**No. _____**

**In the Supreme Court of the United States**

**October Term, 2016**

FLORENCIO ROSALES-MIRELES, *PETITIONER*,

V.

UNITED STATES OF AMERICA

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


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## QUESTION PRESENTED FOR REVIEW

In *United States v. 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." 507 U.S. 725, 736 (1993). To meet that 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?"

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Petitioner Florencio Rosales-Mireles 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 on March 6, 2017.

## 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 March 6, 2017, a panel of the Fifth Circuit Court of Appeals entered its opinion affirming the judgment of the United States District Court for the Western District of Texas. The opinion is reported as *United States v. Rosales-Mireles*, 850 F.3d 246 (5th Cir. 2017), and a copy 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 March 6, 2017. 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

Petitioner Florencio Rosales-Mireles pleaded guilty to illegal reentry, in violation of 8 U.S.C. § 1326. The district court ordered that a presentence report be prepared to assist in sentencing. In

calculating the United States Sentencing Guidelines applicable to Rosales, the probation officer recommended a total offense level of 21. The probation officer calculated the total criminal history points at 13, resulting in a criminal history category of VI. Combined with Rosales's offense level, the advisory Guidelines range was 77 to 96 months' imprisonment.

The probation officer made a mistake, however, in calculating the criminal history score. The officer counted a 2009 Texas conviction of misdemeanor assault twice, assessing four criminal history points instead of two. Without the two extra erroneously applied criminal history points, Rosales's criminal history category was V, yielding an advisory Guidelines range of 70 to 87 months. Rosales did not object to the guideline calculation error.

Counsel for Rosales instead requested a below-Guideline sentence of 41 months. Counsel argued that, under proposed amendments to the illegal reentry guideline, §2L1.2, a 41-month sentence

would be a within-Guidelines sentence.[1] The district court denied the requested variance and sentenced Rosales to 78 months' imprisonment.

On appeal, Rosales argued that the district court plainly erred by calculating his Guidelines range based on double counting the prior conviction in his criminal history. The Government agreed that the district court committed a plain error. However, it argued that the error did not affect Rosales's substantial rights, and that the court of appeals should not exercise its discretion to remedy the error.

The court of appeals held that, by adding a total of four points to Rosales's criminal history score based on the same conviction, the district court had committed a plain error. *Rosales-Mireles*, 850 F.3d at 248–49. It also held that Rosales had satisfied the third prong of plain-error review. *Id.* at 249. Without the criminal history error, Rosales's Guidelines range would have been 70 to 87 months, rather than 77 to 96 months. *Id.* And the district court did

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[1] Those proposals, which produce significantly reduced sentences for many § 1326 defendants, have since been adopted. U.S. SENTENCING COMM'N, AMENDMENTS TO THE SENTENCING GUIDELINES 36 (April 28, 2016). Available at http://www.ussc.gov/amendment-process/reader-friendly-amendments/reader-friendly-version-amendments-effective-november-1-2016 (last accessed on May 3, 2017).

not "'explicitly and unequivocally indicate that [it] would have imposed the same sentence . . . irrespective of the Guidelines range.'" *Id.* (quotation omitted).

Notwithstanding, the Fifth Circuit declared that it would not exercise its discretion under the fourth prong of plain error review to correct the error. *Id.* at 250. The court of appeals described its exercise of discretion as occurring "only where 'the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *Id.* at 249–50 (quoting *United States v. Escalante-Reyes*, 689 F.3d 415, 419 (5th Cir. 2012) (en banc) (quoting *United States v. Puckett*, 556 U.S. 129, 135 (2009)). Such errors, the court said, are "'ones 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.'" *Id.* at 250 (quoting *United States v. Segura*, 747 F.3d 323, 331 (5th Cir. 2014)). It found there to be "*no* discrepancy between the sentence and the correctly calculated range," and thus "[w]e cannot say that the error or resulting sentence would shock the conscience." *Id.* (emphasis in original). The court of appeals affirmed the sentence. *Id.* at 251.

Petitioner respectfully submits that the Fifth Circuit applied a reformulated and heightened standard for the fourth prong of

plain error review that conflicts with decisions of this Court and other circuit courts of appeals, and has created an intracircuit split.

## REASONS FOR GRANTING THE WRIT

The Fifth Circuit Court of Appeals applied a reformulated and heightened standard for the fourth prong of plain error review in Rosales's case, which involved a sentencing error. The Fifth Circuit's standard conflicts with decisions by this Court, other courts of appeals, and is part of an intracircuit split. This Court should 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.

"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). In *United States v. Olano*, 507 U.S. 725 (1993), this Court articulated the familiar 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 articulated in *United States v. Atkinson*, 297 U.S. 157 (1936)." *Id.* at 763. It is this: "The Court of Appeals should correct a plain forfeited error affecting substantial rights if the error 'seriously affect[s] the fairness, integrity, or publish reputation of judicial proceedings.'" *Id.* at 736 (quoting *Atkinson*, 297 U.S. at 160) (alteration in *Olano*).

The Fifth Circuit, while quoting *Olano*'s fourth-prong standard, applied a reformulated and 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 precedent of this Court to justify its particular reformulation. *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)). Rather, the dissent set out to rebuke the regular application of *Olano* for what it considered an "unwarranted extension" of the fourth prong standard. *United States v. Hernandez*, 690 F.3d 613, 624 (5th Cir. 2012) (J. Smith, dissenting).

The Fifth Circuit's 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. In adopting the *Atkinson* standard, *Olano* rejected suggestions in earlier 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))). Moreover, the adoption of a "shock the conscience" standard would elevate plain error review to the level of substantive due process, where that stringent standard is intended to reach "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). Additionally, by focusing on the fourth prong as an evaluation of the district judge's competency, the court of appeals' reformulation conflicts with this Court's decision in *Henderson v. United States*, which pointed out that "plain-error review is not a grading system for trial judges." 133 S. Ct. 1121, 1129 (2013).

Although this Court has emphasized that meeting the requirements of plain error should be difficult and reversal not automatic, it has continued to apply *Olano*'s formulation of the fourth prong.

*See United States v. Molina-Martinez*, 136 S. Ct. 1338, 1343 (2016); *Henderson*, 133 S. Ct. at 1127, 1129; *United States v. Puckett*, 556 U.S. 129, 135 (2009). This Court has thereby recognized that "appellate courts retain broad discretion in determining whether a remand for resentencing is necessary[,]" but it has not deviated from the *Olano* standard. *Molina-Martinez*, 136 S. Ct. at 1348.

The Fifth Circuit's reformulated heightened standard also conflicts with decisions in other circuits on plain sentencing error. The Tenth Circuit has stated, for example, that "we can think of few things that 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. Sabillon-Umana*, 772 F.3d 1328, 1335 (10th Cir. 2014). It is for that reason that the Third Circuit "generally exercise[s its] discretion to recognize a plain error in the misapplication of the Sentencing Guidelines." *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 resentencing") (emphasis in original). This Court should address the circuit split caused by the Fifth Circuit's use of a reformulated and heightened standard for the fourth prong of plain error review.

Additionally, the Fifth Circuit's decision in Rosales's case contributes to a growing intracircuit conflict on applying the fourth prong. Other recent decisions by the Fifth Circuit, both published and unpublished, have relied on the reformulated standard in declining to correct plain errors. *See United States v. Renteria-Martinez,* 847 F.3d 297, 301–02 (5th Cir. 2017), *reh'g en banc denied* (Mar. 17, 2017); *United States v. Mendoza-Velasquez*, 847 F.3d 209, 213 (5th Cir. 2017) (per curiam); *United States v. Solano-Hernandez*, 847 F.3d 170, 179 (5th Cir. 2017), *reh'g en banc denied* (Mar. 17, 2017); *United States v. Handy*, 647 F. App'x. 296, 300 (5th Cir. 2016).

But in other decisions applying the *Olano* standard, the Fifth Circuit "ha[s] often exercised [its] discretion to correct error when it resulted in a custodial sentence in excess of the correct Guidelines recommendation." *United States v. Putnam*, 806 F.3d 853, 856 (5th Cir. 2015) (per curiam). That includes cases, like this one, where the sentence imposed falls within an overlap between the correct and incorrect Guidelines ranges, and a degree of error of

approximately 10% exists between the sentence imposed and the comparative sentence under the correct Guidelines range. S*ee, e.g., 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); *United States v. De Santiago-Guillen*, 653 F. App'x 303 (5th Cir. 2016), *on remand from* 136 S. Ct. 1711(2016) (same); *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). The Fifth Circuit's inconsistent use of the reformulated and heightened standard on the fourth prong of plain error review results in criminal defendants in similar circumstances being treated differently. Some will have their sentences of imprisonment reduced and some will not based whether the panel applies the reformulated standard.

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 intracircuit split, this Court should grant certiorari.

## 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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