No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ALEJANDRO PARRA-RAMOS

Petitioner.

-v-

UNITED STATES OF AMERICA,

Respondent.

On Petitioner For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Michael Marks
Federal Defenders of San Diego
225 Broadway, #900
San Diego, California 92101
(619) 234-8467
Michael_Marks@fd.org

Counsel for Petitioner

QUESTION PRESENTED

Whether a defendant suffers prejudice when the government breaches a plea agreement by calling its agreed-upon recommendation irrational, and the court accordingly varies upward after agreeing that the recommendation is "zany" and improvident.

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IN THE SUPREME COURT OF THE UNITED STATES

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OPINION BELOW

After Petitioner appealed his sentence based on the government's breach of the plea agreement, the United States Court of Appeals for the Ninth Circuit affirmed Petitioner's sentence in an unpublished memorandum disposition, ruling that there was no plain error. *United States v. Parra-Ramos*, 729 F. App'x 403 (9th Cir. 2018).[1]

JURISDICTION

The court of appeals entered final judgment on April 23, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

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[1] A copy of the Ninth Circuit's memorandum is attached to this brief at Appendix A under S. Ct. R. 14(i)(i).

STATUTORY PROVISIONS[2]

18 U.S.C. § 3553 Imposition of Sentence

U.S.S.G. app. C. amend. 802 (2016) Accounting for Prior Illegal Reentry Offenses

STATEMENT OF THE CASE

A. Background

Petitioner was born and raised in Michoacan, Mexico, and he is a Mexican citizen. Attempting to support himself and, later, his two children, Petitioner has been an economic migrant to the United States for more than 20 years. He first entered the United States in 1995 at the age of 16, and he has lived and worked in California, Oregon, Washington, and Montana.

Because he never gained lawful immigration status, the government has deported Petitioner several times. Along the way, he has been convicted of immigration-related offenses five times. Prior to this case, his sentences ranged from 60 days to 10 months in prison. After he completed his most recent sentence, ICE deported Petitioner to Mexico in December 2015.

B. Offense and conviction

At the beginning of 2017, Petitioner struggled to survive in Mexico working construction for about $100 a week. He had no money to send his children to school, and higher wages in the United States again drew him toward the border. On January 3, 2017, Petitioner attempted to enter the United States illegally near

[2] A copy of these provisions is included at App'x B.

Tecate, California. But Border Patrol agents apprehended him and arrested him. The government charged him with being a removed alien found in the United States, in violation of 8 U.S.C. § 1326.

Petitioner quickly pleaded guilty under the government's Fast Track program. In exchange for Petitioner's pleading guilty, giving up the right to request variances from the sentencing guidelines, and an appellate waiver, the government agreed to recommend a four-level Fast Track departure. The government promised as part of the plea agreement to "recommend that Defendant be sentenced to the low end of the advisory guideline range recommended by the Government at sentencing."

C. Sentencing

Both Petitioner and the government filed sentencing summary charts prior to sentencing. Both charts calculated the guideline range at two to eight months. The government's chart also included a sentencing recommendation: "2 months as required by the plea agreement." The government's chart offered no other explanation or support for its recommendation. United States Probation filed a presentence report that concurred with the parties' guideline calculations but recommended a high-end sentence of eight months.

Petitioner subsequently appeared before the district court for sentencing. Defense counsel began the hearing by explaining Petitioner's motivation for entering the United States illegally. Petitioner had a son in high school, and Petitioner's sister had been paying the tuition. Petitioner "felt that it was his responsibility to take care of that and it wasn't right for him to rely on his sister to do that . . ." So he decided

to reenter the United States in search of a better wage, where he had previously earned an additional $2,000 per month over his wage in Mexico. Speaking for himself, Petitioner told the court, "Just rest assured that by now I have resolved the issue or the problem that [my son] will be able to go to school. And please give me the benefit of the doubt. Please believe me, that I'm not going to come back."

Sensing the court's skepticism, defense counsel stated, "obviously in a case like this we understand that the Court is disinclined to follow a plea agreement and—" But cutting off counsel, the court asked:

> Wait, obvious to whom? To you maybe, but apparently not to the government. They have offered, you know, fast track like it's some giveaway on a corner, you know, handing out free samples.

Counsel clarified that he was referring to himself and to his client—in other words, Petitioner pleaded guilty even understanding that the district court might not follow the plea agreement. That reflected a sincere acceptance of responsibility. As counsel put it, "his position is I made this mistake, I knew there was a risk, there's a consequence to pay and he was prepared to pay it."

After defense counsel concluded his argument, the court turned its attention to the prosecutor in the courtroom (a different prosecutor had apparently negotiated and signed the plea agreement while yet another prosecutor had filed the sentencing summary chart). The court stated that at an earlier sentencing on the same day, the government had recommended an 84-month sentence for a defendant who had previously received a 30-month sentence for illegal reentry. Referencing the government's low-end recommendation in Petitioner's case, the court asked, "Can you

explain that [two-month] recommendation [for Petitioner] and how it's consistent with like the 54 month jump that the other Assistant United States Attorney asked me to give a guy for a second felony immigration offense?" But rather than explain its recommendation, the prosecutor responded, "I'm going to take the fifth."

But the court persisted. "I'm not blaming you," the court said, "I just don't get it. It doesn't—where's the rationality to that?" Presented with a second chance to explain the government's recommendation, the prosecutor responded, "There isn't any rationality to that."

The district court asked, "I'm assuming you embrace this, you're recommending two months?" And the prosecutor replied, "Right. I'm consistent with the plea agreement, you know, the government's bound to recommend the two months." But the prosecutor quickly hedged, "I wish I could offer an explanation." And acknowledging the prosecutor's failure to stand behind the government's recommendation, the court said, "Well, I'm not going to ask you to name names as to who came up with this zany idea to recommend two months on the sixth conviction, fourth felony, but boy, I just don't understand the judgment on that."

Turning to the guidelines, the court agreed with the parties with regard to the base offense level and upward adjustments. But the court rejected the requested Fast Track departure. It explained, "I think, you know, when [defense counsel] said what [he] said to me that [he] didn't think I was going to go along with it, [he was] a lot more realistic than whoever made this silly preposterous offer by the United States." Without the departure, the court calculated the guidelines at 10 to 16 months. But

the court stated that the guideline range was too low for the offense. The court departed upward three levels and imposed a sentence of 24 months.

D. Appeal

Petitioner appealed his sentence to the Ninth Circuit, arguing that the government had breached the plea agreement. Specifically, he argued that the prosecutor's decision to "take the fifth" in response to the district court's questions and later to state that there "isn't any rationality" to the government's sentencing recommendation breached the plea agreement it had made with Petitioner. Petitioner conceded that the case should be reviewed for plain error, because he did not object to the breach at sentencing. He argued, however, that he could meet all four prongs of the plain error standard, warranting remand.

A screening panel of the Ninth Circuit affirmed in a memorandum disposition. *See* Appendix A. The panel ruled, "We do not approve of 'taking the fifth' when asked by a judge about the reasoning behind a plea agreement and then saying it had 'no rationality.' We expect more serious responses by officers of the court, especially when the issue is the length of a defendant's sentence." App'x A. But the court concluded that "[e]ven if the government breached the plea agreement by implicitly disclaiming the agreed-upon recommendation, the breach did not affect Petitioner's substantial rights." *Id.* The Ninth Circuit panel cited the district court's focus on Petitioner's immigration and criminal history to rule "there is no reasonable probability that the alleged breach affected the court's sentencing determination." *Id.*

REASONS FOR GRANTING THE PETITION

This is the rare case where this Court should grant review for purposes of error correction. *See* S. Ct. R. 10. Here, the Ninth Circuit affirmed Petitioner's sentence despite the government's plain and prejudicial breach of the plea agreement. The Ninth Circuit erred in ruling that the breach did not affect Petitioner's sentence, and this Court should grant certiorari to review and reverse the Ninth Circuit's erroneous ruling.

A. The government's breach prejudiced Petitioner, because the prosecutor's failure to stand behind its agreed-upon recommendation led to a higher sentence.

"[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Santobello v. New York*, 404 U.S. 257, 262 (1971). "The integrity of our judicial system requires that the government strictly comply with its obligations under a plea agreement." *United States v. Mondragon*, 228 F.3d 978, 981 (9th Cir. 2000). This means the Government cannot "extend[] [a] promise . . . with one hand and [take] it away with the other." *United States v. Heredia*, 768 F.3d 1220, 1224 (9th Cir. 2014). Here, the government promised as part of a plea agreement to recommend that the district court impose a sentence at the low-end of the guidelines. While the government at first complied with that promise in its sentencing summary chart, the prosecutor at sentencing wholly undermined the written pleading when he proclaimed there was "no rationality" to its recommendation. That was a plain breach of the plea agreement.

This Court has clarified, however, that a defendant forfeits his claim of breach if he does not object at sentencing. *See Puckett v. United States*, 556 U.S. 129, 135 (2009). Thus, because Petitioner did not object to the government's breach at sentencing, review of the breach is for plain error. *Id.* This deferential standard of review makes no difference here, because the government's breach was plain error that prejudiced Petitioner's substantial rights and affected the fairness, integrity, and public reputation of the proceedings.

"When it offers to recommend a specific sentence, the government induces the defendant to forfeit his constitutional rights in exchange for a 'united front.' " *Heredia*, 768 F.3d at 1231 (quoting *United States v. Camarillo–Tello*, 236 F.3d 1024, 1028 (9th Cir. 2001)). "[W]hen the sentencing court hears that both sides believe a certain sentence is appropriate and reasonable in the circumstances, this is more persuasive than only the defendant arguing for that sentence.... [T]his 'united front' is the defendant's benefit of the bargain." *Camarillo-Tello*, 236 F.3d at 1028. Accordingly, a prosecutor who implicitly argues against an agreed-upon recommendation may breach a plea agreement even when he "uttered the requisite words by recommending a sentence at the low-end of the guidelines." *See id.* at 972; *accord Heredia*, 768 F.3d at 1231.

That is precisely what happened here. Prior to the sentencing hearing, the government filed a sentencing summary chart recommending two month's custody as required by the plea agreement. At sentencing, the district court chided the government for "offer[ing], you know, fast track like it's some giveaway on a corner,

you know, handing out free samples." But rather than defend—or merely reassert—its recommendation, the government left Petitioner in the cold, essentially agreeing with the court that the recommendation made no sense.

Concerned about Petitioner's criminal history, the court pointedly asked the prosecutor to explain the government's recommendation:

> . . . and now magically we're at a two-month recommendation by the United States. *Can you explain that recommendation* and how it's consistent with like the 54 month jump that the other Assistant United States Attorney asked me to give a guy for a second felony immigration offense?

Instead of even a lukewarm, unenthusiastic explanation of its recommendation, the prosecutor responded, "I'm going to take the fifth." The court clarified, "I'm not blaming you [the prosecutor in the courtroom], I just don't get it. It doesn't—where's the rationality to that?" ER 20. But again, not even offering the bare minimum "I stand by the plea agreement," the prosecutor walked away from the government's promised recommendation and stated, "There isn't any rationality in that." That was clear breach.

Although the prosecutor did not expressly seek a sentence longer than two months, his comments breached the plea agreement because they failed to present a "united front" and "serve[d] no practical purpose but to advocate for a harsher [sentence]." *Heredia*, 768 F.3d at 1231. Far from "hear[ing] that both sides believe[d] a [low-end] sentence [was] appropriate and reasonable," *see Camarillo-Tello*, 236 F.3d at 1028, the district court here heard that the prosecutor believed a low-end sentence was *irrational* and *unexplainable*.

The prosecutor could have explained that the applicable Guideline, U.S.S.G. § 2L1.2, had recently been amended in part to decrease the severity of sentences for certain illegal reentry defendants like Petitioner. *See* U.S.S.G. app. C amend. 802, reason for amendment. He could have explained that Petitioner pleaded guilty early in the case, saving the government valuable time and resources. He could have explained that Petitioner had no convictions for any crimes other than immigration-related offenses. Or he could have simply reasserted that the government believed a low-end sentence was appropriate.

But instead, the prosecutor called the low-end recommendation irrational and told the court he could not explain it, comments that were as good as expressly asking for a higher sentence. Rather than dispelling the court's concern that the government's recommendation was nothing more than an unreasoned handout, the prosecutor *confirmed* the court's misgivings and stoked the court's consternation. That a prosecutor may not so flagrantly undermine a sentencing recommendation guaranteed by a plea agreement is plain error.

To prevail in his appeal, however, Petitioner needed to show that the government's breach affected his substantial rights. *Puckett*, 556 U.S. at 140. This required establishing "a reasonable probability that the error affected the outcome of the [sentencing]." *United States v. Marcus*, 560 U.S. 258, 261 (2010). Here, prejudice to his substantial rights is clear: the district court departed upward drastically to a 24-month sentence, at least in part based on the government's failure to defend its sentencing recommendation.

Notably, Petitioner did not "obtain[] the benefits contemplated by the deal anyway (*e.g.*, the sentence that the prosecutor promised to request). . ." *See Puckett*, 556 U.S. at 141-42. Rather, the 24-month sentence the district court ultimately selected was more than double the longest sentenced Petitioner had ever received in the past, and *twelve times* the sentence he requested.

Nor was it likely that Petitioner "would not have obtained those benefits in any event." *See id.* at 142. Petitioner does not contend that, absent the government's breach, he would have received a two-month sentence. But he need not prove that he would have received a two-month sentence to establish prejudice. Instead, he need only show reasonable probability that he would have received a *lower* sentence than 24 months. He does that easily here.

The district court expressly linked its sentence to its inability to understand the government's position at sentencing. Belittling the government's undefended recommendation as a "zany idea," the court quickly cast it aside. The court remarked that it was:

> *confounding for me to understand why* [Fast Track] was given here and drives the guidelines down to, you know, a low end of two months, two to eight months, and then [the government] jump[s] on the low end too. . . I don't get it, [defense counsel]. I think, you know, when you said what you said to me that you didn't think I was going to go along with [the plea agreement], you were a lot more realistic than whoever made this *silly, preposterous offer* by the United States. . . So I decline to give fast track in this case.

Thus, the district court expressly based its sentencing decision on the fact that it was "confounded" by the government's indefensible recommendation, a view that the prosecutor inexplicably *supported*.

The district court twice asked the prosecutor to explain its written sentencing recommendation, and the court would not have asked if it weren't open to persuasion. While an honest and firm recommendation from the prosecutor may not have secured the two-month sentence Petitioner sought, it likely would have tempered the district court's disdain for the government's recommendation. And had the prosecutor not poured fuel on the fire by conceding that its two-month recommendation was irrational and unexplainable, there is a reasonable probability that the district court would have imposed a sentence more strongly tethered to the Guidelines.

B. This court should grant review and correct the error in Petitioner's case.

Despite the district court's plain error, the Ninth Circuit screening panel affirmed the sentence. The panel's decision was erroneous, because it completely ignored material portions of the record and misunderstood the requisite prejudice analysis.

The Ninth Circuit ruled that "[e]ven if the government breached the plea agreement by implicitly disclaiming the agreed-upon recommendation, the breach did not affect [Petitioner's] substantial rights." App'x A. It reasoned:

> At sentencing, the district court focused on [Petitioner's] five prior convictions for immigration offenses and his failure to be deterred by previous sentences. Even defense counsel recognized at sentencing that, in light of [Petitioner's] history, the court would be "disinclined" to follow the parties' recommendation. Under these circumstances, there is no reasonable probability that the alleged breach affected the court's sentencing determination.

Id. This analysis was incorrect.

The Ninth Circuit's ruling fails to acknowledge that the district's court's "focus" at sentencing was equally divided between relevant § 3553(a) factors and the basis for the government's recommendation. True, the district court cited Petitioner's criminal and immigration history throughout its analysis. But it also spent significant time trying to understand why the government had made a low recommendation *despite* those factors. Without the government's support, Petitioner was alone in arguing why the mitigation in the case warranted a lower sentence, even if not the two months jointly requested by the parties.

The Ninth Circuit's ruling also adopts the wrong prejudice analysis. The ruling implies that Petitioner cannot show prejudice because he cannot prove that the district court would have "followe[ed] the parties' recommendation." *See* App'x A. But, as explained above, Petitioner need only show a reasonable probability that he would have received a sentence less than 24 months. He does so easily here.

The "reason to believe," *see* App'x A, the district court would have imposed a less severe sentence had the prosecutor responded differently is plain on the record: the district court asked for an explanation and support for the government's recommendation. The district court would not have asked the prosecutor to explain the recommendation if it were not open to persuasion. But when the prosecutor confirmed that he too believed the two-month recommendation to be irrational and unexplainable, his comments served no purpose other than to encourage a higher sentence. Accepting that encouragement, the district court denied the jointly-recommended Fast Track departure and then varied upward an additional 50

percent. Had the government stuck by its recommendation, there is a reasonable probability that the court might have tempered its variance at the very least. That suffices to show prejudice to Petitioner's substantial rights.

CONCLUSION

This Court should grant the petition for a writ of certiorari and reverse the Ninth Circuit's erroneous ruling.

Respectfully submitted,

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MICHAEL MARKS
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 900
San Diego, CA 92101
Telephone: (619) 234-8467
Facsimile: (619) 687-2666
Michael_Marks@fd.org

Attorneys for Petitioner