IN THE SUPREME COURT OF THE UNITED STATES

CARLOS TIZADO-VALENZUELA,

PETITIONER,

- v -

UNITED STATES OF AMERICA,

RESPONDENT.

PETITIONER'S PETITION FOR WRIT OF *CERTIORARI* TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Should the Court address the division of circuit authority over the Court's application of the prejudice prong of plain-error review in *Molina-Martinez v. United States*?

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PETITION FOR A WRIT OF CERTIORARI TO THE
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Petitioner, Carlos Tiznado-Valenzuela, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit, in an unpublished decision, affirmed the sentence for violation of 8 U.S.C. § 1324. *See* Appendix A (*United States v. Tiznado-Valenzuela,* 731 F. App'x 627 (9th Cir. 2018)).

The panel denied rehearing, and the Ninth Circuit declined to rehear the matter en banc. *See* Appendix B.

JURISDICTION

On April 25, 2018, the Ninth Circuit affirmed the sentence. *See* Appendix A. On June 28, 2018, it denied a petition for rehearing. *See* Appendix B. The Court has

jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT PROVISIONS[1]

18 U.S.C. § 3553
Fed. R. Crim. P. 52
U.S.S.G. § 5D1.1

STATEMENT OF THE CASE

A. Introduction

This Petition concerns the operation of plain-error review in applying the U.S. Sentencing Guidelines, an issue the Court recently addressed in *Molina-Martinez v. United States,* 136 S. Ct. 1338 (2016); subsequently extended in *Rosales-Mireles v. United States,* 138 S. Ct. 1897 (2018); and followed its rationale in *Hughes v. United States,* 138 S. Ct. 1765 (2018). Those cases highlight the continuing importance of a proper consideration of the Guidelines as the "starting point" and "lodestar" "for most federal sentencing proceedings," *Molina-Martinez*, 136 S. Ct. at 1346, "even in an advisory capacity." *Rosales-Mireles*, 138 S. Ct. at 1904.

Their crucial role gives misapplication of the Guidelines a unique status regarding the operation of plain-error review. Resolving circuit divergences, the Court found in *Molina-Martinez* that error in applying the Guidelines will, "[a]bsent unusual circumstances," satisfy the third, prejudice prong of the plain-error test in *United States v. Olano*, 507 U.S. 725 (1993). 136 S. Ct. at 1347. Then, in *Rosales-Mireles*, 138 S. Ct. at 1909, the Court built on the reasoning in *Molina-Martinez* to

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[1] The text of these provisions is laid out in Appendix C, pursuant to Sup. Ct. R. 14.1(f).

hold that prejudicial, Guideline error "is precisely the type of error that ordinarily warrants relief under [Fed. R. Crim. P.] 52(b)," 138 S. Ct. at 1907, and so will "seriously affect the fairness, integrity, and public reputation of judicial proceedings," meeting the fourth prong of plain error as well. *Id.* at 1911. This centrality of the Guidelines as the benchmark for sentencing informed the decision in *Hughes*, holding that even a stipulated-sentence plea under Rule 11(c)(1)(C) looked to the Guidelines sufficiently to be "based on" them for purposes of a retroactive sentence reduction. *See* 138 S. Ct. at 1775-77 (citing *Molina-Martinez*).

But despite the absence of any "unusual circumstances" here, the Ninth Circuit defied these holdings in finding no prejudice from the Guidelines error. It did so in a way distorting this Court's noted exception to the typical case and ignoring the Court's particular concern for a silent record. *See Molina-Martinez*, 136 S. Ct. at 1347. Thus, the Ninth Circuit not only defies the holdings of *Molina-Martinez*, but also diverges from the analysis in other courts, like the Fifth Circuit in *United States v. Sanchez-Arvizu*, 893 F.3d 312 (2018) (per curiam). The Ninth Circuit overlooks that it is the *sentencing judge's* articulation of non-Guideline reasoning that matters under *Molina-Martinez*, not *reviewing judges'* post-hoc characterization of the record.

Accordingly, the Ninth Circuit decision creates rifts with the Court's recent treatment of the Guidelines in *Molina-Martinez, Rosales-Mireles*, and *Hughes*, while diverging from the holdings of a sister circuit. To foreclose further misapplication of this Court's precedents, the Petition should be granted.

B. The District Court Proceedings

Petitioner is a Mexican citizen who was originally a resident of the seaside town of San Felipe in Northern Baja California. At age 23, he left the rural ranch life he had known in San Felipe and moved to Tijuana. During his couple months in the big city, Mr. Tiznado became involved with drugs for the first time and committed a crime for the first time in his life. To pay for his new drug habit, he agreed to assist bringing aliens into the U.S. illegally. During a period from July to August 2016, he worked for a person known as El Pato. After an initial training run with an experienced guide, Mr. Tiznado, joined by other guides, attempted thrice to lead aliens into the country, but was unsuccessful each time. After the first two failed attempts, he was returned to Mexico; on the third, he was prosecuted for aiding and abetting illegally bringing an alien into the United States, a violation of 8 U.S.C. § 1324(a)(1)(A)(i) & (v)(II).

Following arrest, Mr. Tiznado cooperated, providing extensive information about his involvement and prior runs. At this point, he learned that one of the people in the party on the second run had died, after the man's family decided to leave him behind. Mr. Tiznado admitted his involvement in that crossing and began to cry in remorse for the death.

Mr. Tiznado pled guilty to the charge. At sentencing, the parties disputed the applicability of various enhancements under U.S.S.G. § 2L1.1. Probation calculated the Guidelines by applying increases for number of aliens smuggled, substantial risk of injury, death during smuggling, and reckless endangerment during flight, giving a

final range of 70 to 87 months. But, based on the statutory sentencing factors, it recommended a variance down to 48 months. Without any discussion or reference to the directions in § 5D1.1(c),[2] Probation recommended the maximum, three-year term of supervised release.

Under the plea agreement, the parties recommended a three-level increase for uncharged conduct and a two-level reduction for acceptance of responsibility. The Government asked for 18 months' imprisonment and three years of supervision, again without explanation or reference to § 5D1.1. Mr. Tiznado disputed Probation's recommendations on number of aliens smuggled, causing a death during smuggling, and increases for substantial risk and reckless endangerment, arguing that the parties' three-level increase for uncharged conduct adequately accounted for this. This produced the same range as in the Government's calculations, but Mr. Tiznado asked the court for a sentence toward the low end—twelve months and a day. He made no recommendation as to supervised release.

At the sentencing hearing, the district court heard argument regarding the various, disputed Guidelines calculations. Ultimately, it decided not to include the enhancements for death or endangerment during flight, but did aggregate the number of aliens and found a substantial risk of death or injury. The court's calculated range was 18 to 24 months, with the parties asking for 18 months.

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[2] Stating "[t]he court ordinarily should not impose a term of supervised release in a case in which supervised release is not required by statute and the defendant is a deportable alien who likely will be deported after imprisonment."

Addressing the court, Mr. Tiznado said he was "very remorseful for what happened to Mr. Palacios," the man who had died, and asked the court to consider Mr. Tiznado's background and his desire to return to his former, rural life, perhaps as a veterinarian.

The court imposed the high end of 24 months, saying

> I rarely go above the Government's recommendation, but … I think an upper guideline sentence is appropriate. The—for the need to deter him and others. That is the key fact here. [¶] The defendant is committed to the custody of the Bureau of Prisons for 24 months, which the Court finds is the least sentence to effect deterrence and fair punishment and encourage respect for the law.

However, without further discussion or comment why, it then imposed three years of supervised release, the statutory maximum: "The period of imprisonment is followed by three years of supervised release."

C. The Appellate Decisions

On appeal, Mr. Tiznado argued the district court had erred in three ways: in imposing the substantial-risk enhancement; in aggregating the number of aliens smuggled; and in imposing the statutory maximum term of supervised release without explanation or compliance with § 5D1.1(c).

Regarding supervised release, the Ninth Circuit reviewed the claim for plain error. *See Tiznado-Valenzuela*, 731 F. App'x at 631. The panel held, "Defendant's challenge fails under the third prong," stating "[r]egardless of whether the district court explanation was sufficiently 'particularized' to satisfy Section 5D1.1(c), it did not affect Defendant's substantive [sic] rights." *Id.* It opined that was so, because,

from "the district court's discussion of his repeated behavior and 'the need to deter him and others,' it is clear the outcome would be the same if this matter were returned to the district court for further explanation." *Id.* The panel rejected the argument that the deterrence cited by the sentencing court (to deter alien smuggling) differed from the sort of deterrence (against illegal entry) contemplated by § 5D1.1.(c), since by guiding aliens into the country, Mr. Tiznado "was repeatedly attempting to illegally enter the United States." *Id.* at 632.

Mr. Tiznado sought rehearing on the basis that the panel's analysis of the third (prejudice) prong of plain error in the context of the judge's Guideline error was contrary to this Court's holding in *Molina-Martinez*. In fact, the district court had given a heightened, custodial sentence crucially for its deterrent effect, and so the sole, legitimate basis for imposing supervised release on Mr. Tiznado was already accounted for. Moreover, the facts exhibited a *lessened* need to deter and protect, not an increased one, as required under § 5D1.1(c)

The Ninth Circuit declined to rehear the matter. *See* Appendix B.

REASONS FOR GRANTING THE PETITION

THE COURT SHOULD GRANT REVIEW TO RESTORE CIRCUIT CONSISTENCY ON THE APPLICATION OF THE THIRD PRONG OF PLAIN-ERROR REVIEW AS SET OUT IN *MOLINA-MARTINEZ*

The Court has recently clarified how plain-error review operates in the context of a misapplication of the U.S. Sentencing Guidelines. *Molina-Martinez* held that in "most instances," "[a]bsent unusual circumstances," plain error in applying the Guidelines resulting in a higher sentence "will suffice to show an effect on a defendant's substantial rights." 136 S. Ct. at 1347. Consequently, defendants "should not be barred from relief on appeal simply because there is no other evidence that the sentencing outcome would have been different had the correct range been used." *Id.* at 1346. In the typical case, then, misapplication of the Guidelines will satisfy the third prong of *Olano*. Here, the judge's failure to implement the mandate of § 5D1.1(c) resulted in a greatly increased supervisory sentence, making this the precise sort of error *Molina-Martinez* states satisfies prong three.

Although the Ninth Circuit analyzed Mr. Tiznado's case under the plain-error standard, it held his claim "fails under the third prong," because the error did not "affect Defendant's substantive rights." *Tiznado-Valenzuela,* 731 F. App'x at 631. Citing the district court's discussion of deterrence as to the *custodial sentence*, the memorandum maintains "it is clear the outcome [on supervised release] would be the same if this matter were returned to the district court for further explanation." *Id.*

But the Ninth Circuit's treatment of a patently silent record on supervised release is contrary to *Molina-Martinez* and Fifth Circuit precedent on when record

evidence can provide the "unusual circumstances" overcoming a typically prejudicial error. Review is warranted to stem this divergence from the *Molina-Martinez* line of cases, whose holdings affect the scope of the "lodestar" of federal, criminal sentencing procedure. 136 S. Ct. at 1346.

A. In *Molina-Martinez* and Subsequent Decisions, the Court Has Clarified the Keystone Role of the Guidelines, Which Significantly Affects the Operation of the Plain-Error Standard Applied to Federal Sentencing

Molina-Martinez concerned review of an unnoticed, Guideline error that resulted in a higher sentence than the advisory recommendation. Addressing a divergence in the circuits how such error is analyzed, the Court first stressed that case law reiterates "the Guidelines are not only the starting point for most federal sentencing proceedings but also the lodestar." 136 S. Ct. at 1346. Their crucial status affects how one applies the plain-error analysis under Fed. R. Crim. P. 52(b). *See id.* Once the first two prongs of *Olano* (error which is plain) are met, the nature of a Guideline error impacts the third prong on effects to substantial rights. *See* 507 U.S. at 734. Thus, "when a defendant shows that the district court used an incorrect range, he should not be barred from relief on appeal simply because there is no other evidence that the sentencing outcome would have been different had the correct range been used." *Molina-Martinez,* 136 S. Ct. at 1346. So, "**[i]n most cases** a defendant who has shown that the district court mistakenly deemed applicable an incorrect, higher Guidelines range **has demonstrated a reasonable probability** of a different

outcome. And, **again in most cases**, that will **suffice for relief** if the other requirements of Rule 52(b) are met." *Id.* (emphasis added).

This accords with consistent, post-*Booker* treatment of the Guidelines. The Court first described the continued primacy of the now-advisory Guidelines in *Rita v. United States,* 551 U.S. 338 (2007), which held that an appellate court may presume a within-Guideline sentence is reasonable, because of the institutional position of the Guidelines and the empirical work of the Sentencing Commission. *See id.* at 347-51. Because the Guidelines endeavor to embody the statutory, sentencing goals the process will "normally begin" with the proposed Guideline calculations. *Id.* at 351.

Subsequently, in *Gall v. United States,* the Court interpreted *Rita* to say that "a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range," as "the Guidelines should be the starting point and the initial benchmark." 552 U.S. 38, 49 (2007); *see also Kimbrough v. United States,* 552 U.S. 85, 108 (2007) ("As explained in *Rita* and *Gall*, district courts **must** treat the Guidelines as the 'starting point and the initial benchmark' ") (emphasis added). Courts must *start* with a proper calculation, because it is to be used throughout as the "benchmark" for gauging the proposed sentence. "The fact that [18 U.S.C.] § 3553(a) explicitly directs sentencing courts to consider the Guidelines supports the premise that district courts must begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process." *Gall*, 552 U.S. at 50 n.6. In other words, the Guideline policies must be continuously consulted as the touchstone for reasonableness. *See Peugh v. United States,* 569 U.S. 530, 541-42 (2013).

Molina-Martinez directly builds on this foundation by treating plain, Guidelines error as inherently prejudicial in the typical case, precisely because of the central role they play: "the Guidelines are not only the starting point for most federal sentencing proceedings but also the lodestar." *Molina-Martinez,* 136 S. Ct. at 1346. The crucial function of the Guidelines is what makes the error prejudicial in the usual case: "The Guidelines' central role in sentencing means that an error related to the Guidelines can be particularly serious." *Id.* at 1345.

Subsequently, *Rosales-Mireles* confirmed this central role of correct Guidelines application by extending the *Molina-Martinez* reasoning from the third prong of plain error to the fourth prong in most instances. The Court recognized that Guidelines error will usually satisfy the fourth prong of plain error (seriously impairs the fairness, integrity, or reputation of the process), because, again, the pivotal position of the Guidelines makes such error likely to have influenced the result, even when in an advisory role. *See* 138 S. Ct. at 1909. Thus, "Courts are not bound by the Guidelines, but even in an advisory capacity the Guidelines serve as 'a meaningful benchmark' in the initial determination of a sentence and 'through the process of appellate review.' " *Id.* at 1904 (quoting *Peugh,* 569 U.S. at 541).

Rosales-Mireles held the risk of error resulting in excessive incarceration suffices to render Guidelines error generally a matter impugning the fairness and integrity of the sentencing process. *See id.* at 1908 ("The risk of unnecessary deprivation of liberty particularly undermines the fairness, integrity, or public reputation of judicial proceedings in the context of a plain Guidelines error because

of the role the district court plays in calculating the range and the relative ease of correcting the error."). Thus, supporting this view of plain error are the facts that (1) sentencing errors require less institutional effort to correct (*see id.*—"resentencing, while not costless, does not invoke the same difficulties as a remand for retrial does"), and (2) leaving Guidelines error uncorrected creates inaccurate feedback to the Sentencing Commission's review and amendment process, as well as impairing effective functioning of the Bureau of Prisons. *See id.* & n.2 ("To realize those goals, it is important that sentencing proceedings actually reflect the nature of the offense and criminal history of the defendant, because the United States Sentencing Commission relies on data developed during sentencing proceedings, including information in the presentence investigation report, to determine whether revisions to the Guidelines are necessary. When sentences based on incorrect Guidelines ranges go uncorrected, the Commission's ability to make appropriate amendments is undermined.") (citation omitted).

Finally, the Court recently applied the rationale of *Molina-Martinez* in *Hughes* to hold that, even in a stipulated-sentence plea under Fed. R. Crim. P. 11(c)(1)(C), the role of the Guidelines in determining and evaluating such a plea sufficed to hold that the sentence was "based on" the Guidelines in a way that made it eligible for a retroactive sentence reduction under § 3582(c)(2) and U.S.S.G. § 1B1.10. *See* 138 S. Ct. at 1775 (quoting *Molina-Martinez*, 136 S. Ct. at 1345 that "[e]ven if the sentencing judge sees a reason to vary from the Guidelines, if the judge uses the sentencing range

as the beginning point to explain the decision to deviate from it, then the Guidelines are in a real sense the basis for the sentence.").

The *Molina-Martinez* line of cases confirms the keystone role served by consideration of the Guidelines in all federal sentencing. The proper implementation of that reasoning is an important question of law affecting thousands of cases nationwide every year. The Ninth Circuit's deviation from that reasoning therefore raises a "compelling reason" to grant review. Sup. Ct. R. 10.

B. The Ninth Circuit Approach Diverges from Both *Molina-Martinez* and Fifth Circuit Authority

It is clear from the Court's recent decisions that misapplication of the Guidelines is grave error and so "most often … sufficient" to satisfy both the third and fourth prongs of *Olano. Rosales-Mireles*, 138 S. Ct. at 1907. Although the Ninth Circuit assumed that prongs one and two of plain error were met, it refused to follow *Molina-Martinez* as to the third prong. Moreover, it did so under circumstances for which this Court noted particular concern. The principal reasons the Court should grant this Petition, then, are that the Ninth Circuit's holding conflicts with the protocols for plain error in Guideline application articulated in *Molina-Martinez,* the Court's rationales there and in subsequent cases, and the application of those principles in a sister circuit.

Mr. Tiznado had argued the district court erred to impose the statutory-maximum term of supervised release, contrary to § 5D1.1(c). In § 5D1.1(c), the Sentencing Commission directed that "[t]he court should not ordinarily impose a term

of supervised release" when not statutorily required and the defendant is "a deportable alien who likely will be deported after imprisonment." However, if the court finds a need for "an added measure of deterrence" beyond that provided by a subsequent prosecution for illegal re-entry under 8 U.S.C. § 1326, then supervised release may be appropriate. *Id.* cmt. n.5. The central rationale behind § 5D1.1(c) is that an alien—typically deported after sustaining a federal, felony conviction—will "ordinarily" be deterred sufficiently (but not greater than necessary—§ 3553(a)) by the threat of a future prosecution for illegal re-entry, if he were to return, facing either a 10- or 20-year statutory maximum. *See* U.S.S.G. app. C amend. 756 reason for amendment (2011). Accordingly, when the district court found its custodial sentence sufficient to deter repetition of commercial smuggling (with a 10-year cap), it follows Mr. Tiznado would be deterred from illegally re-entering, where he would face a 20-year maximum due to the instant alien-smuggling conviction being an aggravated felony under 8 U.S.C. § 1101(a)(43)(N). *See* 8 U.S.C. § 1326(b)(2).

But the judge was completely silent about any reasons why he imposed the maximum term of three years' supervised release on Mr. Tiznado, a deportable alien, saying only "[t]he period of imprisonment is followed by three years of supervised release." In other words, the only 'consideration' of the term of supervised release was to impose it. The court articulated neither a need for *any* supervised release under § 5D1.1(c) nor why it imposed a functional, three-year, upward variance over the Guideline recommendation of zero months.

The Ninth Circuit did not dispute that the court below had imposed supervised

release in defiance of § 5D1.1(c). Instead, it held "Defendant's challenge fails under the third prong," *Tiznado-Valenzuela*, 731 F. App'x at 631, that is, "that the plain error 'affec[t] substantial rights.' " *Olano*, 507 U.S. at 734 (citation omitted). The purported reason why the error was not prejudicial was that "[c]onsidering the district court's discussion [regarding the custodial sentence] of his repeated behavior and 'the need to deter him and others [from smuggling],' it is clear the outcome would be the same if this matter were returned to the district court for further explanation [of the supervised-release sentence]." *Tiznado-Valenzuela*, 731 F. App'x at 631.

The Ninth Circuit's reasoning is inconsistent with how the Court squarely set out the standards for such review in *Molina-Martinez*, treating Guidelines error as prejudicial "absent unusual circumstances" and subject only to exceptions where *the sentencing judge* articulated a basis for a non-Guideline sentence.

> There **may be instances** when, despite application of an erroneous Guidelines range, a reasonable probability of prejudice does not exist. … The **record in a case may show**, for example, that the **district court thought** the sentence it chose was appropriate irrespective of the Guidelines range. **Judges may find** that some cases merit a **detailed explanation of the reasons** the selected sentence is appropriate. And **that explanation could make** it clear that **the judge** based the sentence he or she selected on factors independent of the Guidelines.

136 S. Ct. at 1346-47 (citations omitted; emphasis added).

The Court's focus on the *judge's* explanation is of particular pertinence to the claims in this case. That is because § 5D1.1 expressly disfavors the pro-forma imposition of supervised release on deportable aliens, unless the court makes a specific and particularized finding that supervised release would provide needed

additional deterrence. § 5D1.1 cmt. n.5. So, Application Note 5 expressly requires a court consider supervised release only "if *the court determines* it would provide an added measure of deterrence and protection based on the facts and circumstances of a particular case." *Id.* (emphasis added).

Here, the record indicates no consideration of the requirements of § 5D1.1(c). The Probation Officer never mentioned or applied § 5D1.1(c); instead, she repeatedly asserted the advisory Guideline range was one to three years, recommending three. The prosecution's recommendation also did not cite § 5D1.1(c). Nor did the judge's comments acknowledge that his sentence was disfavored under § 5D1.1(c). Thus, this case has all the hallmarks of a knee-jerk imposition from force of habit and does not exhibit even a minimum of recognition for the presumption against supervised release. Accordingly, the exception to the general treatment of third-prong prejudice in *Molina-Martinez*—detailed explanation showing intent to deviate from the Guidelines—is glaring in its absence here.

The Ninth Circuit's holding is especially divergent from *Molina-Martinez*, because the simple fact is, this is a case of a manifestly silent record on why supervised release was imposed. The district judge said *nothing* pertaining to supervised release, obliging the panel to make the custody discussion serve double duty to provide a basis for heightened deterrence beyond: (1) the deterrence the court found adequate by two years' imprisonment and (2) the threat of a new prosecution with a 20-year exposure. But *Molina-Martinez* took a particular position on silent records that vitiates the Ninth Circuit's analysis.

Although the Court acknowledged there may be instances where the typical, prejudice presumption may be countered, citing as an example where the district court's "explanation could make it clear that the judge based the sentence he or she selected on factors independent of the Guidelines," *Molina-Martinez,* 136 S. Ct. at 1347, "[w]here, however, **the record is silent** as to what the district court might have done had it considered the correct Guidelines range, the court's reliance on an incorrect range **in most instances will suffice** to show an effect on the defendant's substantial rights." *Id.* (emphasis added). And "[a]bsent unusual circumstances, [appellants] will not be required to show more." *Id.*

Though a judge's "detailed explanation" may demonstrate a clear, extra-Guideline orientation to the sentence, here, the record displays a *lack of explanation* pertinent to the supervised-release sentence. Effectively, the panel's analysis requires Mr. Tiznado "show more" (*id.*) and "bar[s him] from relief on appeal simply because" the panel—not the district judge—finds "the sentencing outcome would [not] have been different had the correct range been used." *Id.* at 1346.

As a result, the Ninth Circuit's approach deviates from treatment in other circuits that adhere more faithfully to *Molina-Martinez*. The Fifth Circuit in *Sanchez-Arvizu* does just that. There, the sentence for illegal re-entry was challenged on plain error. *See* 893 F.3d at 315. In assessing prejudice on the third prong, *Sanchez-Arvizu* applied the framework of *Molina-Martinez,* noting that the judge erroneously believed that a 16-level enhancement applied to the calculation. *See id.* at 315-16. Under *Molina-Martinez,* such an error itself demonstrated prejudice. *See*

id. at 316. While noting the Court's exception for instances where the judge indicates an extra-Guideline orientation, that exception does not apply to a silent record and "[s]uch is the case here." *Id.*

Although the district judge there did discuss the prior conviction underlying the erroneous enhancement and applied the statutory sentencing factors, nothing showed the judge was contemplating going beyond the Guidelines recommendation; indeed, the judge confirmed he was not inclined to vary in either direction. *See id.* at 316-17. Thus, nothing contradicted the *Molina-Martinez* rule for prejudice. *See id.* at 317. The Fifth Circuit went on to apply *Rosales-Mireles* to the fourth prong, rejecting the Government's argument that the defendant's criminal history somehow made the procedural error less injurious to the fairness and integrity of the proceedings. *See id.* at 317-18.

The Fifth Circuit's handling of a silent record accords with *Molina-Martinez,* but not with the Ninth Circuit decision here. Unlike *Sanchez-Arvizu*, the Ninth Circuit did not look to the plainly Guideline-oriented nature of the sentencing judge's analysis. As in the Fifth Circuit case, the sentencing discussion here revolved solely around the applicability *vel non* of certain Guidelines enhancement provisions. The judge here meticulously stayed *within* the advisory Guideline range as calculated, differing with the parties only as to which end of the range was appropriate. Likewise, the discussion of the statutory sentencing factors did not signal an intent to vary from the Guidelines, but actually certified that the Guideline sentence met the parsimony mandate of § 3553(a). And in both cases the judge imposed a within-

Guideline, custodial term. Under the *Molina-Martinez* treatment of a silent record as applied in *Sanchez-Arvizu*, the panel here diverged starkly by ignoring the question of Guideline-centric focus.

The Ninth Circuit's holding is out of synch with this Court's in *Molina-Martinez*. Nothing shows "unusual circumstances" apply here to vitiate the typical result that Guidelines error prejudices a substantial right. In light of the continuing, pervasive importance of correct application of the Guidelines highlighted by *Molina-Martinez, Rosales-Mireles,* and *Hughes*, affecting the cornerstone in every federal sentencing proceeding, this issue presents "compelling reasons" for this Court to grant review to address and head off an incipient, circuit-splitting conflict with Court precedent. Sup. Ct. R. 10.

C. Review Is Warranted to Avoid Further Deviation from the Line of Analysis Established in *Molina-Martinez*

The Court should act to forestall further distortion of the *Molina-Martinez* analysis as occurred in Petitioner's case. The Ninth Circuit has departed from the protocols for analyzing the prejudice prong as set out in *Molina-Martinez,* particularly when faced with a silent record regarding the plain error. This divergence also creates conflict with the application of *Molina-Martinez* in a sister circuit. For both reasons, review should be granted on this Petition.

This case is a proper vehicle for review. First, the question whether a silent record on Guidelines error truly satisfies the third prong "absent unusual circumstances" was squarely presented to the Ninth Circuit in the petition for

rehearing. The Court of Appeals declined to conform its decision with *Molina-Martinez.*

Next, the Question Presented requires only a straightforward analysis: the panel assumed the first two prongs of plain error were met; *Rosales-Mireles* indicates that the fourth prong will be met too; so this Court need address only the pinpoint issue whether the third prong was analyzed in accordance with *Molina-Martinez.* But, as just shown, the Ninth Circuit's post-hoc analysis does not comport with *Molina-Martinez,* which looks primarily to "relevant statements of the judge" to show that he or she intended to apply a non-Guideline sentence. 136 S. Ct. at 1347. Here, there was no statement by the judge of the sort; rather, nothing in this record shows the *sentencing judge* had any awareness or intent to impose a sentence that "was appropriate irrespective of the Guidelines range," *Molina-Martinez,* 136 S. Ct. at 1346, or "selected [it] on factors independent of the Guidelines." *Id.* at 1347.

Moreover, the error is harmful even in a traditional sense, since Petitioner remains subject to three years of supervised release, when the Guidelines presume he will get none. Moreover, the Ninth Circuit's prejudice analysis looked solely to sentence length as a source of harm, ignoring other detriments and the institutional concerns that go beyond the term of supervision, viz. the multiple, additional values served by an adequate explanation from the sentencing judge, as catalogued in *Rita,* 551 U.S. at 356-58. Mr. Tiznado was deprived of those transparency-benefits in precisely the circumstance (an elevated sentence) where they are at a premium. This was harmful, irrespective of the raw sentence length.

Finally, this question begs resolution, as shown by the fact this is not the first time that misconstrual and misapplication of *Molina-Martinez* has arisen since 2016. A three-judge dissent to denial of rehearing in *United States v. Serrano-Mercado*, 828 F.3d 1, 1-5 (1st Cir. 2016), argued the majority's requirement of "*affirmative* evidence that [the defendant] would have received a more favorable sentence" was inconsistent with *Molina-Martinez*. *Id.* at 1 (Lipez, J., dissenting). The dissent noted *Molina-Martinez* reduced the need for affirmative evidence of harm on the third prong of plain error in such cases, implicitly abrogating the First Circuit's approach. *See id.* at 2-4.

Serrano-Mercado demonstrates that questions about the scope and applicability of *Molina-Martinez* have arisen from the outset. The First Circuit dissent notes (*id.* at 4) the identity between the legal issue there and the one which *Molina-Martinez* specifically granted certiorari to review: the divergent views whether "the defendant, on appeal, must identify 'additional evidence' to show that use of the incorrect Guidelines range did in fact affect his sentence" versus "a district court's application of an incorrect Guidelines range can itself serve as evidence of an effect on substantial rights." 136 S. Ct. at 1341.

The Court denied review of the panel decision—at a point when *Molina-Martinez* was a very new case. *See Serrano-Mercado v. United States,* 137 S. Ct. 812 (2017). But now, two years hence, the Ninth Circuit has diverged from *Molina-Martinez,* as well as from the Fifth Circuit. A split has emerged. Also, *Serrano-Mercado* concerned an error in the categorical analysis of a predicate conviction that

affected both the Guidelines and statutory requirements of the Armed Career Criminal Act. *See Serrano-Mercado*, 828 F.3d at 1-2 (Lipez, J., dissenting). Here, in contrast, the error lies *solely* in the misapplication of a uniquely Guidelines-derived policy against supervised release for deportable aliens. It is therefore a clearer, factual and procedural match to the *Molina-Martinez* holding. *See* Sup. Ct. R. 10(c). And because the record here was as silent as that in the Fifth Circuit's *Sanchez-Arvizu* (*see* Part B *supra*), this case exhibits a split in authority threatening the uniform application of *Molina-Martinez. See* Sup. Ct. R. 10(a).

Thus, because Petitioner continues to be subject to the offending term of supervised release, the Court's analysis and ruling will matter. The issue here is narrowed to the single one of the third prong, and so the Court's ruling will be fully dispositive of relief in this case. The Court of Appeals teed-up the question for decision by declining the opportunity to conform its analysis to *Molina-Martinez.* This case is therefore ideally positioned for a focused resolution of the Question Presented, which affects a myriad of criminal cases across the nation.

CONCLUSION

Because "the other requirements of Rule 52(b) are met," *Molina-Martinez,* 136 S. Ct. at 1346, and nothing "unusual" (*id.* at 1347) marks the Guideline error here, the four prongs of *Olano* are satisfied. The Court should grant review to address the Ninth Circuit's divergence from Court precedent and other-circuit applications of that precedent. Sup. Ct. R. 10(a) & (c).

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Respectfully submitted,

s/ James Fife

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