U.S. Department of Justice

United States Attorney
Southern District of New York

The Silvio J. Mollo Building
One Saint Andrew's Plaza
New York, New York 10007

January 19, 2005

BY HAND

Roseann B. MacKechnie
Clerk of Court
United States Court of Appeals
for the Second Circuit
40 Centre Street
New York, New York 10007

Re: United States v. David Melendez-Santos
No. 03-1536-cr

Dear Ms. MacKechnie:

The Government respectfully submits this letter in order to respond further to the panel's questions about whether this case should be remanded for reconsideration or for resentencing in light of the Supreme Court's decision in *United States* v. *Booker*, __ U.S. __, 2005 WL 50108 (U.S. Jan. 12, 2005). The Government respectfully submits that this Court should affirm Melendez-Santos's conviction and sentence because his unpreserved claim of sentencing error does not meet the requirements of the plain error test.

First, the Government respectfully attaches to this letter a copy of the Government's letter in *United States* v. *Jose Perez*, No. 04-0232-cr. As discussed this morning, this letter responds to some, but not all, of the issues raised this morning at oral argument, and the Government incorporates herein the legal

arguments presented in it.

Much of the discussion at oral argument concerned whether this case satisfies the rigorous test for plain error review. Even conceding for the sake of argument that there was an error, which is now plain, in Melendez-Santos's sentencing, and that this error may have affected the outcome of the District Court proceedings, Melendez-Santos nevertheless cannot meet the fourth prong of the plain error test. When an error is plain and affects substantial rights, reversal is not automatic. Rather, an appellate court may "exercise its discretion to notice a forfeited error, but only if (4) the error seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Johnson* v. *United States*, 520 U.S. 461, 467 (1997) (quotations omitted).

The Supreme Court in *Booker* specifically stated in its concluding paragraph that, although its decision is applicable to all cases on direct review, "[t]hat fact does not mean that . . . every sentence gives rise to a Sixth Amendment violation" or that "every appeal will lead to a new sentencing hearing." *Id.* at *29. Rather, the Supreme Court directed appellate courts to apply "ordinary prudential doctrines" of harmless and plain error review, recognizing that many Guidelines sentences would simply be affirmed on appeal, particularly where the error has not been

preserved and does not meet the "plain error" test. *Id.*[1]

In other words, the Supreme Court's decision in *Booker* imposes an obligation on this Court, in every case, to determine whether a *Booker* error that was not argued below constitutes "plain error." A decision by this Court to remand every case in which the district court imposed a Guidelines sentence does not honor this obligation. Nor would such a decision accord with the requirements of plain error review as they have been defined by this Court and the Supreme Court. After all, it cannot be the case that every sentencing error that affects "substantial rights" (because the defendant might have received a lower sentence absent the error) amounts to plain error. Such a conclusion simply ignores the fourth prong of the test and essentially equates the plain error standard with the harmless error standard available to defendants who preserve their claims below.

Indeed, the Supreme Court and this Court have repeatedly

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[1] Counsel for Melendez-Santos asserted that this was dictum and not part of the Supreme Court's holding. In fact, the Supreme Court began its analysis of how cases on direct review should be handled by stating that "we must apply today's holdings . . . to all cases on direct review," and then the Court explained how this review is to be conducted. *Booker*, 2005 WL 50108, at *29. Nothing about this discussion indicates that it can simply be ignored, as Melendez-Santos would have it. Nor is the remand in Fanfan's case any indication that all cases must be remanded for resentencing. After all, the Government appealed Fanfan's sentence (which was below the applicable Sentencing Guidelines range), and on remand, the Government may now seek a higher sentence (that is within the Guidelines range).

held that some errors that affect substantial rights nevertheless do not "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *See United States* v. *Cotton*, 535 U.S. 625, 632-34 (2002) (holding that "even if . . . substantial rights were affected, the error did not seriously affect the fairness, integrity, or public reputation" of the proceedings where the sentence imposed advanced the "fairness and integrity of the criminal justice system [by] meting out to those inflicting the greatest harm on society the most severe punishments," even if Sixth Amendment rights under *Apprendi* were violated); *Johnson* v. *United States*, 520 U.S. 461, 469-70 (1997) (holding that even if substantial rights were violated by an error that was plain, the error did not seriously affect the fairness, integrity or public reputation of judicial proceedings and also reasoning that "'[r]eversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it'") (internal citation omitted); *United States* v. *Olano*, 507 U.S. 725, 737 (2d Cir. 1993) ("[A] plain error affecting substantial rights does not, without more, satisfy the . . . standard, for otherwise the discretion afforded by Rule 52(b) would be illusory."); *United States* v. *Joyner*, 313 F.3d 40, 45 (2d Cir. 2002) (holding that failure to submit issue to jury was a plain error that affected substantial rights, but declining to find

fourth prong satisfied where "the error did not seriously affect the fairness, integrity, or public perception of the fairness of [defendant's] trial").

The absence of any serious effect on the fairness, integrity or public reputation of these judicial proceedings is demonstrated by the Supreme Court's holding in *Booker* that the Sentencing Guidelines must still be considered as part of every sentencing proceeding in order to "ensur[e] similar sentences for those who have committed similar crimes in similar ways." *Id.* at *20. Given the important interests advanced by the Sentencing Guidelines and their continued relevance to each and every sentence that is to be imposed post-*Booker*, the Government submits that a sentence imposed within or below the applicable Guidelines range cannot "seriously affect," in a negative way, "the fairness, integrity, or public reputation" of the sentencing proceedings. That is, of course, because defendants like Melendez-Santos were sentenced pursuant to the sentencing regime which still plays such a prominent role in sentencing proceedings.

At the argument this morning, the Court drew an analogy between the *Booker* decision and a hypothetical situation in which Congress repealed the statute making the Sentencing Guidelines mandatory, but where the district court did not learn of this development until after imposing sentence. In the Government's

view, this hypothetical situation is quite different from the current post-*Booker* situation. In the hypothetical situation, the Guidelines are of no effect at all after Congress acted. In the current post-*Booker* situation, district judges must still consider the Guidelines in every case, and sentences outside the Guidelines ranges can be reviewed to determine whether they are "unreasonable." Given that the Guidelines are meant to achieve "honesty," "uniformity," and "proportionality" in sentencing, U.S.S.G. § 1A1.1, a sentence that was imposed within or below the applicable Guidelines range cannot constitute plain error.[2] *See Olano*, 507 U.S. at 736 ("We previously have explained that the discretion conferred by Rule 52(b) should be employed "'in those circumstances in which a miscarriage of justice would otherwise result.'") (internal citations omitted).

Finally, contrary to the suggestion of Melendez-Santos at oral argument, the record below does not support an inference that Judge Martin wanted to impose a shorter sentence but felt constrained by the Sentencing Guidelines. Rather, Judge Martin suggested on two occasions that certain facts raised by the defendant would not have led to a shorter sentence, even if the

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[2] This is particularly true where, as here, the defendant's sentence did not violate his Sixth Amendment rights. *See Booker*, 2005 WL 50108, at *15 ("Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.").

Guidelines permitted him to consider these facts. First, in response to a contention that Melendez-Santos's sentence was unduly harsh due to the calculation of his Criminal History Category, Judge Martin explained that the defendant's criminal history was properly treated by the Guidelines and that he could not "in good conscience say [that] someone who has had 12 criminal history category points, three felony drug convictions, that Category V overstates his criminal record." (A. 62). Also, he described the Guidelines approach to recidivism and commented that when defendants who are sentenced to parole commit additional crimes, "the more likely it is that they're going to do it again when they get out," adding that "[t]he logic of that [rule] makes sense." (A. 62).

Later, when Melendez-Santos asked for a sentence that took into account the time he had served on an underlying state conviction, the District Court stated that "[e]ven if I did have that authority" under the Guidelines, "I would not exercise [it] because I think that that [state offense] was a separate offense for which separate punishment was appropriately applied, and it would denigrate the seriousness of these two separate crimes to say we're going to treat them all as one." (A. 65). In short, these comments are an additional reason for the Court to conclude that nothing about the sentence imposed "seriously affect[s] the fairness, integrity, or public reputation of judicial

proceedings." *Johnson v. United States*, 520 U.S. at 467 (quotations omitted).

Although we note these comments by Judge Martin, the Government wishes to clarify its comments today. The Government submits that even had Judge Martin indicated clearly a desire to impose a sentence below the Guidelines range, such remarks would be relevant to the third, but not the fourth prong of plain error review. This is because the fourth prong of plain error review does not address whether an individual has been negatively affected by an error below, but rather whether the public's perception of the integrity or the judicial system has been impugned.

Accordingly, the Government respectfully submits that, applying the principles of plain error review, as the Court is obliged to do in light of *Booker*, the sentence imposed was not plainly erroneous and should be affirmed.

Respectfully submitted,

DAVID N. KELLEY
United States Attorney

By: _____
HARRY SANDICK
KATHERINE LEMIRE
Assistant United States Attorney
Telephone (212) 637-2340/2532

cc: Alexander Eisemann, Esq.
(by facsimile)

U.S. Department of Justice

United States Attorney
Southern District of New York

The Silvio J. Mollo Building
One Saint Andrew's Plaza
New York, New York 10007

January 18, 2005

BY HAND

Roseann B. MacKechnie
Clerk of Court
United States Court of Appeals
for the Second Circuit
40 Centre Street
New York, New York 10007

Re: United States v. Jose Perez
No. 04-0232-cr

Dear Ms. MacKechnie:

The Government respectfully submits this letter in response to the panel's request at this morning's oral argument for briefing on the question of whether this case should be remanded for reconsideration or for resentencing in light of the Supreme Court's decision in *United States* v. *Booker*, __ U.S. __, 2005 WL 50108 (U.S. Jan. 12, 2005). The Government respectfully submits that a remand is inappropriate because Perez's unpreserved claim of sentencing error does not meet the requirements of the plain error test.

In *Booker*, a five-member majority of the Court concluded that the Sixth Amendment principles announced in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004), apply to the Sentencing Guidelines. *United States* v. *Booker*, __ U.S. __, 2005 WL 50108, at *5. At the same

time, however, a different five-member majority ruled that the appropriate remedy is to sever from the Sentencing Reform Act 18 U.S.C. § 3553(b)(1), the provision that makes the Guidelines mandatory, and instead to treat the Guidelines as advisory, not mandatory.[1] *Id.* at *16. Although the Guidelines will no longer play a mandatory role at sentencing, they nevertheless will continue to play a critical role in trying to achieve the "basic aim" that Congress tried to meet in enacting the Sentencing Reform Act, namely, "ensuring similar sentences for those who have committed similar crimes in similar ways." *Id.* at *20.

In furtherance of that goal, judges will be required to "consider the Guidelines 'sentencing range established for . . . the applicable category of offense committed by the applicable category of defendant,' § 3553(a)(4), the pertinent Sentencing Commission policy statements, the need to avoid unwarranted sentencing disparities, and the need to provide restitution to victims, §§ 3553(a)(1), (3), (5)-(7) (main ed. and Supp. 2004)." *Id.* at *24. In addition, "despite the absence of § 3553(b)(1), the [Sentencing Reform] Act continues to provide for appeals from sentencing decisions (irrespective of whether the trial judge sentences within or outside the Guidelines range in the exercise of his discretionary power under § 3553(a))." *Id.* (citing

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[1] The Court also excised 18 U.S.C. § 3742(e), which sets forth standards of review on appeal, because that section contains a critical cross-reference to § 3553(b)(1). *Id.*

§ 3742(a) (appeal by defendant) and (b) (appeal by Government)). That review will be for "reasonableness." *Id.*

As Justice Breyer explained in his remedial majority opinion for the Court, by making the Guidelines advisory and by preserving appellate review of sentences for reasonableness, the Court expected the remaining sentencing system to "continue to move sentencing in Congress' preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary." *Id.* at *27 (citing 28 U.S.C. § 991(b)). That direction can only be maintained if appellate review for "reasonableness" uses as its guidepost the Sentencing Guidelines. In other words, sentences within the Guidelines range should be upheld as reasonable, whereas sentences that deviate from the Guidelines should be presumptively unreasonable.

At the conclusion of its remedial majority opinion, the Court was particularly careful to point out that, although its decision is applicable to all cases on direct review, "[t]hat fact does not mean that . . . every sentence gives rise to a Sixth Amendment violation" or that "every appeal will lead to a new sentencing hearing." *Id.* at *29. To the contrary, the Court plainly anticipated that, in applying "ordinary prudential doctrines" of harmless and plain error review, many sentences would simply be affirmed on appeal, particularly where the error

has not been preserved and does not meet the "plain error" test. *Id.*

This Court accordingly has an obligation, in every case, to determine whether a *Booker* error that was not argued below constitutes "plain error." To show "plain error," a defendant must establish four things:

> First, there must be "error" or deviation from a legal rule which has not been waived. Second, the error must be "plain," which at a minimum means "clear error under current law." Third, the plain error must . . . "affect substantial rights," which normally requires a showing of prejudice.

United States v. *Bayless*, 201 F.3d 116, 127028 (2d Cir. 2000); *see Johnson* v. *United States*, 520 U.S. 461, 467 (1997). A plain error affects "substantial rights" only if it "affected the outcome of the District Court proceedings." *United States* v. *Olano*, 507 U.S. 725, 734 (1993). "If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Johnson* v. *United States*, 520 U.S. at 467 (quotations omitted).

In light of *Booker*, an error occurred at the sentencing below because at that proceeding, the parties and the District Court believed that the District Court was required to sentence Perez in accordance with the Sentencing Guidelines. That error

was also plain. Whether the error "affected the outcome of the District Court proceedings" is a closer question that, in the Government's view, turns at least in part on whether the defendant or the Government bears the burden of establishing prejudice or the lack thereof.[2] The Court need not resolve that question here, however, because the defendant in any event cannot meet the fourth prong of the plain error test.

Perez received a sentence of 66 months' imprisonment. As discussed in the Government's brief, that sentence was below the applicable Sentencing Guidelines range of 77 to 96 months' imprisonment.[3] That range was calculated pursuant to a complex, comprehensive, and carefully calibrated set of offense and offender characteristics that, taken together, resulted in a fair and just punishment. Moreover, because Perez was sentenced only

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[2] "When, as here, the source of the alleged error is a supervening judicial decision that alters 'a settled rule of law in the circuit,' [this Court has] in the past applied a 'modified plain error rule' in which the Government bears the burden of persuasion as to whether substantial rights have been affected." *United States* v. *Bruno*, 383 F.3d 65, 79 (2d Cir. 2004) (quoting *United States* v. *Thomas*, 274 F.3d 655, 668, n.15 (2d Cir. 2001) (en banc) (quoting *United States* v. *Santiago*, 238 F.3d 213, 215 (2d Cir.2001)). The Government continues to assert that this modified plain error rule was implicitly overruled by *Johnson* v. *United States*, 520 U.S. 461 (1997), and *Salinas* v. *United States*, 522 U.S. 52 (1997)). *See United States* v. *Thomas*, 274 F.3d at 668, n.15.

[3] Judge Patterson granted the defendant's motion for a downward departure under U.S.S.G. § 5K2.0, based on prosecutorial delay, as set forth in this Court's prior decision in *United States* v. *Los Santos*, 283 F.3d 422 (2d Cir. 2002).

on facts that he admitted and that related to his prior convictions, his sentence did not violate the Sixth Amendment. *See Booker*, 2005 WL 50108, at *15 ("Accordingly, we reaffirm our holding in Apprendi: Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.").

The sentence was imposed, moreover, pursuant to the Sentencing Reform Act, which was enacted in 1984 and pursuant to which tens of thousands of defendants have been sentenced for nearly two decades. Even though Judge Patterson believed that he was required to sentence within the Guidelines range (and only to depart from it based on certain grounds and principles), it cannot be said that the imposition of a sentence below that range "seriously affect[ed]," in a negative way, "the fairness, integrity, or public reputation" of the sentencing proceedings. If anything, the imposition of a sentence below the range (based on a recognized departure ground) *promoted* the "fairness, integrity, [and] public reputation" of the sentencing proceedings. Indeed, in enacting the Sentencing Reform Act, Congress sought to achieve "honesty," "uniformity," and "proportionality" in sentencing. U.S.S.G. § 1A1.1.

That the Act, as enacted, violated the Sixth Amendment

principles first announced in *Apprendi* says nothing about whether the imposition of a Guidelines sentence is fundamentally unfair or lacks integrity. Even if the Court were to remand, the sentencing judge could reimpose the exact same sentence, which would be considered presumptively reasonable if it were appealed again.

At the argument this morning, Your Honors asked whether the *Booker* error presented here may require a remand because there is no way to know whether the sentencing judge would impose the same sentence absent mandatory Sentencing Guidelines. This uncertainty is appropriately considered in connection with the third prong of the plain error test, however, and goes to whether the error affected the defendant's substantial rights. Even conceding that the District Court might impose a different sentence in a purely discretionary sentencing regime, the question presented in the fourth prong of the plain error test is whether the sentence that was imposed in the first place seriously affected the fairness, integrity and public reputation of the judicial proceedings.

From the public's perspective, it would be a remand for resentencing, to permit the sentencing judge to impose a lesser sentence based on considerations that do not warrant a departure under the Sentencing Guidelines, that would seriously undermine the public's confidence in the integrity and fairness of the

criminal justice system. *See United States v. Cotton*, 535 U.S. 625, 634 (2002) ("The real threat then to the 'fairness, integrity, and public reputation of judicial proceedings' would be if respondents, despite the overwhelming and uncontroverted evidence that they were involved in a vast drug conspiracy, were to receive a sentence prescribed for those committing less substantial drug offenses because of an error that was never objected to at trial."). This is particularly true on the facts presented here, where Perez's sentence was not imposed in violation of the Sixth Amendment.[4]

Your Honors also analogized the issue presented here to an appeal from a sentencing judge's decision not to depart downward from the Guidelines range, where that refusal was the result of the judge's misapprehension about the basis for the departure. In that circumstance, as Your Honors pointed out, the appropriate course would be to remand for resentencing to permit the sentencing judge to consider a departure while fully aware of the possible sentencing options. That circumstance is not applicable here because the error here is not preserved.[5] While the

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[4] There may also be other situations not presented by this appeal in which there are even stronger cases for affirmance, such as those cases in which a defendant has stipulated in a plea agreement to a sentence within a particular Sentencing Guidelines range, and has waived his right to appeal any sentence imposed by the district court within that range.

[5] Indeed, it has been the law that a defendant who "failed to argue [an] allegedly mitigating circumstance as a basis for

defendant in the hypothetical raised the potential departure ground below, the defendant here forfeited his *Booker* objection and review is accordingly for plain error. The issue accordingly is not simply whether the error was harmless, but whether, under the fourth prong of the plain error test, the error seriously affected the fairness, integrity and public reputation of the judicial proceedings. For the reasons discussed earlier, the Government respectfully submits that the error here does not meet that requirement.

Accordingly, the Government respectfully submits that, applying the principles of plain error review, as the Court is obliged to do in light of *Booker*, the sentence imposed on Perez was not plainly erroneous and should be affirmed.

Respectfully submitted,

DAVID N. KELLEY
United States Attorney

By: _____
HARRY SANDICK
ARTHUR GOLLWITZER
Assistant United States Attorney
Telephone (212) 637-2340/1583

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departure before the district court . . . may not do so for the first time on appeal." *United States* v. *Howard*, 998 F.2d 42, 50 (2d Cir. 1993); *see also United States* v. *Hurtado*, 47 F.3d 577, 585 (2d Cir. 1995) (claim of entitlement to downward departure 'waived' if not raised at sentencing.").

cc: Mary Anne Wirth, Esq.
(by facsimile and electronic mail)