

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ISELA CAMPOS,

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) .

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Petitioner Isela Campos 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 May 1, 2019.

JURISDICTION

Petitioner pled guilty to importation of methamphetamine, in violation of 21 U.S.C. §§ 952 and 960, in the United States District Court for the Southern District of California. The district court sentenced her to 108 months' imprisonment and five years of supervised release. Reviewing her sentence under 28 U.S.C. § 1291, the Ninth Circuit affirmed Petitioner's sentence in an unpublished disposition. *See United States v. Campos*, 749 Fed. App'x 555 (9th Cir. 2019) (attached to this petition as Appendix A). On May 1, 2019, the Ninth Circuit panel denied a petition for rehearing, and the full court declined to rehear the matter en banc. *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).

STATEMENT OF THE CASE

A. The Offense

Homeless and suffering from addiction, Petitioner agreed to smuggle drugs into the United States. From the start, Petitioner's life was difficult. At age 11, Petitioner was a meth and heroin user. Along with cutting herself, she did drugs to cope with her diagnosed mental illness, sexual abuse from a stepfather, and neglect from her parents. She entered into abusive relationships with men. She lost custody of her children and lost her home. When someone offered her a place to stay and money in exchange for smuggling drugs, she accepted.

As part of her agreement, Petitioner allowed the drug organization to register a car in her name. Members of the organization loaded the car with methamphetamine. They instructed Petitioner to drive the car from Mexico into the United States, where another person would take possession of the car and unload the drugs. Petitioner was to be paid \$2,000 for the trip. She was arrested crossing the United States Port of Entry.

The government charged Petitioner with conspiracy to import methamphetamine in violation of 21 U.S.C. §§ 952 and 960. Following her arrest, Petitioner posted bond and made positive progress. She remained off drugs for several months, was in full compliance with the conditions of release, and received addiction treatment.

B. District Court Proceedings

Pursuant to a plea agreement, Petitioner plead guilty to the charged offense, which carried a mandatory minimum sentence. The offense carried a 10-year

mandatory minimum custodial sentence and a mandatory minimum term of five years of supervised release. 21 U.S.C. § 960(b)(1)(h) (triggering mandatory minimum sentences for a person convicted of importing 500 grams or more of a mixture containing methamphetamine). Following her plea, she provided the government with information regarding her participation in the offense. Based on this, the government found that Petitioner “truthfully provided to the Government all information and evidence [she] has concerning the offense” and recommended that the district court grant Petitioner safety valve, allowing her to be sentenced below the mandatory minimum. 18 U.S.C. § 3553(f) (a district court shall impose a sentence pursuant to the Guidelines “without regard to any statutory minimum sentence,” after the Government has been afforded the opportunity to make a recommendation); U.S.S.G. § 5C1.2 (same).

Before sentencing, the United States Probation Department prepared a Presentence Report (“PSR”) detailing Petitioner’s personal history and applicable sentencing Guidelines. The PSR calculated a custodial Guideline range of 108 to 135 months. The range was based on Petitioner not suffering any prior convictions as well as downward adjustments for acceptance of responsibility, fast track, and safety valve. The PSR recommended a variance down to 70 months custody due to Petitioner’s mitigating social history. As to supervised release, the PSR indicated that the mandatory minimum provisions of 21 U.S.C. § 960(b)(1) were applicable here requiring “at least five years” to life of supervised release. Consistent with the statutory mandatory minimum, the PSR cited the Guideline range as five years. The

PSR did not account for safety valve, which would have changed the Guidelines range to two to five years of supervised release. U.S.S.G. § 5C1.2. The PSR recommended a five-year term without reference to the correct Guidelines range.

The government similarly calculated the custodial sentence Guidelines and recommended a variance to 71 months imprisonment. Without any reference to the Guidelines, the government recommended five years of supervised release.

Petitioner requested an additional downward departure for minor role under U.S.S.G. § 3B1.2 and a variance to 37 months custody. She did not make a recommendation for supervised release.

At the sentencing hearing, much of the discussion had to do with the request for minor role and a variance of the custodial sentence under 18 U.S.C. § 3553(a). Petitioner asked the court to consider her lack of criminal history, social history, and rehabilitation since the arrest.

The district court denied minor role and granted safety valve, calculating a Guidelines range for the custodial sentence of 108 to 135 months custody. The court stated that Petitioner's social history did not justify a variance because “[b]ig deal” “[s]he's had a tough life. Almost everybody that appears before me, Counsel, has had a tough life. I had a tough life ... a lot of people in this room have had a tough life.” The court sentenced Petitioner to the low end of the range, 108 months custody.

The district court did not calculate the Guidelines range for the supervised release. The district court simply stated “I will put her on supervised release for a period of five years.” There was no further discussion regarding this sentence.

Petitioner timely appealed her sentence.

C. Appeal to the Ninth Circuit

On appeal, Petitioner argued *inter alia* that the district court failed to calculate the supervised-release Guidelines range under U.S.S.G. § 5D1.2 or explain its imposition of the five-year term. Petitioner further explained that this plain error affected her 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 term of supervised release. Petitioner argued that this unexplained discrepancy was ample evidence of prejudice.

The court of appeals implicitly assumed that there was plain error, but affirmed after determining that Petitioner had not satisfied the third prong of the plain-error test. *Campos*, 749 Fed. App'x at 556. Specifically, the court of appeals determined that Petitioner could not show a reasonable probability that her sentence would have been different absent the alleged errors. *Id.*

Petitioner challenged *inter alia* 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.

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 ensure proper operation of plain-error review of procedural errors during federal sentencing. *See United States v. Olano*, 507 U.S. 725 (1993) (establishing that reversal under the plain-error test requires a showing of (1) error, 2) that is plain, 3) that affects a defendant's substantial rights, and 4) that seriously affects the fairness, integrity or public reputation of judicial proceedings.) 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” satisfying the third, prejudice prong of the plain-error test. *Id.* at 1347 (citing *Olano*, 507 U.S. 725). 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 her substantial rights. *See id.* The panel’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. *See, e.g.*, *United States v. Meliton-Salto*, 738 F. App’x 525 (9th Cir. 2018); *United States v. Reyes-Quintero*, 712 F. App’x 708 (9th Cir. 2018); *United 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). This Court should grant certiorari, review the Ninth Circuit’s erroneous rule, and reverse.

A. This Court has established that a sentencing court’s failure to calculate the Guidelines range ordinarily establishes prejudice and warrants reversal under the third prong of the plain-error test.

“Although the district court has discretion to depart from the Guidelines, the court ‘must consult those Guidelines and take them into account when sentencing.’” *Id.* 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 sentencing 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. 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. The Court 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 court of appeals was wrong to affirm the district court in Petitioner's case after the district court failed to calculate the Guidelines.

The approach taken by the court of appeals is inconsistent with the Court's approach in *Molina-Martinez*. Here, the record in the district court was silent as to the correct Guidelines range for the supervised release term. The only reference to a Guidelines range was within the PSR and that range was not applicable to Petitioner. Because it did not account for safety valve, the PSR listed the range as five years and stated the statutorily required supervised release sentence as "at least five years." Following a grant of safety valve, the applicable Guidelines range to Ms. Campos was a term of two to five years. U.S.S.G. § 5D1.2.

The record in this case is silent as to the correct Guidelines for supervised release. The district court may have very well relied on the PSR statement that a term of "at least five years" was mandated. It may be that the district court was unaware of the applicable Guidelines of two to five years. It is not possible to know with this record since the district court failed to make any reference whatsoever to the supervised release Guidelines and simply stated "I will put her on supervised release for a period of five years." Under those circumstances, Petitioner obviously "lack[s] the additional evidence" to prove prejudice, *see Molina-Martinez*, 136 S. Ct. at 1346, but that cannot undermine her appeal. As described above, the district court's unfettered, unguided decision is all that Petitioner needs to show under *Molina-Martinez*. The court of appeals erred in rejecting Petitioner's appeal due to a lack of prejudice.

The Sentencing Commission provided further guidance, recommending a term of two to five years. U.S.S.G. § 5D1.2. Yet, the district court never mentioned the Guidelines and failed to provide any basis for the five-year term imposed. 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 her substantial rights. *See id.*

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

C. This case is a good vehicle for resolving the important question presented.

Petitioner's case is the perfect case to resolve this important legal issue. First, the question presented requires a straightforward analysis. The panel implicitly assumed that the first two prongs of plain error were met. Thus, this Court need address only the narrow issue whether the third prong was analyzed in accordance with *Molina-Martinez*.

Next, the complete failure to calculate the correct Guidelines makes this case a good vehicle for resolving this important issue. The PSR, the parties' papers, and the sentencing transcript do not reference the correct Guidelines range of two to five years of supervised release. The extent of the district court's consideration on this

portion of the sentence is “I will put her on supervised release for a period of five years.” Thus, this is the perfect case to decide what happens when the district court fails to calculate the Guidelines range and the correct Guideline calculation does not appear anywhere in the record.

Moreover, this case presents a perfect opportunity for this Court to correct a pervasive error in the Ninth Circuit. The 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., United States v. Meliton-Salto*, 738 F. App’x 525 (9th Cir. 2018); *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 the 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 the Court. Further, these cases show that the district courts’ plainly erroneous sentences stand uncorrected, and the error is likely to repeat without the 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,

Dated: July 30, 2019

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