IN THE SUPREME COURT OF THE UNITED STATES

JESÚS YUGOPICIO-ROJAS,

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

Does failure to calculate the applicable Sentencing Guidelines attract the same protocol for plain error as set out in *Molina-Martinez v. United States* for miscalculation of the Guidelines?

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Petitioner, Jesús Yugopicio-Rojas, 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The Ninth Circuit, in an unpublished decision, affirmed the sentence for violation of 8 U.S.C. § 1326. *See* Appendix A (*United States v. Yugopicio-Rojas,* 754 F. App'x 671 (9th Cir. 2019)). It subsequently denied his petition for rehearing or rehearing en banc. *See* Appendix B.

JURISDICTION

On February 27, 2019, the Ninth Circuit affirmed the sentence. *See* Appendix A. On June 12, 2019, the court declined to rehear the appeal. *See* Appendix B. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT PROVISIONS[1]

18 U.S.C. § 3553
Fed. R. Crim. P. 52
U.S.S.G. § 5D1.2

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 recently addressed in *Molina-Martinez v. United States,* 136 S. Ct. 1338 (2016); subsequently extended in *Rosales-Mireles v. United States,* 138 S. Ct. 1897 (2018); and then applied that rationale in *Hughes v. United States,* 138 S. Ct. 1765 (2018). Those cases highlight 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, "even in an advisory capacity." *Rosales-Mireles*, 138 S. Ct. at 1904.

Their crucial role gives misapplication of the Guidelines a special status regarding the operation of plain-error review. Resolving circuit divergences, the Court found in *Molina-Martinez* that for error in applying the Guidelines, "[a]bsent unusual circumstances, [a defendant] will not be required to show more" to 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* to hold that prejudicial, Guideline

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

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. This centrality of the Guidelines as the benchmark for sentencing informed the decision in *Hughes*, holding that even a stipulated-sentence plea under Rule 11(c)(1)(C) looked to the Guidelines sufficiently to be "based on" them for purposes of a retroactive sentence reduction. *See* 138 S. Ct. at 1775-77 (citing *Molina-Martinez*).

Yet, despite the absence here of "unusual circumstances" as cited in *Molina-Martinez*, the Ninth Circuit defied the Court's holdings by requiring Petitioner "show more" to establish prejudice from a failure to calculate the Guidelines. Although the sentencing judge completely failed to calculate or consult the applicable range for supervised release, the Ninth Circuit denied relief, because Petitioner "has not shown a reasonable probability that he would have received a different sentence had the district court expressly calculated the applicable Guidelines range or more fully explained its decision to impose a three-year term." *Yugopicio-Rojas*, 754 F. App'x at 672. Because failure to calculate the Guidelines was procedural, sentencing error under this Court's precedents, the Ninth Circuit erroneously deviated from the protocols in *Molina-Martinez* for "most cases" "absent unusual circumstances."

Thus, the Court of Appeals affirmed, despite the non-calculation error and deviation on a silent record, a circumstance this Court showed particular concern for in *Molina-Martinez*, 136 S. Ct. at 1347. The Ninth Circuit thereby defies the holdings

of *Molina-Martinez*, overlooking that a court's error of non-calculation of the Guidelines cannot logically be treated differently from a miscalculation of the Guidelines.

Accordingly, the Ninth Circuit decision creates rifts with the Court's recent treatment of the Guidelines in *Molina-Martinez* and progeny. To foreclose further misapplication of this Court's precedents, the Petition should be granted to clarify that failure to calculate the Guidelines is treated as functionally and legally equivalent to a miscalculation error under the protocols of *Molina-Martinez*.

B. The District Court Proceedings

In August 2018, Petitioner pled guilty to illegal re-entry under 8 U.S.C. § 1326.

Probation filed a criminal history report, indicating Mr. Yugopicio had three criminal history points deriving from one 2011 conviction for importing marijuana, which drew a custodial sentence of thirteen months and one day. The report contained no Guideline calculations.

The defense filed a sentencing summary chart with an adjusted offense level of 14. In accordance with the plea agreement, points were deducted for acceptance of responsibility and Fast Track. This resulted in a final range of four to ten months, and the defense recommended a sentence of time served (just over three months at the time of filing). The defense made no recommendation regarding supervised release.

The Government's chart made identical calculations, but recommended the low-end sentence of four months. It called for three years of supervised release, but

gave no Guideline calculation or explanation for its recommendation.

At the sentencing hearing, the district court started out by inquiring on details of Mr. Yugopicio's immigration history, also noting the prior conviction for backpacking marijuana across the border in Arizona. The prosecutor indicated that in addition to a voluntary return in 2010, Mr. Yugopicio had four formal removals since 2012.

From this, the court remarked, "I'm a little dubious about that [four-level reduction for Fast Track] given his immigration record and the fact that he's got a prior felony which involved illegal entry into the United States, doubling down as a courier of drugs—importer of drugs at the time."

Defense counsel pointed to this being the first time Mr. Yugopicio was convicted of an immigration offense, while acknowledging he had been apprehended and returned to Mexico on other occasions. Counsel argued this fact was mitigating, because his prior conduct was not deemed worthy of prosecution, and he had not apparently received Fast Track previously. All the circumstances of the case showed "that probably makes him pretty average" in comparison with cases seen in the district. For instance, this made him much less aggravated than a case heard earlier that day involving 11 prior removals.

The prosecution stood by its recommendations of Fast Track and the low end of the resulting range.

The court then calculated the custodial, Guideline range, granting only a two-level reduction for Fast Track, pointing to the immigration record. With this, the

court calculated a final range of 8 to 14 months. Acknowledging Mr. Yugopicio was "not the worst immigration offender" nor "the most benign," the court imposed a mid-range sentence of 12 months, which it found "reasonable under all the circumstances," including the parsimony mandate of 18 U.S.C. § 3553(a).

Next, the court stated, "I place the defendant on supervised release for three years." The court stated further,

> The Court would add that I'm aware of the guidance from the Sentencing Commission that supervised release ordinarily should not be imposed in cases involving people that are not legally in the United States. I've taken that into consideration. I discount it here because I think there is a need for a deterrence, and moreover, I just disagree with that advice as being a rule in all cases. I think there's a deterrent aspect to supervised release which is called for in cases of repeat illegal entrance to the United States, and this is one of those cases.

Counsel entered objections to the procedural and substantive reasonableness of the sentence. Specifically, counsel noted the court may have believed there was a prior Fast Track grant, but the court said it accepted Probation's claim there was none. Instead, the court denied Fast Track, because "he had been put out five times" (later corrected to four times) and "I found his criminal record [of one prior conviction in 2011] to be aggravated, particularly the fact that he was entering the United States illegally and bringing a drug backpack."

C. The Appellate Decisions

On appeal, Mr. Yugopicio argued that the imposition of the statutory maximum term of supervised release was erroneous under circuit law requiring a sentencing court to calculate expressly the applicable Guidelines and explain both

the need for and extent of a variance from the Guidelines.

In a memorandum decision, the Ninth Circuit affirmed the custodial and supervisory sentences.[2] *See Yugopicio-Rojas*, 754 F. App'x at 673. Regarding the supervised release claims, the panel held:

> Yugopicio-Rojas also contends that the district court procedurally erred by failing to calculate the Guidelines range for the supervised release term and by insufficiently explaining its decision to impose a three-year term. We review for plain error, *see United States v. Valencia-Barragan*, 608 F.3d 1103, 1108 (9th Cir. 2010), and conclude that there is none. Yugopicio-Rojas has not shown a reasonable probability that he would have received a different sentence had the district court expressly calculated the applicable Guidelines range or more fully explained its decision to impose a three-year term. *See United States v. Dallman*, 533 F.3d 755, 762 (9th Cir. 2008).

Id. at 672.

Mr. Yugopicio sought rehearing, claiming the Ninth Circuit's application of the plain-error standard was contrary to this Court's decision in *Molina-Martinez*. The panel erroneously held Mr. Yugopicio failed to satisfy the third, prejudice prong of plain error, despite undisputed, plain, procedural, Guidelines errors of non-calculation and non-explanation and "absent unusual circumstances." Moreover, the panel had overlooked record evidence showing prejudice even under the traditional, pre-*Molina-Martinez* standard.

The full court declined to rehear the case. *See* Appendix B.

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[2] However, it remanded to strike three conditions of supervised release. *See id.* at 672-73.

REASONS FOR GRANTING THE PETITION

THE COURT SHOULD GRANT REVIEW TO ENSURE CIRCUIT CONSISTENCY BY CLARIFYING THAT NON-CALCULATION OF THE GUIDELINES AND MISCALCULATION FOLLOW THE SAME ANALYSIS OF THE THIRD PRONG OF PLAIN-ERROR REVIEW AS SET OUT IN *MOLINA-MARTINEZ*

Just two terms ago, the Court 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. In the "usual case," then, misapplication of the Guidelines will satisfy the third prong of *Olano*. *Id.*

This case presents the factual scenario envisioned by the Court when the "record is silent as to what the district court might have done had it considered the correct Guidelines range." *Id.* at 1347. The district court never calculated the applicable Guidelines and so had no benchmark to consider. In such a case, an appellant may typically rely on the district court's deficient treatment of the Guidelines alone to show prejudice under plain-error review. But, to the contrary, the Ninth Circuit required more than *Molina-Martinez* stated suffices in these circumstances.

Molina-Martinez was decided in the context of a specific miscalculation of the Guidelines (failure to apply § 4A1.2(a)(2) to the criminal history score calculation—*see id.* at 1344). But the Court's case law treats non-calculation of the applicable Guidelines as a co-eval form of procedural, sentencing error. *See Gall v. United States,* 552 U.S. 38, 51 (2007) (listing both non-calculation and miscalculation together as instances of "significant procedural error"). Nor is there logic in distinguishing the sort of prejudice accruing from a judge's relying on a false Guideline recommendation from a sentencing totally unanchored to any Guideline recommendation. Both flaws equally undermine the mandate to consider the advice and policies of the Sentencing Guidelines in 18 U.S.C. § 3553(a)(4) & (5) and the uniformity mandate of (6), for which the Guidelines are the principal vehicle to reduce nationwide disparity. *See Molina-Martinez*, 136 S. Ct. at 1342 (noting the Guidelines' "goal was to achieve uniformity in sentencing") (citations and internal quotation marks omitted).

Review is warranted to stem this divergence from the *Molina-Martinez* line of cases. The Court should clarify that, as with the error here, the *Molina-Martinez* protocol applies equally to mis- and non-calculation of the pertinent Guidelines—both errors that distort the operation of the "lodestar" of federal, criminal sentencing procedure. *Id.* at 1346.

A. In *Molina-Martinez* and Subsequent Decisions, the Court 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 in the criminal history calculation 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.* (emphasis added).

This accords with consistent, post-*Booker* 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 work 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,* the Court interpreted *Rita* to say that "a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range" and "the Guidelines should be the starting point and the initial benchmark." 552 U.S. at 49; *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 § 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 cognizant of them throughout the sentencing process." *Gall*, 552 U.S. at 50 n.6. 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." 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."). Thus, supporting this view of plain error are the facts that (1) sentencing errors require less institutional effort to correct (*see id.*—"resentencing,

while not costless, does not invoke the same difficulties as a remand for retrial does"), 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 ("it is important that sentencing proceedings actually reflect the nature of the offense and criminal history of the defendant, because the United States Sentencing Commission relies on data developed during sentencing proceedings, including information in the presentence investigation report, to determine whether revisions to the Guidelines are necessary. When sentences based on incorrect Guidelines ranges go uncorrected, the Commission's ability to make appropriate amendments is undermined.") (citation omitted). *See also* U.S. Sentencing Comm'n, RESEARCH NOTES #1 at 5 (July 17, 2019) (describing the institutional burden of reconciling errors in district court sentencing documents on the Commission's data gathering).

Finally, the Court recently applied the rationale of *Molina-Martinez* in *Hughes* 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 *Molina-Martinez* line of cases 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 Court Should Clarify That the *Molina-Martinez* Analysis Applies to Non-Calculation Errors, As Well As Miscalculations

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. Despite their advisory status, "[t]he Guidelines' central role in sentencing means that an error *related to the Guidelines* can be particularly serious." *Molina-Martinez*, 136 S. Ct. at 1343 (emphasis added).

Although the Ninth Circuit here assumed 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 of a silent record, for which this Court noted particular concern. The principal reasons the Court should grant this Petition, then, are: (1) to stem the Ninth Circuit's conflict with the protocols for plain error in Guideline application articulated in *Molina-Martinez* by (2) clarifying that the Court's prejudice analysis for miscalculations applies in cases of complete failure to calculate.

The district court committed recognized, procedural error in imposing supervised release: it never calculated or referenced the applicable Guideline range

for this offense. In other words, this was an error of omission, rather than of commission. But under the logic of this Court's precedents, that fact can have no import for the applicability of the *Molina-Martinez* plain-error protocol. Since the Ninth Circuit declined to apply *Molina-Martinez* to this omission error, it defied the Court's precedents. The Petition should be granted to clarify the law and avoid further divergence from authority.

Molina-Martinez dealt with the particular circumstance of an affirmative misapplication of a specific Guideline provision on criminal history. *See* 136 S. Ct. at 1344. This overlooking the rule of § 4A1.2(a)(2) on calculating multiple convictions, was, in effect, an error of omission. It follows that the same reasoning on prejudice must apply to sentencings where the court fails to calculate the Guidelines altogether—the purest form of a Guidelines 'miscalculation.' *See Gall*, 552 U.S. at 51 (first citing "failing to calculate"—yoked parenthetically with "improperly calculating"—the Guidelines as two comparable species of "procedural error" during sentencing). As the Court has explained, "[t]he Guidelines' central role in sentencing means that an error *related to the Guidelines* can be particularly serious." *Molina-Martinez,* 136 S. Ct. at 1343 (emphasis added). That is so, because, 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 imposed sentence cannot stand, and that logic applies whether the reason the "correct

Guidelines range" was ignored arose from a specific miscalculation or from wholesale failure to calculate *any* Guidelines range. *Id.* at 1347.

True, *Molina-Martinez* clarified that its general rule applied to *most* cases, not all. As it 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 (emphasis added). 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. Typically, "sentencing judges often say little about the degree to which the Guidelines influenced their determination." *Id.* And, of course, that is never more true than in cases where the district court does not calculate the Guidelines at all. Almost by definition, a silent record—including a total failure to calculate or reference the Guideline range—cannot activate the "unusual circumstance" of a thorough explanation to negate prejudice.

In any event, failure to equate functionally and legally a non-calculation error with miscalculation error under the *Molina-Martinez/Rosales-Mireles* framework would work as a perverse incentive for sentencing judges to avoid the mandate that "the Guidelines should be the starting point and the initial benchmark" for all sentencing decisions. *Gall*, 552 U.S. at 49. A judge who faces thorny Guidelines issues could insulate the sentence from by not making an express calculation of the range. Likewise, not explicitly noting the proper range can mask the fact that a sentence is indeed a variance from the Guideline, eliminating the requirement under

Gall to articulate justification commensurate with the deviation. *See* 552 U.S. at 51. Such 'appeal-proofing' should be discouraged. This Court may do so by simply applying the *Molina-Martinez* rule to non-calculation errors as well, thereby eliminating any incentive to slide the calculations under a rug at sentencing, while also promoting transparency values noted by this Court as part of the general rationale for adequate, on-record explanation in *Rita*, 551 U.S. at 356-58.

Molina-Martinez illustrates that the burden of proving prejudice is not high, once a defendant establishes a plain, procedural, Guideline error occurred. This makes sense, given the continuing importance of the Guidelines in the federal sentencing protocol. Thus,

> From the centrality of the Guidelines in the sentencing process it must follow that, when a defendant shows the district court used an incorrect range [or failed to calculate one at all], 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. (emphasis added).

However, the Ninth Circuit's analysis of the plain error here is directly contrary: Mr. Yugopicio's claim failed, because he "has **not shown a reasonable probability** that he would have received **a different sentence**" had the errors not occurred. *Yugopicio-Rojas*, 754 F. App'x at 672 (emphasis added). Such reasoning is inconsistent with the standards in *Molina-Martinez*, because the non-calculation omission was, in truth, a plain, procedural, Guideline error.

The Ninth Circuit's holding diverges from *Molina-Martinez*, because the

simple fact is, this is a case of a manifestly silent record with no Guideline calculations ever proffered. Though a judge's on-record rationale may demonstrate a clear, extra-Guideline orientation to the sentence, here, the non-calculation error entails a *lack of transparency* as to the reasoning. Such silence cannot, by definition, satisfy the *Molina-Martinez* exception for "detailed explanation." The Court should accept review to clarify that cases of non-calculation fall squarely under the same rationale underpinning the *Molina-Martinez* protocol for plain error.

C. Review Is Appropriate in This Case to Clarify the Scope of the *Molina-Martinez* Protocol

This case is a proper vehicle for that review. First, the question whether a silent record of non-calculation and non-explanation 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 to *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; this Court need address only the pinpoint issue whether the third prong was analyzed in accordance with *Molina-Martinez.* Here, the inapplicability of "unusual circumstances" is patent: no statement by the judge showed an awareness of the Guideline range that he never calculated or consulted.

The Court's analysis and ruling will matter and will be **fully dispositive of relief** in this case. The errors were harmful even in a traditional sense, since Petitioner remains subject to three years of supervised release, when the Guidelines advise he

get none. Moreover, the Ninth Circuit's prejudice analysis looked solely to *sentence length* as a source of harm, ignoring other detriments and the institutional concerns that go beyond the term of supervision, viz., the multiple, additional values served by an adequate explanation from the sentencing judge, as catalogued in *Rita,* 551 U.S. at 356-58. Mr. Yugopicio was deprived of those transparency-benefits in precisely the circumstance (an elevated sentence) where they are at a premium. This was harmful, irrespective of the raw sentence length.

Finally, review is particularly merited here, because it provides the **ideal factual scenario** to address the novel question of the status of non-calculation errors under *Molina-Martinez*. The record below is devoid of any mention of the proper calculation for a supervised release term under § 5D1.2 or any sign of the district judge consulting the Guideline range as the "benchmark" or "lodestar" for his decisions regarding supervised release. Such facts provide the starkest possible backdrop for the Court's addressing the applicability of *Molina-Martinez* to omission errors. In sum, this Petition presents the limiting case of an absolute failure to fulfil the directions ever since *Rita* to treat the Guidelines as "the starting point for every sentencing calculation in the federal system." *Peugh,* 569 U.S. at 542.

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. Sup. Ct. R. 10.

CONCLUSION

As "the other requirements of Rule 52(b) are met," *Molina-Martinez,* 136 S. Ct. at 1346, and nothing "unusual" (*id.* at 1347) marks the sentencing here, the four prongs of *Olano* are satisfied.

Because non-calculation is just as baleful a Guidelines error as miscalculation, the Court should grant review to address the Ninth Circuit's divergence from the plain-error review protocols set out in *Molina-Martinez*. Sup. Ct. R. 10(a).

Date: September 9, 2019

Respectfully submitted,

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