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Legal Sidebar

Oops: When Does a Plain Error in Calculating a Defendant's Sentencing Guidelines Range Warrant Resentencing?

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In the federal criminal justice system, not all errors justify relief. Notably, under Federal Rule of Criminal Procedure 52(b), federal courts *may*, but are not required to, correct an error if a defendant failed to notify the district court about the error. (These kinds of forfeited errors, like failing to object when an error is made, are generally called "plain errors.") However, the Supreme Court has opined that an appellate court *should* exercise its discretion to correct an unpreserved error "if the error seriously affects the fairness, integrity or public reputation of judicial proceedings." For example, under that standard a new trial unlikely would be warranted if defense counsel neglected to object to a prosecutor's improper leading question. But what about if defense counsel doesn't point out an error in the district court's calculation of the defendant's U.S. Sentencing Guidelines (Guidelines) range? *Rosales-Mireles v. United States*, argued during the Supreme Court's October 2017 term, addressed that question. Specifically, the case evaluated the scope of an appellate court's discretion to order resentencing when the district court makes a plain error in calculating a defendant's Guidelines range. In a 7-2 ruling authored by Justice Sotomayor, the Court held that "in the ordinary case," resentencing will be warranted.

Guidelines Calculation - Overview: Before sentencing a defendant, the district court must calculate the defendant's Guidelines range. (This is generally done with the aid of a presentence report prepared by the U.S. Probation Office.) Although the Guidelines are only advisory, the court must "remain cognizant of them throughout the sentencing process" and explain the reasons for deviating from them.

A defendant's Guidelines range is determined by calculating a defendant's "offense level" and "criminal history score." The offense level is based on the particular crime committed, plus any aggravating or mitigating factors. The criminal history score takes into account the defendant's past criminal transgressions. A court commits a procedural error when it incorrectly calculates the Guidelines.

Plain Error Standard: Federal Rule of Criminal Procedure 52(b) permits federal appellate courts to correct a "plain error" that was not brought to the district court's attention. In *United States v. Olano,* the Supreme Court outlined three requirements for appellate courts to exercise this discretion: (1) the error must be "plain," or obvious, under current law; (2) the right to contest the error could not have been intentionally abandoned; and (3) the error must have affected the defendant's substantial rights, for

example, by affecting the outcome of the district court proceedings. If those three elements are met, an appellate court "should exercise its discretion to correct the forfeited error if the error seriously affects the fairness, integrity or public reputation of judicial proceedings."

Rosales-Mireles: *Rosales-Mireles v. United States* involved the sentencing of Florencio Rosales-Mireles for unlawful reentry into the United States. In calculating his criminal history score, the probation office counted a 2009 conviction twice, resulting in an erroneous score of 13 and placement in criminal history category VI—the highest category. That score, combined with his offense level of 21, produced a Guidelines range of 77 to 96 months' imprisonment. Had Rosales-Mireles's criminal history been correctly calculated, his Guidelines range would have been 70 to 87 months. The district court imposed a 78-month sentence—a sentence that fell within both the incorrect and correct Guidelines ranges.

The error went unnoticed until Rosales-Mireles sought to appeal his sentence. The U.S. Court of Appeals for the Fifth Circuit (Fifth Circuit) declined to exercise its discretion to remedy the error because circuit precedent limited that discretion to sentencing errors that "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." And the court concluded that a sentence like Rosales-Mireles's, which falls within the properly calculated Guidelines range notwithstanding a Guidelines' calculation error, does not "shock the conscience."

Because the Fifth Circuit stood alone among its sister courts in applying that standard to the final element of the test outlined in *Olano*, the Supreme Court granted certiorari to resolve the circuit split. The Court rejected the Fifth Circuit's formulation of plain error review, describing its approach as "unduly restrictive." The Court recounted that the "shock the conscience" standard is typically invoked to assess whether the government has committed a due process violation. And generally, the Court elaborated, conscience-shocking behavior is the result of intentional, or deliberate indifference to, conduct intended to injure a person in a manner that cannot be justified by any governmental interest. But, the Court opined, the plain-error standard has never been limited to such intentional conduct. Rather, the Court reminded, it has "repeatedly reversed judgments for plain error on the basis of *inadvertent or unintentional* errors."

Having resolved that narrow issue certified for argument, the Supreme Court opined further that "[a] plain Guidelines error that affects a defendant's substantial rights is precisely the type of error that ordinarily warrants relief under Rule 52(b)." The Court reasoned that "[t]he risk of unnecessary deprivation of liberty"—in the form of a longer prison sentence—"particularly undermines the fairness, integrity, or public reputation of judicial proceedings in the context of a plain Guidelines error because of the role the district court plays in calculating the range and the relative ease of correcting the error." It is the *court* that errs when miscalculating the Guidelines, the Court emphasized. With that in mind, the Court declared—borrowing from an opinion authored by then-Judge Gorsuch when he sat on the U.S. Court of Appeals for the Tenth Circuit—"what reasonable citizen wouldn't bear a rightly diminished view of the judicial process and its integrity if courts refused to correct obvious errors of their own devise that threaten to require individuals to linger longer in federal prison the law demand?" Still, the Court cautioned that relief in such circumstances is not automatic, and unspecified "countervailing factors" way warrant an appellate court, in an extraordinary case, to decline to exercise its discretion to correct a plain Guidelines error.

In dissent, Justice Thomas, joined by Justice Alito, criticized the majority opinion for diluting Rule 52(b)'s "demanding standard." In his view, the majority has created a rebuttable presumption that plain Guidelines errors satisfy Rule 52(b). And because the majority did not discuss what countervailing factors might not warrant resentencing when a Guidelines error is made, Justice Thomas asserted that the discretionary element of plain-error review will be "'illusory' in most Guidelines cases."

Conclusion: *Rosales-Mireles* is the most recent elaboration of Rule 52(b) in a series of Supreme Court rulings interpreting how appellate courts may exercise the discretion Congress has authorized. Going forward, the appellate courts may need to determine what "countervailing factors" will make a case so atypical such that resentencing would not be warranted. Otherwise, *Rosales-Mireles* directs the appellate courts to order resentencing when the district court plainly erred in calculating the defendant's Guidelines range. Should Congress seek to cabin or expand Rule 52(b)'s discretion, it could amend the rule.

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