No. 19-

IN THE

SUPREME COURT OF THE UNITED STATES

RAMON MONTERO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is the Fifth Circuit correctly conducting its harmlessness inquiry when reviewing preserved Guidelines-calculation errors arising under Rule 52(a) of the Federal Rules of Criminal Procedure, particularly in light of this Court's decision in *Molina-Martinez v. United States*, 136 S. Ct. 1338 (2016)?

PARTIES

Petitioner: Ramon Montero

Respondent: United States of America

TABLE OF CONTENTS

PAGE

INDEX TO APPENDICES

TABLE OF AUTHORITIES

PAGE

FEDERAL CASES

STATUTES

RULES

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Ramon Montero, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The unpublished opinion fo the United States Court of Appeals for the Fifth Circuit is captioned as *United States of America v. Ramon Montero*, No. 18-10153, 742 Fed. Appx. 892 (5th Cir. Nov. 21, 2018)). See Appendix A.

JURISDICTIONAL STATEMENT

The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). This petition has been filed within 90 days of the opinion of the court of appeals and is therefore timely. *See* Sup. Ct. R. 13.1.

FEDERAL RULE OF CRIMINAL PROCEDURE INVOLVED

The question presented involves Rule 52(a) of the Federal Rules of Criminal Procedure, which provides: "[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded."

STATEMENT OF THE CASE

Petitioner pleaded guilty to possessing with intent to distribute 50 grams or more of methamphetamine. *Montero*, 742 Fed. Appx. at 892. The district court sentenced Petitioner to 365 months, the top of what it found to be the applicable Guidelines range of 292-365 months. (ROA. 77-79,182, 187-189.) This sentence was nearly 11 years longer than the top of the Guidelines range Petitioner contended should have applied— 188-235 months. Specifically, Petitioner had challenged the application of a 1) the application of a two-level maintaining-a-premises enhancement USSG § 2D1.1(b)(12) and 2) a two-level importation-from-Mexico enhancement under USSG § 2D1.1(b)(5).((ROA. 173-181, 225-227.)

After pronouncing the 365-month sentence, the government asked the district court if it would have imposed the same sentence even if it had sustained Appellant's objections and calculated the sentence as 188-235 months. (ROA. 179.) The court curtly responded "yes." (ROA. 189.) In the Statement of Reasons the district court similarly remarked "if the guideline calculations are not correct, this is the sentence the Court would otherwise impose under 18 U.S.C. § 3553." (ROA. 261.)

Petitioner appealed, raising the two preserved Guidelines objections made in the district court. The court of appeals refused to address these claims, concluding that any error was harmless in light of the district court's sentencing comments. *Montero*, 742 Fed. Appx. at 892.

REASONS FOR GRANTING THE PETITION

I. The Fifth Circuit has set too low a bar for the government to demonstrate a preserved Sentencing Guidelines error is harmless.

Petitioner respectfully submits that the Fifth Circuit continues underestimate the influence of the Guidelines when reviewing Guidelines errors for harm under Rule 52(a) of the Federal Rules of Criminal Procedure. In *Molina-Martinez*, this Court held that when reviewing unpreserved errors arising under Rule 52(b), a defendant can "in most cases" show a reasonable probability of harm where a Guidelines error causes a defendant to be sentenced under an incorrect Guidelines range. *See Molina-Martinez*, 136 S. Ct.1338, 1347 (2017). The Court rejected the Fifth Circuit's overly "rigid" standard of review it had used for unpreserved Guidelines errors. *Molina-Martinez*, 136 S.Ct. at 1341. Because the Guidelines"are not only the starting point for most federal sentencing proceedings, but also the lodestar," *Id.* at 1346, the Court concluded that "in most cases the Guidelines range will affect the sentence." *Id.* at 1349.

Critically, *Molina-Martinez* considered review of the harmless error standard under Rule 52(b), which applies to unpreserved error—where the *defendant* bears the burden to show a reasonable probability of a different outcome. *See Molina-Martinez*, 136 S. Ct. at 1349; *United States v. Olano*, 507 U.S. 724, 734 (1993). The Court held that a defendant can typically satisfy this burden merely by showing that the district court's "starting point and initial benchmark" was the wrong Guidelines range. *Gall v. United States*, 552 U.S. 38, 49 (2007); *see Molina-Martinez,* 136 S.Ct. at 1346 ("The

Guidelines inform and instruct the district court's determination of an appropriate sentence. [I]n the usual case, then, the systematic function of the selected Guidelines range will effect the sentence.").

The reasoning of *Molina-Martinez* compels the conclusion that *preserved* Guidelines errors arising under Rule 52(a) should rarely, if ever, be found to be harmless. For preserved claims arising under Rule 52(a), the *government* instead of the defendant bears the burden of showing a Guidelines error was harmless. *See United States v. Vonn*, 535 U.S. 55, 62 (2002) (for errors arising under Rule52(a), government "carr[ies] the burden of showing that any error was harmless, as having no effect on the defendant's substantial rights"); *Olano*, 507 U.S. at 734. This Court held in *Molina-Martinez* that a defendant can affirmatively establish a reasonable probability of harm in most cases *solely* with proof that an unpreserved Guidelines error led him to be sentenced under the wrong Guidelines range. *Molina-Martinez*, 136 S. Ct. at 1346-1349. This holding would seem to compel the conclusion that for preserved errors, the government could rarely if ever affirmatively demonstrate that a district court's consideration of the wrong Guidelines range "did not affect the district court's selection of the sentence imposed." *Williams v. United States*, 503 U.S. 193, 203 (1992) (discussing Rule 52(a)).

But that is not the state of affairs in the Fifth Circuit. Even after *Molina-Martinez*, the Fifth Circuit continues to underestimate the"real and pervasive effect the Guidelines have on sentencing." *Molina-Martinez*, 136 S. Ct. at 1346. It sets far

too low a bar for the government to establish harmlessness for preserved claims of Guidelines error.

In this case, the district court sentenced Petitioner under the erroneous belief that the applicable Guidelines range was 292-365 months instead of 188-235 months. These respective tops of these ranges are not close to one another—130 months or nearly 11 *years* apart. The district court sentenced Petitioner under the impression that the Guidelines recommended over a 30- year sentence; if Petitioner is correct in his objections, the Guidelines would not even recommend a 20-year sentence. *Any* sentence above 235 months would have been an upward variance and required "compelling" justification. *Gall v. United States*, 552 U.S. 38, 50 (2007).

But Petitioner had even more evidence against finding harmlessness than the disparity in ranges, which alone should be enough. Additionally, however, this very same district court has demonstrated previously that it will in fact impose a lower sentence on remand notwithstanding its earlier remarks. For example, in one case this same district judge was confronted on remand with a reduced sentencing range of 151 months-188 months instead of 292-365 months. *United States v. Bazemore*, 839 F.3d 379, 383-85 (5th Cir. 2016). Even though the court had said during the first sentencing that it would have imposed the same sentence had it been wrong about the Guidelines, it did in fact significantly reduce the defendant's sentence at resentencing from 292 months to 188 months. *Id.* at 385. This very same district court reduced the sentence by nearly nine years on remand in spite of what it had said during the first sentencing.

Remarkably, the Fifth Circuit suggested this evidence had no relevance to the harmless error inquiry. *See Montero*, 742 Fed. Appx. at 892 ("Montero does not cite, and research has not revealed any precedent that suggests a district court's propensity to impose a lower sentence on remand is relevant to the harmless error inquiry."). This conclusion is utterly confounding. If the purpose of the harmless-error inquiry is to assess whether the Guidelines error effected the district court's selection of the sentence, is behavior in nearly identical situations would seem particularly probative.

This Court must clarify to the Fifth Circuit that it needs a more firm basis to in the record before finding a preserved Guidelines error to be harmless. Had Petitioner not objected, Petitioner most certainly would have prevailed on showing harm based on the differential Guidelines ranges alone. *see Molina-Martinez,* 136 S.Ct. at 1346 ("The Guidelines inform and instruct the district court's determination of an appropriate sentence. [I]n the usual case, then, the systematic function of the selected Guidelines range will effect the sentence."). In light of *Molina-Martinez*, it is absurd for the court of appeals to so liberally find a preserved Guidelines error harmless with no evidence beyond a passive "yes" answer to the prosecutor's question of whether it would have imposed the same sentence had it been wrong about the Guidelines. The government purportedly carries a heavy burden to show an error had zero effect "on the district court's selection of the sentence imposed." *Williams*, 503 U.S. at 203. It should not be able to immunize itself from any appellate challenge by exhorting the court to utter a few magic words. This Court should grant certiorari.

CONCLUSION

Petitioner respectfully requests that this Court grant his petition for a writ of certiorari.

DATE: February 15, 2019

Respectfully Submitted,

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