

No. 10-9746

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IN THE SUPREME COURT OF THE UNITED STATES

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RICARDO GUERRERO-CAMPOS, PETITIONER

v.

UNITED STATES OF AMERICA

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

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner established reversible plain error when the district court sentenced him within an erroneous advisory Guidelines range but his sentence also fell within the correct range, and petitioner identified nothing else in the record to establish a reasonable probability that the error affected his sentence.

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OPINION BELOW

The per curiam opinion of the court of appeals (Pet. App. 1-3) is not published in the Federal Reporter but is available at 405 Fed. Appx. 919.

JURISDICTION

The judgment of the court of appeals was entered on December 23, 2010. The petition for a writ of certiorari was filed on March 23, 2011. 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 Western District of Texas, petitioner was convicted of one count of illegally reentering the United States after having previously been removed, in violation of 8 U.S.C. 1326. He was sentenced to 48 months of imprisonment, to be followed by three years of supervised release. Judgment 1-3. The court of appeals affirmed. Pet. App. 1-3.

1. Petitioner is a citizen of Mexico. Presentence Investigation Report (PSR) ¶ 8. On August 25, 2009, he was arrested by local law enforcement for driving while intoxicated. He was subsequently found by federal authorities in the jail of Williamson County, Texas. Gov't C.A. Br. 3; PSR ¶ 7; Factual Basis ¶¶ 1, 3.

Petitioner had previously been removed from the United States following his felony convictions for burglary and attempted rape under Ohio law. Gov't C.A. Br. 2-3; PSR ¶ 8; Factual Basis ¶ 2. In December 2007, petitioner re-entered the United States. PSR ¶ 7. Before his re-entry, he did not receive the consent of the Attorney General or the Secretary of Homeland Security to re-apply for admission to the United States. Gov't C.A. Br. 3; Factual Basis ¶ 5.

2. Petitioner was indicted in the United States District Court for the Western District of Texas on one count of illegally

re-entering the United States after having previously been removed, in violation of 8 U.S.C. 1326. Petitioner pleaded guilty.

The Probation Office calculated petitioner's total offense level as 21. PSR ¶¶ 14-23. That computation included a base offense level of 8; an increase of 16 levels, because petitioner had previously been deported after committing a crime of violence; and a decrease of 3 levels, for acceptance of responsibility. Ibid.; Sentencing Guidelines §§ 2L1.2(a) and (b) (1) (A), 3E1.1. The Probation Office determined that petitioner had 4 criminal history points, resulting in a criminal history category of III. PSR ¶¶ 25-27. The PSR therefore calculated petitioner's advisory Guidelines range as 46 to 57 months of imprisonment. PSR ¶ 44.

Petitioner initially objected to the 16-level enhancement, but in his sentencing memorandum, he explicitly "with[drew] his previously filed objection" and stated that "[t]he correct advisory guideline range in this case is 46-57 months" of imprisonment. Sent. Mem. 1 n.1. Petitioner asked the district court to vary downward from his advisory Guidelines range, because that range allegedly "overstate[d] the seriousness of the instant offense and of [petitioner's] history and characteristics." Id. at 2. Petitioner concluded by requesting the district court to "consider a sentence below the advisory guideline range of 46-57 months." Ibid.

At sentencing, petitioner's counsel asked the district court to "consider a variance" from the advisory Guidelines range. Sent. Tr. 9. The court denied such a variance. Id. at 10. After considering other factors relevant to the sentencing analysis under 18 U.S.C. 3553(a), id. at 5-14, the district court sentenced petitioner to 48 months of imprisonment, a sentence within petitioner's advisory Guidelines range. Id. at 14.

In the statement of reasons accompanying the judgment, the district court explicitly adopted the presentence report "without change." Statement of Reasons 1. The court confirmed that it had calculated petitioner's advisory Guidelines range as 46-57 months and that it found "no reason to depart" from that range. Ibid.

3. Petitioner appealed. For the first time on appeal, petitioner argued that the district court committed reversible plain error when it assessed three criminal history points, rather than two, for his prior burglary and attempted rape convictions. See Pet. App. 1. Petitioner contended that he had been sentenced to only six months of imprisonment for those crimes and so should have received only two criminal history points and, as a result, a criminal history category of II. Id. at 1-2.

The court of appeals affirmed in an unpublished, per curiam decision. Pet. App. 1-3. Because petitioner "did not object to the calculation of his criminal history category in the district court," the court of appeals concluded that its review should be

"limited to plain error." Id. at 2. The court of appeals agreed that the district court had "committed error that was clear or obvious" by assigning the third criminal-history point. Ibid.

The court of appeals concluded, however, that petitioner had not shown any effect on his substantial rights. Had petitioner been placed in criminal history category II, his advisory Guidelines range would have been 41 to 51 months of imprisonment, overlapping with the range the district court used, 46 to 57 months. Pet. App. 2. The court of appeals noted that the district court had "considered and rejected" petitioner's request for a downward variance and had not sentenced petitioner at the bottom of the erroneously high Guidelines range to which the parties had agreed. Id. at 3. The court of appeals thus concluded that, in the absence of additional evidence "that the district court could not impose the same sentence on remand or that there is a reasonable probability that, but for the error, his sentence would have been lower," petitioner had not shown that his substantial rights had been affected, and thus there was no reversible plain error. Ibid.

#### ARGUMENT

Petitioner contends (Pet. 5-8) that the court of appeals misapplied the plain-error rule by declining to find that the district court's application of the incorrect Guidelines range presumptively affected his substantial rights. That claim lacks

merit, and the court of appeals' decision does not create a conflict with any holding of another court of appeals that warrants this Court's review. Further review is not warranted.

1. The district court, without objection from petitioner, applied an advisory Guidelines range of 46 to 57 months and sentenced petitioner to 48 months. On appeal, petitioner contended that the correct range was 41 to 51 months. The court of appeals agreed, but correctly concluded that absent additional evidence, petitioner had not shown that the error had any effect on his substantial rights.

To obtain relief on a forfeited claim, petitioner must meet the plain-error standard. Fed. R. Crim. P. 52(b). To show reversible plain error, petitioner must demonstrate (1) that the district court committed an error; (2) that the error was "plain," "clear," or "obvious"; (3) that the error "affect[ed] [his] substantial rights"; and (4) that the error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." United States v. Olano, 507 U.S. 725, 732-736 (1993) (citation omitted). This Court has explained that, "in most cases," the requirement of an effect on substantial rights "means that the error must have been prejudicial: It must have affected the outcome of the district court proceedings." Id. at 734. Under the plain-error standard of Rule 52(b), unlike the harmless-error standard of Rule 52(a), "[i]t is the defendant rather than the

Government who bears the burden of persuasion with respect to prejudice.” Ibid. The defendant’s burden on plain-error review is to show a reasonable probability that, absent the error, the result of the proceeding would have been different. See, e.g., United States v. Dominguez Benitez, 542 U.S. 74, 81-82 (2004) (adopting the same standard for plain-error cases as for other “cases where the burden of demonstrating prejudice (or materiality) is on the defendant seeking relief,” which “requir[es] the showing of ‘a reasonable probability that, but for [the error claimed], the result of the proceeding would have been different.’”) (citation omitted; second brackets in original).

Applying the third prong of plain-error review in this case, the court of appeals correctly held that petitioner had not met his burden of showing that using an advisory Guidelines range of 46 to 57 months of imprisonment, rather than 41 to 51 months, affected his substantial rights. Pet. App. 2-3.

While the advisory Guidelines range forms the “starting point and the initial benchmark,” district judges “may impose sentences within statutory limits based on appropriate consideration of all of the factors listed in [18 U.S.C.] 3553(a).” Pepper v. United States, 131 S. Ct. 1229, 1241 (2011) (citation omitted). It would be one thing to presume that a reasonable probability exists that a judge might have imposed a different sentence if the judge imposed a within-range sentence, but the correct range does not

overlap with the incorrect range that the judge actually applied. In that circumstance, the sentence actually imposed would reflect a departure (or variance) from the correct range when the court has not necessarily disagreed with the Guidelines' advice.<sup>1</sup> Cf. 18 U.S.C. 3553(c)(2) (requiring the court to give a "specific reason" for a non-Guidelines sentence). But it is quite different when the judge has already selected a sentence within the correct range. Under those circumstances, even if the court commits a Guidelines error, the court's sentence accords with the Sentencing Commission's advice, because of the overlap between the correct and incorrect ranges. Indeed, the Commission originally designed the Sentencing Table with overlapping ranges in order to "discourage unnecessary litigation." Sentencing Guidelines Chap. 1, Pt. A (intro. comment. 1, § 4(h), at 11) (2010). "Both prosecution and defense will realize that the difference between one level and another will not necessarily make a difference in the sentence the court imposes." Ibid. That point has added force in an advisory Guidelines regime.

As the court of appeals noted, petitioner's sentence of 48 months fell within both the Guidelines range employed by the district court and the Guidelines range that should have been used

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<sup>1</sup> Even then, on plain-error review, reversal is not automatic. See, e.g., United States v. Dickson, 632 F.3d 186, 191 (5th Cir.), cert. denied, No. 10-10278 (May 31, 2011); United States v. Davis, 602 F.3d 643, 649-650 (5th Cir. 2010).

absent the incorrect scoring of his criminal history. Pet. App. 2. The district court did not sentence petitioner at the very bottom of the advisory Guidelines range (as calculated by the court), which could have suggested that a lower range might have resulted in a lower sentence. Rather, the district court rejected petitioner's argument for a variance and imposed a sentence of exactly four years, in the middle of the Guidelines range. See id. at 3. Petitioner pointed to nothing else in the record suggesting that the lower, overlapping range would have changed the ultimate sentence. On the facts of this case, therefore, the court of appeals correctly concluded that petitioner had failed to carry his burden of demonstrating "a reasonable probability that, but for the error" in the computation of his advisory Guidelines range, "his sentence would have been lower." Ibid.

2. The approach taken by the decision below does not conflict with any decision of another court of appeals. Although one court of appeals has made statements, in distinguishable contexts, that are in some tension with the Fifth Circuit's approach, there is no square circuit conflict, and further review is not warranted here.

a. Petitioner relies principally on cases decided while the Guidelines were still mandatory, before this Court's decision in United States v. Booker, 543 U.S. 220 (2005). See Pet. 7-8 (relying on Third and Tenth Circuit cases decided before Booker).

Those cases did hold that a Guidelines error may well affect substantial rights even when "guideline ranges overlap." United States v. Osuna, 189 F.3d 1289, 1295 (10th Cir. 1999); accord United States v. Knight, 266 F.3d 203, 207-208 (3d Cir. 2001) (Guidelines error presumptively affects substantial rights even when the ranges overlap, "unless the record shows that the sentence was unaffected by the error").

But the question whether a district court would have imposed the same sentence even under a different Guidelines range is quite different now that the Guidelines are advisory. Under advisory Guidelines, the district court has discretion to impose any sentence between the statutory minimum and maximum, not just a sentence within the incorrectly calculated advisory Guidelines range. In deciding on the appropriate sentence, the court takes all of the relevant factors into account, without any presumption in favor of a Guidelines sentence. Gall v. United States, 552 U.S. 38, 50 (2008). That discretion reduces the risk that an error in the range has affected the outcome, when the sentence imposed lies within the correct range.

Here, for example, the correct Guidelines range was 41 to 51 months; the district court considered sentences within that range, either because they overlapped with the incorrect range (46 to 57

months) or because petitioner asked the court to vary downward.<sup>2</sup> The district court ultimately rejected the request for a variance and selected a sentence of 48 months (an even four years), which was at neither the high end nor the low end of the range the court used. Nothing about that decision indicates a reasonable likelihood that the court would have selected a different sentence if the court had been aware that the correct advisory Guidelines range included the sentence imposed (48 months) but also extended seven months lower.

b. Petitioner cites (Pet. 7) only one post-Booker case, the Seventh Circuit's decision in United States v. Garrett, 528 F.3d 525 (2008), but that case is also inapposite. In Garrett, the district court explained that it wanted to impose a sentence at the middle of the Guidelines range, but because of a Guidelines error the sentence was actually above the correct Guidelines range. Id. at 526, 530. The Seventh Circuit therefore concluded that the error likely "affect[ed] [the court's] selection of the particular sentence." Id. at 530. The court briefly stated in dictum that "even if a sentence imposed is within the correct as well as the incorrect Guideline range" -- which was not the case in Garrett -- "the case must still be remanded for resentencing," ibid., but the court did not purport to abandon the established principle that the

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<sup>2</sup> The statutory maximum term is 20 years of imprisonment, and there is no mandatory minimum. 8 U.S.C. 1326(b)(2).

ultimate question is whether the defendant has shown a reasonable probability that the district court would likely have imposed a different sentence. The single sentence of dictum from Garrett does not create a conflict calling for this Court's review.

c. Since Booker, the Tenth Circuit has not reached the question presented in any published decision, but in unpublished decisions has concluded that errors in computing an advisory Guidelines range did not affect substantial rights. See United States v. Cosey, 399 Fed. Appx. 380, 383-384 (2010); United States v. Owens, 394 Fed. Appx. 504, 509-510 (2010).<sup>3</sup>

The Third Circuit, too, has not squarely reached the question presented in any post-Booker case governed by the plain-error standard, although the reasoning of some of its post-Booker decisions (none of which petitioner cites) is in tension with the reasoning of the court below. In United States v. Vasquez-Lebron, 582 F.3d 443 (2009), the Third Circuit stated that "[i]n the post-Booker era, very few procedural errors by a District Court will fail to be prejudicial, even when the Court might reasonably have

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<sup>3</sup> Petitioner cites (with a "cf." signal, Pet. 7) one post-Booker decision of the Tenth Circuit, United States v. Martinez-Jimenez, 464 F.3d 1205 (2006). That case did not apply the plain-error standard or, indeed, any harmless-error standard, because the court found no error. Id. at 1209-1212. The court noted only in passing that the sentence was at the high end of the range the defendant urged was correct, but the low end of the range the district court used, and that there was no indication that the district court "would have imposed an identical sentence if Ms. Martinez-Jimenez's criminal history category was IV instead of V." Id. at 1208-1209.

imposed the same sentence under the correct procedure.” And in United States v. Langford, 516 F.3d 205 (2008), the Third Circuit stated that it adhered to its pre-Booker precedent on prejudice from Guidelines errors, even in advisory Guidelines cases. Id. at 216-218. Neither case, however, creates a square conflict warranting this Court’s review at this time.

Although Vasquez-Lebron was a plain-error case, it involved an unusual type of Guidelines error and did not involve overlapping Guidelines ranges. The defendant received a one-level downward departure for substantial assistance to the prosecution, see Sentencing Guidelines § 5K1.1, so his advisory Guidelines range changed from 46 to 57 months to 41 to 51 months. The district court then imposed a sentence of 48 months of imprisonment, which was within both the adjusted and unadjusted range. 582 F.3d at 444. The court of appeals concluded that the sentence misapplied the substantial-assistance Guideline because “the sentence reached after granting a [substantial-assistance] departure motion must be less than the bottom of the otherwise applicable Guidelines range,” which in Vasquez-Lebron’s case meant less than 46 months. Id. at 445 (quoting United States v. Floyd, 499 F.3d 308, 312-313 (3d Cir. 2007)). Thus, Vasquez-Lebron was not truly a case of overlapping Guidelines ranges: although a sentence of 48 months could be permissible, it could be permissible only as an upward variance from the Guidelines range, id. at 445 n.2, and the district court

did not state that it was varying upward. The court of appeals concluded that “the District Court’s intentions [we]re not at all clear,” and that if the district court had “applied the correct guideline range, it might have sentenced the defendant differently.” Id. at 446-447. The court therefore concluded that the Guidelines error was not harmless. Ibid. Vasquez-Lebron is unlike this case because the Third Circuit concluded that the sentence actually imposed was not a permissible within-Guidelines sentence at all.

Langford, which the Third Circuit cited in Vasquez-Lebron, was a harmless-error case in which the government, not the defendant, bore the burden of proof. Because there was “nothing in the record to indicate that the District Court would have imposed the same sentence under a lower Guidelines range,” and the sentence was “at the low end[point] of the erroneous Guidelines range” actually used, the court held that the government had not carried the burden of showing harmlessness. Id. at 219 & n.5; see id. at 208. The court acknowledged, however, that in examining whether the Guidelines error affected the sentence actually imposed, “[t]he overlap [between the correct and incorrect Guidelines ranges] may be helpful,” although “it is the sentencing judge’s reasoning, not the overlap alone, that will be determinative.” Id. at 216.

Accordingly, although some statements in post-Booker cases from the Third Circuit suggest that that court might disagree with

the Fifth Circuit's application of the substantial-rights prong in this case, the Third Circuit has not squarely addressed that question in any case like this one, in which the burden is on the defendant, the Guidelines ranges overlap, and the record is otherwise silent (e.g., the district court did not impose a sentence at the lower endpoint of the Guidelines range).<sup>4</sup> In the absence of such a decision, the general statements from the Third Circuit cases discussed above do not create a conflict warranting this Court's review.

#### CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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<sup>4</sup> The Third Circuit in Langford cited United States v. Wood, 486 F.3d 781 (3d Cir.), cert. denied, 552 U.S. 855 (2007), as a plain-error case that postdated Booker. In Wood, the Guidelines error was based on the Ex Post Facto Clause, and it resulted in a three-level enhancement; as a result, the correct and incorrect Guidelines ranges did not overlap. The government conceded that the error affected substantial rights, and the court of appeals did not discuss the issue. Id. at 790.