

**QUESTION PRESENTED FOR REVIEW**

If a district court imposes a sentence within an incorrectly calculated Sentencing Guidelines range and the sentence also falls within the lower, correctly calculated range, should a court of appeals reviewing the sentence for plain error presume that the error affected the defendant's substantial rights absent some indication that the district court would have imposed the same sentence regardless?

No. \_\_\_\_\_

In the Supreme Court of the United States

**October Term, 2010**

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RENE PACHECO-GARCIA, PETITIONER,

v.

UNITED STATES OF AMERICA

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

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Petitioner Rene Pacheco-Garcia asks 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 December 8, 2010.

**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**

A copy of the opinion of the court of appeals, *United States v. Pacheco-Garcia*, No. 09-51158, unpub. op. (5th Cir. Dec. 8, 2010), 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 December 8, 2010. 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**

Rule 52(b) of the Federal Rules of Criminal Procedure reads: “A plain error that affects substantial rights may be considered even though it was not brought to the court’s attention.”

**STATEMENT**

Petitioner Pacheco pleaded guilty to illegally reentering the United States after having been removed, in violation of 8 U.S.C. § 1326. The district court exercised jurisdiction under 18 U.S.C. § 3231.

Pacheco, a citizen of El Salvador, was removed from the United States in June 2002. In June 2009, he was found in the Western District of Texas. He had not obtained permission from the Attorney General or the Secretary of Homeland Security to reapply for admission to the United States.

Under guideline §2L1.2(a), the base offense level for Pacheco’s reentry offense was 8. The probation officer recommended a 16-level increase, under §2L1.2(b)(1)(A)(i), because Pacheco had a prior drug-trafficking conviction.

After an adjustment for acceptance of responsibility, the recommended total offense level was 21.

The probation officer determined that Pacheco had four prior Washington D.C. convictions that counted for a total of 9 criminal history points. Three of the prior offenses, which the probation officer assigned 2 points each, were sentenced on the same day—December 18, 2000. The presentence report did not have the arrest dates for the first two of these prior offenses. The 9 total criminal history points placed Pacheco in Criminal History Category IV, which combined with the offense level of 21 to produce a Guidelines range of 57 to 71 months.

The district court adopted the presentence report, and sentenced Pacheco to 57 months' imprisonment.

Pacheco appealed his sentence. He argued that the district erred by counting each of the December 18, 2000, convictions separately. Sentences imposed on the same day count as a single sentence under the guidelines, unless the offenses were separated by intervening arrests. U.S.S.G. §4A1.2(a)(2). Pacheco argued that there was no evidence that he was arrested for any of the three offenses prior to committing the next one; to the contrary, documents from the proceedings in those cases indicated that he was arrested for all three offenses on the same day.<sup>1</sup> Had the district court correctly treated the three sentences as a single sentence, Pacheco would have had only 5 criminal history points, placing him in Criminal History Category III and producing a Guidelines range of 46 to 57 months—lower than

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1. The Fifth Circuit granted Pacheco's unopposed motion to supplement the record with these documents.

the 57- to 71-month range determined by the district court. Pacheco argued that this error affected his substantial rights: had the district court correctly calculated his Guidelines range, it likely would have imposed a lower sentence because the court was aware of the mitigating circumstances in his case (including the age of his prior convictions and the fact that he stayed outside the United States for nine years) and it imposed a sentence at the bottom of the incorrect range.

Because Pacheco did not raise his Guidelines objection in the district court, the court of appeals reviewed for plain error. App. A at 2. It declined to reach the question of whether there was any error that was plain, instead concluding that any error did not affect Pacheco's substantial rights. App. A at 2–4. The court noted that it has “‘shown considerable reluctance in finding a reasonable probability that the district court would have settled on a lower sentence’ when the defendant’s sentence falls within both the correct and incorrect guideline ranges.” App. A at 3 (quoting *United States v. Blocker*, 612 F.3d 413, 416 (5th Cir.), *cert. denied*, 131 S. Ct. 623 (2010)). Furthermore, “[a] one-month overlap between the correct and incorrect guideline ranges demonstrates ‘only a *possibility* of a lesser sentence but for the error, not the requisite *probability*.’” *Id.* (quoting *United States v. Cruz-Meza*, 310 F. App’x 634, 637 (5th Cir. 2009)). The court ultimately held that, because “[t]he district court considered his arguments and declined to reduce his sentence[,] Pacheco-Garcia has not demonstrated a ‘reasonable probability that, but for the district court’s misapplication of the Guidelines, he would have received a lesser sentence.’” App. A at 4 (quoting *United States v. Villegas*, 404 F.3d 355, 364 (5th Cir. 2005)).

## REASON FOR GRANTING THE WRIT

**THE COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CIRCUIT SPLIT OVER WHETHER THE IMPOSITION OF A SENTENCE THAT FALLS WITHIN BOTH CORRECTLY AND INCORRECTLY CALCULATED GUIDELINES RANGES PRESUMPTIVELY AFFECTS A DEFENDANT'S SUBSTANTIAL RIGHTS ON PLAIN ERROR REVIEW.**

Rule 52(b) of the Federal Rules of Criminal Procedure provides that, “[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*, this Court explained that under Rule 52(b), “[t]here must be an ‘error’ that is ‘plain’ and that ‘affect[s] substantial rights.’” 507 U.S. 725, 732 (1993) (second alteration in *Olano*). “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.* at 735. An error is prejudicial if there is “a reasonable probability that, but for the error claimed, the result of the proceeding would have been different.” *United States v. Dominguez-Benitez*, 542 U.S. 74, 81–82 (2004) (internal quotation marks, brackets, and citation omitted); *see Olano*, 507 U.S. at 734. But *Olano* also suggested the possibility of “errors that should be presumed prejudicial if the defendant cannot make a specific showing of prejudice.” 507 U.S. at 735.

The circuits are divided over the application of the substantial-rights prong to a particular category of sentencing error: the district court imposes a sentence within an incorrectly calculated Sentencing Guidelines range, but the sentence also happens to fall within the lower, correctly calculated range. The Second, Fourth, and Fifth Circuits hold that, absent some evidence in the record that shows that the district court would have imposed a lower sentence had it correctly calculated the Guidelines range, an error resulting in a

sentence that falls within overlapping ranges does not affect a defendant's substantial rights. By contrast, the Third, Seventh, and Tenth Circuits hold that the error presumptively affects a defendant's substantial rights. This Court should grant certiorari to resolve this conflict among the circuits on this important and recurring issue.

The Second Circuit harbors “a reluctance . . . to find that a defendant's substantial rights were affected where he or she ‘*could* have received’ the *same* sentence under either Guidelines range.” *United States v. Keigue*, 318 F.3d 437, 444 (2d Cir. 2003) (quoting *United States v. Diaz*, 176 F.3d 52, 118 (2d Cir. 1999)). Instead, “where . . . the record permits the inference that a defendant *would* have received a different, shorter sentence absent the unobjected-to error, the defendant's substantial rights have been affected within the meaning of Rule 52(b).” *Id.* at 445. So, for example, a district court's statement reflecting its “intent to choose a term of imprisonment based on where it fell within the applicable Guidelines range . . . would [be] sufficient by itself to require resentencing[.]” *Id.* at 444.

The Fourth Circuit shares the Second Circuit's view, if perhaps more robustly. In one case, it found a Guidelines calculation error to affect a defendant's substantial rights when “[t]he sentencing court sentenced the defendant at the low end of the applicable range, but expressly noted that the sentence would have been at the bottom of the sentencing range even if the defendant's criminal history had” been one category lower. *United States v. Brothers Const. Co. of Ohio*, 219 F.3d 300, 320 (4th Cir. 2000) (discussing *United States v. Ford*, 88 F.3d 1350, 1355–56 (4th Cir. 1996)). But in a later case involving a fine that fell within incorrect and correct ranges, the Fourth Circuit declined to find an effect on the defendant's substantial rights, as it

was not “crystal clear that, but for the error, the defendant’s sentence would have been substantially different.” *Id.*

The Fifth Circuit likewise holds that, “where the resulting sentence falls within both the correct and incorrect guidelines, we do not assume, in the absence of additional evidence, that the sentence affects a defendant’s substantial rights.” *United States v. Blocker*, 612 F.3d 413, 416 (5th Cir.), *cert. denied*, 131 S. Ct. 623 (2010). But it applies that rule even more forcefully than the Second and Fourth Circuits. In *United States v. Jasso*, for example, the sentence imposed was at the bottom of the incorrect range and in the middle of the correct range. 587 F.3d 706, 713 (5th Cir. 2009). The court refused to find that the Guidelines calculation error affected the defendant’s substantial rights even though “the district court stated on record that ‘the defendant should be placed at the bottom of the advisory Guideline Range.’” *Id.* at 714 n.11. It held that this statement “only demonstrates that the district court . . . concluded it would be reasonable to place the defendant at the bottom of” the range it calculated. *Id.* “Without any additional evidence, we cannot ascertain the likelihood that the district court would consider the lowest end of *any* range to be appropriate.” *Id.*

By contrast, in the Seventh Circuit, “even if a sentence imposed is within the correct *as well as* incorrect Guideline range, the case must still be remanded for resentencing.” *United States v. Garrett*, 528 F.3d 525, 530 (7th Cir. 2008). So too in the Tenth Circuit: “The fact that guideline ranges overlap does not make a plain error harmless.” *United States v. Osuna*, 189 F.3d 1289, 1295 (10th Cir. 1999); *cf. United States v. Martinez-Jimenez*, 464 F.3d 1205, 1209 (10th Cir. 2006) (in preserved-error case, holding that fact that sentence was at bottom of incorrect range and top of correct range did not obviate need to address error).

The Third Circuit is farthest apart from the Fifth Circuit on this issue. Relying on *Olano*'s suggestion of a category of presumptively prejudicial errors, it holds that "an error in application of the Guidelines that results in use of a higher sentencing range should be presumed to affect the defendant's substantial rights." *United States v. Knight*, 266 F.3d 203, 207 (3d Cir. 2001). Thus, "a sentence based upon a plainly erroneous Guideline range will ordinarily be remanded so that the District Court may exercise its discretion to choose an appropriate sentence based upon the correct range, unless the record shows that the sentence was unaffected by the error." *Id.* at 208.

The Third, Seventh, and Tenth Circuits have the better view. As the Third Circuit has observed, "absent a fortuitous comment by the sentencing judge on the record, it is very difficult to ascertain the impact of an erroneous Guidelines range." *Knight*, 266 F.3d at 207. Moreover, even though the Guidelines are advisory, they are still "the starting point and the initial benchmark" in the determination of a sentence. *Gall v. United States*, 552 U.S. 38, 49 (2007). And the Guidelines still have a role in ensuring nationwide consistency in sentencing. *See id.* Indeed, the Guidelines remain an important touchstone for sentencing in the Fifth Circuit. In Fiscal Year 2009, 71.7% of all sentences imposed in the circuit were within the Guidelines range—the highest rate in the nation. U.S. SENTENCING COMM'N, 2009 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl. N-5. In the Western District of Texas, where Pacheco was sentenced, the rate of within-Guidelines sentences is even greater: 79.2%. *Id.* tbl. 26. Given these considerations, it makes sense to presume that a Guidelines calculation error affects a defendant's substantial rights, at least absent some indication that the district court would have imposed the same sentence regardless.

**CONCLUSION**

FOR THESE REASONS, Pacheco asks that this Honorable Court grant a writ of certiorari.

Respectfully submitted.

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**APPENDIX**

*United States v. Pacheco-Garcia,*  
No. 09-51158, unpub. op. (5th Cir. Dec. 8, 2010)