NO. 14-8913

IN THE SUPREME COURT OF THE UNITED STATES

SAUL MOLINA-MARTINEZ,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITIONER'S REPLY TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

In United States v. Olano, 507 U.S. 725 (1993), the Court held that, in order to secure relief under plain-error review pursuant to Federal Rule of Criminal Procedure 52(b), a defendant must show that the error affected his substantial rights, which "in most cases [ ] means that the error must have been prejudicial[, i.e.,] [i]t must have affected the outcome of the district court proceedings." Id. at 734 (citations omitted). The Court, however, declined to "decide whether the phrase 'affecting substantial rights' is always synonymous with 'prejudicial,'" id. at 735 (citations omitted); and the Court suggested that "[some] errors [ ] should be presumed prejudicial [even] if the defendant cannot make a specific showing of prejudice." Id.

Since that time, at least two circuits have, in connection with errors in the application of the United States Sentencing Guidelines, adopted the very sort of presumption suggested in Olano: that is, they presume an effect on substantial rights when an error results in the application of an erroneous Guideline range to a criminal defendant. See United States v. Sabillon-Umana, 772 F.3d 1328, 1333-34 (10th Cir. 2014); United States v. Knight, 266 F.3d 203, 207-10 (3d Cir. 2001). In this case, however, the Fifth Circuit rejected such a presumption as foreclosed by its prior decisions. See United States v. Molina-Martinez, 588 Fed. Appx. 333, 334 n.1 (5th Cir. 2014) (unpublished).

In light of the foregoing, the question presented is as follows:

> Where an error in the application of the United States Sentencing Guidelines results in the application of the wrong Guideline range to a criminal defendant, should an appellate court presume, for purposes of plain-error review under Federal Rule of Criminal Procedure 52(b), that the error affected the defendant's substantial rights?

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The federal circuits are divided respecting the proper application of the third prong of plain-error review (the "affected substantial rights" prong) to plain errors resulting in the application of the wrong Sentencing Guideline range to a criminal defendant. At least the Third and the Tenth Circuits presume that such errors affected a defendant's substantial rights, whereas at least the Fifth Circuit has declined to adopt such a presumption. Because the application of the third prong of plain-error review to Guideline calculation errors is an important and frequently recurring question in the federal courts of appeals, the Court should grant certiorari in this case to resolve that division.

1. Grudgingly acknowledging that "the [Fifth Circuit's] approach to plain-error review [of Guideline application errors] is in some tension with decisions of two other courts of appeals," Br. Opp. 7, the government nevertheless argues that "this Court's review is unwarranted at this time," Br. Opp. 7, for two reasons. First, the government argues that "the courts of appeals are entitled to take different approaches to reviewing forfeited Guidelines miscalculation claims." Br. Opp. 7. Second, the government argues that "no square conflict exists in cases (such as this one) where the defendant's sentence falls within both the correct and the incorrect advisory Guidelines range." Br. Opp. 7. Neither one of these arguments is persuasive.

2. With respect to its first argument, the government asserts that "this Court has not insisted on rigid procedural uniformity in appellate review of sentences following its decision rendering the Guidelines advisory in United States v. Booker, 543 U.S. 220

(2005)," Br. Opp. 14-15; but the only example it can produce in support of this statement is this Court's decision in Rita v. United States, 551 U.S. 338, 354 (2007), in which this Court permitted, but did not require, courts of appeals to apply a presumption of reasonableness when reviewing the substantive reasonableness of within-Guidelines sentences.[1] See Br. Opp. 14. Based upon this lone example, the government concludes that "[t]his Court has not held that any error in calculating a defendant's Guidelines range presumptively affects the defendant's substantial rights for purposes of plain-error review, and the courts of appeals are entitled to take different approaches in dealing with that question." Br. Opp. 15.

The first half of that sentence is unquestionable: this Court has ***not*** held that a Guideline application error resulting in the application of an erroneous Guideline range presumptively affects a defendant's substantial rights. That is the point of this petition – to ask the Court to do so. And, the second half of that sentence is just flat wrong. Courts of appeals are ***not*** entitled to apply Federal Rule of Criminal Procedure 52(b) in disparate ways, which is why this Court has, over the past two decades, repeatedly granted certiorari to address circuit splits in the interpretation and application of Rule 52(b).

Interestingly, not that many years ago, the government was confronted with – and

[1] The government also cites, with a "cf." signal, a denial of certiorari by this Court in another case, see Br. Opp. 15, but, of course, it is well known that a denial of certiorari does not reflect any view on the merits of the question presented. Additionally, in that case, the circuit split presented by the petition was an ephemeral one, applicable only to cases "in the pipeline" when Booker was decided.

disputed – the very sort of argument it now makes here. In United States v. Marcus, No. 08-1341, the government as petitioner argued that the Second Circuit had misapplied the affected-substantial-rights prong of plain-error review under Rule 52(b). In his brief in opposition, the respondent "assert[ed] that 'a uniform national rule [was] not required for this procedural issue,' and that the Second Circuit 'did not abuse its discretion' in granting relief in th[at] case." Reply Brief for the United States, United States v. Marcus, No. 08-1341, 2009 WL 4875823, at *4 (Jul. 15, 2009) (citations omitted). The government adamantly disagreed: it argued that "Congress and this Court have determined that a uniform rule is warranted by promulgating Federal Rule of Criminal Procedure 52(b), which, like the rest of the Criminal Rules, 'govern[s] the proceedings in ***all*** criminal proceedings in . . . the United States courts of appeals.'" Id. (citation and footnote omitted; emphasis added in government's brief).

Along the way, the government distinguished Ortega-Rodriguez v. United States, 507 U.S. 234 (1993), which the respondent had cited as an example of courts of appeals' being given discretion to craft their own procedural rules. Ortega-Rodriguez, said the government, "involved an issue . . . that was not directly addressed by a statute or federal rule." Id. at *4 n.2. But that distinction applies with equal force to the rule in Rita relied upon by the government in this case. Rita simply allowed the courts of appeals some leeway in the reasonableness review crafted by this Court in Booker – a review that likewise "was not directly addressed by a statute or federal rule."

In short, the government has provided no authority, nor any good reason, why courts of appeals should be allowed to apply Rule 52(b) in drastically different ways. Rather, the fact that the courts of appeals are doing so is a traditional and appropriate reason for this Court to exercise its certiorari jurisdiction.

3. The government next argues that "[a]lthough two courts of appeals have made statements, in distinguishable contexts, that are in tension with the Fifth Circuit's approach, no square circuit conflict exists at this time, and no further review is warranted." Br. Opp. 15. The government then proceeds to analyze and distinguish the Third and Tenth Circuit decisions that petitioner argued were directly in conflict with the Fifth Circuit's decision in this case. See Br. Opp. 15-22.

The government's attempts to distinguish the Third and Tenth Circuit decisions relied upon by petitioner are unavailing. With respect to the Third Circuit's decision in United States v. Knight, 266 F.3d 203 (3d Cir. 2001), the government relies heavily on the fact that it was decided when the Guidelines were mandatory, not advisory. See Br. Opp. 15-17. But petitioner explained in his petition why that fact makes no difference and why the question presented here remains an important one, due to the continuing centrality of the Sentencing Guidelines in federal sentencing. See Pet. Cert. 13-14, 15-16.

The government also argues that "[t]he Third Circuit has not squarely reached the question presented in any post-Booker case governed by the plain-error standard." Br. Opp. 17. That is not correct: the Third Circuit has at least twice since Booker held that

where a Guideline application error results in the application of an erroneous Guideline range to the defendant, it will presume an effect on the defendant's substantial rights.[2] See United States v. Porter, 413 Fed. Appx. 526, 530 (3d Cir. 2011) (unpublished); United States v. Wood, 486 F.3d 781, 790-91 (3d Cir. 2007).

But the government's error appears to proceed from its misunderstanding of petitioner's argument. Petitioner is not arguing for a presumption of prejudice only when a defendant's sentence falls within the overlap between the correct Guideline range and the incorrect range applied by the sentencing court (although that is the factual scenario presented by petitioner's case). Rather, petitioner is arguing for such a presumption ***whenever*** a defendant is sentenced under the incorrect Guideline range.

The government's erroneous understanding of petitioner's argument likewise taints the government's discussion of the Tenth Circuit's decision in United States v. Sabillon-Umana, 772 F.3d 1328 (10th Cir. 2014), which the government again distinguishes primarily on the ground that it "did not involve overlapping Guidelines ranges." Br. Opp. 21 (footnote omitted). Again, however, petitioner's argument is not limited merely to the scenario of overlapping Guideline ranges. More importantly, nothing in the Third and

[2] The government's error appears to proceed from its misunderstanding of petitioner's argument. Petitioner is not arguing for a presumption of prejudice only when a defendant's sentence falls within the overlap between the correct Guideline range and the incorrect range applied by the sentencing court (although that was the factual scenario presented by petitioner's case). Rather, petitioner is arguing for such a presumption ***whenever*** a defendant is sentenced under the incorrect Guideline range.

Tenth Circuit's decisions suggests that their presumptions of prejudice would not apply to overlapping Guideline ranges. To the contrary, those courts presume (subject to rebuttal) an effect on substantial rights ***whenever*** a defendant is sentenced under an incorrect Guideline range.

5. In sum, this petition raises an important question respecting the application of the plain-error doctrine of Rule 52(b) in the context of errors in the Sentencing Guidelines, and the Fifth Circuit's answer to that question is in direct conflict with the answer given by the Third and Tenth Circuits. Moreover, the question is a frequently recurring one, as demonstrated by the government's (presumably incomplete) list of petitions in which the question has been raised, see Br. Opp. 8 n.2, as well as the fact that there are two other currently pending petitions raising the same question. See Br. Opp. 7 n.1. Accordingly, this Court should not stay its hand any further, but rather should grant certiorari to resolve this question.

CONCLUSION

For the foregoing reasons, as well as those set forth in the original petition for writ of certiorari, petitioner Saul Molina-Martinez prays that this Court grant certiorari to review the judgment of the Fifth Circuit in this case.

Date: June 11, 2015

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