sentencing.

The district judge rejected the negotiated, jointly requested 2-level variance and then varied still further upward to sentence Mr. Deleon to 70 months in custody. In doing so, the district judge relied on the commentary from the government's sentencing summary chart, which the district judge described as "seeming like an argument for a variance the other way." The district court again cited the government's sentencing summary chart as part of the justification for the sentence imposed, including the government's description of Mr. Deleon's conduct as "brazen."

Mr. Deleon appealed. He argued that the government's sentencing summary chart and comments at sentencing breached the plea agreement by implicitly arguing that a sentence longer than the negotiated-for one was appropriate.

The panel held that any breach that may have occurred did not constitute plain error because it did not affect Mr. Deleon's substantial rights. Pet. App. 2a–3a. Specifically, the panel cited the Ninth Circuit decision in *United States v. Gonzalez-Aguilar*, 718 F.3d 1185, 1189–90 (9th Cir. 2013), which holds that when the prosecutor breaches the plea agreement, "[a]bsent proof of prejudice, [a defendant] cannot establish plain error." Pet. App. 3a.

Mr. Deleon filed a petition for rehearing. The petition was denied on April 18, 2023.

REASONS FOR GRANTING THE WRIT

I. Courts are divided over when a prosecutor's breach of the plea agreement satisfies the third prong of the plain error test.

This Court has long recognized that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Santobello v. New York*, 404 U.S. 257, 262 (1971). In *Puckett v. United States*, 556 U.S. 129 (2009), the Court resolved a circuit split regarding the standard of review applicable to claims of breach when a defendant fails to object, holding that plain error review applies in such cases. *Id.* at 133–34. Since *Puckett*, in order to prevail in such cases, appellants must show (1) there is an error or defect, (2) which is clear or obvious, (3) that affected appellant's substantial rights, and (4) that seriously affected the fairness or integrity of judicial proceedings. *United States v. Olano*, 507 U.S. 725, 732–34 (2009).

But courts of appeals are divided over how to apply the third prong of the plain error test in the context of breach claims. Specifically, they are divided over what a defendant must show to get relief when the government has broken its promises.

A. The Fourth, Fifth, and Seventh Circuits hold that substantial rights are violated absent some indication in the record that the sentencing court was not influenced by the breach.

The Fourth, Fifth, and Seventh Circuits hold that when the government breaches a plea agreement, a defendant's substantial rights are violated unless

there is an affirmative indication in the record that the sentencing court was not influenced by the breach.

The Fourth Circuit holds that even when the sentencing judge expresses skepticism about a sentencing recommendation, substantial rights are violated as long as a court "may well have taken the government's position into account and arrived at a sentence within, or at least closer to, the sentencing range anticipated by the plea agreement." *United States v. Edgell*, 914 F.3d 281, 290 (4th Cir. 2018).

The Fifth Circuit similarly holds that "the Government's breach of its promise to recommend a lesser sentence affects a defendant's substantial rights unless the record indicates that the district court would have imposed the same sentence regardless of Government's breach." *United States v. Kirkland*, 851 F.3d 499, 503 (5th Cir. 2017). Thus, the Fifth Circuit finds that the third prong of the plain error test will be met whenever there is "no indication the district court would have been unmoved by the Government's recommendation for a lower sentence." *Id.* at 504 (citing *United states v. Williams*, 821 F.3d 656, 658 (5th Cir. 2016)).

The Fifth Circuit arrives at this standard by weighing the defendant's burden of showing a "reasonable probability" that the breach affected the sentence with the "common sense understanding of the important role the Government's recommendation plays in sentencing." *Id.*

The Seventh Circuit holds that government breaches affect substantial rights unless the record "compellingly reflects the sentencing court was not influenced by the government's recommendation." *United States v. Navarro*, 817 F.3d 494, 501

(7th Cir. 2014). It describes cases in which substantial rights are not affected when a breach occurs as "unusual." *Id.* In fact, it holds that even a judge's express statement that he would impose the same sentence regardless of what the government said is—standing alone—insufficient to warrant a finding that substantial rights were not affected. *Id.*

B. The Eighth, Ninth, and Eleventh Circuits hold that absent affirmative proof of prejudice, an appellant cannot establish that the breach affected the sentence.

In this case, the panel applied a contrary rule adopted by the Eighth, Ninth, and Eleventh Circuits. These circuits allow courts to avoid finding substantial rights were affected as long as there is any indication in the record that the judge's decision may have been based on something other than the breach. In full, the Ninth Circuit reasoned: "At sentencing, the district court focused on Deleon-Juarez's prior convictions for immigration offenses and his failure to be deterred by previous sentences. The district court expressly rejected the 51-month sentence requested by the government as insufficient to deter Deleon-Juarez. Under these circumstances, there is no reasonable probability that the alleged breach affected the court's sentencing determination." Pet. App. 2a–3a. To support that conclusion, the panel cited *Gonzelez-Aguilar*, which holds that a court may not find that substantial rights were affected "[a]bsent proof of prejudice." *Gonzalez-Aguilar*, 718 F.3d at 1189.

This standard is similar to the one employed in the Eleventh Circuit, which holds that "where the record does not provide any indication that there would have

been a different sentence [absent the error], the [defendant] loses." *United States v. Rodriguez*, 398 F.3d 1291, 1304 (11th Cir. 2005).

Even more exacting is the standard used in Eighth Circuit, which requires that the defendant point to an indication in the record that the government's comments were the "but for" cause of his receiving a longer sentence. *United States v. Lovelace*, 565 F.3d 1080, 1088 (8th Cir. 2009). Applying this test, the Eighth Circuit has repeatedly declined to find substantial rights affected so long as the final sentence was a legally permissible exercise of judicial discretion. *Id.*; *see also United States v. Jensen*, 423 F.3d 851, 855 (8th Cir. 2005); *United States v. Keller*, 413 F.3d 706, 710–11 (8th Cir. 2005).

II. The division among the circuits demands the Court's attention because plea agreements are at the heart of the federal criminal system, and Mr. Deleon's case presents the perfect vehicle to resolve the issue.

"[C]riminal justice today is for the most part a system of pleas, not a system of trials." *Lafler v. Cooper*, 566 U.S. 156, 157 (2012). In fiscal year 2022, only 2.3% of defendants went to trial. Almost nine out of ten (89.5%) pleaded guilty. United States Courts' Caseload Statistics Data Table D-4, *available at* bit.ly/43gEoTK. Thus, "disposition of criminal charges by agreement between the prosecutor and the accused . . . is an essential component of the administration of justice." *Santobello*, 404 U.S. at 260.

The centrality of plea bargains to the system of justice requires that "safeguards" be in place to "insure the defendant what is reasonably due in the circumstances." *Id.* at 262. Equally as important is ensuring uniformity in how

courts handle cases where the system breaks down—when a defendant does not get what was promised him.

Granting cert in this case is also consistent with the Court's practice of weighing in to resolve splits among the circuits in the law concerning breach. *See Puckett v. United States*, 556 U.S. 129 (2009).

Mr. Deleon's case also presents the right vehicle to resolve the split. It is undisputed that the district court incorporated the prosecutor's allegedly violative comments into his justification for imposing a sentence 19 months longer than the harshest one contemplated by the plea agreement. In addition, the sentencing court gave no affirmative indication that its decision was independent of these comments. Thus, under the standard employed in the Fourth, Fifth, and Seventh Circuits, Mr. Deleon would have satisfied his burden of showing that the government's comments affected his substantial rights.

III. The Ninth Circuit's test for when substantial rights have been violated by a breach of the plea agreement is wrong.

The divergent approaches of the courts of appeals warrant review no matter which standard prevails. But granting the petition is particularly important here because the Ninth Circuit's requirement that a defendant prove that the government's violative comments were the cause of his sentence is incorrect, illogical, and contrary to the policy goals underlying plea bargains.

On its face, the Ninth Circuit test virtually ensures that absent extraordinary facts, no plain error breach claim will ever prevail. Sentencings are lengthy and incorporate significant quantities of information. Every sentencing will therefore

always contain at least some information upon with a judge could rely in imposing a longer sentence, as well as some that would justify a shorter one. Requiring that a defendant show that the government's comments caused him to get a longer sentence presents him with an impossible task. Plain error is a high bar, to be sure, but it cannot be insurmountable.

The test articulated by the Fifth Circuit is more consistent with the realities of plea bargaining. The Fifth Circuit correctly understands the "common sense" fact that the recommendation of the prosecutor will carry great weight in any sentencing. *Kirkland*, 851 F.3d at 503. The mere fact that a prosecutor makes violative statements necessarily plausibly affects the outcome of the case absent strong indication to the contrary.

Requiring that a party prove that a breach caused him to receive a higher sentence is furthermore contrary to the logic underpinning *Santobello*. It removes the "safeguards" that this court recognizes are necessary to "insure the defendant what is reasonably due." *Santobello*, 404 U.S. at 262.

"[S]carce prosecutorial and judicial resources are conserved" when defendants plead guilty instead of going to trial. *Brady v. United States*, 397 U.S. 742, 752 (1970). Defendants who plead guilty ensure the continued, efficient functioning of the judicial system. Unreasonable and unachievable standards for demonstrating that a plain error occur threaten the stability of the system as a whole.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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