

No. 17-8998

IN THE SUPREME COURT OF THE UNITED STATES

MAURICIO LUNA-BARRAGAN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly determined that the district court did not commit plain error in calculating petitioner's advisory Sentencing Guidelines range.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-4) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 6, 2018. The petition for a writ of certiorari was filed on May 7, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Southern District of Texas, petitioner was convicted of illegally reentering the United States after having been removed following a conviction for an aggravated felony, in violation of 8 U.S.C. 1326(a) and (b). Judgment 1. He was sentenced to 57 months of imprisonment, to be followed by three years of supervised release. Id. at 2-3. The court of appeals affirmed. Pet. App. 1-4.

1. Petitioner is a citizen of Mexico who entered the United States illegally in the early 1990s. Presentence Investigation Report (PSR) ¶¶ 37, 45. In June 2015, petitioner was removed to Mexico following convictions in Florida state court for robbery, armed robbery, armed burglary of a dwelling, and aggravated battery with a deadly weapon. PSR ¶¶ 6-7, 37. Petitioner subsequently reentered the United States illegally by wading across the Rio Grande River near Brownsville, Texas. PSR ¶ 5. In April 2016, a U.S. Customs and Border Protection agent encountered petitioner in Brownsville, Texas. PSR ¶ 4. Petitioner identified himself as a Mexican national with no legal status in the United States and was arrested. Ibid.

2. Following a guilty plea, petitioner was convicted of illegally reentering the United States after having been removed

following a conviction for an aggravated felony, in violation of 8 U.S.C. 1326(a) and (b). Judgment 1.

The Probation Office conducted a presentence investigation and prepared a presentencing report for the district court. The Probation Office determined that petitioner's base offense level under the Sentencing Guidelines was eight. PSR ¶ 14 (citing Sentencing Guidelines § 2L1.2(a)). It recommended an eight-level increase under Section 2L1.2(b)(2)(B), because before petitioner's first removal order he had been convicted of a felony for which the sentence imposed was more than two years. PSR ¶ 15. The Probation Office recommended an additional four-level increase under Section 2L1.2(b)(3)(D), because after petitioner's first removal order he had been convicted of another felony offense. PSR ¶ 16. Combined with a recommended three-level reduction of petitioner's offense level for acceptance of responsibility, the recommended offense level was 17. PSR ¶¶ 22-24.

The Probation Office further determined that petitioner had a criminal history score of 10, placing him within criminal history category V. PSR ¶ 33. The Probation Office observed that petitioner had several prior convictions, including the convictions noted above for robbery, armed robbery, and armed burglary of a dwelling in 2012 in Florida state court, PSR ¶¶ 26, 28-29, and a 2015 conviction for aggravated battery with a deadly weapon in Florida state court, PSR ¶ 30, as well as a 2011

conviction for theft by taking in Georgia state court, PSR ¶ 27. For the theft offense, the Probation Office indicated that petitioner was sentenced to five years of probation with credit for 75 days of time served and assigned the conviction two criminal history points. Ibid. (citing Sentencing Guidelines § 4A1.1(b)).

A total offense level of 17 and criminal history category of V would result in an advisory Sentencing Guidelines range of 46 to 57 months of imprisonment. PSR ¶ 67. Petitioner filed written objections to the presentence report, none of which is relevant here. See D. Ct. Doc. 19, at 1-3 (Oct. 18, 2016). At sentencing, the district court adopted the findings and Guidelines calculations from the presentence report and sentenced petitioner to 57 months of imprisonment, to be followed by three years of supervised release. 2/17/17 Sent. Tr. 6-7.

3. Petitioner appealed, arguing for the first time that the district court erred in calculating his criminal history category by assigning two points for his conviction for theft by taking under Georgia law. Under Sentencing Guidelines § 4A1.1, a prior sentence of imprisonment of at least 60 days is assigned two criminal history points and a lesser sentence is assigned one point. Petitioner argued that, although the 75 days of time served in confinement awaiting his sentence “may appear to be a term of imprisonment,” because the 75 days were credited against a five-year probation sentence, it should not have been considered a

sentence of imprisonment. Pet. C.A. Br. 16; see id. at 15-25 (explaining the "quite unusual" details of Georgia sentencing law as applied to petitioner's sentence). Petitioner contended that he therefore should have received one criminal history point, instead of two, for the theft conviction, which would have resulted in a criminal history category of IV and advisory sentencing range of 37 to 46 months of imprisonment. Id. at 8.

The court of appeals affirmed. Pet. App. 1-4. The court observed that, because petitioner did not raise his objection before the district court, it was subject to review under the plain-error standard in Federal Rule of Criminal Procedure 52(b). Id. at 2. That standard "authorizes an appeals court to correct a forfeited error only if (1) there is 'an error,' (2) the error is 'plain,' * * * (3) the error 'affect[s] substantial rights,'" and (4) "'the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" Henderson v. United States, 568 U.S. 266, 272 (2013) (citations omitted; brackets in original).

The court determined, for purposes of the first element of plain-error analysis, that petitioner had demonstrated error in his Guidelines calculation. Pet. App. 2. The court explained that, although petitioner spent 75 days in custody in connection with the Georgia offense, because the Georgia court ultimately sentenced petitioner to five years of probation and credited the

time in custody against that term of probation, petitioner should have received only one criminal history point for the sentence. Ibid.

The court of appeals further determined, however, that the Guidelines error was not plain, as the second element of plain-error analysis requires. Pet. App. 3. The court noted that “[a] sentence of 75 days ‘time served,’ standing alone, would result in two points, as would ‘a sentence of 75 days to be followed by 5 years of probation.’” Id. at 2-3. The court observed that it was only because the 75 days of custody was credited against a sentence of probation that the sentence should have been assigned only one point. Id. at 3. And because petitioner actually did serve 75 days in custody in addition to the receiving the sentence of probation, “it was not readily apparent that the scoring in the Presentence Report was wrong.” Ibid. “This error,” the court found, “is not an obvious one.” Ibid.

The court of appeals separately reasoned that, “[e]ven if [petitioner] could show obvious error,” the court “would not correct the mistake because he is unable” to show that the error “substantially affect[ed] the fairness, integrity, or reputation of the proceeding” under the fourth element of plain-error analysis. Pet. App. 3. The court concluded that the error in this case did not meet that standard, because “the Georgia conviction would have received two points if the judge had just

sentenced [petitioner] to time served,” and the punishment that petitioner actually received (75 days in custody followed by five years of probation) was “much more serious.” Ibid. “The nuanced distinction -- between the 75 days being credited against the probation term as opposed to being in addition [to] 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.” Id. at 4.

ARGUMENT

Petitioner contends (Pet. 7-22) that the Fifth Circuit applied an erroneously heightened standard in evaluating whether the asserted Guidelines error satisfied the fourth element of plain-error review. In Rosales-Mireles v. United States, No. 16-9493 (June 18, 2018), decided after petitioner filed his petition for a writ of certiorari, this Court held that a miscalculation of an advisory Sentencing Guidelines range “will in the ordinary case * * * seriously affect the fairness, integrity, or public reputation of judicial proceedings” and thus satisfy the fourth element of the plain-error standard. Slip op. 1. If the court of appeals had affirmed petitioner’s sentence by relying solely on his failure to satisfy the fourth element of plain-error analysis, a remand for further consideration in light of this Court’s decision in Rosales-Mireles would be appropriate.

A remand for further consideration in light of Rosales-Mireles is unwarranted, however, because the court of appeals did not rely solely on the fourth element of plain error. The court instead affirmed petitioner's sentence principally because petitioner failed to satisfy the second element of plain-error review -- namely, that any Guidelines error was not "clear or obvious," Rosales-Mireles, slip op. 3; see Pet. App. 3 (reasoning that the error in this case "is not an obvious one"); see also id. at 4 ("Because [petitioner] does not satisfy the second and fourth requirements for plain-error correction, the judgment is AFFIRMED.").

The court of appeals' fact-bound determination that petitioner failed to satisfy the second element of the plain-error standard in this case -- which he does not expressly ask this Court to review -- is, in any event, correct.* As the court reasoned, the technical distinction between a 75-day sentence for time served followed by approximately four and three-quarters years of probation, which all agree would properly be assigned two criminal history points, and petitioner's sentence of five years of

* To the extent petitioner's assertion (Pet. 5 n.2) that the error here would be obvious "in the Eleventh District" is intended to allege a conflict with the Eleventh Circuit, he identifies no decision from that court of appeals or any other reaching a different result in similar circumstances. And a conflict in the application of the second element of plain-error review to an unusual Georgia sentencing practice would not warrant this Court's review in any event.

probation against which petitioner is credited 75 days served in state custody, even if material under Sentencing Guidelines § 4A1.1, is not obviously so. Pet. App. 2-3; cf. Sentencing Guidelines § 4A1.2 comment (n.2) (noting that a sentence of probation should be assigned one criminal history point "unless a condition of probation requiring imprisonment of at least sixty days was imposed"). In either case, petitioner would serve the same amount of time in prison, and the same time on probation, for the same crime. Petitioner acknowledges that the Georgia sentencing law requiring the particularized structure of his sentence "is unusual." Pet. 3. The court of appeals' case-specific application of the second prong to the asserted Guidelines error here does not warrant this Court's further review, and a remand for reconsideration of the court of appeals' additional determination that petitioner also did not satisfy the fourth element of plain-error analysis is unnecessary.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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