

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

RICARDO GUERRERO-CAMPOS, PETITIONER,

v.

UNITED STATES OF AMERICA

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

Petitioner Ricardo Guerrero-Campos 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 23, 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. Guerrero-Campos*, No. 10-50284, unpub. op. (5th Cir. Dec. 23, 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 23, 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 Guerrero 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.

Guerrero, a Mexican citizen, was removed from the United States in October 2004. On August 25, 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 Guerrero’s reentry offense was 8. The probation officer recommended a 16-level increase, under §2L1.2(b)(1)(A)(ii), for Guerrero having a prior conviction for a crime of

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

Based on Guerrero's prior convictions, the probation officer recommended the assessment of four criminal history points, placing Guerrero in Criminal History Category III. One of those points resulted from a Texas conviction for driving while intoxicated, for which Guerrero had been sentenced to 50 days in jail. The probation officer assigned the remaining three points on the basis of Guerrero's Ohio conviction for burglary and attempted rape; Guerrero was sentenced to six months' imprisonment on the burglary count, and five years' community control (Ohio's version of probation) on the attempted rape count, with six months' imprisonment as a condition of community control.¹

Guerrero requested a sentence below the Guidelines range. He argued that, although he was convicted of burglary and attempted rape in Ohio, he was actually innocent of those charges. Defense investigations done in 2004, and again in 2010, revealed that the complainant was "mentally unstable, a heavy substance abuser, and a serial rape complainant." Guerrero was offered a lenient sentence in Ohio—"he gets six months on the burglary . . . and on the attempted rape he gets probation." Indeed, his Ohio defense attorney believed that the prosecution offered such a lenient sentence because they knew their case was weak, and he urged Guerrero not to accept

1. The six-month jail sentences appear to have been concurrent.

the offer. But Guerrero pleaded guilty because he was afraid that if he went to trial he could get more time in jail.

Guerrero also asked the district court to sentence him below the Guidelines range because the range overstated the seriousness of the offense and the danger he posed to the public. The court denied the request, adopted the presentence report, and sentenced Guerrero to 48 months' imprisonment.

Guerrero appealed his sentence. He argued that the district erred in calculating his criminal history score by assessing three points for the Ohio burglary and attempted rape conviction. Because he was sentenced to just six months' incarceration for those offenses, Guerrero argued, the conviction should have only received two criminal history points under guideline §4A1.1(b). When added to the one point for the prior DWI conviction, that would have resulted in a total of only three criminal history points, placing Guerrero in Criminal History Category II rather than III. When combined with his total offense level of 21, Guerrero's Guidelines range would have been 41 to 51 months, rather than the 46- to 57-month range calculated by the district court. Guerrero 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, and it imposed a sentence near the bottom of the incorrect range.

Because Guerrero did not raise his Guidelines objection in the district court, the court of appeals reviewed for plain error. App. A at 2. It agreed with Guerrero that the district court committed clear or obvious error in assessing three criminal history points for the Ohio conviction, and that the correct

Guidelines range was 41 to 51 months. *Id.* But the court concluded that the error did not affect Guerrero's substantial rights. *Id.* at 2–3. The court noted that “[w]hen . . . the sentence imposed ‘falls inside both the correct and incorrect guidelines ranges, we have shown considerable reluctance in finding a reasonable probability that the district court would have settled on a lower sentence.’” *Id.* at 2 (quoting *United States v. Blocker*, 612 F.3d 413, 416 (5th Cir.), *cert. denied*, 131 S. Ct. 623 (2010)). “In such cases,” the court continued, “we do not assume, in the absence of additional evidence, that the sentence affects a defendant’s substantial rights.” *Id.* Because “[t]he district court considered and rejected Guerrero-Campos’s request for a downward variance and chose not to sentence him at the bottom of the guidelines range[,]” the court held that Guerrero “failed to show 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[.]” *Id.* at 3 (citing *Blocker*, 612 F.3d at 416–17, and *United States v. Jasso*, 587 F.3d 706, 713–14 (5th Cir. 2009)).

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 both 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* the 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 Guerrero was sentenced, the rate of within-Guidelines sentences is even greater: 79.2%.² *Id.* tbl. 26. Given these considerations, it makes sense to presume that a Guidelines calculation error affects a defendant's

2. By contrast, the nationwide rate of within-Guidelines sentences is just 56.8%. U.S. SENTENCING COMM'N, 2009 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl. N.

substantial rights, at least absent some indication that the district court would have imposed the same sentence regardless.

CONCLUSION

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

Respectfully submitted.

HENRY J. BEMPORAD
Federal Public Defender
Western District of Texas
727 E. Durango Blvd., B-207
San Antonio, Texas 78206
(210) 472-6700
Fax: (210) 472-4454

JUDY FULMER MADEWELL*
Assistant Federal Public Defender

**Counsel of Record for Petitioner*

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APPENDIX

United States v. Guerrero-Campos,
No. 0-50284, unpub. op. (5th Cir. Dec. 23, 2010)