

No. 24-5714

IN THE SUPREME COURT OF THE UNITED STATES

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GERARDO FARIAS-CONTRERAS,
aka, Tomas Gomez,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

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SUPPLEMENTAL BRIEF IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI:
NEW CASE: *UNITED STATES v. RIVERA*,
SECOND CIRCUIT DECISION AUGUST 21, 2024

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Pursuant to this Court’s Rule 15.8, petitioner submits this supplemental brief to present a new case decided shortly before the submission of the petition for writ of certiorari. On August 21, 2024, the United States Court for the Second Circuit Court of Appeals issued an opinion in *United States v. Rivera*, 115 F.4th 141 (2d Cir. 2024). The decision was issued shortly before filing of the petition for writ of certiorari, but was not discovered by counsel until shortly after submission of the petition.

In *Rivera*, defendant Victor Rivera was subject to criminal charges related to robbery of jewelers and luxury watch stores. Rivera entered a plea agreement to one count of engaging in a Hobbs Act robbery conspiracy in violation of 18 U.S.C. § 1951. The plea agreement stipulated to a guidelines range that the parties agreed not to contest at sentencing. The agreement provided that “[b]ased upon the information now available to this Office (including representations by the defense), the defendant has three criminal history points” which resulted in a Criminal History Category II. *Id.* at 145. The plea agreement calculated the total offense level of 34 and resulted in a “stipulated guidelines range” of 168-210 months. *Id.* The agreement limited the parties’ ability to seek an adjustment or enhancement but allowed for each party to seek a variance under the 3553(a) factors or “based upon *new information* that the defendant’s criminal history category [was] different from that set forth” in the agreement. *Id.* (emphasis added).

The PSR included three convictions for Rivera in Puerto Rico that were not accounted for in the plea agreement. *Id.* This increased the criminal history points to ten and placed Rivera in Criminal History Category V, resulting in Probation calculating the applicable guidelines ranges

as the maximum sentence of 240 months. *Id.* Probation nonetheless recommended a sentence of 160 months. *Id.* In its sentencing memorandum, the United States agreed with Probation's criminal history calculation and argued for a revised guidelines range of 235-240 months. *Id.* The Government explained that it was advocating for a higher applicable Guidelines range than the stipulated range of 168 to 210 months because of Rivera had "extensive criminal history in Puerto Rico," which the Government "was unaware of . . . at the time of the plea agreement[.]" *Id.* The trial court sentenced Rivera to 235 months imprisonment. *Id.* at 146.

As the court of appeals concluded Rivera did not raise the argument of the government's breach before the trial court, the issue was reviewed under plain error. *Id.* As an initial matter, the Second Circuit concluded that the government "broke its promise to abide by the stipulated Guidelines range at sentencing and therefore breached its agreement." *Id.* at 147.

In reviewing the error, the issue was whether the Puerto Rico convictions constituted "new information" under the plea agreement. *Id.* The court's analysis of this question turned heavily on contractual interpretation. As the court noted, the offense level and guidelines sentence set forth in the plea agreement was "[b]ased upon the information *now available*" to the U.S. Attorney's Office. (emphasis original). *Id.* "In other words, the Government agreed not to advocate for a higher sentence except in reliance on information that was not 'available.'" *Id.*

The court rejected the argument by the United States that "available" equated to what information was known by the government at the time of plea agreement. *Id.* at 148. The court also rejected Rivera's argument that "available" could only apply to new events arising after the agreement. Instead, the court concluded that "available" under the terms of the contract means the information was "not reasonably obtainable at the time of the plea." *Id.* at 150.

The court concluded that the United States failed to demonstrate that the Puerto Rico conviction information was not reasonably obtainable at the time of the plea agreement. *Id.* at *6.

The court observed,

[a]t oral argument, the Government explained that it used a rap sheet to prepare the plea agreement. This rap sheet contained Rivera's past arrests in Puerto Rico but did not mention whether the arrests led to convictions. The information about these arrests, however, should have prompted further investigation on the Government's part into whether the arrests resulted in convictions. That Probation, presumably relying on the same rap sheet, chose to conduct further due diligence into Rivera's Puerto Rico criminal history in preparing the PSR confirms that the rap sheet signaled the possibility that Rivera had Puerto Rico convictions.

Id.

The court further noted that the Puerto Rico convictions were readily obtainable as the convictions were unsealed and thus available in public records. The court explicitly rejected the argument that the definition of "available" was ambiguous under the agreement and that "even if whether Rivera's Puerto Rico convictions were 'available' to the government was ambiguous, that would not aid the Government's case because we are obligated to construe all ambiguities strictly against the government." *Id.* As a result, the court concluded that the United States breached the plea agreement. *Id.*

The Second Circuit's plain-error inquiry did not end with the breach. Despite the reliance on contractual interpretation principles to conclude that breach occurred, the court's analysis departed markedly from an analysis based on contract principles in addressing whether the error was "plain." The Second Circuit stated:

But prior to today, we lacked Circuit guidance on how to read the term "available" used in Rivera's plea agreement to define the scope of the government's commitments. Cf. Puckett v. United States, 556 U.S. 129, 143 (2009) ("Plea agreements are not always models of draftsmanship, so the scope of

the Government’s commitments will on occasion be open to doubt.”). It was not obvious to the trial judge, then, that the terms of the plea agreement prohibited the Government’s reliance on Rivera’s Puerto Rico convictions to advocate for a higher Guidelines range. Absent an objection by the defendant, we do not think the sentencing court had reason to believe that a breach occurred, much less that it was derelict in failing to remedy the breach. Thus, we conclude that any error was not plain.

Id. at 151 (emphasis added). The Second Circuit’s decision in *Rivera* continues the circuit split identified in the petition for certiorari. *See* Petition at 24-34.

Rivera follows the same qualified immunity-like analysis of *MacPherson* in the Second Circuit and *Farias-Contreras* in the Ninth Circuit where both circuits relied on the absence of circuit authority to determine whether an error from the government’s breach constituted a “plain” error. *United States v. MacPherson*, 590 F.3d 215, 219 (2d Cir. 2009) (“In view of these conflicting outcomes concerning the plea agreement, the prosecutor’s similar conduct in the pending case cannot have precipitated *plain* error, if any error at all.”) (emphasis in original); *United States v. Farias-Contreras*, Petition Appendix at 16 (“because our precedent does not make sufficiently clear to what extent the government may respond to a defendant’s request for a downward departure without implicitly breaching the plea agreement, we find that the error committed by the government was not plain.”).

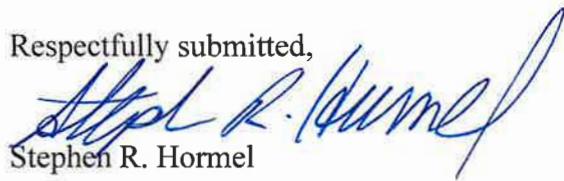
This approach is in tension with this Court’s decision in *Puckett* which directs the analysis on the plainness of an error towards the clarity of the scope of the government’s commitments in the plea agreement. *Puckett v. United States*, 556 U.S. 129, 143 (2009). Since plea agreements are contractual in nature, the inquiry on whether an error is “plain” should focus on whether the scope of the government’s commitments in a plea agreement are “clear or obvious” or whether the commitments are “ambiguous” and “open to doubt.” *Id.* at 135, 137,

143.

It is, therefore, requested that the Court grant the petition for writ of certiorari.

Dated this 10th day of October, 2024.

Respectfully submitted,



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