

No. _____

In the Supreme Court of the United States

October Term, 2023

ROBERTO BUENDIA, *PETITIONER*,

V.

UNITED STATES OF AMERICA

**PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

MAUREEN SCOTT FRANCO
Federal Public Defender

JUDY FULMER MADEWELL
First Assistant
Federal Public Defender
Western District of Texas
300 Convent Street, Suite 2300
San Antonio, Texas 78205
(210) 472-6700
(210) 472-4454 (Fax)

Counsel of Record for Petitioner

QUESTION PRESENTED FOR REVIEW

Whether the standard the Fifth Circuit Court of Appeals applied for determining if the sentencing Guidelines' error in Buendia's case was "plain" conflicts with the reasoning in this Court's decisions in *Molina-Martinez v. United States*, 578 U.S. 189 (2016), *Rosales-Mireles v. United States*, 585 U.S. __, 138 S. Ct. 1897 (2018), and *Davis v. United States*, 589 U.S. __, 140 S. Ct. 1060 (2020). And whether this Court should grant certiorari to clarify the standard for determining the second prong of plain-error review.

No. _____

In the Supreme Court of the United States

October Term, 2023

ROBERTO BUENDIA, Petitioner,

v.

UNITED STATES OF AMERICA

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT**

Petitioner Roberto Buendia asks that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit.

PARTIES TO THE PROCEEDING

The caption of this case names all parties to the proceeding in the court whose judgment is sought to be reviewed.

RELATED PROCEEDINGS

All proceedings directly related to the case are as follows:

- *United States v. Buendia*, No. _____ (W.D. Tex. _____) (judgment)
- *United States v. Buendia*, 73 F.4th 336 (5th Cir. 2023) (published opinion)

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW.....	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	iii
OPINION BELOW.....	1
JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES	1
FEDERAL RULE INVOLVED	1
SENTENCING GUIDELINE INVOLVED	1
STATEMENT	1
REASONS FOR GRANTING THE WRIT	9
I. The Fifth Circuit’s overly restrictive standard on the second prong of plain-error review conflicts with this Court’s cases in sentencing Guidelines’ errors.....	9
II. The Fifth Circuit’s rigid standard for “plain” error is inconsistent with other courts of appeals and creates intra-circuit conflict.....	15
III.This is a suitable vehicle to address the question presented.	17
CONCLUSION.....	18
APPENDIX <i>United States v. Buendia,</i> 73 F.4th 336 (5th Cir. July 11, 2023)	

TABLE OF AUTHORITIES

Cases

<i>Davis v. United States</i> , 589 U.S. __, 140 S. Ct. 1060 (2020)	<i>passim</i>
<i>Gall v. United States</i> , 552 U.S. 38 (2007)	10
<i>Glover v. United States</i> , 531 U.S. 198 (2001)	11
<i>Molina-Martinez v. United States</i> , 578 U.S. 189 (2016)	<i>passim</i>
<i>Peugh v. United States</i> , 569 U.S. 530 (2013)	10, 11
<i>Rosales-Mireles v. United States</i> , 585 U.S. __, 138 S. Ct. 1897 (2018)	<i>passim</i>
<i>United States v. Bankston</i> , 945 F.3d 1316 (11th Cir. 2019)	15, 16
<i>United States v. Booker</i> , 543 U.S. 220 (2005)	10
<i>United States v. Buendia</i> , 73 F.4th 336 (5th Cir. 2023)	<i>passim</i>
<i>United States v. Chau</i> , 426 F.3d 1318 (11th Cir. 2005)	15
<i>United States v. del Carpio Frescas</i> , 932 F.3d 324 (5th Cir. 2019)	14, 17
<i>United States v. DeLeon</i> , 484 F. App'x 920 (5th Cir. 2012)	7, 8
<i>United States v. Ellis</i> , 564 F.3d 370 (5th Cir. 2009)	13

<i>United States v. Escalante-Reyes,</i> 689 F.3d 415 (5th Cir. 2012) (en banc)	13
<i>United States v. Gadson,</i> 77 F.4th 16 (1st Cir. 2023)	15
<i>United States v. Hernandez,</i> 690 F.3d 613 (5th Cir. 2012)	14
<i>United States v. Marroquin,</i> 884 F.3d 298 (5th Cir. 2018)	15
<i>United States v. Montague,</i> 67 F.4th 520 (2d Cir. 2023)	16
<i>United States v. Olano,</i> 507 U.S. 725 (1993)	2, 9, 10
<i>United States v. Piper,</i> 839 F.3d 1261 (10th Cir. 2016)	15
<i>United States v. Ramirez,</i> 783 F.3d 687 (7th Cir. 2015)	16
<i>United States v. Rodriguez-Parra,</i> 581 F.3d 227 (5th Cir. 2009)	8, 13
<i>United States v. Stinson,</i> 734 F.3d 180 (3d Cir. 2013)	15
<i>United States v. Torres,</i> 856 F.3d 1095 (5th Cir. 2017)	2
Statutes	
18 U.S.C. § 3553(a)	11
28 U.S.C. § 1254(1)	1
Rule	
Fed. R. Crim. P. 52(b).....	1, 9

United States Sentencing Guideline

U.S.S.G. § 2L1.1(b)(8)(A) 1, 5, 7

Other Authorities

BLACK'S LAW DICTIONARY (11th ed. 2019) 6, 7

THE OXFORD ENGLISH DICTIONARY (online ed. 2023) 7

United States Sentencing Commission, 2022 Federal Sentencing
Statistics for the District Courts within the Fifth Circuit from
October 1, 2021 through September 30, 2022 11

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 73 F.4th 336 and attached to this petition as Appendix A.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The Court of Appeals entered the judgment in Buendia's case on July 11, 2023. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

FEDERAL RULE INVOLVED

Federal Rule of Criminal Procedure 52(b) provides:

Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

SENTENCING GUIDELINE INVOLVED

Guideline § 2L1.1(b)(8)(A) provides, in pertinent part:

If an alien was involuntarily detained through coercion or threat, or in connection with a demand for payment, ... (ii) while the alien was transported or harbored in the United States, increase by 2 levels.

STATEMENT

This case involves an important question regarding the second prong of plain-error review of federal sentencing Guidelines errors.

In *United States v. Olano*, 507 U.S. 725, 732 (1993), this Court held that, to establish plain error on appeal, the appellant must prove: 1) there was error, 2) the error was plain—that is clear or obvious, and 3) it seriously affected his substantial rights. If those three prongs were met, then the court of appeals should exercise its discretion to correct the error if it “seriously affects the fairness, integrity or public reputation of judicial proceedings.” *Id.* In Buendia’s case, there was an error in the sentencing Guidelines calculation that went unnoticed by the district court and the parties. Buendia raised the error for the first time on appeal, acknowledging review was for plain error. The Fifth Circuit Court of Appeals found there was error in the Guidelines calculation but refused to correct the error. *United States v. Buendia*, 73 F.4th 336, 340–41 (5th Cir. 2023). The court held that the error was not “plain” because the error was not “uncomplicated.” *Id.* at 340 (quoting *United States v. Torres*, 856 F.3d 1095, 1099 (5th Cir. 2017)). That was so because the court had to “survey the relevant definitions [of ‘threat’ and ‘coercion’] and distinguish prior non-precedential case law.” *Id.* at 341. The relevant definitions were from the dictionary, and the prior non-precedential case law was one unpublished case with dissimilar facts. *Id.*

This Court has recognized that “[t]he Court of Appeals for the Fifth Circuit stands generally apart from other Courts of Appeals with respect to its consideration of unpreserved Guidelines errors.” *Molina-Martinez v. United States*, 578 U.S. 189, 198 (2016). This Court has repeatedly reversed the Fifth Circuit’s rigid standards for applying the plain-error review. In *Molina-Martinez*, this Court rejected the Fifth Circuit’s standard requiring a defendant to present “additional evidence,” beyond an increased Guidelines range, to show that the Guidelines error affected his sentence. *Id.* at 191–92, 198. In *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1905–06, 1911 (2018), this Court held that the Fifth Circuit’s standard for a court to exercise discretion to correct plain error—which required such errors to “shock the conscience of the common man, serve as a powerful indictment against our system of justice, or seriously call into question the competence or integrity of the district judge”—was incorrect and “out of step with the practice of other Circuits.” In *Davis v. United States*, 140 S. Ct. 1060, 1061–62 (2020), this Court held there was “no legal basis for the Fifth Circuit’s” standard that “[q]uestions of fact capable of resolution by the district court upon proper objection at sentencing can never constitute plain error.”

Once again, the Fifth Circuit’s rigid standard for applying plain-error review—here for whether the error is “plain”—is out of step with other Circuits and contrary to the reasoning in *Molina-Martinez, Rosales-Mireles, and Davis*.

1. Roberto Buendia pleaded guilty to transporting undocumented migrants resulting in serious bodily injury and death. At sentencing, the district court applied a two-level enhancement for involuntarily detaining an undocumented migrant by threat or coercion. Buendia did not object to the enhancement. On appeal, Buendia argued that court plainly erred by applying the two-level enhancement.

2. On a highway in south Texas, U.S. Border Patrol agents observed a Buick car, registered to Roberto Buendia, that was suspected of transporting two undocumented migrants. Agents activated their emergency equipment to stop the Buick, but it accelerated and did not pull over. Other law enforcement joined in the pursuit. At an intersection, the Buick ran a red light at a high rate of speed, hit a utility pole, and ripped in two. Buendia, who was driving, and both passengers were thrown from the Buick.

The two passengers were Mexican citizens who were in the United States unlawfully—A.M.A. died at the scene, and L.G.G.G. suffered serious injuries. After the accident, Buendia and L.G.G.G.

were airlifted to medical facilities in San Antonio in critical condition. Both were placed in medically induced comas.

Over a month later, L.G.G.G. told investigators that he paid a man named Gordo \$2,500 to smuggle him into the United States. Once inside the country, L.G.G.G., along with A.M.A., were picked up by the Buick. The driver, Buendia, told them to get into the back passenger area and keep their heads down. He also told them that if they got pulled over, they were to jump out of the car and run. When law enforcement began pursuing them, Buendia accelerated and started driving erratically. L.G.G.G. heard Buendia on the telephone saying that “he will flee from the police and get away.” L.G.G.G. told Buendia to slow down and stop the car, but Buendia told him to shut up and stay quiet.

3. After Buendia pleaded guilty to transporting undocumented migrants resulting in serious bodily injury and death, a probation officer prepared a presentence report. The officer recommended a two-level enhancement for involuntarily detaining a migrant through threat or coercion, or in connection with a demand for payment. U.S.S.G. § 2L1.1(b)(8)(A). The officer’s basis for the enhancement was L.G.G.G.’s statement that “he told Buendia to stop the vehicle. However, Buendia told him to shut up and stay quiet.” Buendia did not object to this enhancement. The probation

officer calculated the advisory Guidelines range as 87-to-108 months' imprisonment.

The district court adopted the presentence report but found the advisory Guidelines range to be inadequate. The court imposed an upward variance to 144 months' imprisonment.

3. On appeal to the Fifth Circuit Court of Appeals, Buendia argued that the district court erred in applying the two-level enhancement for involuntarily detaining a migrant through threat or coercion based on his telling L.G.G.G., while they were fleeing in the car from law enforcement, to shut up and stay quiet. He acknowledged that, because he had not objected in the district court, review was for plain error.

Buendia argued that his conduct did not constitute a "threat" or "coercion," which were not defined in the Guidelines, according to the ordinary meaning of those terms as found in dictionaries. *See BLACK'S LAW DICTIONARY* (11th ed. 2019) ("coercion," "threat").

The Fifth Circuit panel agreed with, and the Government did not contest, the definitions of threat and coercion. *Buendia*, 73 F.4th at 339–40. The court held the error in applying the enhancement was plain. Although Buendia had involuntarily detained the migrants, he had not done so through "threat" because that requires "a declaration, express or implied, of an intent to inflict loss

or pain on another.” *Id.* at 339–40 (citing BLACK’S). The court also held that Buendia had not involuntarily detained the migrants through “coercion” because he did not act “to control the action of a voluntary agent.” *Id.* at 340 (citing BLACK’S; THE OXFORD ENGLISH DICTIONARY (online ed. 2023)).

Buendia argued that the error was plain because it involved a “straightforward application” of the language of sentencing guideline § 2L1.1(b)(8)(A). *See id.* at 340. The Fifth Circuit disagreed. Although the court “f[ou]nd error here based on the ordinary meanings of the terms in the enhancement,” it involved “the additional step of explaining how this case differed from the circumstances of” another case—*United States v. DeLeon*, 484 F. App’x 920, 924 (5th Cir. 2012). *Buendia*, 73 F.4th at 341. The government had cited *DeLeon* to support its argument that the enhancement applied based on Buendia’s conduct. *DeLeon* involved undocumented migrants being held at a stash house in which “the exits of the house were boarded up and/or padlocked from the outside to prevent those inside from escaping.” 484 F. App’x at 934. The Fifth Circuit rejected the government’s argument, finding *DeLeon* distinguishable. In *DeLeon*, the enhancement was “properly applied” because “the smuggler acted ‘to control the action of a voluntary agent.’” *Buendia*, 73 F.4th at 340 (emphasis in original). Here,

“Buendia did not continue to drive *in order to* prevent L.G.G.G. from escaping—he continued to drive in order to avoid apprehension.” *Id.* (emphasis in original).

Although *DeLeon* was unpublished, nonprecedential, and factually distinguishable, the Fifth Circuit held that it was still “relevant because ‘[t]here is no plain error if the legal landscape at the time showed the issue was disputed.’” *Id.* at 341. The court referred to its earlier decision in *United States v. Rodriguez-Parra*, 581 F.3d 227, 231 (5th Cir. 2009), in which it held that an “error was not plain because it required ‘a careful parsing of all the relevant authorities, including the sentencing Guidelines and applicable decisions.’” *Id.* at 341. “We reach a similar conclusion here: since we had to survey the relevant definitions and distinguish prior non-precedential case law, the error was not plain.” *Id.*

The Fifth Circuit held that there was error but that it was not plain and affirmed the sentence. *Buendia*, 73 F.4th at 341.

Petitioner Buendia respectfully submits that the Fifth Circuit applied a heightened standard for the second prong of plain-error review that conflicts with the decisions of this Court.

REASONS FOR GRANTING THE WRIT

The Fifth Circuit Court of Appeals applied a heightened standard for the second prong of plain-error review in Buendia's case, which involved a sentencing Guidelines error. The Fifth Circuit's standard comes from earlier circuit cases that required a more stringent review under the second prong because of a perceived unacceptable "permissiveness" on the third and fourth prongs of plain-error review. The alleged unacceptable permissiveness was subsequently affirmed by this Court when it reversed the Fifth Circuit's standards in *Molina-Martinez*, *Rosales-Mireles*, and *Davis*. This Court should grant certiorari to reverse the Fifth Circuit's rigid standard and clarify the correct standard to be used when the court of appeals decides whether sentencing Guidelines error is "plain."

I. The Fifth Circuit's overly restrictive standard on the second prong of plain-error review conflicts with this Court's cases in sentencing Guidelines' errors.

"A plain error that affects substantial rights may be considered, even though it was not brought to the court's attention." Fed. R. Crim. P. 52(b). In *United States v. Olano*, 507 U.S. 725 (1993), this Court articulated the familiar four-prong approach to plain-error review. The appellant must prove: 1) there was error, 2) the error was plain, and 3) it seriously affected his substantial rights.

Id. at 733–35. If those three prongs were met, then the court of appeals should exercise its discretion to correct the error if it “seriously affects the fairness, integrity or public reputation of judicial proceedings.” *Id.* at 732 (cleaned up). Olano defined “plain” error as “clear” or “obvious.” *Id.* at 734. This case raises the issue of what that means when reviewing a sentencing Guidelines error.

This Court has recognized the importance of correctly calculating the sentencing Guidelines. Although the Guidelines are advisory after *Booker*,¹ “district courts must begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process.” *Peugh v. United States*, 569 U.S. 530, 541 (2013) (cleaned up); *see also Molina-Martinez v. United States*, 578 U.S. 189, 198 (2016). The district court is required to correctly calculate the Guidelines and consider them as “the starting point and the initial benchmark.” *Peugh*, 569 U.S. at 536 (quoting *Gall v. United States*, 552 U.S. 38, 49 (2007)). “[T]he rule that an incorrect Guidelines calculation is procedural error ensures that they remain the

¹ *United States v. Booker*, 543 U.S. 220, 245–58 (2005).

starting point for every sentencing calculation in the federal system.” *Id.* at 542.²

“The Guidelines’ central role in sentencing” means Guidelines calculation errors “can be particularly serious.” *Molina-Martinez*, 578 U.S. at 199. An “error resulting in a higher range than the Guidelines provide usually establishes a reasonable probability that a defendant will serve a prison sentence that is more than ‘necessary’ to fulfill the purposes of incarceration.” *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1907 (2018) (quoting 18 U.S.C. § 3553(a)). The stakes are high as “any amount of actual jail time” is significant. *Id.* (quoting *Glover v. United States*, 531 U.S. 198, 203 (2001)).

This Court has stressed that the federal sentencing Guidelines are complex—“a set of elaborate, detailed Guidelines.” *Molina-Martinez*, 578 U.S. at 193. Determining the Guidelines range “can be a ‘complex’ undertaking.” *Rosales-Mireles*, 138 S. Ct. at 1904. And the district court is ultimately responsible. *Id.* Because of the complexity of Guidelines calculations, “district courts sometimes

² Indeed, the district courts in the Fifth Circuit routinely sentence offenders within the sentencing Guidelines range. United States Sentencing Commission, 2022 Federal Sentencing Statistics for the District Courts within the Fifth Circuit from October 1, 2021 through September 30, 2022. Available at: <https://www.ussc.gov/research/data-reports/geography/2022-federal-sentencing-statistics>.

make mistakes.” *Id.* “It is unsurprising, then, that ‘there will be instances when a district court’s sentencing of a defendant within the framework of an incorrect Guidelines range goes unnoticed’ by the parties as well.” *Id.* (quoting *Molina-Martinez*, 578 U.S. at 193–94). But “[t]hose defendants are not entirely without recourse” on appeal because of plain-error review. *Id.*

Yet the Fifth Circuit has repeatedly tried to withhold that recourse in the context of federal Guidelines errors.

This Court has recognized that “[t]he Court of Appeals for the Fifth Circuit stands generally apart from other Courts of Appeals with respect to its consideration of unpreserved Guidelines errors.” *Molina-Martinez*, 578 U.S. at 198. This Court has repeatedly reversed the Fifth Circuit’s rigid standards for applying plain-error review. In *Molina-Martinez*, this Court rejected the Fifth Circuit’s standard requiring a defendant to present “additional evidence,” beyond an increased Guidelines range, to show the Guidelines error affected his sentence. 578 U.S. at 191–92, 198. In *Rosales-Mireles*, this Court held that the Fifth Circuit’s standard for a court to exercise discretion to correct plain error—which required such errors to “shock the conscience of the common man, serve as a powerful indictment against our system of justice, or seriously call into question the competence or integrity of the district judge”—was

incorrect and “out of step with the practice of other Circuits.” 138 S. Ct. at 1905–06, 1911. In *Davis v. United States*, 140 S. Ct. 1060, 1061–62 (2020), this Court held there was “no legal basis for the Fifth Circuit’s” standard that “[q]uestions of fact capable of resolution by the district court upon proper objection at sentencing can never constitute plain error.”

The Fifth Circuit’s decision in Buendia’s case is just the latest instance in an ongoing attempt to limit plain-error review in Guidelines cases. The panel relied on prior Fifth Circuit cases expressing displeasure with permissive applications of the plain-error standard. *Buendia*, 73 F. 4th at 341 (citing *United States v. Rodriguez-Parra*, 581 F.3d 227, 230 (5th Cir. 2009); *United States v. Ellis*, 564 F.3d 370, 378 (5th Cir. 2009)). A strict standard for what is “plain” is needed, according to some Fifth Circuit judges, because of the Fifth Circuit—as mandated by this Court—being increasingly “generous with remand” when interpreting the third and fourth prongs in plain-error sentencing Guidelines cases. *Ellis*, 564 F.3d at 378; *see also United States v. Escalante-Reyes*, 689 F.3d 415, 431–41 (5th Cir. 2012) (en banc) (Smith, J., dissenting) (bemoaning Fifth Circuit’s “expansive and permissive application of plain-error review”); *United States v. Hernandez*, 690 F.3d 613, 623 (5th Cir.

2012) (Smith, J., dissenting from remand for sentencing Guidelines error because “[r]eversal on plain error is ‘exceptional,’ ‘used sparingly,’ ‘rare,’ and ‘difficult, as it should be,’ reserved for only the most ‘egregious,’ ‘serious,’ and ‘grievous’ errors”); *United States v. del Carpio Frescas*, 932 F.3d 324, 333, 340–42 (5th Cir. 2019) (Oldham, J. dissenting) (lamenting this Court’s lessening of plain-error standard in Guidelines context so as to find error “plain” in case involving “subtle” calculation error).

This Court has addressed some of the Fifth Circuit’s concerns by emphasizing the different burden involved in correcting a Guidelines calculation error compared to trial error. *Molina-Martinez*, 578 U.S. at 204; *Rosales-Mireles*, 138 S. Ct. at 1909. Indeed, this Court noted that earlier cases requiring plain error to be applied “sparingly” and reserved for “exceptional circumstances” involved remands for additional jury proceedings. *Rosales-Mireles*, 138 S. Ct. at 1909. In the context of a plain Guidelines error, the case can be remanded for relatively inexpensive resentencing procedures. *Id.* Accordingly, Guidelines errors do not require the “high degree of caution” the Court applied to cases involving jury proceedings. *Id.*

II. The Fifth Circuit’s rigid standard for “plain” error is inconsistent with other courts of appeals and creates intra-circuit conflict.

Many of the Circuit Courts, including the Fifth Circuit, have held that error can be “plain” based on the language of the Sentencing Guidelines. *See, e.g., United States v. Gadson*, 77 F.4th 16, 20–22 (1st Cir. 2023) (error can be plain if “compelled by the guidelines’ language itself”) (cleaned up); *United States v. Marroquin*, 884 F.3d 298, 300 (5th Cir. 2018) (error plain or obvious based on Guidelines language); *United States v. Piper*, 839 F.3d 1261, 1269 (10th Cir. 2016) (error plain if the Guidelines language itself is clear and obvious) (cleaned up); *United States v. Stinson*, 734 F.3d 180, 187 (3d Cir. 2013) (error in applying fraud enhancement was “clear in light of the plain language of the relevant Guidelines provision and the evidence before the District Court”).

The Eleventh Circuit has made clear that an error can be “plain” based solely on the language of the Sentencing Guidelines as applied to the defendant’s conduct. *United States v. Bankston*, 945 F.3d 1316, 1318 (11th Cir. 2019) (quoting *United States v. Chau*, 426 F.3d 1318, 1322 (11th Cir. 2005)). “Here, we have no precedent interpreting the relevant language, and our analysis begins and ends with the language of the Sentencing Guidelines.” *Id.* The Court then applied the Guidelines definition of “use” to Bankston’s conduct, holding that Bankston’s sale of body armor for

money did not qualify as a “use” for purposes of the enhancement. *Id.* at 1319. The Government responded by offering legislative history, which the court of appeals rejected because there was no ambiguity in the Guidelines language. It found the error was plain. Under the Fifth Circuit’s reasoning, however, that the court of appeals had to review the Guidelines language and commentary, along with rejecting the legislative history argument, would result in the error not being plain. *See Buendia*, 73 F.4th at 341 (error not plain because court of appeals had to “survey the relevant definitions and distinguish prior nonprecedential case law”).

The Fifth Circuit, and some of the other circuits, have held that a sentencing Guidelines error cannot be plain if it is “complicated.” *See, e.g., United States v. Ramirez*, 783 F.3d 687, 694 (7th Cir. 2015) (plain error cannot be “factually complicated”) (internal citation removed). This issue has divided judges within the same circuit. *See United States v. Montague*, 67 F.4th 520, 542 (2d Cir. 2023) (dissenting judge arguing that error, based on language of statutory provision, cannot be plain because the provision is part of a “complex statutory regime”); *Id.* at 535 (authoring judge arguing that “legal error in this case does not implicate any complexities,” because it focuses on meaning of one word in statute); *see also*

del Carpio Frescas, 932 F.3d at 333, 340–42 (dissenting judge lamenting Supreme Court’s lessening of plain error standard in Guidelines context so as to find error “plain” in case involving “subtle” calculation error); *Id.* at 332 (majority finding error “plain” based on language of sentencing Guidelines and commentary). It is unclear, however, what “uncomplicated” means in the Guidelines context.

III. This is a suitable vehicle to address the question presented.

In Buendia’s case, the Fifth Circuit found there was error in the calculation of the Guidelines. The court refused to correct the error, however, finding it was not “plain.” It was not “plain,” according to the Fifth Circuit, because although the ordinary meaning of the terms in the Guidelines proved there was error, the court distinguished an unpublished, nonprecedential, factually dissimilar case. The Fifth Circuit’s standard for “plain” error conflicts with this Court’s decisions in *Molina-Martinez*, *Rosales-Mireles*, and *Davis*. The Fifth Circuit’s rationale harkens back to an earlier standard based on trial error. This Court should grant certiorari in Buendia’s case to address the Fifth Circuit’s incorrect application of the second prong of plain-error review and to clarify how “plain” error is determined in the Guidelines context.

CONCLUSION

FOR THESE REASONS, this Court should grant certiorari in this case.

Respectfully submitted.

MAUREEN SCOTT FRANCO
Federal Public Defender
Western District of Texas
300 Convent Street, Suite 2300
San Antonio, Texas 78205
Tel.: (210) 472-6700
Fax: (210) 472-4454

s/ Judy Fulmer Madewell

JUDY FULMER MADEWELL
First Assistant
Federal Public Defender

Counsel of Record for Petitioner

DATED: October 10, 2023.