IN THE SUPREME COURT OF THE UNITED STATES

ALEXANDER MONZONI,

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 application of the prejudice prong of plain-error review for Guideline error as set out in *Molina-Martinez v. United States*, particularly for cases like this, where the Guideline calculation was entirely omitted?

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PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Alexander Monzoni, 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The Ninth Circuit, in an unpublished decision, affirmed the sentence for violation of 21 U.S.C. §§ 952 & 960. *See* Appendix A (*United States v. Monzoni,* 747 F. App'x 547 (9th Cir. 2018)).

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

JURISDICTION

On December 21, 2018, the Ninth Circuit affirmed the sentence. *See* Appendix A. On April 5, 2019, 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

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 addressed in *Molina-Martinez v. United States,* 136 S. Ct. 1338 (2016), and subsequently extended in *Rosales-Mireles v. United States,* 138 S. Ct. 1897 (2018). Those cases highlight the continuing importance of treating 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*. There, the Court noted that prejudicial, Guideline error "is precisely the type of error

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

that ordinarily warrants relief under [Fed. R. Crim. P.] 52(b)." 138 S. Ct. at 1907. Such error "seriously affect[s] the fairness, integrity, and public reputation of judicial proceedings," meeting the fourth prong of plain error as well. *Id.* at 1911.

But despite the absence of any "unusual circumstances" here, the Ninth Circuit defied these holdings in finding no prejudice from Guidelines error. It did so, because Mr. Monzoni did not show "a reasonable probability that he would have received a different sentence had the court expressly calculated the applicable Guidelines range" for supervised release. *Monzoni*, 747 F. App'x at 548. That holding is flatly inconsistent with *Molina-Martinez*'s statement that plain-error claimants "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.

In particular, *Molina-Martinez* explained that, although the judge's actual analysis may show an intent to ignore the Guidelines recommendation altogether, "[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.* at 1347. But the Ninth Circuit's analysis distorts this exception to the typical case, ignoring the effect of a silent record here. 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), which hew more faithfully to this Court's treatment of silence.

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.

Where a sentencing court simply fails to calculate the advisory recommendation, such silence is the purest form of misapplication of the Guidelines. Failing to apply *Molina-Martinez*'s default, prejudice burden where the district court does not calculate the Guidelines at all—as opposed to where the court miscalculates a particular part of the Guidelines—is unwise policy. Disparate treatment would create a perverse incentive for a sentencing judge to avoid calculating the Guidelines, absent an objection, to insulate the decision on appeal. The Ninth Circuit's analysis promotes just such an untenable practice.

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

B. Petitioner's Background and Circumstances of the Offense

Mr. Monzoni, age 41 at sentencing, was born in Peru, where he graduated college and worked as a computer operator for a bank before immigrating to the United States at age 26. He became a naturalized citizen in 2008. He took community college courses for English language, got married, and had twin children, moving up from working in construction and stocking to become a supervising cable

installer.

But the result of his working hard in 12-hour days put stress on his relationship and the couple separated in 2015. From that point, Mr. Monzoni's life-trajectory took a sharp turn. While he continued to work successfully for his employer and supporting his twins, about a year before the charged offense, he entered a committed relationship with Fatima Espinoza, a Mexican national living in Mexico. This led to his moving from San Diego to Tijuana, adopting Fatima's daughter, and their having another child of their own. However, the move to Tijuana also required him to cross the border very frequently to work and split his time between his Mexican and American children.

It was likely his status and frequent crossing that made him attractive to the drug-smugglers. Pressured by his intense work schedule, family commitments, and the effects of a recent family death, Mr. Monzoni made the poor decision to become involved with smuggling.

On October 25, 2016, Mr. Monzoni drove his Toyota to the San Ysidro Port of Entry, knowing there were drugs concealed in the vehicle, seeking entry into the United States. He was sent to secondary inspection, where 32 packets were extracted from the door panels. It was determined that the packages contained 13.13 kilograms of methamphetamine and 1.503 kilograms of cocaine.

C. The District Court Proceedings

Mr. Monzoni entered a guilty plea to the charges of importing methamphet-

amine and cocaine. In its presentence report, Probation made two conflicting references to the Guideline recommendation for supervised release. First, it stated, "**Guideline Provisions**: *As to each count*: The Guideline term for supervised release is three years. USSG § 5D1.2(c)." Later, it asserted, "**Guideline Range:** At least 3 years." It made no reference to the range for this conviction calculated under § 5D1.2(a), which is one to three years. Ultimately, it recommended three years of supervised release.

Mr. Monzoni's sentencing memorandum made no recommendation as to supervised release and offered no calculation of the range. For its part, the Government recommended three years' supervision, but it did not provide any Guideline calculation or explain its recommendation.

At the hearing, the court calculated the advisory Guideline range for custody for this offense as 210 to 240 months. Then, taking note of Mr. Monzoni's substantial equities, it decided to vary downward on custody, just as Probation, prosecution, and defense had recommended, though to varying degrees. The court observed that, "I just don't think that that [Guideline range] takes into consideration his equities. It doesn't treat him the same as similarly situated people." It varied downward to impose 80 months, a 62% reduction from the low end of the Guidelines.

But, then, without calculating or citing the Guideline range, it imposed supervised release, saying only, "He is to be on supervised release following his completion of the custodial portion of his sentence for five years."

After advising Mr. Monzoni on his appeal rights and soliciting a

recommendation for placement, the court adjourned with the admonition that Mr. Monzoni "[g]o back to being the good citizen for 41 years before you got involved with this."

D. The Appellate Decisions

On appeal, Mr. Monzoni argued the district court had erred under circuit and Supreme Court precedent by failing to calculate the Guideline range for supervised release and then failing to explain the need for a variance or its extent by providing reasons commensurate with the degree of deviation from the Guideline.

The Ninth Circuit reviewed these claims for plain error. *See Monzoni*, 747 F. App'x at 748. The panel held,

> Monzoni has not shown a reasonable probability that he would have received a different sentence had the district court expressly calculated the applicable Guidelines range. *See United States v. Dallman*, 533 F.3d 755, 762 (9th Cir. 2008). Moreover, the district court's reasons for imposing an above-Guidelines term of supervised release are apparent from the record as a whole, *see United States v. Carty*, 520 F.3d 984, 992 (9th Cir. 2008) (en banc), and the court did not rely on any proscribed factor in imposing the five-year term. *See* 18 U.S.C. §§ 3553(a) and 3583(c).

Id.

Mr. Monzoni sought rehearing on the basis that the panel's analysis of the third (prejudice) prong of plain error was contrary to this Court's holding in *Molina-Martinez*.

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 principal reasons the Court should grant this Petition are that the Ninth Circuit's holding conflicts with the protocols for plain error in Guideline application articulated by *Molina-Martinez,* the Court's rationales there and in subsequent cases, and the application of those principles in a sister circuit.

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.

Although the Ninth Circuit analyzed Mr. Monzoni's case under the plain-error standard, it rejected his claim, because he "has not shown a reasonable probability that he would have received a different sentence had the district court expressly calculated the applicable Guidelines range." *Monzoni*, 747 F. App'x at 548. Apparently referencing the district court's discussion of the *custodial sentence*, the memorandum contends "the reasons for imposing an above-Guidelines term of supervised release are apparent from the record as a whole." *Id.*

The Ninth Circuit's treatment of a silent record with no Guideline calculations or reasons for imposing a variance is contrary to *Molina-Martinez* and Fifth Circuit precedent addressing when the record exhibits "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.*

This accords with consistent, post-*Booker*[2] 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 research 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**

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[2] *United States v. Booker*, 543 U.S. 220 (2005).

cognizant of them throughout the sentencing process." *Gall*, 552 U.S. at 50 n.6 (emphasis added). 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."). Supporting this view of plain error are the facts that: (1) sentencing errors require less institutional effort to correct (*see id.*); 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.

Finally, the Court recently applied the rationale of *Molina-Martinez* in *Hughes v. United States,* 138 S. Ct. 1765 (2018), 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 Court's case law 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 Analysis Diverges from the *Molina-Martinez* Line 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 here presupposed 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 had noted particular concern, contrary to the approach of a sister circuit.

Here, the record is clear the judge never calculated the Guideline range and was completely silent about the reasons why he imposed a term of supervised release that was a two-thirds, upward variance over the high end of the properly calculated Guideline range. No one—not Probation, not the Government, not the defense—calculated and proffered a range under § 5D1.2. Probation made conflicting and erroneous statements: that the *term* was exactly "three years" and that the *range* was "at least three years."[3] The defense made no calculation or recommendation on

[3] In fact, more accurately, the applicable range was one to three years under § 5D1.2(a)(2); it is only by subsequent operation of § 5D1.2(c) that the statutory

supervised release. The Government did recommend three years, but gave no calculation or any reasoning for its choice.

Nothing was ever articulated in any written submission about the applicable Guidelines for supervised release nor in the one sentence the court devoted to supervised release at the hearing. That is, the only 'consideration' given the term of supervised release was to impose it. The court articulated neither a need for its variance above the Guideline recommendation nor why a two-thirds increase was parsimonious.

The district court's silence was plain error. The Court has directed the Guidelines are "the 'starting point and the initial benchmark ' " for any federal, criminal sentence. *Kimbrough*, 552 U.S. at 108 (quoting *Gall*, 552 U.S. at 49). It has stressed repeatedly the primacy of a proper Guideline calculation ever since. And the Ninth Circuit has followed suit. *See Carty*, 520 F.3d at 991, 993 ("All sentencing proceedings are to begin by determining the applicable Guidelines range" and it is "procedural error for a district court to fail to calculate—or to calculate incorrectly—the Guidelines range").

Accordingly, the Ninth Circuit did not dispute that the judge below had erred by imposing supervised release without first calculating the proper Guidelines. Instead, it held there was no prejudice for this plain error, because "Monzoni has not

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minimum trumps that *range* to make the *recommended term* the high end of the range, *viz.* three years.

shown a reasonable probability that he would have received a different sentence had the district court expressly calculated the applicable Guidelines range." *Monzoni*, 747 F. App'x at 548. That is to say, the Ninth Circuit rejected the claim of error on the third prong of *Olano* "that the plain error 'affec[t] substantial rights.' " 507 U.S. at 734 (citation omitted).

But the Ninth Circuit's reasoning is inconsistent with how the Court set out standards for such review in *Molina-Martinez*. The Court established a modified standard for prejudice in reviewing Guideline error which treats errors as prejudicial "absent unusual circumstances." 136 S. Ct. at 1347. That makes sense, given the gravity of such error under the continuing importance of the Guidelines in federal sentencing protocol. *See Molina-Martinez,* 136 S. Ct. at 1342 ("[a]lthough the district court has discretion to depart from the Guidelines, the court 'must consult those Guidelines and take them into account when sentencing.' ") (quoting *Booker*, 543 U.S. at 264). But the Ninth Circuit adopted a standard for plain error flatly contrary to *Molina-Martinez*, as a direct comparison shows:

Claimants of plain, Guideline error "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 (emphasis added).	No plain error, because Mr. Monzoni "has **not shown a reasonable probability that he would have received a different sentence** had the district court expressly calculated the applicable Guidelines range." *Monzoni*, 747 F. App'x at 548 (emphasis added).

It is true that the Court specified its general, prejudice rule applied to *most* cases, not all. Thus, it explained, "[t]here may be instances when, despite application

of an erroneous Guidelines range, a reasonable probability of prejudice does not exist." 136 S. Ct. at 1346. But those are "unusual circumstances" where the court's express 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.* And, of course, that is never truer than in cases where the district court does not calculate the Guidelines at all.

Thus, the Court's 'exception' to the typical case does not apply in instances like this, where the district court failed to calculate the Guidelines and never explained whether its decision to impose a variance was anchored to that recommendation, since it did not even acknowledge that it *was* varying. Under such circumstances, Mr. Monzoni obviously "lack[s] the additional evidence" to prove prejudice. *Id.* But that cannot undermine the success of his appeal, as the Court in *Molina-Martinez* disavowed any such added requirement. *See id.*

The Ninth Circuit's analysis simply does not comport with the low hurdle the Court has set for relief on plain, procedural, Guideline error, which is subject only to an exception where *the sentencing judge* articulated a basis for the non-Guideline sentence. *See id.* at 1346-47. This Court's focus on the *judge's* explanation is of particular pertinence here. The record indicates no consideration of the requirements for justifying a variance under circuit or this Court's precedents. *See Gall,* 552 U.S. at 50 ("If [the judge] decides that an outside-Guidelines sentence is warranted, he must consider the extent of the deviation and ensure that the justification is

sufficiently compelling to support the degree of the variance."). It is the judge's very silence here that vitiates the exception in *Molina-Martinez*—there are simply no "selected … factors" on the record for a reviewing court to consult. 136 S. Ct. at 1347.

The Ninth Circuit's holding is therefore divergent from *Molina-Martinez*, because this is a case of a manifestly silent record on why the above-Guideline, supervised release term was imposed. The district judge said *nothing* pertaining to the calculation or selection of supervised release, obliging the panel to make vague assertions that the *custody* discussion preceding the imposition of supervised release serves double duty to provide a basis for the heightened sentence.

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* is such a case. 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, *Sanchez-Arvisu* held that the 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 actually 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 superseded the *Molina-Martinez* rule for prejudice. *See id.* at 317.

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 address the actual nature of the sentencing judge's analysis. If it had, it is manifest the sentencing discussion in Mr. Monzoni's case focused exclusively on how the custodial recommendation of the Guidelines was *excessive* due to his substantial equities. The Guideline range was not in dispute, only how much *lower* the parsimonious sentence would be. The proposals ranged between a 43% and 66% reduction; the court eventually imposed a sentence 62% below the low end of the Guideline range. If anything about this record on custody showed a non-Guideline focus, it was in a mitigated, *downward* direction. Nothing in this record logically addresses a need to *increase* any sentence component.

In short, the only findings supporting an upward variance are the appeal court's, not the sentencing judge's. The Ninth Circuit thus contravenes the *Molina-Martinez* treatment of a silent record, as applied in *Sanchez-Arvizu*, because it starkly ignored the evidence that any discussion of deviation from the Guideline was

contrary to an upward variance. The panel filled the silent record with a wholly implausible and illogical conclusion.[4]

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. Failure to calculate the Guideline is no less baleful mistreatment of the Guidelines than a specific error in application. Applying a higher burden in cases where the district court does not calculate the Guidelines at all is unwise policy. It would create a perverse incentive to avoid calculating the Guidelines absent an objection to avoid appellate scrutiny. To avoid promoting such an untenable practice, failure to calculate must be treated the same as any other procedural, Guideline error under *Molina-Martinez*. Thus, it must apply here, where the judge not only failed to calculate the Guideline, but then imposed an above-Guideline sentence without acknowledgment it *was* a variance or an explanation of its deviation from the Guideline.

In light of the importance of correct application of the Guidelines highlighted

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[4] The split-treatment between custody and supervision shows Mr. Monzoni also meets even the traditional standard of prejudice under *Olano*, which *Rosales-Mireles*, 138 S. Ct. at 1907 acknowledged is a "reasonable probability" of a different outcome. Simple comparison of the disparity here between lessened custody (with a Guidelines calculation) and heightened supervised release (without one) creates a "reasonable probability" the court would have selected less supervision had it considered the correct, Guideline range. After all, "[a] 'reasonable probability' is, of course, less than a certainty, or even a likelihood." *United States v. Tapia*, 665 F.3d 1059, 1061 (9th Cir. 2011) (citing *United States v. Dominguez-Benitez*, 542 U.S. 74, 86 (2004) (Scalia, J., concurring in the judgment)).

by *Molina-Martinez* and *Rosales-Mireles,* 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. *See* Sup. Ct. R. 10(c). This divergence also creates conflict with the application of *Molina-Martinez* in a sister circuit. *See* Sup. Ct. R. 10(a). For both reasons, the Court should grant review 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," since it cited no factors at all. *Id.* at 1347.

Moreover, as also suggested in footnote 4 *supra,* the error is harmful even in a traditional sense. Petitioner remains subject to five years of supervised release, when the Guidelines recommend he get three, and the district court varied down, not up, on the custodial sentence. Additionally, the prejudice analysis must not look solely to sentence length as a source of harm. There are other detriments and institutional concerns that go beyond the sentence itself, *viz.* the multiple, additional values served by an adequate explanation from the sentencing judge. As this Court noted in *Rita,* 551 U.S. at 356-58, rules calling for explanations from the bench serve important goals of transparency: to provide a basis for proper review, to assure defendant and public that the law has been followed, and to provide useful, empirical data to the Sentencing Commission to carry out its statutory duties of review and refinement of the Guidelines. Mr. Monzoni was deprived of those transparency-benefits in precisely the circumstance where they are at a premium—where the judge imposes an elevated

sentence above that expected and urged by all the parties. This was harmful, irrespective of the raw sentence length.

Because Petitioner continues to be subject to the offending term of supervised release, the Court's analysis and ruling will still 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 with *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).

Date: June 20, 2019

Respectfully submitted,

s/ James Fife

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