No. 16-9493

IN THE

Supreme Court of the United States

FLORENCIO ROSALES-MIRELES,
Petitioner,

v.

UNITED STATES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF PETITIONER

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QUESTION PRESENTED

In *United States* v. *Olano*, this Court held that, under the fourth prong of plain error review, "[t]he Court of Appeals should correct a plain forfeited error affecting substantial rights if the error 'seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.'" 507 U.S. 725, 736 (1993). To meet that standard, is it necessary, as the United States Court of Appeals for the Fifth Circuit required, that the error be one that "would 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?"

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINION BELOW	1
JURISDICTION	1
RULE INVOLVED	1
INTRODUCTION	1
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	5
ARGUMENT	8
I. IN THE ORDINARY CASE, A GUIDELINES MISCALCULATION SATISFIES THE FOURTH PRONG OF THE *OLANO* STANDARD FOR PLAIN ERROR REVIEW	9
A. Certain Kinds Of Plain Errors, Like A Miscalculated Sentencing Guidelines Range, Ordinarily Should Be Corrected	9
B. Correcting Guidelines Errors In The Ordinary Case Still Leaves Room For Countervailing Factors In Particular Cases	17
II. THE FIFTH CIRCUIT'S SHOCK-THE-CONSCIENCE STANDARD IS IRRECONICILABLE WITH THIS COURT'S PRECEDENTS AND IMPOSES AN IMPROPER BURDEN ON CRIMINAL DEFENDANTS	18

TABLE OF CONTENTS—continued

	Page
A. The Fifth Circuit's Standard Is Unduly Harsh And Has No Place In Plain Error Review	19
B. The Fifth Circuit's Standard Is Especially Misguided In The Unique Context Of Guidelines Errors	22
CONCLUSION	24

TABLE OF AUTHORITIES

CASES Page

Argersinger v. *Hamlin*, 407 U.S. 25 (1972) (Burger, C.J., concurring) 11
Baldwin v. *New York*, 399 U.S. 66 (1970) 11
Barber v. *Thomas*, 130 S. Ct. 2499 (2010) (Kennedy, J., dissenting) 11
Brasfield v. *United States* 272 U.S. 448 (1926) 10
Breithaupt v. *Abram*, 352 U.S. 432 (1957) 20
Cty. of Sacramento v. *Lewis*, 523 U.S. 833 (1998) 7, 8, 19, 20
Daniels v. Williams, 474 U.S. 327 (1986) 19, 20
Foucha v. *Louisiana*, 504 U.S. 71 (1992) 11
Gall v. *United States*, 552 U.S. 38 (2007) 6, 12
Glover v. *United States*, 531 U.S. 198 (2001) 11, 22
Henderson v. *United States*, 568 U.S. 266 (2013) 21
Hicks v. *United States*, 137 S. Ct. 2000 (2017) (Gorsuch, J., concurring) 1, 2, 3, 10, 11
Johnson v. *United States*, 520 U.S. 461 (1997) 9, 10
Molina-Martinez v. *United States*, 136 S. Ct. 1338 (2016) ..... *passim*
Peugh v. *United States*, 133 S. Ct. 2072 (2013) 12
Puckett v. *United States*, 556 U.S. 129 (2009) 7, 10, 17

TABLE OF AUTHORITIES—continued

Page

Rita v. *United States*, 551 U.S. 338 (2007) 14, 15, 22
Rochin v. *California*, 342 U.S. 165 (1952) 19, 20
United States v. *Booker*, 543 U.S. 220 (2005) 12
United States v. *Castillo-Casiano*, 198 F.3d 787 (9th Cir. 1999) 13, 15
United States v. *Corso*, 549 F.3d 921 (3d Cir. 2008) 17
United States v. *Dahl*, 833 F.3d 345 (3d Cir. 2016) 16
United States v. *Escalante-Reyes*, 689 F.3d 415 (5th Cir. 2012) (en banc) (Smith, J., dissenting) 20
United States v. *Figueroa-Ocasio*, 805 F.3d 360 (1st Cir. 2015) 16
United States v. *Frady*, 456 U.S. 152 (1982) 19
United States v. *Jaimes-Jaimes*, 406 F.3d 845 (7th Cir. 2005) 21
United States v. *Langford*, 516 F.3d 205 (3d Cir. 2008) 14
United States v. *Martinez-Rios*, 143 F.3d 662 (2d Cir. 1998) 11
United States v. *Olano*, 507 U.S. 725 (1993) ..... *passim*
United States v. *Pennington*, 667 F.3d 953 (7th Cir. 2012) 11
United States v. *Rushton*, 738 F.3d 854 (7th Cir. 2013) 22
United States v. *Sabillon-Umana*, 772 F.3d 1328 (10th Cir. 2014) 15, 16

TABLE OF AUTHORITIES—continued

Page

United States v. *Syme*, 276 F.3d 131 (3d Cir. 2002) 16
United States v. *Wernick*, 691 F.3d 108 (2d Cir. 2012) 16, 17
United States v. *Westover*, 435 F.3d 1273 (10th Cir. 2006) 18
Wall v. *Kholi*, 562 U.S. 545 (2011) 9
Williams v. *Pennsylvania*, 136 S. Ct. 1899 (2016) 21
Williams v. *United States*, 503 U.S. 193 (1992) 22

STATUTES AND RULES

18 U.S.C. § 3552(a) 12
18 U.S.C. § 3553(a) 11, 12, 14
18 U.S.C. § 3742(f)(1) 16
28 U.S.C. § 991(b) 14
28 U.S.C. § 994 ..... 14, 15
Fed. R. Crim. P. 32(c) 12
Fed. R. Crim. P. 52(b) 1, 6

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S. Rep. No. 98-225 (1983) 12, 13
Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1 (1988) 14

TABLE OF AUTHORITIES—continued

Page

William H. Pryor, Jr., *The Integral Role of Federal Probation Officers in the Guidelines System*, 81 Fed. Probation 13 (Sept. 2017)..... 13

United States Courts, *Incarceration Costs Significantly More Than Supervision* (Aug. 17, 2017), *available at* http://www.uscourts.gov/news/2017/08/17/incarceration-costs-significantly-more-supervision 15

U.S. Sentencing Commission, Sourcebook of Federal Sentencing Statistics (2016)..... 12

U.S. Sentencing Guidelines Manual (U.S. Sentencing Comm'n 2016) 3, 4, 14, 15

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reprinted at Joint Appendix (J.A.) 32–38 and is reported at 850 F.3d 246.

JURISDICTION

The court of appeals entered judgment on March 6, 2017. J.A. 39. The petition for a writ of certiorari was filed on June 5, 2017, and was granted on September 28, 2017. J.A. 40. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RULE INVOLVED

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

INTRODUCTION

This Court has directed that the courts of appeals "should correct a plain forfeited error affecting substantial rights if the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States* v. *Olano*, 507 U.S. 725, 736 (1993). "In most cases," given that the "Sentencing Guidelines provide the framework for the tens of thousands of federal sentencing proceedings that occur each year," a showing that the district court "mistakenly deemed applicable an incorrect, higher Guidelines range" should "suffice for relief." *Molina-Martinez* v. *United States*, 136 S. Ct. 1338, 1342, 1346 (2016). That is because, most of the time, such "obvious judicial error[s]" will seriously affect the fairness, integrity, or public reputation of judicial proceedings by threatening to "allow[ ] individuals to linger longer

in prison than the law requires[.]" *Hicks* v. *United States*, 137 S. Ct. 2000, 2000–01 (2017) (Gorsuch, J., concurring).

Once again, however, "the Fifth Circuit stands generally apart from other Courts of Appeals with respect to its consideration of unpreserved Guidelines errors." *Molina-Martinez*, 136 S. Ct. at 1345. Applying a piecemeal standard assembled from inapposite areas of the law, the Fifth Circuit has declined to correct a plain Guidelines error unless it "shock[s] the conscience of the common man, serve[s] as a powerful indictment against our system of justice, or seriously call[s] into question the competence or integrity of the district judge." J.A. 36. The Fifth Circuit's strict rule is contrary to this Court's precedents and to the fundamental nature of Guidelines errors. More than that, the Fifth Circuit's test would effectively gut this Court's holding in *Molina-Martinez*. After defendants succeed on the first three prongs of plain error review, they would arrive at the fourth prong only to learn that their success on the other three was entirely for naught. Such a result would seriously thwart "the fairness, integrity, or public reputation of judicial proceedings."

This case is emblematic. Petitioner Florencio Rosales-Mireles received a 78-month sentence that was just one month above the erroneous 77-month Guidelines floor presented to the district court. The correct range started at 70 (not 77) months. The Fifth Circuit nevertheless refused to allow the district court to revisit its sentence or to decide whether it might impose a sentence of, say, 70 or 71 months, because the court of appeals was not convinced that "the error or resulting sentence would shock the conscience." J.A. 37. That is emphatically not the way to protect against "the possibility that [courts] might

permit the government to deny someone his liberty longer than the law permits only because [they] refuse to correct an obvious judicial error." *Hicks*, 137 S. Ct. at 2001 (Gorsuch, J., concurring). Because the Guidelines error below readily satisfies *Olano*'s fourth prong, the court of appeals should have corrected it. The Court should reverse.

STATEMENT OF THE CASE

Mr. Rosales-Mireles pleaded guilty to illegally reentering the United States in violation of 8 U.S.C. § 1326. In anticipation of sentencing, one of the district court's probation officers prepared a presentence report that included the officer's calculation of the imprisonment range recommended by the U.S. Sentencing Guidelines. According to the probation officer, Mr. Rosales-Mireles had 13 criminal history points, which placed him in Criminal History Category VI. J.A. 33. That Category combined with Mr. Rosales-Mireles's total offense level of 21 to produce a Guidelines range of 77 to 96 months of imprisonment. *Id*.

That range was wrong. The probation officer miscalculated Mr. Rosales-Mireles's Criminal History Category, which is determined by assessing points for prior convictions. See U.S. Sentencing Guidelines Manual § 4A1.1 (U.S. Sentencing Comm'n 2016) (USSG). Specifically, the probation officer counted one of Mr. Rosales-Mireles's prior convictions—a misdemeanor assault—as two separate convictions. J.A. 32–33. By counting the conviction twice, the probation officer assessed four criminal history points instead of two for the single conviction. See USSG § 4A1.1(b); J.A. 32–33. But for that error, the total number of criminal history points would have been 11, not 13, which would have placed Mr. Rosales-Mireles in Criminal History Category V, not VI. See

USSG Ch.5, Pt.A (Sentencing Table). The correct Guidelines range at Category V is 70 to 87 months of imprisonment, not 77 to 96 months. *Id.*

Everyone—Mr. Rosales-Mireles, the Government, and the district court—overlooked that obvious error in the presentence report. At sentencing, the district court rejected Mr. Rosales-Mireles's motion for a downward variance from the incorrect 77- to 96-month Guidelines range, adopted the presentence report without change, and sentenced Mr. Rosales-Mireles to 78 months of imprisonment. J.A. 19.

Mr. Rosales-Mireles appealed. He argued that the district court plainly erred in determining the applicable Guidelines range by counting a single conviction twice in his criminal history calculation. Mr. Rosales-Mireles contended that the error affected his substantial rights because the error produced a Guidelines range that was higher than he should have faced. Mr. Rosales-Mireles also argued that the court of appeals should correct the error because it seriously affected the fairness, integrity, and public reputation of the judicial proceedings.

The Government conceded that the district court had plainly erred in the Guidelines calculation, but opposed any relief for Mr. Rosales-Mireles. With respect to the fourth prong, the Government argued that the error did not warrant correction because Mr. Rosales-Mireles's sentence fell within both the correct and incorrect ranges. In addition, the Government argued, several extra months in prison was not a big deal: "the disparity between the sentence imposed—78 months—and the very bottom of the correctly-calculated Guideline range—70 months—is small[,]" and the difference between 71 months (one month above the bottom of the correct range) and 78 months was "just seven months." Brief for the United States

of America at 12 & n.2, *United States* v. *Rosales-Mireles*, No. 16-50151 (5th Cir. Aug. 4, 2016).

The court of appeals agreed that the district court plainly erred in calculating Mr. Rosales-Mireles's Guidelines range. J.A. 33–34. Relying on this Court's decision in *Molina-Martinez*, the court of appeals also held that the error affected Mr. Rosales-Mireles's substantial rights because it resulted in the use of an incorrect range, and because the district court's statements at sentencing did not clearly and explicitly indicate that it would have imposed the same sentence regardless of the range. *Id.* at 34–35.

Nevertheless, the court of appeals refused to correct the plain error. In the Fifth Circuit's view, "[t]he types of errors that warrant reversal are ones that would 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." J.A. 36. Because Mr. Rosales-Mireles's 78-month sentence was "in the middle of the proper range of 70–87 months[,]" the Fifth Circuit could not "say that the error or resulting sentence would shock the conscience." *Id.* at 37. The court therefore "elect[ed] not to exercise [its] discretion." *Id.*

This Court granted certiorari to consider whether the Fifth Circuit applied the wrong fourth-prong standard.

SUMMARY OF ARGUMENT

Mr. Rosales-Mireles was—without question—sentenced under an erroneously high Guidelines range. Because of that indisputably plain error Mr. Rosales-Mireles's case should have been sent back to

the district court for resentencing. See Fed. R. Crim. P. 52(b).

I. The fourth-prong standard for plain error review is well-established: the inquiry that "should guide the exercise of remedial discretion" is whether "the error seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Olano*, 507 U.S. at 736.

A Sentencing Guidelines miscalculation that leads to application of an incorrect, higher Guidelines range ordinarily satisfies that standard. The Guidelines "are complex, and so there will be instances when a district court's sentencing of a defendant within the framework of an incorrect Guidelines range goes unnoticed." *Molina-Martinez*, 136 S. Ct. at 1342–43. When that happens, courts of appeals typically should exercise their discretion to correct the forfeited error. *Olano*, 507 U.S. at 736.

That result follows from the Guidelines' fundamental role in determining criminal sentences and their concomitant role in helping to protect against defendants spending unnecessary time in prison. The Guidelines are both "the starting point" for any sentence, *Gall* v. *United States*, 552 U.S. 38, 49 (2007), and "the lodestar," *Molina-Martinez*, 136 S. Ct. at 1346. District judges clearly follow those guideposts, as almost every sentence imposed nationwide falls within or below the Guidelines range. As this Court recently summarized, the Guidelines' "systemic function" and "[e]ffect [on] the sentence" in "the usual case" is "essential to the application of Rule 52(b) to a Guidelines error." *Molina-Martinez*, 136 S. Ct. at 1346.

The Court should therefore recognize that Guidelines errors ordinarily satisfy *Olano*'s fourth prong.

This conclusion is consistent with this Court's precedent, is the near-unanimous view of the courts of appeals, and guarantees the fairness, integrity, and public reputation of judicial proceedings system-wide. What is more, the conclusion allows district judges to exercise their sentencing discretion under the correct range in the first instance, promotes the uniformity and proportionality goals underlying the Guidelines, and is a relatively low-cost solution that does not require anything like a complete retrial. Such benefits should be encouraged.

Finally, this approach preserves the discretion inherent in the fourth prong while accounting for the Guidelines' unique status in judicial proceedings. The courts of appeals still retain discretion to identify "countervailing factors" that weigh against relief "on a case-specific and fact-intensive basis." *Puckett* v. *United States*, 556 U.S. 129, 142–43 (2009). But those factors should be the exception rather than the rule.

II. The standard the Fifth Circuit invoked to deny relief to Mr. Rosales-Mireles is irreconcilable with these principles. In its own, unique gloss on *Olano*'s fourth prong, the Fifth Circuit has held that the court of appeals should deny relief under the fourth prong unless the error at issue "shock[s] the conscience of the common man, serve[s] as a powerful indictment against our system of justice, or seriously call[s] into question the competence or integrity of the district judge." J.A. 36. That holding is mistaken.

First, the Fifth Circuit's standard is unduly strict and was improperly lifted from incongruous legal contexts. The shocks-the-conscience test is directed towards deliberate executive misconduct—formulated to capture only the most egregious misdeeds and strict enough to "categorically" exclude merely negligent action. *Cty. of Sacramento* v. *Lewis*, 523 U.S.

833, 849 (1998). Such a test has no relevance in the context of plain error review, which is almost always about mistakes that are at most negligent—as the Guidelines oversight was here. Indeed, Mr. Rosales-Mireles is not aware of a single instance in which the Fifth Circuit has granted relief under its heightened fourth-prong test.

Second, the Fifth Circuit's stringent standard undermines the Guidelines' core purposes and this Court's holding in *Molina-Martinez*. As for the Guidelines, the Fifth Circuit's test would leave miscalculated ranges uncorrected almost all of the time, eroding uniformity and proportionality and subverting the district courts' discretion to impose sentences under the correct range. As for *Molina-Martinez*, the Fifth Circuit's rule would turn this Court's holding upside down. No longer would "relief" be due "[i]n most cases" or "[i]n the ordinary case," 136 S. Ct. at 1343, 1349, because, even if a defendant satisfied the first three prongs, the fourth prong would preclude relief practically every time. The Court should reject such a backwards result.

ARGUMENT

Federal Rule of Criminal Procedure 52(b) authorizes courts of appeals to correct unpreserved errors when justice demands. *Olano*, 507 U.S. at 735–36. The obvious injustice in sentencing defendants under mistakenly high Sentencing Guidelines ranges is precisely the kind of error that should ordinarily be corrected, but the Fifth Circuit's shocks-the-conscience test ensures that such errors will ordinarily be left uncorrected—and defendants will be left to serve excess time in prison by mistake.

I. IN THE ORDINARY CASE, A GUIDELINES MISCALCULATION SATISFIES THE FOURTH PRONG OF THE *OLANO* STANDARD FOR PLAIN ERROR REVIEW.

Rule 52(b) requires defendants to show that (1) there was an "error," (2) that is "plain," and (3) "affect[s] substantial rights." *Olano*, 507 U.S. at 732–34. If those three requirements are met, the court of appeals "should exercise its discretion to correct the forfeited error if the error seriously affects the fairness, integrity or public reputation of judicial proceedings." *Molina-Martinez*, 136 S. Ct. at 1343. That final step should ordinarily be satisfied—and the courts of appeals therefore should exercise their discretion—when a defendant is sentenced under an incorrect Guidelines range.

A. Certain Kinds Of Plain Errors, Like A Miscalculated Sentencing Guidelines Range, Ordinarily Should Be Corrected.

1. Courts of appeals have discretion to correct plain errors under the fourth prong, but discretion is a matter of "judgment[,] to be guided by sound legal principles." *Wall* v. *Kholi,* 562 U.S. 545, 559 (2011) (quoting *United States* v. *Burr*, 25 F. Cas. 30, 35 (No. 14,692d) (C.C. Va. 1807) (Marshall, C.J.)). In the context of the fourth prong of plain error review, "the standard that should guide the exercise of remedial discretion" is whether "the error seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Olano*, 507 U.S. at 736.

This Court has provided some indication of what sorts of errors satisfy that standard. "[C]ircumstances in which a miscarriage of justice would otherwise result," for example, plainly suffice. *Id.*; see also *Johnson* v. *United States*, 520 U.S. 461, 470 (1997) ("No

'miscarriage of justice' will result here if we do not notice the error."). And that of course means that a "court of appeals should no doubt correct a plain forfeited error that causes the conviction or sentencing of an actually innocent defendant." *Olano*, 507 U.S. at 736. But the standard codified in Rule 52(b)—that is, the "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings" test—extends well beyond actual innocence, to correct additional plain errors. *Id*. (citing *United States* v. *Atkinson*, 297 U.S. 157, 160 (1936)).

Some plain errors are of a type that "should," in most cases, be corrected. *Id.* In *Brasfield* v. *United States*, for example, this Court recognized that "the practice of inquiring of a jury, unable to agree, the extent of its numerical division" is "ground for reversal," because it "is never useful and is generally harmful, [and so] is not to be sanctioned." 272 U.S. 448, 449–50 (1926) (cited in *Atkinson* for what became the fourth-prong standard). Similarly, in *Puckett*, the Court acknowledged that, "when the Government reneges on a plea deal, the integrity of the system may be called into question," and correction would thus ordinarily be appropriate, but noted that there could always be "countervailing factors in particular cases" that counsel against it. 556 U.S. at 142–43.

2. Within the universe of plain errors, an erroneous Guidelines range is the type of error that seriously affects the fairness, integrity, or public reputation of judicial proceedings and therefore "should [be] correct[ed]" in the ordinary case. *Molina-Martinez*, 136 S. Ct. at 1343. Leaving such errors in place, by contrast, "call[s] into question" "the integrity of the system," *Puckett*, 556 U.S. at 142–43, because, in the end, "who wouldn't hold a rightly diminished view of

[the] courts if [they] allowed individuals to linger longer in prison than the law requires only because [they] were unwilling to correct [their] own obvious mistakes?" *Hicks*, 137 S. Ct. at 2001 (Gorsuch, J., concurring); see also *United States* v. *Martinez-Rios*, 143 F.3d 662, 676 (2d Cir. 1998) ("[O]ne would be hard-pressed to think of a more senseless injustice than the deprivation of a citizen's liberty for several months as a result of a clerical error.").

This Court has often said that "any deprivation of liberty is a serious matter," *Argersinger* v. *Hamlin*, 407 U.S. 25, 41 (1972) (Burger, C.J., concurring), and imprisonment is uniquely so. Indeed, "*any* amount of actual jail time has Sixth Amendment significance." *Glover* v. *United States*, 531 U.S. 198, 203 (2001) (emphasis added). "[T]he prospect of imprisonment for however short a time will seldom be viewed … as a trivial or 'petty' matter and may well result in quite serious repercussions affecting [a defendant's] career and his reputation." *Baldwin* v. *New York*, 399 U.S. 66, 73 (1970). Nor, "[t]o a prisoner," is "time behind bars … some theoretical or mathematical concept. It is something real, even terrifying." *Barber* v. *Thomas*, 130 S. Ct. 2499, 2517 (2010) (Kennedy, J., dissenting). Congress has recognized that reality as well through the so-called "parsimony" provision, 18 U.S.C. § 3553(a), requiring judges to "impose a sentence sufficient, but no greater than necessary." See also *United States* v. *Pennington*, 667 F.3d 953, 957 (7th Cir. 2012) ("four months in prison cannot be summarily dismissed as insignificant"). It is thus "clear that commitment for any purpose constitutes a significant deprivation of liberty." *Foucha* v. *Louisiana*, 504 U.S. 71, 80 (1992).

The Guidelines are singularly important in determining how long a prison sentence will be. They "pro-

vide the framework for the tens of thousands of federal sentencing proceedings that occur each year," *Molina-Martinez*, 136 S. Ct. at 1342, and district courts must consider them, 18 U.S.C. § 3553(a); *United States* v. *Booker*, 543 U.S. 220, 259 (2005). They are not only "the starting point and the initial benchmark" for any sentence, *Gall*, 552 U.S. at 49, but they are "also the lodestar," *Molina-Martinez*, 136 S. Ct. at 1346. In other words, they are, "in a real sense the basis for the sentence" imposed in each case. *Peugh* v. *United States*, 133 S. Ct. 2072, 2083 (2013).

The numbers confirm as much. Nationally, a staggering 97.6% of sentences are within or below the applicable Guidelines range. See U.S. Sentencing Commission, Sourcebook of Federal Sentencing Statistics, tbl. N (2016). Broken down, 76.8% of sentences fall within the range or below that range based on a Government motion, and another 20.8% are below the range for other reasons. *Id.*; see also *Molina-Martinez*, 136 S. Ct. at 1346 (reciting similar data). Those statistics make plain that judges almost always view the Guidelines range as, at most, a ceiling. As a result, "when a Guidelines range moves up or down, offenders' sentences move with it." *Peugh*, 133 S. Ct. at 2084.

The technical calculations behind Guidelines ranges, moreover, are a critical part of the *judicial* process that *Olano*'s fourth prong seeks to protect. Guidelines ranges are first calculated by a probation officer in a presentence report, 18 U.S.C. § 3552(a); Fed. R. Crim. P. 32(c); *Molina-Martinez*, 136 S. Ct. at 1342, and district judges are "directed to impose [a] sentence after a comprehensive examination of the characteristics of the particular offense and the particular offender" from the presentence investigation report, S. Rep. No.

98-225, at 53 (1983). As Judge Pryor, Acting Chair of the Sentencing Commission, has observed, because presentence reports "became the epicenter of the guidelines sentencing process," probation officers have assumed an indispensable role in the Guidelines system, acting as "arms of the court." William H. Pryor, Jr., *The Integral Role of Federal Probation Officers in the Guidelines System*, 81 Fed. Probation 13, 15 (Sept. 2017).

Given the Guidelines' centrality to judicial proceedings, it is "easy to see why prejudicial sentencing errors undermine the fairness, integrity, and public reputation of [those] proceedings" in the ordinary case. *United States* v. *Castillo-Casiano*, 198 F.3d 787, 792 (9th Cir. 1999). After all, the inescapable reality is that the Guidelines "are complex, and so there will be instances when a district court's sentencing of a defendant within the framework of an incorrect Guidelines range goes unnoticed." *Molina-Martinez*, 136 S. Ct. at 1342–43. "[S]uch errors" generally result in "a longer sentence than might have been imposed had the court not plainly erred" and generally should be fixed. *Castillo-Casiano*, 198 F.3d at 792. In short, the Guidelines' "systemic function" and "[e]ffect [on] the sentence" in "the usual case" is "essential to the application of Rule 52(b) to a Guidelines error." *Molina-Martinez*, 136 S. Ct. at 1346.

The benefits of correcting Guidelines errors under *Olano*'s fourth prong are also clear. First, correction gives district courts the opportunity to properly discharge their sentencing roles. "[I]t allows a sentencing court to make, for the first time, a discretionary determination necessary to arrive at an appropriate sentence." *Castillo-Casiano*, 198 F.3d at 792. By extension, remand for resentencing protects the fairness, integrity, and public reputation of judicial pro-

ceedings and "actually affords deference and respect for the District Court judge." *United States* v. *Langford*, 516 F.3d 205, 220 (3d Cir. 2008). Real-world experience supports such efforts: when judges resentence defendants on remand following Guidelines errors, most elect to impose lower sentences.

Second, correcting these errors furthers the Guidelines' overarching purpose: to achieve "*uniformity* in sentencing … imposed by different federal courts for similar criminal conduct, as well as *proportionality* in sentencing through a system that imposes appropriately different sentences for criminal conduct of different severity." *Rita* v. *United States*, 551 U.S. 338, 349 (2007); see also USSG Ch.1, Pt.A(3), p.s. (2016). Before the Guidelines, "punishments for identical actual cases could range from three years to twenty years imprisonment," even within the same Circuit. Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 5 (1988). The Guidelines sought to remedy that by "providing certainty and fairness in sentencing and reducing unwarranted sentence disparities." 28 U.S.C. § 994(f); see also 28 U.S.C. § 991(b); 18 U.S.C. § 3553(a)(6) (directing sentencing court to consider "the need to avoid unwarranted disparities among defendants with similar records who have been found guilty of similar conduct"). Sending cases back for resentencing under the Guidelines range that every other similarly situated defendant properly received furthers that goal.

Third, Guidelines errors reverberate beyond the length of imprisonment, both in individual cases and systemically. The Bureau of Prisons, for instance, uses the defendant's criminal history category, as recorded in the presentence report and district court's statement of reasons, in deciding how to designate

and classify prisoners. Federal Bureau of Prisons, *Program Statement P5100.08–Inmate Security Designation and Custody Classification*, Ch. 2, at 1; Ch. 4, at 8; Ch. 6, at 5 (Sept. 12, 2006), https://www.bop.gov/policy/progstat/5100_008.pdf. In a similar vein, if a defendant's term of supervised release is revoked, the Guidelines use the criminal history category from his *original* sentencing to determine a recommended range of punishment. USSG § 7B1.4 comment. (n.1) (category to be used "is the category determined at the time the defendant originally was sentenced to the term of supervision"). The Sentencing Commission also uses the presentence reports, as it collects data on Guidelines calculations to analyze the efficacy of the Guidelines and to make recommendations to Congress. 28 U.S.C. § 994(w); see *Rita*, 551 U.S. at 350. These widespread repercussions demonstrate the systemic harm that follows from leaving Guidelines errors uncorrected.

Finally, remanding for resentencing in the ordinary case is a "simple task." *Castillo-Casiano*, 198 F.3d at 792. Although "not costless, [it] does not invoke the same difficulties as a remand for retrial does." *Molina-Martinez*, 136 S. Ct. at 1348–49; see also *United States* v. *Sabillon-Umana*, 772 F.3d 1328, 1333–34 (10th Cir. 2014) (remand "simply allows the district court to exercise its authority to impose a legally permissible sentence"). Indeed, the cost savings trickle down systemically, as shorter prison terms of course cost less. See United States Courts, *Incarceration Costs Significantly More Than Supervision* (Aug. 17, 2017), http://www.uscourts.gov/news/2017/08/17/incarceration-costs-significantly-more-supervision (one year of imprisonment costs over $30,000 more than one year of supervised release—roughly $2,500 more per month). Given the low costs and substantial

benefits of correcting Guidelines errors, remand is warranted in the ordinary case.

3. Congress and almost all courts of appeals agree that most Guidelines errors seriously affect the fairness, integrity, or public reputation of judicial proceedings. As for Congress, it has mandated that, when the court of appeals determines that a sentence was "imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings." 18 U.S.C. § 3742(f)(1). Whether or not that provision extends to unpreserved errors, it undeniably reflects Congress's considered judgment that Guidelines range errors are sufficiently serious to require remand.

As for the courts of appeals, they are virtually unanimous (save the Fifth Circuit). They instruct, for example, that a Guidelines calculation error "usually satisf[ies]" the fourth prong, *Sabillon-Umana*, 772 F.3d at 1333, "ordinarily" warrants remand, *United States* v. *Figueroa-Ocasio*, 805 F.3d 360, 374 (1st Cir. 2015), or "generally" should cause the appeals court to "exercise [its] discretion to recognize [the] plain error," *United States* v. *Dahl*, 833 F.3d 345, 359 (3d Cir. 2016). See also *Sabillon-Umana*, 772 F.3d at 1333 (collecting cases from six other circuits that "reached similar conclusions or even adopted an explicit presumption that a clear guidelines error will satisfy the latter two steps of plain error review"). That view is equally applicable when the error resulted in the use of a higher range that overlapped with the correct one. See, *e.g.*, *United States* v. *Syme*, 276 F.3d 131, 158 (3d Cir. 2002). And the courts of appeals also appreciate the inverse to be true—that is, the "failure to notice the error" in most cases would "adversely affect the public perception of the fairness of judicial pro-

ceedings." *United States* v. *Wernick*, 691 F.3d 108, 118 (2d Cir. 2012).

B. Correcting Guidelines Errors In The Ordinary Case Still Leaves Room For Countervailing Factors In Particular Cases.

The fourth prong tells courts of appeals considering Guidelines errors that they "*should* exercise [their] discretion to correct the forfeited error if the error seriously affects the fairness, integrity or public reputation of judicial proceedings." *Molina-Martinez*, 136 S. Ct. at 1343 (emphasis added). By framing the inquiry to set out the circumstances in which "the discretion conferred by Rule 52(b) *should be employed*," this Court has provided that courts of appeals retain the discretion inherent in Rule 52 while indicating how that discretion "should" typically be exercised when the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Olano*, 507 U.S. at 736 (emphasis added). In other words, "should" connotes an affirmative suggestion about what ordinarily ought to happen when the substantive standard is met.

At the same time, courts of appeals always have discretion to decline to remand when "countervailing factors" weigh against relief "on a case-specific and fact-intensive basis." *Puckett*, 556 U.S. at 142–43. Indeed, there are ready examples in which a court might choose to do so, notwithstanding a defendant's success on the first three prongs. For one, a court of appeals may decide, under the fourth prong, that a plain Guidelines error does not overcome a defendant's waiver in a plea agreement of his or her right to appeal sentences that did not "unreasonably exceed[ ] the Guidelines range determined by the Court." *United States* v. *Corso*, 549 F.3d 921, 924 (3d Cir. 2008).

For another, the court of appeals may decline relief when the sentence was already completed. See, *e.g.*, *United States* v. *Westover*, 435 F.3d 1273, 1276–77 (10th Cir. 2006). Or, a defendant might have a concurrently running sentence, such that remand to correct the Guidelines error in one sentence would accomplish nothing of any value. In each of those instances, the Guidelines error may well satisfy the third prong—because the district court might have imposed a different sentence but for the error—but "countervailing factors" nevertheless counsel against the exercise of discretion under the fourth prong.

All of this reinforces, rather than undermines, the proper result here: courts of appeals typically should exercise their discretion to correct plain Guidelines errors, but the occasional case may present countervailing reasons not to do so.

II. THE FIFTH CIRCUIT'S SHOCK-THE-CONSCIENCE STANDARD IS IRRECONCILABLE WITH THIS COURT'S PRECEDENTS AND IMPOSES AN IMPROPER BURDEN ON CRIMINAL DEFENDANTS.

The Fifth Circuit once again "stands generally apart from other Courts of Appeals with respect to its consideration of unpreserved Guidelines errors." *Molina-Martinez*, 136 S. Ct. at 1345. In its view, the fourth prong could be satisfied only when the error "shock[s] the conscience of the common man, serve[s] as a powerful indictment against our system of justice, or seriously call[s] into question the competence or integrity of the district judge." J.A. 36. That rule, cobbled together from wholly inapt due process precedent, gravely overstates *Olano*'s actual standard and renders *Molina-Martinez* a dead letter. Indeed, Mr. Rosales-Mireles is not aware of a single case in which

the Fifth Circuit has granted relief under its heightened fourth-prong test.

A. The Fifth Circuit's Standard Is Unduly Harsh And Has No Place In Plain Error Review.

Rule 52(b) exists to ensure "that obvious injustice be promptly redressed." *United States* v. *Frady*, 456 U.S. 152, 163 (1982). The Fifth Circuit's standard does the opposite. It is precisely the kind of "rigid and undeviating" rule that is "out of harmony with … the rules of fundamental justice." *Olano*, 507 U.S. at 732.

1. Establishing that an error "shock[s] the conscience of the common man, serve[s] as a powerful indictment against our system of justice, or seriously call[s] into question the competence or integrity of the district judge," J.A. 36, is difficult, to say the least. No doubt that is why the Fifth Circuit has seemingly never found that the standard was met on plain error review.

"Shocks the conscience" is a substantive due process standard generally employed to test civil claims premised on physical violence or purposeful executive behavior. *Lewis*, 523 U.S. at 846. The test gained constitutional significance in *Rochin* v. *California*, 342 U.S. 165 (1952), and has been applied to cover, for example, "conduct intended to injure in some way unjustifiable by any government interest," *Lewis*, 523 U.S. at 849. It focuses on "executive action challenges." *Id.* at 847 n.8. And its target, like substantive due process more broadly, is "deliberate decisions of government officials to deprive a person of life, liberty, or property." *Daniels* v. *Williams*, 474 U.S. 327, 331 (1986).

The standard is exceptionally demanding by design. It emerged against the backdrop of "very narrow

scrutiny" that the Due Process Clause authorizes over state-court convictions, *Rochin*, 342 U.S. at 168, and serves to preserve the "constitutional proportions of constitutional claims" over executive actions, *Lewis*, 523 U.S. at 847 n.8. The test therefore captures only conduct "so 'brutal' and 'offensive' that it did not comport with traditional ideas of fair play and decency." *Breithaupt* v. *Abram*, 352 U.S. 432, 435 (1957). "[O]nly the most egregious official conduct," signaling a drastic departure from the norms of contemporary civilized conduct, "may fairly be said to shock the contemporary conscience." *Lewis*, 523 U.S. at 846–47 & n.8. Forcibly pumping a defendant's stomach qualifies, but a high-speed police chase ending in a deadly crash does not. *Id.* at 854–55; *Rochin*, 342 U.S. at 172.

To the extent the Fifth Circuit's alternative formulations—including that the error "seriously call[s] into question the competence or integrity of the district judge," J.A. 36—have independent meaning, they are equally stringent. Such an error requires, for example, that the district judge "impugn[ed] the integrity of our judicial system with incompetent or malicious decisions." *United States* v. *Escalante-Reyes*, 689 F.3d 415, 436 (5th Cir. 2012) (en banc) (Smith, J., dissenting). That is a very high bar.

2. These rigid standards are unsuitable for plain error review. Consider first the shocks-the-conscience requirement that doomed Mr. Rosales-Mireles in this case. J.A. 35–36. It is aimed at deliberate and offensive executive conduct, *e.g.*, *Daniels*, 474 U.S. at 331; *Breithaupt*, 352 U.S. at 435, and this Court has confirmed that merely negligent conduct is "categorically beneath" the threshold, *Lewis*, 523 U.S. at 849. But the whole point of plain error review is to fix overlooked mistakes made in the judicial process, not de-

liberate misdeeds by executive officials. See, *e.g.*, *United States* v. *Jaimes-Jaimes*, 406 F.3d 845, 851 (7th Cir. 2005) ("[Defendant] may have failed to notice the sentencing error, but so did defense counsel, the Assistant United States Attorney, the probation officer, and the district court judge."). Guidelines miscalculations are virtually always going to be negligent at most, and a standard that "categorically" excludes those errors from correction cannot possibly be the right one.

Asking whether a district judge was "incompetent" or "malicious" is similarly inappropriate. This Court has made clear that "plain error review is not a grading system for trial judges[,]" *Henderson* v. *United States*, 568 U.S. 266, 278 (2013), but that is the inevitable result of shifting the focus to the judge's competence or integrity, rather than the nature of the error at issue. Worse still, the Fifth Circuit's misguided focus on district judges calls to mind the constitutional protection against a biased judge (or a judge with an impermissible risk of actual bias). *Williams* v. *Pennsylvania*, 136 S. Ct. 1899, 1909 (2016). That structural error is so serious that it requires an automatic retrial. *Id.* at 1909–10. But this Court has never so much as hinted that the courts of appeals' discretion to remedy plain errors under Rule 52(b) is limited to the much stricter constitutional standard for structural errors.

Finally, demanding that an error act as a "powerful indictment against our system of justice" is equally flawed. The Fifth Circuit has not explained this phrase, and it is unclear that it adds anything to the Fifth Circuit's fourth-prong analysis.

In sum, the Fifth Circuit's standard fundamentally rewrites *Olano*'s fourth prong. It imports overly restrictive tests from inapposite areas of the law and

drastically overstates the burden defendants must meet. Because "[n]othing in the text of Rule 52(b), its rationale, or the Court's precedents supports" the Fifth Circuit's approach, *Molina-Martinez*, 136 S. Ct. at 1345, the Court should reject it.

B. The Fifth Circuit's Standard Is Especially Misguided In The Unique Context of Guidelines Errors.

The ramifications of the Fifth Circuit's heightened standard are especially egregious in the unique context of a miscalculated Guidelines range.

First, the Fifth Circuit's test would undermine the Guidelines' core purposes. Allowing sentences based on inaccurate Guidelines calculations to stand frustrates the "uniformity" and "proportionality" that Congress enacted the Guidelines to provide. *Rita*, 551 U.S. at 349. Miscalculated ranges "can be particularly serious," *Molina-Martinez*, 136 S. Ct. at 1345—indeed, "*any* amount of actual jail time" is "significant," *Glover*, 531 U.S. at 203 (emphasis added)—and Guidelines ranges are an essential part of sentencing proceedings. The Fifth Circuit's approach to plain error review sweeps aside all of these considerations.

Second, the Fifth Circuit's standard usurps the district court's discretion to sentence a defendant under the proper standards in the first instance. Courts of appeals are not supposed to "substitute [their] judgment for that of the sentencing court as to the appropriateness of a particular sentence." *Williams* v. *United States*, 503 U.S. 193, 205 (1992); see, *e.g.*, *United States* v. *Rushton*, 738 F.3d 854, 861 (7th Cir. 2013). Yet that is exactly what the Fifth Circuit's rule authorizes courts of appeals to do.

Finally, the Fifth Circuit's standard would effectively nullify the Court's recent holding in *Molina-*

Martinez. There, the Court held that "in the ordinary case a defendant will satisfy his burden to show prejudice [under the third prong] by pointing to the application of an incorrect, higher Guidelines range and the sentence he received thereunder." 136 S. Ct. at 1347. But under the Fifth Circuit's test, the same defendant who has "rel[ied] on the application of an incorrect Guidelines range to show an effect on his substantial rights," *id.* at 1348, would arrive at the fourth prong only to discover that his earlier showings made no practical difference. The Fifth Circuit's uniquely demanding test for the fourth prong should be rejected.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment below and remand to the Fifth Circuit.

Respectfully submitted,

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