No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ARREZ MELITON-SALTO,

Petitioner,

-v-

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

When the district court fails to calculate the guideline range at sentencing, whether the defendant may rely on the district court's error alone to show prejudice under plain error review 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).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

SENTENCING GUIDELINES

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Petitioner Arrez Meliton-Salto respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit entered on September 12, 2018.

JURISDICTION

A district judge found Petitioner guilty of being a removed alien found in the United States, 8 U.S.C. § 1326, in the United States District Court for the Southern District of California. The district court sentenced him to 24 months' imprisonment followed by three years of supervised release. Reviewing the judgment under 28 U.S.C. § 1291, the Ninth Circuit affirmed Petitioner's sentence in an unpublished disposition. *See United States v. Meliton-Salto*, 738 F. App'x 525 (9th Cir. 2018) (attached to this petition as Appendix A). Petitioner filed a petition for panel rehearing and rehearing en banc, which the court denied on January 25, 2019. *See* Order Denying Petition for Rehearing (attached to this

petition as Appendix B). This Court has jurisdiction to review the Ninth Circuit's decision under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS

U.S.S.G. § 5D1.1 Imposition of a Term of Supervised Release

> (a) The court shall order a term of supervised release to follow imprisonment—
>
> (1) when required by statute (see 18 U.S.C. § 3583(a)); or
>
> (2) except as provided in subsection (c), when a sentence of imprisonment of more than one year is imposed.
>
> (b) The court may order a term of supervised release to follow imprisonment in any other case. See 18 U.S.C. § 3583(a).
>
> (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. § 5D1.2(a) Term of Supervised Release

> (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).

18 U.S.C. § 3583(b)

> (b)Authorized Terms of Supervised Release.—Except as otherwise provided, the authorized terms of supervised release are—
>
> (1)for a Class A or Class B felony, not more than five years;
>
> (2)for a Class C or Class D felony, not more than three years; and
>
> (3)for a Class E felony, or for a misdemeanor (other than a petty offense), not more than one year.

STATEMENT OF THE CASE

A. District Court Proceedings.

Petitioner, a Mexican citizen, crossed the United States/Mexico border illegally in February 2017. Border Patrol Agents found him hiding behind some rocks in an area about five miles from the nearest port of entry. After his arrest, the government prosecuted Petitioner for being a removed alien found in the United States in violation of 8 U.S.C. § 1326. The district court convicted Petitioner after a stipulated-facts bench trial.

Before sentencing, the United States Probation Department prepared a Presentence Report ("PSR") detailing Petitioner's personal history, prior convictions, and applicable sentencing guidelines. The PSR calculated a custodial guideline range of 27-to-33 months and recommended a low-end sentence of 27 months' imprisonment. Regarding the applicable term of supervised release, the PSR stated, "[s]ince the offense is a Class C Felony, the guideline range for a term of supervised release is 1 year to 3 years. U.S.S.G. § 5D1.2(a)(2)." The PSR recommended a low-end, one-year term of supervised release "[d]ue to the nature of the defendant's criminal convictions, and the need to protect the community."

Petitioner and the government jointly calculated the custodial guideline range at 24-to-30 months, each recommending an additional point for acceptance of responsibility. Petitioner requested a custodial sentence of 16 months, with no supervised release to follow. Petitioner's counsel argued that this sentence was appropriate for numerous reasons: 1) this was the first time that Petitioner had

been prosecuted for an immigration offense; 2) he was coming back to the United States to earn money to provide for his elderly mother's medication; 3) he had remained out of the United States for the entire ten years since his sole prior deportation; and 3) his prior criminal history was stale.

After hearing argument regarding the basis for counsel's recommended sentence, the district court calculated the custodial Guideline range at 24-to-30 months. The district court stated that it considered the § 3553(a) factors. It noted that this was Petitioner's first § 1326 offense, but commented that the court's sentence is "supposed to promote respect for the law." It added, "I would hope that a [low-end] 24-month sentence would, in fact, accomplish that." Ultimately, the court was "satisfied that the low end of the Guideline range [was] reasonable, [was] sufficient, but not greater than necessary," and "should deter [Petitioner] from further violations of the law." The court, thus, imposed a low-end custodial sentence of twenty-four months.

The court next considered a term of supervised release. But the court ignored two applicable guidelines pertaining to supervised release at U.S.S.G. §§ 5D1.1 and 5D1.2. Section 5D1.1(c) recommended imposing *no* supervised release, because "supervised release is not required by statute and the defendant is a deportable alien who likely will be deported after imprisonment." And even assuming a term of supervised release was nonetheless appropriate for "added deterrence," *see* U.S.S.G. § 5D1.1 cmt. n.5, section 5D1.2(a)(2) recommended a term of one-to-three years.

Without consulting these guidelines or announcing a guideline range, the court stated that it was placing Petitioner on three years of supervised release in addition to the custodial sentence, the maximum term under 18 U.S.C. § 3583(b). The court explained:

> I point out that one of the reasons why I'm imposing three years of supervised release is his, you know, past criminal conduct. It causes me to believe that we don't want him to come back into the United States. We don't want him – we don't want to take the risk of him re-engaging in that type of conduct, and hopefully supervised release will deter him from coming back.

At no point did the district court consult the provision setting out the guideline range for Petitioner's offense or provide any explanation for imposing the statutory-maximum, three-year term of supervised release instead of a lower term.

Petitioner timely appealed.

B. Appeal to the Ninth Circuit.

On appeal, Petitioner argued *inter alia* that the district court had plainly erred by failing to calculate the applicable sentencing guidelines for a term of supervised release under U.S.S.G. § 5D1.2. Petitioner further explained that this plain error affected his substantial rights. Whereas the district court had imposed a low-end custodial sentence after correctly calculating the guidelines for imprisonment, the court inexplicably imposed a high-end, statutory maximum term of supervised release after failing to consult the guidelines. Petitioner argued that this unexplained discrepancy was ample evidence of prejudice.

The Ninth Circuit disagreed and affirmed Petitioner's sentence in an unpublished memorandum disposition. *Meliton-Salto*, 738 F. App'x at 525. The

panel reasoned that Petitioner had "not shown a reasonable probability that he would have received a different sentence had the court explicitly calculated the Guidelines range for supervised release." *Id.*

Petitioner challenged the panel's reasoning in a petition for rehearing and rehearing en banc. Petitioner explained that the panel's decision broke from this Court's precedent in *Molina-Martinez*, which provided that the calculation of the wrong guideline range was sufficient evidence of prejudice absent unusual circumstances. *See* 136 S. Ct. at 1347. Petitioner explained that the same general presumption necessarily extended to a district court's complete failure to calculate the guidelines. He also urged en banc review in light of a growing trend of district courts failing to calculate guideline ranges for supervised release and the Ninth Circuit's summary affirmance of those procedurally erroneous sentences. *See, e.g., United States v. Reyes-Quintero*, 712 F. App'x 708 (9th Cir. 2018); *Untied States v. Romero-Payan*, 696 F. App'x 245 (9th Cir. 2017); *United States v. Mendoza-Zazueta*, 693 F. App'x 557 (9th Cir. 2017).

The Ninth Circuit denied the petition without ordering a response from the government nor providing any explanation for its decision.

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari to correct the Ninth Circuit's drastic departure from this Court's sentencing jurisprudence. This Court explained in *Molina-Martinez* that "[w]here [] 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." 136 S. Ct. at 1347. Where, as here, the district court indicated *no awareness* of the correct range at all, the same rule must apply: if there are no "unusual circumstances," *id.*, nor any indication of what the district court would have done had it calculated the guidelines correctly, a defendant should "not be required to show more" to prove prejudice to his substantial rights. *See id.* The Ninth Circuit's contrary rule creates a perverse incentive for district courts to avoid calculating the guidelines, as shown by a disturbing string of affirmed sentences where district courts entirely failed to announce the applicable sentencing guidelines as required by statute and this Court's rulings. This Court should grant certiorari, review the Ninth Circuit's erroneous rule, and reverse.

A. When a District Court Fails to Calculate the Guideline Range at Sentencing, a Defendant May Later Rely on the District Court's Failure to Show Prejudice to His Substantial Rights Under Plain Error Review.

"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. Accordingly, "failing to calculate (or improperly calculating) the Guideline range" is "significant procedural error." *Gall v. United States*, 552 U.S. 38, 51 (2007).

This Court explained the inherent prejudicial impact of a guideline error in *Molina-Martinez*: "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." *Molina-Martinez*, 136 S. Ct. at 1346.

True, this 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 the large majority of cases, "sentencing judges often say little about the degree to which the Guidelines influenced their determination." *Id.* Thus, a reviewing Court may rely on the district court's reliance on the wrong guidelines as dispositive evidence of prejudice.

The reasoning behind this rule must also apply to sentencings where the district court entirely fails to calculate the guidelines. First, as this 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. In other words, when a district court fails to calculate the guidelines, a reviewing court has no way to tell whether the sentencing court is exercising its discretion by whim or bias. 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 addition, failing to extend *Molina-Martinez* from cases involving the *wrong* guideline range to cases involving *no* guideline calculation would create a perverse incentive for district courts to avoid mandated procedure. Under such a regime, a district court uncertain about the correct range might avoid calculating the guidelines—rather than risk a mistake—in order to insulate his or her sentencing decision from appellate review. In the same vein, a district court might deliberately fail to calculate the guidelines to avoid the difficult task of explaining any deviation from the guidelines or its decision to sentence at the high-end or low-end of the applicable range. This Court's law must discourage this sort of "appeal proofing." Extending the general presumption of prejudice from *Molina-Martinez* to a district court's failure to calculate the guidelines easily and smartly accomplishes that task.

B. The Ninth Circuit Was Wrong to Affirm the District Court in Petitioner's Case After the District Court Failed to Calculate the Guidelines.

The Ninth Circuit panel erroneously affirmed Petitioner's sentence after the district court failed to calculate the applicable supervised release guidelines. Here, the district court never explained whether its decision to impose a high-end, statutory-maximum term of supervised release was anchored to the correct guidelines. Under those circumstances, Petitioner obviously "lack[s] the additional evidence" to prove prejudice to a certainty, *see Molina-Martinez*, 136 S. Ct. at 1346, but that cannot undermine his appeal. As described above, the district court's unfettered, unguided decision to impose the longest sentence possible is all that Petitioner needs to show under *Molina-Martinez*. The Ninth Circuit thus erred in rejecting Petitioner's appeal due to a lack of prejudice.

The district court had discretion below to impose anywhere between zero and three years of supervised release under 18 U.S.C. § 3583(b)(2). But the Sentencing Commission provided further guidance. Under U.S.S.G. §§5D1.1 and 5D1.2, specific guideline ranges applicable to Petitioner's case. First, § 5D1.1(c) states "[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." Because each of those circumstances applied to Petitioner's case, the guidelines accordingly urged the district court to impose *no* supervised release. But even assuming the court exercised discretion to depart from § 5D1.1(c)'s recommendation, § 5D1.2 became

operable. Petitioner's applicable guideline range for a term of supervised release under § 5D1.2(a)(2) was one-to-three years.

Yet the district court never mentioned any of these guideline provisions at sentencing. Instead, the Court discussed only *one* factor—deterrence—supporting its decision to impose a high-end, statutory maximum term of supervision. Petitioner's case is not, therefore, the "unusual" case where the reviewing court can be sure that the district court would have imposed the same sentence had it properly calculated the guidelines. *See Molina-Martinez*, 136 S. Ct. at 1347. Instead, because "the record is silent as to what the district court might have done had it considered the correct Guidelines range," the guideline error was all Petitioner needed to proffer in order to prove prejudice to his substantial rights. *See id.*

Moreover, Petitioner did not rely *solely* on the district court's error in failing to calculate the guideline range to establish prejudice. After the district court conducted a thorough § 3353(a) analysis—including expressly considering the applicable guideline range for *imprisonment*—the court selected a low-end custodial sentence. It did so after expressly stating that it thought the low-end custodial sentence would deter Petitioner from future criminal conduct. That adherence to the guidelines for the custodial sentence creates a "reasonable probability" that the court would have selected a low-end term of supervision had it considered the correct guideline range for supervised release—especially when the court stated its principal goal for supervision was *also* deterrence.

In short, Petitioner easily carried his low burden of proving prejudice to his substantial rights, and this Court should reverse the Ninth Circuit's erroneous decision.

C. This Case is a Good Vehicle for Resolving the Question Presented.

Petitioner's case is the perfect case to resolve this important legal issue. Here, the sole issue is whether the district court's plain error prejudiced Petitioner. Whether the district court's failure to calculate the guidelines provides sufficient evidence of prejudice is entirely dispositive of the case. If, contrary to the Ninth Circuit's ruling, the district court's plain error caused prejudice to Petitioner's substantial rights, Petitioner will necessarily prevail.

Moreover, this case presents a perfect opportunity for this Court to correct a pervasive error in the Ninth Circuit. As *the government* pointed out in briefing below, district courts have failed to calculate supervised release guidelines in a number of cases, yet the Ninth Circuit has consistently affirmed those sentences based on the same erroneous reasons applied to Petitioner's case. *See, e.g., Reyes-Quintero*, 712 F. App'x at 708; *Romero-Payan*, 696 F. App'x at 245; *Mendoza-Zazueta*, 693 F. App'x at 557.

The prevalence of these decisions heightens the importance of this Court's review. Together with Petitioner's appeal, these cases indicate that district courts are failing to calculate the guidelines, a trend that ought to concern this Court. Further, these cases show that the district courts' plainly erroneous sentences stand uncorrected, and the error is likely to repeat without this Court's intervention.

Summarily affirming plain guideline errors, which this Court has called "particularly serious," *see Molina-Martinez*, 136 S. Ct. at 1343, abdicates the appellate court's responsibility. While defendants bear a burden to prove prejudice, the Ninth Circuit's rule creates an insurmountable hurdle rejected by this Court in *Molina-Martinez*. This Court accordingly should seize the opportunity to reverse the Ninth Circuit's error and terminate a disturbing trend of procedurally erroneous sentences.

CONCLUSION

For the foregoing reasons, this Court should grant this Petition for a Writ of Certiorari.

Respectfully submitted,

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