

NO. _____

In the Supreme Court of the United States

October Term, 2017

MAURICIO LUNA-BARRAGAN,
PETITIONER,

V.

UNITED STATES OF
AMERICA

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

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QUESTION PRESENTED FOR REVIEW

Whether, when conducting plain-error review of Sentencing guidelines miscalculations errors, following Federal Rule of Criminal Procedure 52(b), there should be a categorical exception under Olano for sentencing errors, thus allowing Courts of Appeals to comfortably and routinely remand for correction of sentencing errors.

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Petitioner MAURICIO LUNA-BARRAGAN, respectfully prays that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit in cause number United States v. Luna-Barragan, 5th Cir. No. 17-40080. (5th Cir. 2017) on February 6, 2018.

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.

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OPINION BELOW

On February 6, 2018, a panel of the Fifth Circuit Court of Appeals entered its opinion affirming the judgment of the United States District Court for the Southern District of Texas. The opinion, United States v. Luna-Barragan, 5th Cir. No. 17-40080 (5th Cir. 2017), is not reported. A copy of the unpublished opinion is attached to this petition as an appendix.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit were entered on Feb. 6, 2018. This petition is filed within 90 days after entry of judgment. See SUP. CT. R. 13.1. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

FEDERAL RULE OF CRIMINAL PROCEDURE INVOLVED

The question presented involves Federal Rule of Criminal Procedure 52(b), which provides: "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).

STATEMENT

Mauricio Luna-Barragan pleaded guilty to illegal reentry and was sentenced to 57 months in prison, the high end of his Guidelines range calculated by district court. That sentence was premised on a criminal history category of V, based on ten criminal history points which the probation officer assigned to Luna-Barragan. Two of those points came from a Georgia sentence for "theft by taking" in which Luna-Barragan spent 75 days in jail and ultimately received a strictly probation sentence of 5 years. Although Luna-Barragan did not object to the scoring of that Georgia conviction in the trial court, no one at sentencing appears to have investigated Georgia sentencing law to examine the character of sentence he received. On appeal, Luna-Barragan's appellate counsel discovered the discrepancy and argued that the case should be remanded for re-sentencing because Luna-Barragan should have received only one point for the "theft by taking" case. That one point reduction would put him in category IV, which would reduce his Guidelines range to 37-46 months, 11 months lower than the top of the guideline where he should have scored. The 57 months sentence was 24% higher than the top of the guidelines where he should have scored.

The probation officer obviously made a mistake, assuming that the sentence for the unlawful taking was a "sentence of imprisonment". Defense counsel

apparently did not investigate the judgement of sentence in that case, nor reviewed relevant Georgia sentencing law. The Government accepted the Presentence Report, as it usually does, without more. The court did not question the correctness of how the "theft by taking" conviction should have been evaluated in determining criminal history. Luna-Barragan was the only person in the court room at sentencing who suffered from the error.

The Fifth Circuit agreed with Luna-Barragan that only one point should have been assigned to the Georgia probation sentence. The court noted that the Guidelines assign three points for any sentence of imprisonment exceeding one year and one month; two points for a sentence of imprisonment less than a year and a month but of at least sixty days; and one point for other prior sentences. U.S.S.G. § 4A1.1. Because Luna-Barragan had spent 75 days in custody on the Georgia conviction, the probation office assigned two criminal history points to the "theft by taking" conviction.

Georgia law is unusual, however, because Georgia courts must credit one with any time spent under any legal disability, regardless of whether the time was spent in custody or under the limitations of a probationary sentence. Under Georgia law, a person could spend four years and 364 days on probation, on a five year sentence, and if revoked, would be credited with all probation time against

his sentence of imprisonment. Thus, in that five year sentence, the actual time served would be one day. The same situation applies if one serves time pending sentence, if they received a strictly probation sentence. The Georgia court could have sentenced Liana-Barragan to a sentence of 75 days, as the probation officer thought the George court had done, followed by a sentence of so much time on probation. Instead, apparently fully knowing his criminal history, the Georgia court imposed a sentence of 5 years probation and credited the 75 days spent in jail against that probation obligation (so Luna-Barragan would have 4 years, 9 ½ months of probation remaining after his sentencing).¹ Because the sentence imposed was only for probation, it should have been assigned only one point. See U.S.S.G. § 4A1.1 cmt. 5 background (explaining that the sections assigning points for prior sentences "distinguish confinement sentences longer than one year and one month, shorter confinement sentences of at least sixty days, and all other sentences, such as confinement sentences of less than sixty days, probation, fines and residency in halfway house"

The Fifth Circuit noted that this error is not an obvious one, and appears to

¹In his brief, Luna-Barragan argued that the Georgia courts were required to do this under Georgia law, and not to do it might be grounds to set aside the sentence.

have tried to cut off any Olano discussion.² However, the court also noted that it had no cases addressing this unusual interplay of a sentence involving both jail time and probation. United States v. Evans, 587 F.3d 667, 671 (5th Cir. 2009) ("We ordinarily do not find plain error when we have not previously addressed an issue." (citation omitted)). Because Luna-Barragan served 75 days in addition to receiving a probation sentence, the court felt it was not readily apparent that the scoring in the Presentence Report was wrong. United States v. Rivera, 784 F.3d 1012, 1017 (5th Cir. 2015).

The court then held that even if Luna-Barragan could show obvious error, the court would not correct the mistake because Luna-Barragan was unable to meet the final requirement for an appeals court to have that authority. The court recognized that Petitioner can satisfy the third requirement because the error prejudiced him by increasing his Guidelines range. Molina-Martinez v. United States, 136 S. Ct. 1338 (2016). The court then noted that not all errors that impact a sentence are ones that substantially affect the fairness, integrity, or reputation of the proceeding. United States v. Sarabia-Martinez, 779 F.3d 274, 278 (5th Cir. 2015). The court did not see an unjust result here because the Georgia conviction

²Luna-Barragan does not ignore this point by the Fifth Circuit, but argues that while the error was not obvious in the Fifth Circuit, it would have been obvious in the Eleventh District.

would have received two points if the judge had just sentenced Luna-Barragan to time served.

Petitioner respectfully submits that in this case, similar to the situation in Rosales-Mireles, the Fifth Circuit applied a reformulated and heightened standard for the fourth prong of plain error review by requiring that the sentence have produced an "unjust result" to permit it to exercise discretion to review. United States v. Rosales-Mireles, 850 F.3d 246 (5th Cir. 2017), certiorari granted June 9, 2017 in Rosales-Mireles v. United States, 16-9493 (S. Ct. 2017). Although the Fifth Circuit panel appears to address the majority opinion in Escalante-Reyes as the basis for its holding, in actuality, the "unjust result" is no different than the "shocks the conscience" reformulation in Reyes. Such reformulated and heightened standard conflicts with decisions of this Court and other circuit courts of appeals, and has created an intra circuit split. United States v. Escalante-Reyes, 689 F.3d 415 (5th Cir. 2012) (en banc). Such analysis, additionally, is a confusing and unnecessary step, hamstringing courts of appeals, and risking skewed sentencing data, which is the basis for the sentencing commission to determine appropriate punishments under the Guidelines.

REASONS FOR GRANTING THE WRIT

In Olano, this Court held that, under the fourth prong of plain error review, "[t]he Court of Appeals should correct a plain forfeited error affecting substantial rights if the error 'seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.'" United States v. Olano, 507 U.S. 725, 736 (1993). This Court has granted certiorari in United States v. Rosales-Mireles, 850 F.3d 246 (2017), based on a question somewhat similar to that in this case, i.e., that to meet that fourth prong of the plain error review standard, is it necessary, as the Fifth Circuit Court of Appeals required, that the error be one that "would 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?" That "shocks the conscience" language appears to have been rejected by the Fifth Circuit panel in this case, which instead applied the en banc majority opinion in United States v. Escalante-Reyes, 689 F.3d 415 (5th Cir. 2012) (en banc), rather than the "shocks the conscience" language from the Escalante-Reyes dissenting opinion, relied on in Rosales-Mireles. It thus appears that the lower court is abandoning part of the reasoning in Rosales-Mireles. However, the question still remains as to how to apply the fourth prong of plain error review when all parties made a mistake in not correctly applying a guideline factor, thus

costing the defendant in this case considerable more time in prison. Where a defendant is sentenced under an incorrect Guidelines range, due to a miscalculation of a guideline factor, Petitioner argues that the holding and reasoning of *Molina-Martinez* should be extended to require remand for re-sentencing to ensure that the proper factors be considered in fashioning a sentence in a discretionary regime. *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1345 (2016).

As in *Rosales-Mireles*, Petitioner in this case also argues that the Fifth Circuit Court of Appeals applied a reformulated and heightened standard for the fourth prong of plain error review in his case, which involved a sentencing error. Petitioner also argues that the Fifth Circuit's standard, the requirement of an "unjust result", conflicts with decisions by this Court, other courts of appeals, and thus has resulted in an intra-circuit split. This Court should thus grant certiorari to clarify the correct standard to be used when the court of appeals must decide whether to exercise its discretion to correct plain sentencing error and to clarify whether sentencing calculation errors should be treated differently than the typical Olano type of error originally anticipated in the Olano case.

Fed. R. Crim. P. 52(b) reads as follows: "A plain error that affects substantial rights may be considered, even though it was not brought to the court's

attention." In United States v. Olano, 507 U.S. 725 (1993), this Court announced a four-prong approach to plain error review under Rule 52(b). If the first three prongs are satisfied—an error that is plain and affects the defendant's substantial rights—then "the court of appeals has authority to order correction, but is not required to do so." *Id.* at 735. The standard for exercising that discretion under the fourth prong was adapted from the holding in United States v. Atkinson, 297 U.S. 157 (1936). *Id.* at 763; namely, "The Court of Appeals should correct a plain forfeited error affecting substantial rights if the error 'seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.'" *Id.* at 736 (quoting *Atkinson*, 297 U.S. at 160). .

In *Rosales-Mireles*, the Fifth Circuit, while quoting *Olano*'s fourth-prong standard, applied a reformulated and, as *Rosales-Mireles* argued, a heightened standard—does the error "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." United States v. Rosales-Mireles, 850 F.3d 246, 250 (5th Cir. 2017) (quoting United States v. Segura, 747 F.3d 323, 331 (5th Cir. 2014)). This reformulation of the *Olano* standard comes from a dissent from the en banc decision in United States v. Escalante-Reyes, 689 F.3d 415 (5th Cir. 2012). See *id.* at 435 (Smith, J.,

dissenting). The dissent drew on this Court's decisions emphasizing that "[p]lain errors are those that are 'exceptional,' 'particularly egregious,' and 'undermine the fundamental fairness' of our [judicial] system[,]" but cited no Fifth Circuit precedent to justify its particular reformulation. See, Escalante-Reyes, 689 F.3d at 435 (Smith, J., dissenting) (quoting Atkinson, 297 U.S. at 160, and United States v. Young, 470 U.S. 1, 15–16 (1985)).

As in Rosales-Mireles, Petitioner also argues that the Fifth Circuit's "unjust result" reformulation of the fourth prong of the plain error review conflicts with Olano, which rejected this sort of heightened standard for the exercise of discretion under the fourth prong. Arguably, by incorporating the Atkinson standard, Olano rejected suggestions in earlier plain error cases that Rule 52(b) should be employed only in circumstances where "'a miscarriage of justice would otherwise result.'" Olano, 507 U.S. at 736–37 (quoting Young, 470 U.S. at 15 (quoting United States v. Frady, 456 U.S. 152, 163 n.14 (1982)). Adding into the calculus a "shock the conscience" or "unjust result" limits Olano, ultimately, to allowing correction where an Appeals court encountered "only the most egregious official conduct" that "violates the decencies of civilized conduct." County of Sacramento v. Lewis, 523 U.S. 833, 846–47 (1998) (internal quotation marks and citations omitted). Although this Court has emphasized that meeting the

requirements of plain error should be difficult and reversal not automatic, this Court has not made it impossible for sentencing errors to be corrected. United States v. Molina-Martinez, 136 S. Ct. 1338, 1343 (2016); United States v. Puckett, 556 U.S. 129, 135 (2009). This Court has not deviated from the Olano standard. Molina-Martinez, 136 S. Ct. at 1348. Recently, however, in accepting Rosales-Mireles, it is clear that this Court is reconsidering the Olano holding and the extent of Molina-Martinez.

Intra Circuit conflict

The Fifth Circuit's reformulated heightened standard also conflicts with decisions in other circuits on plain sentencing error. See, United States v. Sabillon-Umana, 772 F.3d 1328, 1335 (10th Cir. 2014)-- "few things ... affect an individual's substantial rights or the public's perception of the fairness and integrity of the judicial process more than a reasonable probability an individual will linger longer in prison than the law demands only because of an obvious judicial mistake." United States v. Dahl, 833 F.3d 345, 359 (3d Cir. 2016). See also United States v. Garrett, 528 F.3d 525, 530 (7th Cir. 2008) (exercising discretion to correct plain error which resulted in a sentence one month greater than the correct Guidelines range because "even if a sentence imposed is within the correct as well as incorrect Guidelines range, the case must still be remanded

for re-sentencing"). Even within the Fifth Circuit resolution of how, why, and when to correct sentencing errors remains an enigma. Cf. United States v. Molina-Martinez, 824 F.3d 548 (5th Cir. 2016), on remand from 136 S. Ct. 1338 (2016) (vacating sentence at bottom of incorrect range that would be 10% greater (seven months) than a sentence imposed at the bottom of the correct range) with United States v. De Santiago-Guillen, 653 F. App'x 303 (5th Cir. 2016), on remand from 136 S. Ct. 1711(2016) ; United States v. Zavala, F. App'x, 2016 WL 3455947 (5th Cir. June 23, 2016), on remand from 136 S. Ct. 1711 (2016) (vacating sentence at bottom of incorrect range, which would be 11.5% greater (30 months) than a sentence imposed at the bottom of the correct range). It is clear that within the Fifth Circuit there are inconsistent uses of various reformulated and heightened standards on the fourth prong of plain error review resulting in criminal defendants in similar circumstances being treated differently. The differences between how such errors are handled among the various circuits, can only lead to future sentencing disparity.³

³See also, Sabillon-Umana, 772 F.3d at 1333--Guidelines calculation error "ordinarily" warrants remand, United States v. Figueroa-Ocasio, 805 F.3d 360, 374 (1st Cir. 2015), United States v. Dahl, 833 F.3d 345, 359 (3d Cir. 2016)--such error "generally" should cause the appeals court to "exercise [its] discretion to recognize [the] plain er-ror," Oother circuits have held that Sentencing calculation error resulting in the use of a higher range that overlapped with the correct one also requires reversal. . See, United States v. Syme, 276 F.3d 131, 158

Because the Fifth Circuit's application of a reformulated and heightened standard on the fourth prong of plain error review conflicts with decisions by this Court, other courts of appeals, and has created an intra circuit split, this Court should grant certiorari.

Molina-Martinez suggests, and even Olano implies, that a categorical approach to sentencing errors may be the proper approach.

When conducting plain-error review of guidelines miscalculations under Federal Rule of Criminal Procedure 52(b), Luna-Barragan argues that there should be an exception under Olano for sentencing errors, thus allowing Courts of Appeals to comfortably and routinely correct sentencing errors. Olano recognized this when it noted that there may be a special category of forfeited errors that can be corrected regardless of their effect on the outcome, but this issue need not be addressed then. See Olano, 507 U.S. at 735. The Olano court noted that it was also not addressing errors that should be presumed prejudicial if the defendant cannot make a specific showing of prejudice, although it felt that normally, "although perhaps not in every case, the defendant must make a specific showing of prejudice to satisfy the "affecting substantial rights" prong of Rule 52(b)." Id.,

(3d Cir. 2002). Most courts of appeals also appreciate the inverse to be true—that is, the “failure to notice the error” in most cases would “adversely affect the public perception of the fairness of judicial proceedings.” United States v. Wernick, 691 F.3d 108, 118 (2d Cir. 2012).

Olano at 735.

Although Olano recognizes the clearly permissive nature of Rule 52(b), Petitioner argues that Rule 52(b), is merely a follow-up to the mandatory rule in 52(a), where any defect which does not affect substantial rights was not permitted to be corrected.⁴ The emphasis on "substantial rights" and the permissive language of 52(b) does not mean that the Circuits should categorically treat all errors capriciously. The real danger of such capriciousness is the situation where a court finds that there is error and that it is significant in the way it affects a defendant, but that the Court simply finds that it is "just too bad".

The reality is that Sentencing Guidelines' errors are not made in a vacuum. Sentencing errors fall under a special category of federal criminal law, of recent origin, relatively. The type of error dealt with in Olano, however, is different from sentencing errors. Petitioner suggests that the true reason why the Olano rule was promulgated is that the Supreme Court had no desire to allow all situations where a substantial right was at issue and abridged to result in automatic reversal. The error in Olano had to do with allowing two alternate jurors to sit in

⁴For a good discussion and explanation of the plain error rule, see Jeffrey L. Lowry, *Plain Error Rule--Clarifying Plain Error Analysis Under Rule 52(b) of the Federal Rules of Criminal Procedure*, 84 J. Crim. L. & Criminology 1065 (1994).
<https://scholarlycommons.law.northwestern.edu/jclc/vol84/iss4/14>

on Jury Deliberations, when a Federal Rule did not allow for that. There was no showing of prejudice, nor harm. Despite the lack of any harm, the Appellate Court overturned the conviction simply because the rule was violated. Understandably, the Supreme Court found this intolerable and formulated a framework to analyze plain errors affecting "substantial rights".

The difficulty in applying Olano to federal sentencing errors is the fact that Rule 52 is a rule formulated long before a Guidelines system was in place. The Guidelines replaced a discretionary sentencing regime, where Federal Judges could fashion sentence as the Court, in the person of the individual sitting at the bench, thought fit under the facts heard and presented during the proceedings. To eliminate sentencing disparity, a Sentencing Commission was set up by Congress to evaluate sentencing and determine an appropriate, binding (prior to Booker), sentence for similarly situated defendants. Booker upset the mandatory regime, restoring discretion. But, Booker did not eliminate the requirement that the Guidelines be calculated correctly.

District Judges use the guidelines to guide their discretion, not to control it. Judges certainly have a great deal of power to raise or lower a sentence, through departures or variances, but the starting point of that discretion remains guidelines themselves. Booker did not eliminate the guidelines, but rather uses the guidelines

as the basis for the exercise of discretion. Errors in sentencing are not just a problem for a defendant, but affect the entire structure of Federal Sentencing. If a sentence is imposed based on an incorrect Guidelines calculation, the quantum of data which the Sentencing Commission uses to fashion sentencing categories is placed in jeopardy. This is especially true where a sentence is imposed above or below the range where the sentence was calculated, and the court, without a departure or variance, accepted the Commission's ranges as the appropriate point for determining a sentence. That is precisely what happened in this case.

in this case, Luna-Barragan was sentenced to 57 months in prison, well beyond the correct sentencing Guidelines range of 37-46 months. The 57 months sentence is 24% greater than the maximum sentence he could have received, had the Court imposed the maximum of the correct range. Keep in mind that the Courts are guided by the Guidelines. A significant error of 24% skews the data upon which the Guidelines are based. The Sentencing Guidelines are under a constant state of review by the Sentencing Commission. This fact alone should meet the Fourth Prong involving "the fairness, integrity or public reputation of judicial proceedings," noted in *Olano*. See, *Olano*, 507 U.S. at 732.

Miscalculations which result in such sentences undermine the very purposes of the guidelines.

Essentially, Olano needs to be tweaked to reflect the reality of the Sentencing regime. There are other currents operating at Federal Sentencing today which were not in place when the Federal Rule 52(a) and (b) were promulgated. Olano makes complete sense when reviewing constitutional errors, or procedural errors. Olano is not really applicable to sentencing issues, and the awkward attempts by the various circuits in applying Olano to sentencing errors reflect this. This does not mean that Rule 52(b) is not applicable; rather, it is the ministerial nature of calculating guideline ranges which should dictate the remedy. Retrial versus remand for re-sentencing are significantly different. Petitioner asserts that most District Judges, when an error is brought to the Judge's attention, will simply correct it. That does not mean the court will not reevaluate the sentencing to decide whether it would have made the same sentence. It does mean that the District Courts, and not the Appellate Courts, are the appropriate place to do this.

It makes no sense to suggest that a 24% error in calculation has no relevance to a defendant whose sentence exceeds the maximum recommended by the Sentencing Commission for similarly situated defendants. It makes no sense to suggest that a sentence at the bottom of an incorrect higher range is an acceptable sentence solely because it lies within the range of the correct sentence range. Sentencing is different and Olano is not completely applicable to sentencing. As

such, this court should fashion a rule which permits Appellate courts to determine whether a sentence is correctly calculated and imposed therefore, and to additionally determine whether there is anything in the record to suggest that the sentence imposed would not be different. Sentences outside of the correct range would normally be remanded; sentences within the correct range, should remain in place unless the Appellant Courts finds in the record facts which reflect a likelihood that a lower sentence would have been imposed. Underpinning both considerations is the fact that District Courts rely on the Guidelines to guide the Court in its discretion.

For the Guidelines to work, accuracy in calculations must be built into the system to avoid disparity. This fact was the cornerstone of the Jan. 13, 2005 Statement, shortly after Booker was issue, made by Hon. Ricardo Hinojosa, U.S. Federal District Court Judge, McAllen, Texas and then Chairman of the Sentencing Commission at the time Booker came out. It reads: "Now that a decision has been issued, the Commission will work with Congress, members of the federal judiciary's Committee on Criminal Law, the Department of Justice, the defense bar, members of the criminal justice community, and other interested individuals to ensure that we have a fair and just sentencing system within the bounds of our Constitution. The U.S. Sentencing Commission is in a unique

position to continue to assist all three branches of government during this period of transition. As the opinion in *Booker/Fanfan* states, the Commission 'remains in place' and will continue to fulfill its statutorily mandated functions such as collecting sentencing data from all federal district courts, amending the guidelines where appropriate, and conducting sentencing-related research ."⁵

Judge Hinojosa, in later reporting to the Congress, reaffirmed his initial statement, but added, "

Many courts have adopted, as the Commission teaches, a three-step approach to determining federal sentences under the framework set forth by *Booker*.⁴ First, pursuant to 18 U.S.C. § 3553(a)(4), a sentencing court must determine and calculate the applicable guideline sentencing range, since sentencing courts cannot consider the sentencing guideline range as required by *Booker* if one has not been determined. Second, the court the court should consider any traditional departure factor that may be applicable under the sentencing guidelines, since 18 U.S.C. § 3553(a)(5), which contemplates consideration of policy statements issued by the Commission, including departure authority remains intact after *Booker*. Third, after consideration of the applicable guideline sentencing range and guideline departure factors, the court should consider the other applicable sentencing factors set forth under 18 U.S.C. § 3553(a) and if the court determines that a guidelines sentence (including any applicable departures) does not meet the purposes of sentencing, it may impose a non-guidelines sentence pursuant to *Booker*.⁶

As indicated in *Booker*, courts must still "consider the Guidelines' sentencing range established for . . . the applicable category of offense committed

⁵<https://www.ussc.gov/about/news/press-releases/january-13-2005>.

⁶Statement to Congress by Judge Richardo Hinojosa, referring to United States v. Booker, 543 U.S. 220, 125 S. Ct. 738 (2005) and Mistreats v. United States, 488 U.S. 361 (1989). at: https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/testimony/20060316_Hinojosa_Testimony.pdf

by the applicable category of defender." Booker, 543 U.S. at 259. After Booker, federal the courts must yet continue to determine and calculate the applicable guideline range, consult the guidelines, and take them into consideration at the time of sentencing, an approach approved by a number of appellate courts. Early post-Booker cases reflect this. United States v. Vaughn, 430 F.3d 518 (2nd Cir. 2005); United States v. White, 405 F.3d 208, 218 (4th Cir. 2005); United States v. Mares, 402 F.3d 511 (5th Cir. 2005); United States v. Stone, 432 F.3d 651 (6th Cir. 2005); United States v. Rodriguez-Alvarez, 425 F.3d 1041 (7th Cir. 2005); United States v. Pizano, 403 F.3d 991 (8th Cir. 2005); United States v. Cantrell, 433 F.3d 1269 (9th Cir. 2006).

Subsequent case law reaffirmed Judge Hinojosa's reaffirmation of the role of the guidelines and the Sentencing Commission in a discretionary regime. See, Gall v. United States, 552 U.S. 38 (2007).--district courts must begin their analysis with the guidelines and remain cognizant of them through the sentencing process. See also, Rita v. United States, 551 U.S. 338 (2007)-- where the Court ruled that courts of appeals may apply a nonbinding presumption of reasonableness to within-Guidelines sentences. The 8-1 Gall Majority Court held that when the sentencing judge and the guidelines established by the Sentencing Commission agree on the proper sentence in a case, the double determination significantly

increases the likelihood that the sentence is a reasonable one.

Thus, there is a clear interplay between the District Courts, as sentencing judges, the Sentencing Guidelines, the Sentencing Commission itself in its "real time" continuing evaluation of disparity in sentencing, and Congressional intent to avoid disparity in the remaining still viable Sentencing regime. Errors in calculation undermine this interplay and disrupt the purposes of federal sentencing. Wall v. Kholi, 562 U.S. 545, 559 (2011)—sound legal principles should guide discretion under Olano. To avoid unwanted disparity and capriciousness, and to ensure that sentences are correctly fashioned in a discretionary regime, this Court needs to re-evaluate its Olano opinion and sever sentencing issues, such as the error complained of here, from the usual error Olano, and Federal Rules 52(a) and (b) anticipated.

CONCLUSION

FOR THESE REASONS, Rosales respectfully requests that this Honorable Court grant a writ of certiorari, vacate the opinion of the court of appeals, and remand the case for further review.

Respectfully submitted.

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DATED: May 6, 2018.

APPENDIX

United States v. Luna-Barragan, 5th Cir. No. 17-40080. (5th Cir. 2017)

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 17-40080

United States Court of Appeals
Fifth Circuit

FILED

February 6, 2018

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

MAURICIO LUNA-BARRAGAN,

Defendant - Appellant

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 1:16-CR-435

Before DAVIS, HAYNES, and COSTA, Circuit Judges.

PER CURIAM:*

Mauricio Luna-Barragan pleaded guilty to illegal reentry and was sentenced to 57 months in prison. That sentence was at the high end of his Guidelines range, which was based on a criminal history category of V because ten criminal history points were assigned to Luna-Barragan. Two of those points came from a Georgia sentence for “theft by taking” in which Luna-Barragan spent 75 days in jail and ultimately received a probation sentence of

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

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5 years. Luna-Barragan did not object to the scoring of that Georgia conviction in the trial court, but now argues it should have received only one point. That reduction would put him in category IV, which would reduce his Guidelines range to 37-46 months.

Because Luna-Barragan did not raise this objection in the district court, he must show a plain error that affected his substantial rights. *Puckett v. United States*, 556 U.S. 129, 135 (2009). If he can do so, then we have the discretion to remedy the error if it “seriously affect[s] the fairness, integrity or public reputation” of the proceeding. *Id.* (alteration in original) (citation omitted).

Luna-Barragan is correct that only one point should have been assigned to the Georgia probation sentence. The Guidelines assign three points for any sentence of imprisonment exceeding one year and one month; two points for a sentence of imprisonment less than a year and a month but of at least sixty days; and one point for other prior sentences. U.S.S.G. § 4A1.1. Because Luna-Barragan had spent 75 days in custody on the Georgia conviction, it was assigned two points. But the Georgia court imposed a sentence of 5 years probation and credited the 75 days spent in jail against that probation obligation (so Luna-Barragan would have 4 years, 9 ½ months of probation remaining after his sentencing). The sentence itself thus did not impose time in prison. It would be different if the court imposed a sentence of 75 days to be followed by 5 years of probation. Because the sentence imposed was only for probation, it should have been assigned only one point. *See* U.S.S.G. § 4A1.1 cmt. background (explaining that the sections assigning points for prior sentences “distinguish confinement sentences longer than one year and one month, shorter confinement sentences of at least sixty days, and all other sentences, such as confinement sentences of less than sixty days, *probation*, fines and residency in halfway house” (emphasis added)).

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This error, however, is not an obvious one. The Presentence Report describes the sentence as “5 years probation with credit for time served (75 days).” A sentence of 75 days “time served,” standing alone, would result in two points. U.S.S.G. § 4A1.1(b). We have no cases addressing this unusual interplay of a sentence involving both jail time and probation. *United States v. Evans*, 587 F.3d 667, 671 (5th Cir. 2009) (“We ordinarily do not find plain error when we have not previously addressed an issue.” (citation omitted)). Because Luna-Barragan served 75 days in addition to receiving a probation sentence, it was not readily apparent that the scoring in the Presentence Report was wrong. *United States v. Rivera*, 784 F.3d 1012, 1017 (5th Cir. 2015).

Even if Luna-Barragan could show obvious error, we would not correct the mistake because he is unable to meet the final requirement for us to have that authority. He can satisfy the third requirement because the error prejudiced him by increasing his Guidelines range. *Molina-Martinez v. United States*, 136 S. Ct. 1338 (2016). But not all errors that impact a sentence are ones that substantially affect the fairness, integrity, or reputation of the proceeding.¹ *United States v. Sarabia-Martinez*, 779 F.3d 274, 278 (5th Cir. 2015). We do not see that unjust result here because the Georgia conviction would have received two points if the judge had just sentenced Luna-Barragan to time served. He ended up receiving a much more serious sentence as he also

¹ The Supreme Court has granted certiorari to review the proper application of this prong from our decision in *United States v. Rosales-Mireles*, 850 F.3d 246 (5th Cir. 2017), *cert. granted*, No. 16-9493, 2017 WL 2505758 (U.S. Sept. 28, 2017). In the meantime, we apply the en banc majority opinion in *United States v. Escalante-Reyes*, 689 F.3d 415 (5th Cir. 2012) (en banc), rather than the “shocks the conscience” language from the dissenting opinion. *United States v. Broussard*, 669 F.3d 537, 554 (5th Cir. 2012) (explaining that, under our rule of orderliness, the earlier of the two opinions controls); *Wicker v. McCotter*, 798 F.2d 155, 157-58 (5th Cir. 1986) (even when the Supreme Court has granted certiorari, we continue to follow our own precedents unless and until the Court says otherwise).

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had to serve years under court supervision. The nuanced distinction—between the 75 days being credited against the probation term as opposed to being in addition the probation obligation—that led to the error thus arguably is in tension with the Guidelines’ common-sense goal of assigning more points to prior sentences that are more severe. It is not the type of error that casts doubt on the fairness of the process.

Because Luna-Barragan does not satisfy the second and fourth requirements for plain-error correction, the judgment is **AFFIRMED**.