

No. 17 - _____

IN THE
Supreme Court of the United States

JUAN PEREZ-MALDONADO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether *Molina-Martinez* abrogates the Eleventh Circuit's incorrect view of Rule 52's harmless error analysis and whether a district court may rely on constitutionally impermissible factors in sentencing a defendant, then strip a defendant of his right to appellate review by uttering "I would have given the same sentence"? In other words, should a defendant be denied appellate review because he lodged an objection, and therefore fare worse than if he had not objected and received review under the plain error standard of Rule 52(b), and should a district court be given *carte blanche* to undermine the appellate standard of review? The Eleventh Circuit says yes, while the Fifth and Ninth Circuits say no. This Court should grant certiorari to resolve this conflict.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Juan Perez-Maldonado respectfully petitions for a writ of certiorari to review the judgment of the Eleventh Circuit Court of Appeals and resolve the conflict between the Eleventh, Fifth and Ninth Circuits.

OPINION BELOW

The opinion of the Eleventh Circuit Court of Appeals denying the petition for rehearing *en banc*, Pet. App. 1a, is not reported. The panel decision is not reported. The oral order of the United States District Court for the Northern District of Georgia is not reported.

JURISDICTION

The final judgment of the Eleventh Circuit Court of Appeals was entered on September 18, 2017. Mr. Perez's *en banc* petition was denied on November 27, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1), which permits review of criminal cases in the courts of appeals.

STATUTORY PROVISIONS INVOLVED

Federal Rule of Criminal Procedure 52(a), entitled "Harmless Error," provides that "[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded."

The Due process clause provides: “No person shall...be deprived of life, liberty, or property, without due process of law.”

The Sixth Amendment provides: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.”

STATEMENT OF THE CASE

Mr. Perez argued below that his prior conviction, for a Georgia “robbery,” was not a crime of violence justifying a four-fold increase in his sentence under §2L1.2 of the Guidelines. On appeal, Mr. Perez continued this argument and also argued that the district court improperly looked at the prosecutor’s recitation of facts, which Mr. Perez did not assent to or agree with at the time of the preceding plea, and objected to at the federal sentencing, as well. Based largely on those objected-to factual allegations by the state prosecutor, the district court wrongly overruled Mr. Perez’s objections to the enhancement. When Mr. Perez objected to the district court’s ruling, the court stated that it would have imposed the same sentence even if it had correctly calculated the Guidelines.

Based upon the district court's assertion, a panel from the Eleventh Circuit Court of Appeals held that it need not reach the issue of Georgia robbery squarely presented by this appeal but instead found that under *United States v. Keene*, 470 F.3d 1347 (11th Cir. 2006), the court would rely on the district court's assertion that correctly calculating the Guidelines would have made no difference in the sentence. The panel thus found any argued error to be harmless under *Keene*'s interpretation of Fed. R. Crim. P. 52(a). Mr. Perez challenges this finding, as well as the continued vitality of *Keene* after *Molina-Martinez v. United States*, 136 S.Ct. 1338, 1346 (2016).

Mr. Perez challenges the *Keene* rule as violating Rule 52(a)'s standards and burdens, and unlawfully shifting the burden of proof from the government to the defendant. Consequently, the Eleventh Circuit's *Keene* rule is contrary to Supreme Court precedent, Rule 52(a) itself, and has created a circuit conflict. As a result, this Court should grant certiorari to set out the parameters and burdens under Rule 52(a) and resolve the circuit conflict.

REASONS FOR GRANTING THE WRIT

I. *Molina-Martinez* Abrogates the Eleventh Circuit's Incorrect View of Rule 52's Harmless Error Analysis

The Eleventh Circuit held that its harmless error rule in *United States v. Keene*, 470 F.3d 1347 (11th Cir.

2006) was not abrogated by *Molina-Martinez*, and thus found the error in Mr. Perez's sentencing to be harmless.

In addition, this Court has held that where there is a constitutional error, the error must be proven harmless beyond a reasonable doubt. Mr. Perez avers that the Constitutional violations (due process and *ex post facto* violations) at his sentencing hearing made *Keene*, on its face, inapposite to this case.

Moreover, Mr. Perez challenges the *Keene* holding as violating Rule 52(a)'s standards and burdens, and unlawfully attempting to shift the burden of proof from the government to the defendant. Consequently, *Keene* is contrary to this Court's precedent, Rule 52(a) itself, and has created a circuit conflict. As a result, *Keene* should be overruled by this Court.

Finally, contrary to the Eleventh Circuit's assertion that Mr. Perez did not argue that the government failed to prove the facts underlying the robbery, the record below and the briefing in this Court show otherwise. In both his objections to the presentence report and at the federal sentencing hearing, Mr. Perez denied and objected to the alleged facts underlying the state robbery conviction and continued to object to the district court's reliance on the prosecutor's factual summary to which Mr. Perez never agreed or even assented. Further, he argued below that the government failed to carry its burden of proof by not offering any evidence about the robbery.

A. Harmless Error Standards

Federal Rule of Criminal Procedure 52(a), entitled “Harmless Error,” provides that “[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.” Affecting substantial rights “[i]n most cases ... means that the error must have been prejudicial: It must have affected the outcome of the district court proceedings.” *United States v. Olano*, 507 U.S. 725, 734 (1993). If a defendant makes a timely objection to an alleged error and Rule 52(a) applies, this Court engages in an analysis of the district court record to determine whether the error was prejudicial. *Id.* Rule 52(a) precludes error correction only if the error “does not affect substantial rights.” *Id.* at 735.

1. Heightened Standard for Constitutional Violation

As *Descamps*¹ and *Mathis*² make clear, the reliance on factual allegations in the underlying plea transcript to which Mr. Perez did not agree violates his due process right to be sentenced on reliable evidence. Of course, relying on this information in making the aggravated felony determination violates Mr. Perez’s Sixth Amendment rights as well. This Court has highlighted

¹*Descamps v. United States*, 133 S.Ct. 2276 (2013).

²*Mathis v. United States*, 136 S.Ct. 2243, 2247 (2016).

three reasons for its “adher[ence] to an elements-only inquiry”: (1) the ACCA’s use of the word “conviction” mandates it; (2) a contrary approach would “raise serious Sixth Amendment concerns”; and (3) “an elements-focus avoids unfairness to defendants” by preventing factual admissions that a defendant had no reason to contest in a prior proceeding from serving as the basis for an enhanced penalty. *Mathis*, 136 S.Ct. at 2252–53.

When the error is of constitutional proportions, such as the violation of Mr. Perez’s due process and Sixth Amendment rights, as here, this Court has made it clear that reversal is required unless the court finds the error harmless beyond a reasonable doubt. A constitutional error under Rule 52(a) heightens the government’s burden of proof: reversal is warranted unless the error was “harmless beyond a reasonable doubt.” *Neder v. United States*, 527 U.S. 1, 7, 119 S.Ct. 1827, 1837 144 L.Ed.2d 35 (1999); *United States v. Caruto*, 532 F.3d 822, 831 (9th Cir. 2008) (analyzing a constitutional error).

On the record before this Court, the error here cannot be said to be harmless beyond a reasonable doubt. First, the actual Guideline range was wrongly calculated. Since the Guideline calculation is the “lodestar,” an error in calculating the guideline is a “systemic” error that permeates the process of determining the final sentence, which the record reveals is precisely what happened here. This Court recognized this reality even in a plain error context, rather than our more defendant-oriented harmless error context:

[T]he Guidelines are not only the starting point for most federal sentencing proceedings but also the lodestar. The Guidelines inform and instruct the district court's determination of an appropriate sentence. In the usual case, then, the systemic function of the selected Guidelines range will affect the sentence. This fact is essential to the application of Rule 52(b) to a Guidelines error. From the centrality of the Guidelines in the sentencing process it must follow that, when a defendant shows that the district court used an incorrect range, he should not be barred from relief on appeal simply because there is no other evidence that the sentencing outcome would have been different had the correct range been used.

Molina-Martinez, 136 S.Ct. at 1346. If the “lodestar” nature of the guidelines is essential to credit in a Rule 52(b) plain error case, it clearly is at least as essential, if not more so, in a Rule 52(a) case.

The Eleventh Circuit held that even assuming guideline error, since the district court said it would still impose the same sentence, the error here is harmless. As the sentencing transcript made abundantly clear, however, the court based its opinion on constitutionally impermissible factors - one of which is the same legal

error that resulted in the guideline error itself - dwelling on the allegations regarding the nature and character of the underlying robbery conviction, without any reliable evidence to support the characterization, and the second of which was the *ex post facto* application of the amended guidelines. The district court gave no other rationale. Just as importantly, the district court did not explain why the appropriate guideline range of 15-21 months would be inadequate or unreasonable. It did not start at the alternate guideline and explain why sentences between it and the 57-month sentence (including the 32-month sentence requested by the defense based on the incorrect guideline calculation) would not be sufficient and reasonable. And, as set forth below, the government bears the burden of proving harmless error and has offered no argument other than the issues erroneously relied upon by the district court.

The erroneously imposed sentence was not harmless beyond a reasonable doubt. This Court should grant certiorari to resolve this important procedural question.

2. High Standard for Non-Constitutional Violation

In this Court's landmark decision in *Kotteakos*, the Court explained that when reviewing a nonconstitutional error under Rule 52(a), an appellate court must determine if the Government has proved "with fair assurance ... that the judgment was not substantially swayed by the error."

Kotteakos v. United States, 328 U.S. 750, 765 (1946). Moreover, in determining if the Government has met this burden, a court must not “strip [] the erroneous action from the whole.” *Id.* Thus, [t]he inquiry cannot be merely whether there was enough [evidence] to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the result cannot stand. *Id.* The Court later explained that “grave doubt” meant “that, in the judge's mind, the matter is so evenly balanced that he feels himself in virtual equipoise as to the harmlessness of the error.” *O'Neal v. McAninch*, 513 U.S. 432, 435 (1995).

In discussing plain error, this Court has recognized that “[i]n most cases a defendant who has shown that the district court mistakenly deemed applicable an incorrect, higher Guidelines range has demonstrated a reasonable probability of a different outcome.” *Molina-Martinez*, 136 S.Ct at 1346-1347. And the Court recognized that sometimes, “despite application of an erroneous Guidelines range, a reasonable probability of prejudice does not exist.” *Id.* The Court pondered:

The record in a case may show, for example, that the district court thought the sentence it chose was appropriate irrespective of the Guidelines range. Judges may find that some cases merit a detailed explanation of the reasons the selected sentence is appropriate. **And that**

explanation could make it clear that the judge based the sentence he or she selected on factors independent of the Guidelines.

Id. (emphasis supplied). By showing factors “independent of the Guidelines,” a court would demonstrate, and the government could meet its burden to prove “with fair assurance ... that the judgment was not substantially swayed by the error.” Here, of course, the trial court discussed no factor independent of the guidelines as a basis for its “alternative, but same, sentence.” By grounding the alternative sentence on two Guideline-centric bases, the district court did not, and thus the government cannot, show that the alternative sentence is independent of the guidelines.

And while *Molina-Martinez* makes clear that “the Government remains free to ‘poin[t] to parts of the record’—including relevant statements by the judge—to counter any ostensible showing of prejudice the defendant may make,’ in Mr. Perez’s case, the government has not and cannot do so—because the record is clear—it’s all about the robbery and the lodestar guideline. *Id.* (citing *United States v. Vonn*, 535 U.S. 55, 68 (2002)).

Additionally, it cannot be overlooked that the sentence here was conspicuously a “low-end” sentence, and shows that the lodestar guidelines were the focal point of the sentencing. As recognized in Justice Alito’s concurrence:

As the Court points out, *Molina–Martinez* demonstrated that the Guidelines “were the focal point for the proceedings”; that “[t]he 77–month sentence the District Court selected is conspicuous for its position as the lowest sentence within what the District Court believed to be the applicable range”; and that “the District Court’s selection of a sentence at the bottom of the range, despite the Government’s request for the maximum Guidelines sentence, ‘evinced an intention ... to give the minimum recommended by the Guidelines.’” This evidence establishes a “reasonable probability that the District Court would have imposed a different sentence had it known that 70 months was in fact the lowest sentence the Commission deemed appropriate.”

Molina-Martinez, 136 S.Ct at 1351 (concurrence by Alito, citations omitted).

As the government has not proven that the guidelines were not the “loadestar” and “focal point” of Mr. Perez’s sentence, and cannot prove that the judgment was not substantially swayed by the error, and because the district court’s own comments clearly show that it was, the sentence cannot stand. Thus, this Court should grant certiorari.

B. In applying the *Keene* doctrine after this Court's opinion in *Molina-Martinez*, the Eleventh Circuit ignores the "lodestar" nature of the guidelines and attempts to shift the burden in a harmless error analysis to the Defendant, as though the plain error burden applies, and conflicts with Rule 52(a), this Court's precedent and the law in other circuits.

The irony here is that Mr. Perez would have been better off under the *Molina-Martinez* plain error standard than he would be under the *Keene* harmless error standard. *Keene* turns Rule 52 on its head.

Under the harmless error rule of Federal Rule of Criminal Procedure 52(a), "[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." Rule 52(a) controls when an objection is lodged in the trial court and was properly preserved, and it allows the Government to avoid reversal by showing that error, albeit raised by a timely objection, "affected no substantial right of the defendant and was thus harmless." *Vonn*, 535 U.S. 55, 58 (2002). Thus, under Rule 52(a), the Government has the burden to show lack of prejudice. *United States v. Davilla*, 749 F.3d 982, 992 (11th Cir. 2014).

The plain error standards and burden of proof under 52(b), controls when a defendant fails to make an objection. As pointed out by Justices Alito and Kennedy,

Consistent with this principle, Rule 52 of the Federal Rules of Criminal Procedure treats defendants who preserve their claims **much more favorably** than those who fail to register a timely objection. **When the defendant has made a timely objection to an error, the Government generally bears the burden of showing that the error was harmless. . .** By contrast, when a defendant has failed to make a timely objection, “[i]t is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice.”

Molina-Martinez, 136 S.Ct. at 1349 (concurrence by Justice Alito) (citations omitted, emphasis supplied).

When the defendant has made a timely objection to an error and Rule 52(a) applies, a court of appeals normally engages in a specific analysis of the district court record—a so-called “harmless error” inquiry—to determine whether the error was prejudicial. Rule 52(b) normally requires the same kind of inquiry, with one important difference: It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice. In most cases, a court of appeals cannot correct the forfeited error unless the

defendant shows that the error was prejudicial. . . . **This burden shifting is dictated by a subtle but important difference in language between the two parts of Rule 52:** While Rule 52(a) precludes error correction only if the error “does not affect substantial rights” (emphasis added), Rule 52(b) authorizes no remedy unless the error does “affec[t] substantial rights.”

United States v. Olano, 113 S.Ct. at 1777-78.

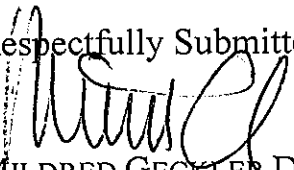
The *Keene* analysis, which shifts the burden to the defendant to show that the alternate sentence is not reasonable, is contrary to Rule 52, and the cases cited above. It is contrary to the burdens outlined in *Olano* and *Molina-Martinez*.

And it is contrary to other circuits’ law as well. *See, e.g., United States v. Rico-Mejia*, 859 F.3d 318 (5th Cir. 2017)(government bears the burden of proof on harmlessness even where court says it would have imposed the same sentence); *United States v. Munoz-Camareno*, 631 F.3d 1028 (9th Cir. 2011) (Court’s statement that it would give same sentence not harmless unless court does two parallel 3553 finding, starting with each of the disputed guideline ranges). *Keene* is contrary to Supreme Court authority and clearly cements a circuit conflict. Rule 52’s mandate should not be undermined so insidiously.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully Submitted,



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February 26, 2018

**IN THE
Supreme Court of the United States**

JUAN PEREZ-MALDONADO,
Petitioner,

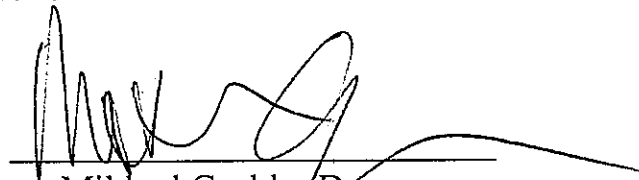
v.

UNITED STATES OF AMERICA,
Respondent.

CERTIFICATE OF SERVICE

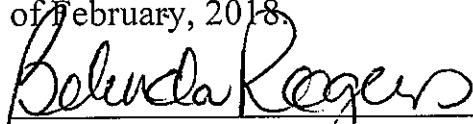
I HEREBY CERTIFY that a true and correct copy of JUAN PEREZ-MALDONADO's MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and PETITION FOR WRIT OF CERTIORARI are being furnished by United States mail, first-class postage prepaid, to counsel for Respondent, The Honorable Noel Francisco, Solicitor General of the United States, Room 5712, Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, DC 20530-0001.

This 26th day of February, 2018.



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Subscribed and sworn to
Before me this 26th day
of February, 2018.



NOTARY PUBLIC in and for
said County and State

