No. 17 --

IN THE

SUPREME COURT OF THE UNITED STATES

ANTONIO AYALA-NUNEZ,

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

On Petition for Writ of Certiorari
To The United States Court of Appeals for the Fifth Circuit

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Questions Presented for Review

1. Whether error may be "plain" if binding precedents are not directly controlling?
2. Whether a party appealing from a criminal sentence may rely solely on the application of an incorrect statutory range to show an effect on his substantial rights?

Parties

Antonio Ayala-Nunez is the Petitioner, who was the defendant-appellant below. The United States of America is the Respondent, who was the plaintiff-appellee below.

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Petition for a Writ of Certiorari

Petitioner, Antonio Ayala-Nunez, respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Opinions Below

The judgment of conviction and sentence was entered October 21, 2016, and is provided in the Appendix to the Petition. [Appendix A]. The unpublished opinion of the United States Court of Appeals for the Fifth Circuit is captioned as *United States v. Ayala-Nunez,* 2017 U.S. App. LEXIS 24143 (5th Cir. November 29, 2017)(unpublished), and is ALSO provided in the Appendix to the Petition. [Appendix B]. The order of the court of appeals denying a timely Petition for Rehearing was issued January 22, 2018, and is likewise provided as an Appendix. [Appendix C].

Jurisdictional Statement

The order of the United States Court of Appeals for the Fifth Circuit denying a timely Petition for Panel Rehearing was filed on January 22, 2018. [Appx. C]. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Statutes, Rules, and Guidelines Involved

8 U.S.C. §1326 provides in part:

(a) In general

> Subject to subsection (b), any alien who—
>
> (1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter
>
> (2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien

previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,
shall be fined under title 18, or imprisoned not more than 2 years, or both.

(b) Criminal penalties for reentry of certain removed aliens

Notwithstanding subsection (a), in the case of any alien described in such subsection—

(1) whose removal was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony), such alien shall be fined under title 18, imprisoned not more than 10 years, or both;

(2) whose removal was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such title, imprisoned not more than 20 years, or both...

18 U.S.C. §3553(a) provides in part:

(a) Factors To Be Considered in Imposing a Sentence.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

***

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

Federal Rule of Criminal Procedure 52 provides:

Harmless and Plain Error

(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.

The 2015 version of Sentencing Guideline 2L1.2 provided:

(a) Base Offense Level: 8

(b) Specific Offense Characteristic

(1) Apply the Greatest:

If the defendant previously was deported, or unlawfully remained in the United States, after–

(A) a conviction for a felony that is (i) a drug trafficking offense for which the sentence imposed exceeded 13 months; (ii) a crime of violence; (iii) a firearms offense; (iv) a child pornography offense; (v) a national security or terrorism offense; (vi) a human trafficking offense; or (vii) an alien smuggling offense, increase by 16 levels if the conviction receives criminal history points under Chapter Four or by 12 levels if the conviction does not receive criminal history points;

(B) a conviction for a felony drug trafficking offense for which the sentence imposed was 13 months or less, increase by 12 levels if the conviction receives criminal history points under Chapter Four or by 8 levels if the conviction does not receive criminal history points;

(C) a conviction for an aggravated felony, increase by 8 levels;

(D) a conviction for any other felony, increase by 4 levels; or

(E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, increase by 4 levels.

STATEMENT OF THE CASE

A. District Court Proceedings

Petitioner Antonio Ayala-Nunez pleaded guilty without a plea agreement to one count of illegally re-entering the country following a removal. *See* (ROA.36-39). [1] He admitted being found in the United States in early 2015, so the 2014 of the Sentencing Guidelines governed his case. *See* (ROA.39); USSG §1B1.11; *Peugh v. United States v. United* States, __U.S.__, 133 S.Ct. 2072 (2013).

A Presentence Report (PSR) noted that his most recent removal occurred in 2014. *See* (ROA.109). It also noted a 2013 Texas conviction for "delivery" of a controlled substance, which produced a 24 month term of deferred adjudication probation, revoked in 2015. *See* (ROA.114-115). The PSR and the district court assessed a 12-point offense level enhancement under the 2014 version of USSG §2L1.2 on the basis of this conviction. *See* (ROA.111). This stemmed from their conclusion that the defendant "was deported, or unlawfully remained in the United States, after ... a conviction for a felony that is a drug trafficking offense for which the sentence imposed exceeded 13 months, a crime of violence." USSG §2L1.2(b)(1)(A)(2014). The 12-level enhancement produced a final offense level of 17. *See* (ROA.123). When that final offense level was combined with the criminal history category of VI, Petitioner became subject to a Guideline range of 51-63 months imprisonment. *See* (ROA.123). The PSR also noted a statutory maximum of 20 years imprisonment rather than 10 years, following its conclusion that the defendant's prior drug offense constituted an "aggravated felony." *See* (ROA.123).

The district court adopted the PSR, (ROA.77), and imposed a term of 60 months imprisonment, within both the statutory and Guideline ranges it believed applicable. *See* (ROA.86-88). The judgment described the defendant's offense of conviction in the judgment to include "8 U.S.C. 1326(b)(2)," the provision applicable to re-entries following an aggravated felony. *See*

[1] Citations to the record in the court of appeals are included in hopes that they are of use to the government in responding to the Petition, or the Court in evaluating it.

(ROA.47).

B. Proceedings in the Court of Appeals

1. On appeal, Petitioner unsuccessfully argued that the district court plainly erred in assessing the 12-level enhancement. Citing *United States v. Rodriguez-Parra*, 581 F.3d 227 (5^{th} Cir. 2009), he noted that a defendant must receive a sentence of actual imprisonment to obtain a 12-level enhancement for a drug trafficking offense. And citing *United States v. Bustillos-Pena*, 612 F.3d 863 (5^{th} Cir. 2010), *United States v. Rodriguez Arias*, 481 Fed. Appx. 234 (5^{th} Cir. 2012)(unpublished), *United States v. Olivas Contreras*, 441 Fed. Appx. 276 (5^{th} Cir. 2011)(unpublished), and *United States v. Franco-Galvan*, 864 F.3d 338 (5^{th} Cir. June 22, 2017), he argued that any qualifying term of imprisonment must be imposed before the defendant's revocation. The government argued, however, that the Guideline did not require any term of imprisonment to qualify the defendant for a 12-level "drug trafficking offense" enhancement.

The Fifth Circuit held that Petitioner had failed to show plain error, for want of Fifth Circuit precedent contradicting the government's interpretation of the Guidelines. Specifically, it stated:

> Any legal error in this case is neither clear nor obvious. No precedent clearly contradicts the Government's interpretation. The interpretation of the Sentencing Guidelines is subject to reasonable dispute.

[Appx. B, at p.9].

2. Petitioner also sought relief on the basis of a different plain error. Under settled Fifth Circuit law, the district court had erred in classifying his Texas drug offense as an "aggravated felony." *See United States v. Ibarra-Luna*, 628 F.3d 712, 715-16 (5th Cir. 2010)(offer to sell a controlled substance is not an aggravated felony); *United States v. Hinkle*, 832 F.3d 569, 574 (5th Cir. 2016)(Texas delivery offense includes offer to sell and may not be subdivided for the purposes of assessing federal criminal history enhancements). Accordingly, he maintained, the district court erred in concluding that his statutory maximum was 20 years rather than 10 years imprisonment. It also erred in classifying his offense as a violation of 8 U.S.C. §1326(b)(2) in the judgment.

The court agreed to modify the judgment, but declined to remand for resentencing. A showing that plain error affected the defendant's substantial rights, thought the court, required more than a changed statutory range. Rather, it also required some further showing that the statutory determination actually entered into the district court's selection of sentence:

> Ayala-Nunez cannot prove that the district court's reference to the 20-year statutory maximum penalty affected his substantial rights. *See United States v. Mondragon-Santiago*, 564 F.3d 357, 369 (5th Cir. 2009). Ayala-Nunez was sentenced to less than 20 years' imprisonment. And there is no indication in the record that the district court sentenced Ayala-Nunez based on the determination that his Delivery Offense was an "aggravated felony."

[Appendix B, at p.11].

3. Petitioner then sought panel rehearing, noting the court's prior decision in *United States v. Rodriguez-Parra*, 581 F.3d 227 (5^{th} Cir. 2009). *Rodriguez-Parra* had held that the twelve-level adjustment for a "drug trafficking offense" requires a sentence of actual imprisonment. The panel had not cited this case. *See* [Appendix B]. The Fifth Circuit denied the petition in a one-sentence order. [Appendix C].

Reason for Granting the Petition

I. The courts of appeals are divided as to whether error may be "plain" if binding precedents are not directly controlling.

A. The courts of appeal are divided.

Federal Rule of Criminal Procedure 52(b) states that "[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). This Court has interpreted the Rule to require that a reversible unpreserved "be clear or obvious, rather than subject to reasonable dispute." *Puckett v. United States*, 556 U.S. 129, 135 (2009).

The court below held that an error may not be plain unless precedent directly demonstrates the error. *See* [Appendix B, at p.9]("No precedent clearly contradicts the Government's interpretation.") . It has repeated this holding in a large number of cases. *See United States v. Garcia-Gonzalez,* 714 F.3d 306, 318 (5th Cir. 2013); *United States v. Jackson*, 549 F.3d 963, 978 (5th Cir. 2008); *see also United States v. Neuman*, No. 03-41630, 176 Fed. Appx. 480 (5th Cir. 2006)(unpublished); *United States v. Parsons*, No. 04-50809, 134 Fed. Appx. 743 (5th Cir. 2005)(unpublished); *United States v. Gordon*, No. 03-10541, 87 Fed. Appx. 384 (5th Cir. 2004)(unpublished); *United States v. Barrigas-Valdovinos*, No. 03-40968, 86 Fed. Appx. 770 (5th Cir. 2004)(unpublished); *United States v. Rollins*, No. 03-10452, 83 Fed. Appx. 611 (5th Cir. 2003)(unpublished); *United States v. Taylor*, No. 03-10140, 78 Fed. Appx. 438 (5th Cir. 2003)(unpublished); *United States v. Taff*, No. 03-10103, 72 Fed. Appx. 184 (5th Cir. 2003)(unpublished).

This position directly conflicts with the published opinion of the Second Circuit in *United States v. Brown*, 352 F.3d 654 (2nd Cir. 2003), which holds:

> Thus, "an error is 'plain' if it is 'clear' or 'obvious' at the time of appellate consideration." What is more, the "plainness" of the error can depend on well-settled legal principles as much as well-settled legal precedents. ***We can, in certain cases, notice plain error in the absence of direct precedent***, or even where uniformity among the circuits, or among state courts, is lacking. Error is plain if it is "so egregious and obvious as to make the trial judge and prosecutor derelict in permitting

it, despite the defendant's failure to object."

Brown, 352 F.3d at 664 (emphasis added)(internal citations and footnotes omitted).

The present case is a strong vehicle to address this question. The question of whether binding precedent must be directly controlling – or whether plain error may instead require modest extension of precedent in light of clearly controlling principles – is likely outcome determinative.

Here, Fifth Circuit law had answered a range of nearly identical questions, and all authorities pointed in the same direction. First, under the law of that court, the 12-level enhancement for a prior drug-trafficking offense requires a term of actual imprisonment. *See United States v. Rodriguez-Parra*, 581 F.3d 227, 231 (5th Cir. 2009). Second, the Fifth Circuit held in a published opinion that where a 16-level enhancement to USSG §2L1.2 requires a particular term of imprisonment, that term must precede the defendant's removal. *See United States v. Bustillos-Pena*, 612 F.3d 863, 865-869 (5th Cir. 2010). A revocation following the removal will not suffice. *See Bustillos-Pena*, 612 F.3d at 865-869. Third, the Fifth Circuit had twice held that where a defendant's "aggravated felony" determination requires a year imprisonment, that term must be imposed before removal – again, post-removal revocations are ignored. *See United States v. Rodriguez Arias*, 481 Fed. Appx. 234 (5th Cir. 2012)(unpublished); *United States v. Olivas Contreras*, 441 Fed. Appx. 276 (5th Cir. 2011)(unpublished). Fourth, after briefing, but before decision, the Fifth Circuit addressed enhancements under the new Guidelines that require a particular term of pre-removal imprisonment. Again, post-removal revocations are ignored. *See United States v. Franco-Galvan*, 864 F.3d 338 (5th Cir. June 22, 2017).

These holdings determine a clear rule: in assessing the length of a pre-removal term of imprisonment for the purpose of an illegal re-entry sentence enhancement, ignore post-removal revocations. The Fifth Circuit had held as much in the context of the new Guideline, the 16-level enhancement under the old Guideline, and the enhanced statutory maximum under 8 U.S.C. §1326 for pre-removal "aggravated felonies." But because it had not held as much with respect to the 12-level enhancement for "drug trafficking offenses" under the old -Guideline, the error was held not plain. If this Court affirmatively answers the question presented – whether error may be "plain" if binding precedents are not directly controlling– the Fifth Circuit is very likely to find relief appropriate on remand.

Alternatively, if the instant case is thought to be an unsuitable vehicle to address the question that has divided the courts of appeals, Petitioner calls the court's attention to an imminent petition arising from *United States v. Kenney*, 2018 U.S. App. LEXIS 3221 (9th Cir. 2018)(unpublished). In the event that certiorari is granted in *Kenney*, Petitioner requests that his Petition be held.

II. The decision below conflicts with this Court's decision in *Molina-Martinez v. United States*, __U.S.__, 136 S.Ct. 1338 (2016).

Section 3553(a) of Title 18 requires a federal sentencing court to consider an array of important factors before imposing punishment. One of those factors is "the kinds of sentences available." 18 U.S.C. §3553(a)(3). Another is the Guideline range established by the Sentencing Commission. 18 U.S.C. §3553(a)(4). While the maximum and minimum penalties established by Congress for each offense bind the district court, the Guideline ranges do not. *See United States v. Booker*, 543 U.S. 220, 264 (2005).

Federal Rule of Criminal Procedure 52(b) states that "[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). This Court has interpreted the Rule to permit relief where the appealing party shows a reasonable probability of a different result. *See United States v. Dominguez-Benitez*, 542 U.S. 74, 83 n. 9 (2004). And it has cautioned that "[t]he reasonable probability standard [on plain error] is not the same as, and should not be confused with, a requirement that a defendant prove by a preponderance of the evidence that but for the error things would have been different." *Dominguez-Benitez*, 542 U.S. at 83 n. 9 (citing *Kyles v. Whitley*, 514 U.S. 419, 434 (1995)). To satisfy this prong of plain error review, an appealing party need only "undermine confidence" in the ultimate sentence; he or she need not prove by a preponderance of the evidence that the result would have been different. *Dominguez-Benitez*, 542 U.S. at 83, n. 9.

In *Molina-Martinez v. United States*, __U.S.__, 136 S.Ct. 1338 (2016), this Court addressed the role that an altered Sentencing Guideline range may play in the defendant's showing of prejudice. In that case, the defendant appealed an unpreserved Guideline error that increased his Guideline minimum by seven months, and his Guideline maximum by nine months. *Molina-Martinez*, 136 S.Ct. at 1344. The sentence received by the defendant was within the correctly determined Guideline range. *See id.* Nonetheless, this Court held that this modest miscalculation of the advisory range could satisfy the defendant's showing of substantial rights – no additional evidence was needed that the district court would be inclined to adjust the sentence on remand. *See id.* at 1345.

The *Molina-Martinez* court reasoned that an "erroneous, and higher, Guidelines range set the wrong framework for the sentencing proceedings." *Id.* The Guidelines, this Court emphasized, are a "starting point and initial benchmark," which the district court is required by statute to keep in mind throughout the sentencing proceedings. *Id*. (quoting *Gall v. United States*, 552 U.S. 38, 49 (2007)). After noting statistical evidence that a defendant's Guideline range tends to affect the sentence imposed, this Court concluded that a bare mathematical change of the advisory sentencing range would generally satisfy the defendant's burden of persuasion. *See id.* at 1346. This is so even if the defendant's ultimate sentence is within the correctly determined range. A contrary rule, this Court noted, would saddle defendants with the unnecessarily difficult burden of showing the effect of an uncontested range on the sentence chosen, though "sentencing judges often say little about the degree to which the Guidelines influenced their determination." *Id*. at 1347. In short, "a defendant can rely on the application of an incorrect Guidelines range to show an effect on his substantial rights." *Id*. at 1348.

An error in the statutory sentencing range is analogous, even if the defendant's sentence is within the correctly determined statutory range. Accordingly, the appealing party should be able to "rely on the application of an incorrect [statutory] range to show an effect on his substantial rights." *Id*. The mandatory sentencing range, perhaps to an even greater degree than the Guideline range, sets "the framework" for sentencing. Indeed, the sentencing range creates the framework for the Commission's choice of Guidelines, not merely for the district court's choice of sentence. *See* USSG Ch. 1, Pt. A(4)(g)("In determining the appropriate sentencing ranges for each offense, the Commission estimated the average sentences served within each category under the pre-guidelines sentencing system. It also examined the sentences specified in federal statutes, in the parole guidelines, and in other relevant, analogous sources."). Like the Guideline range, §3553(a)(3)'s command to consider "the kinds of sentences available," means that district courts" must remain cognizant of" the statutory minimums and maximums "throughout the sentencing process." *Id*. at 1345 (quoting *Peugh v. United States*, __U.S.__, 133 S.Ct. 2072 (2013)). The close analogy between the mandatory and advisory ranges compels the conclusion that an erroneous determination of the sentencing range may be sufficient to show a reasonable probability of a different result.

The court below required more than the alteration of the mandatory range to show a reasonable probability of a different result. *See* [Appendix B, at p.11](“Ayala–Nunez was sentenced to less than 20 years’ imprisonment. And there is no indication in the record that the district court sentenced Ayala–Nunez based on the determination that his Delivery Offense was an ‘aggravated felony.’”). This ignores common sense. The district court must calibrate the factors enumerated at 18 U.S.C. §3553(a) to the entire sentencing range. So it is reasonably probable that a district court considering a range of zero to twenty years would reach a different result than one considering a range of zero to ten years imprisonment. Petitioner’s five-year sentence is, in relative terms, twice as severe when a range of ten years rather than twenty years is considered. The punishment ultimately imposed will often depend on its position with respect to a mandatory range. *Cf. United States v. Paladino*, 401 F.3d 471, 482 (7th Cir. 2005)(observing that a conscientious judge in the era of mandatory Guidelines would attempt to calibrate the defendant’s position in the range to his culpability). More importantly, however, the requirement of additional evidence imposed below conflicted with the guidance of *Molina-Martinez*.

The present case is an excellent vehicle to test the proposition that a changed statutory maximum may be presumed to affect the sentence imposed in the plain error context. Here, the error in the district court is concededly plain, and had a simple, obvious relationship to the statutory maximum. *See* [Appendix B, at p.11]. Further, nothing in the record would rebut a presumption that the sentence was determined in the shadow of the statutory maximum. The question presented – whether an erroneous statutory maximum satisfies the substantial rights prong of plain error in the absence of facts in rebuttal – is thus likely outcome determinative.

CONCLUSION

Petitioner respectfully submits that this Court grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit. Alternatively, he prays for such relief as to which he may justly entitled.

Respectfully submitted this 12th day of April, 2018.

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