IN THE SUPREME COURT OF THE UNITED STATES

NOE GARCIA-LIMA,

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

When the "record is silent as to what the district court might have done had it considered the correct Guidelines range," *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1347 (2016), should an appellate court presume, for purposes of plain-error review under Federal Rule of Criminal Procedure 52(b), that the error affected the defendant's substantial rights.

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OPINION BELOW

Petitioner appealed his sentence based on the district court procedurally erring in imposing supervised release. The United States Court of Appeals for the Ninth Circuit affirmed Petitioner's sentence, finding no plain error, in an unpublished memorandum disposition. *United States v. Garcia-Lima*, 735 F. App'x 374 (9th Cir. 2018).[1]

JURISDICTION

The court of appeals entered final judgment on August 21, 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).

RELEVANT STATUTORY PROVISIONS

U.S.S.G. § 5D1.1(c). The 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.

U.S.S.G. § 5D1.1(c) cmt. n.5. In a case in which the defendant is a deportable alien specified in subsection (c) and supervised release is not required by statute, the court ordinarily should not impose a term of supervised release. Unless such a defendant legally returns to the United States, supervised release is unnecessary. If such a defendant illegally returns to the United States, the need to afford adequate deterrence and protect the public ordinarily is adequately served by a new prosecution. The court should, however, consider imposing a term of supervised release on such a defendant if the court determines it would provide an added measure of deterrence and protection based on the facts and circumstances of a particular case.

U.S.S.G. § 5D1.2(a). Except as provided in subsections (b) and (c), if a term of supervised release is ordered, the length of the term shall be:
(1) At least two years but not more than five years for a defendant convicted of a Class A or B felony. *See* 18 U.S.C. § 3583(b)(1).
(2) At least one year but not more than three years for a defendant convicted of a Class C or D felony. *See* 18 U.S.C. § 3583(b)(2).
(3) One year for a defendant convicted of a Class E felony or a Class A misdemeanor. *See* 18 U.S.C. § 3583(b)(3).

STATEMENT OF THE CASE

A. Background

Petitioner and his twelve siblings grew up in an impoverished home in Mexico. At just 17 years old, he made his way to San Jose, California, seeking work that would enable him to improve his prospects in life. For 15 years, he succeeded.

In his mid-30s, however, Petitioner's home life was unhealthy. He suffered from a serious alcohol problem and was in an unstable romantic relationship. This volatile period lasted five years, and was marked by two serious domestic violence

convictions, as well as convictions for driving under the influence and driving without a license. In 1999, Petitioner regained control of his personal life.

In the ensuing nearly 20 years leading up to his arrest, Petitioner's only criminal history has been status-related immigration offenses. He, otherwise, worked and supported his family. His earnings enabled the family to afford a home, where they lived for nearly a decade. However, that stability ended in 2010 when Petitioner was incarcerated for illegal entry and subsequently deported. Without his support, Petitioner's family lost their home and often did not have enough to eat.

After years of being absent while his family struggled, on January 22, 2017, Petitioner attempted to return to the United States by presenting a false document. Petitioner was sent to secondary inspection and arrested. Petitioner pled guilty to violating 8 U.S.C. § 1326(a) and (b), and admitted to simultaneously violating supervised release.

B. Sentencing

Prior to sentencing, Probation and the parties calculated a sentencing guidelines range of six to 12 months and unanimously recommended a high-end custodial sentence of 12 months. Probation and the government both recommended a three-year term of supervised release. As justification for this recommendation, the government's Sentencing Summary Chart cited deterrence, to promote respect for the law, and the protection of the public due to Petitioner's criminal and immigration history. Probation cited USSG §5D1.2(a)(2), twice stated the applicable Guideline range of supervised release as one to three years, and listed Petitioner's

non-immigration priors from 20 years prior as justification for a term of supervised release. Neither Probation nor the government cited U.S.S.G. § 5D1.1(c). Section 5D1.1(c) instructs that the court ordinarily should not impose a term of supervised release where the defendant is a deportable alien likely to be deported after imprisonment. The attendant comments elaborate that supervised release is unnecessary because adequate deterrence and public safety are achieved by the new prosecution that any subsequent illegal entry would trigger – unless the facts and circumstances of a particular case indicate otherwise. Neither the government nor Probation cite deterrence of future attempted entries in making their supervised release recommendations.

When imposing the sentence, the court began by reiterating that the Sentencing Guidelines are advisory under *United States v. Booker*, 543 U.S. 220 (2005), and it would be imposing a sentence based on the § 3553(a) factors instead. The court enumerated a modified list of 3553(a) factors that amounted to deterrence, respect for the law and public safety.

After reciting Petitioner's criminal history, the court listed the dates of Petitioner's prior removals. The judge calculated the Guidelines, finding a range of six to 12 months and proceeded to sentence Mr. Garcia-Lima to 48 months in custody.

The court also imposed a term of supervised release. In ordering the supervision, the court said only, "I'll put him on supervised release for a period of three years." The court did not acknowledge Petitioner's likely deportation following

imprisonment. The district court made no determination or finding that, based on the facts and circumstances of Petitioner's case, a term of supervised release was needed to provide an *added* measure of deterrence and protection beyond that already provided by the possibility of a new prosecution and beyond the custodial sentence four times the high end of the Guideline range. Nor did the district court ever calculate the guideline range for a term of supervised release. Under U.S.S.G. § 5D1.2(a)(2), the correct range was one to three years, meaning that the district court had imposed a high-end, statutory-maximum term of supervised release.

C. Ninth Circuit Court of Appeals

Petitioner appealed his sentence to the Ninth Circuit, arguing that the district court had erred in imposing a term of supervised release. Specifically, Petitioner alleged that the court plainly erred in failing to calculate the applicable supervised release guideline range, failed to apply § 5D1.1(c), which called for no supervised release, and failed to provide any particularized explanation for its supervised release sentence.

A screening panel of the Ninth Circuit affirmed in a memorandum disposition. *See* Appendix A. The panel ruled that the district court did not commit plain error and concluded that "even if the court had explicitly acknowledged the Guidelines provision at issue, it would have imposed the same three-year term of supervised release given its concerns about Garcia-Lima's failure to be deterred and the danger he poses to the public." *Id.* The panel also noted that no plain error exists "where a defendant cannot a show 'a reasonable probability that he would

have received a different sentence' absent the alleged error." *Id.* (internal citation omitted.)

REASONS FOR GRANTING THE PETITION

This Petition concerns the operation of plain-error review in applying the U.S. Sentencing Guidelines, an issue this Court recently addressed in *Molina-Martinez v. United States*, 136 S. Ct. 1338 (2016). That case highlights 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. 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.

Here, the record is devoid of any indication that the court properly calculated the applicable Guidelines, U.S.S.G. §§ 5D1.1(c) and 5D1.2, which recommend no term of supervised release for individuals, like Mr. Garcia-Lima, who face deportation following incarceration. The court never mentioned the governing Guidelines provision or the relevant factors enumerated within the Guidelines. The entirety of the court's consideration as to Mr. Garcia-Lima consisted of the single statement, "I'll put him on supervised release for a period of three years." Despite this, the Ninth Circuit Court of Appeals claimed that Mr. Garcia-Lima cannot show a "reasonable probability that he would have received a different sentence" had the sentencing court considered the guidelines.

The Ninth Circuit's rule would turn this Court's holding in *Molina-Martinez* 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.

A. The District Court Erred in Failing to Calculate the Guideline Range and Failing to Explain its Sentence

In *Molina-Martinez*, the Court explained that "[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." 136 S. Ct. at 1346 (emphasis added). This makes sense. "Although the district court has discretion to depart from the Guidelines, the court 'must consult those Guidelines and take them into account when sentencing.'" *Molina-Martinez*, 136 S. Ct. at 1342 (quoting *United States v. Booker*, 543 U.S. 220, 264 (2005)). "[T]he Guidelines are not only the starting point for most federal sentencing proceedings but also the lodestar." *Id.* at 1346. "From the centrality of the Guidelines in the sentencing process it must follow that, 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." *Id.*

The reasoning behind this rule must also apply to sentencings where the district court fails to calculate the guidelines. As the Court has often explained, "[t]he Guidelines' central role in sentencing means that an error related to the

Guidelines can be particularly serious." *See id.* at 1343. Without a "lodestar" guiding the district court's sentencing decision, the sentence loses the important guarantees of "[u]niformity and proportionality" protected by the guidelines. *Id.* at 1342. Thus, "[w]here . . . the record is silent as to what the district court might have done had it considered the correct Guidelines range," the ultimate sentence cannot stand. *See id.* at 1347.

In *Molina-Martinez*, the Court clarified that its general rule applied to *most* cases, not all. As the Court explained, "[t]here may be instances when, despite application of an erroneous Guidelines range, a reasonable probability of prejudice does not exist." *Id.* at 1346. But those are "unusual circumstances" where the district court's explanation for its sentence "make[s] it clear that the judge based the sentence he or she selected on factors independent of the Guidelines." *Id.* at 1347. In most cases, "sentencing judges often say little about the degree to which the Guidelines influenced their determination." *Id.* The Court emphasized this in its subsequent decision *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1909 (2018). Building on the reasoning in *Molina-Martinez*, the Court held 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. And of course, that is never more true than in cases where the district court does not expressly calculate the guidelines at all.

B. The Ninth Circuit Approach Diverges from *Molina-Martinez*

The Ninth Circuit's decision is inconsistent with this Court's precedent. *Molina-Martinez* makes clear that misapplication of the Guidelines is grave error and will most often satisfy both the third and fourth prongs of *Olano*. Although the Ninth Circuit assumed that prongs one and two of plain error were met in this case, it refused to follow *Molina-Martinez* as to the third prong.

Below, Mr. Garcia-Lima argued the district court erred in imposing 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).

The sentencing court never mentioned the governing Guidelines provision or the relevant factors enumerated within the Guidelines. The entirety of the court's consideration as to Mr. Garcia-Lima consisted of the single statement, "I'll put him

on supervised release for a period of three years." 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 that there was no plain error because the "record makes clear that, even if the court had explicitly acknowledged the Guidelines provision at issue, it would have imposed the same three-year term of supervised release given its concerns about Garcia-Lima's failure to be deterred and the danger he poses to the public." Appendix A at 2.

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. 136 S. Ct. at 1346-47. 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). 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 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*, 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. Thus, 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 appellate briefs. 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; thus, 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.

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

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

Respectfully submitted,

Dated: November 21, 2018

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