No. _____

# In the
# Supreme Court of the United States

LUIS ALBERTO TORRES,

*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 Writ of Certiorari

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# Question Presented

In recent years, the Court has granted certiorari to clarify how the plain-error standard of review applies to unpreserved claims of sentencing error. *See Rosales-Mireles v. United States*, 138 S. Ct. 1897 (2018); *Molina-Martinez v. United States*, 136 S. Ct. 1338 (2016). This case provides the Court with the opportunity to resolve a circuit conflict and thereby clarify how the harmless-error standard of review applies when such a claim has been preserved. Specifically, it presents this question:

> Does the government meet its burden to prove that a sentencing error is harmless under Fed. R. Crim. P. 52(a) if it shows that it is more probable than not that the district court would have imposed the same sentence but for the error (as the Ninth Circuit has held), or is something more required (as the Second, Third, and Fifth Circuits have suggested)?

# Related Proceedings

United States Court of Appeals for the Ninth Circuit

*United States v. Luis Alberto Torres*, Case No. 16-50496.

Memorandum Decision Entered: May 7, 2018; Mandate Entered: July 19, 2019.

United States District Court for the Central District of California

*United States v. Luis Alberto Torres*, Case No. CR-15-00059-SVW.

Judgment Entered: December 27, 2016.

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# Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Luis Alberto Torres petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in his case.

## Opinions Below

The Ninth Circuit's memorandum decision in *United States v. Torres*, Case No. 16-50496, was not published. App. 1-5a.[1] The district court did not issue any relevant written decision.

[1] "App." refers to the attached appendix. "ER" refers to the appellant's excerpts of record electronically filed in the Ninth Circuit on September 18, 2017 (Docket No. 12). "PSR" refers to the presentence reports and related documents filed under seal in the Ninth Circuit on September 18, 2017 (Docket No. 14). "AOB" refers to the appellant's opening brief electronically filed in the Ninth Circuit on September 18, 2017 (Docket No. 11). "GAB" refers to the government's answering brief electronically filed in the Ninth Circuit on December 22, 2017 (Docket No. 29). "ARB" refers to the appellant's reply brief electronically filed in the Ninth Circuit on January 23, 2018 (Docket No. 36). "PFR" refers to the appellant's petition for panel rehearing / rehearing en banc electronically filed in the Ninth Circuit on June 19, 2018 (Docket No. 51).

# Jurisdiction

The Ninth Circuit issued its memorandum decision on May 7, 2018. App. 1a. It denied Torres' petition for panel rehearing / rehearing en banc on July 11, 2019. App. 6a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

# Constitutional and Statutory Provisions Involved

Fed. R. Crim. P. 52 provides:

> (a) *Harmless Error*. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.
>
> (b) *Plain Error*. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention..

# Introduction

Luis Alberto Torres was convicted in state court and served 51 months in prison. When he finished serving that state sentence, the government charged him with federal crimes having a mandatory-minimum sentence of 15 years. It's undisputed that the state and federal crimes were based on the same conduct. Torres' case therefore presented significant issues of first impression in the Ninth Circuit concerning whether the district court could impose the required 15-year minimum sentence but then grant credit for the 51 months he had already served in state custody for the same conduct. Torres contended that it could; the government contended that it

couldn't. The district court thought this issue was so important that, after reading the parties' memoranda and hearing argument from counsel, it continued Torres' sentencing for a day so it could read government-cited cases. The next morning, it announced that it agreed with the government's position before imposing a 15-year sentence without any custody credit.

Even though the record reflects that the district court probably would have granted credit against the 15-year mandatory minimum if it knew it had the ability to do so, or at the very least uncertainly about that, the Ninth Circuit concluded that any custody-credit-discretion error was harmless because the district court wouldn't have granted credit anyway. By doing so, it avoided dealing with the significant legal issues concerning whether the district court had such discretion. The Ninth Circuit's decision demonstrates that the courts of appeals need guidance from this Court concerning the standard for determining whether the government has met its burden to prove that a sentencing error was harmless. Indeed, there is a circuit conflict on this issue, with the Ninth Circuit requiring the government to show only that it is more probable than not that the district court would have imposed the same sentence but for the error and the Second, Third, and Fifth Circuits suggesting that something more is required. The Court should resolve that conflict.

# Statement of the Case

In November 2010, Luis Alberto Torres was arrested after a search of his phone revealed child pornography.[2] The State of California then charged him with, and he ultimately pleaded guilty to, the sexual touching of a child that resulted in two child-pornography images found on his phone as well as creating the child pornography.[3] In 2011, the state court imposed a five-year sentence.[4] In 2015, after serving 51 months of actual state-custody time, Torres was paroled on that sentence but was immediately arrested in connection with this federal case and charged with production and possession of child pornography.[5] There was no dispute that the state-court offenses and the federal production-of-child-pornography offenses were based on the same offense conduct.[6]

At an early status conference, the district court questioned the government's decision to prosecute Torres despite his conviction and sentence in the state court:

> This is neither here nor there, but I find it interesting that here we are citizens of California. California prosecuted this man, sentenced him. Then you talk about the federal interests as though we're living in two different worlds. In other words, California is an anomaly. They found the sentence adequate. And now

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2 PSR 38.

3 ER 61, 65-66, 541; PSR 38-39, 46-47.

4 PSR 46-47, 62.

5 ER 49-53, 735; PSR 34, 46-47, 54, 62.

6 ER 61, 154-57, 541, 687, 690; PSR 47, 54, 62.

> we're in the world of federal law, and the same facts are filtered through a different prism. I'm not saying you. Someone has decided that, well, society's interests wasn't served. The state had it all wrong. I suppose Thomas Jefferson might be a little concerned[.][7]

Later, Torres pleaded guilty and the case proceeded to sentencing.[8] In his sentencing memorandum, Torres contended that the circumstances warranted imposition of the mandatory-minimum sentence of 180 months, minus the 51 months he spent in state custody, for a final sentence of 129 months.[9] He explained that doing so would not violate the mandatory-minimum statute because the court would be imposing the required sentence, albeit with appropriate credit for time already served.[10] In its sentencing memoranda, the government agreed that Torres should get credit against the advisory range for the 51 months he spent in state custody, but it argued that the district court would err as a matter of law if such credit resulted in a sentence below the mandatory minimum of 15 years.[11]

On the day set for sentencing, the district court began by stating: "One of the issues concerns the credit for time served, correct? ... And the issue is, given the fact that there is a mandatory minimum sentence of 15 years, whether credit for time served for a related offense is allowable

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7 ER 157.

8 ER 538-49, 663-78.

9 ER 700-17.

10 ER 715-16.

11 ER 690, 720-26.

under the guidelines."[12] The district court then engaged in a discussion with government and defense counsel on this issue.[13] At the end of that discussion, the district court said: "I'm inclined to think that [the government's] position is correct, but I'd feel better if I had more time to read all those cases" cited in the government's most recent filing.[14] It therefore put the matter over for one day.[15] The next morning, the district court began the sentencing hearing by stating: "I have considered the arguments that we explored yesterday, and I do agree with the government's supplemental paper that the defendant is not entitled to the 51-month time served as a deduction from the mandatory minimum."[16] The district court then imposed the 15-year mandatory-minimum sentence.[17] In doing so, it said it was "obligat[ed]" to impose that sentence, which it also thought was the "appropriate sentence" under the circumstances; but it said nothing about Torres' state-custody time.[18]

On appeal, Torres argued (among other things) that the district court erred in its legal conclusion that it did not have authority to grant credit against the mandatory-minimum sentence for the time he had already spent in state custody for the same conduct.[19] First, as a matter of

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[12] ER 14.

[13] ER 14-19.

[14] ER 19-20.

[15] ER 20.

[16] ER 26.

[17] ER 35, 727.

[18] ER 39-40.

[19] AOB 50-68; ARB 25-37.

statutory construction, a district court may impose a mandatory-minimum sentence and then grant the defendant credit against that sentence for a fully-served state sentence he received for the same offense conduct. Doing so would not reduce or otherwise evade the mandatory-minimum sentence; it would simply acknowledge that the defendant had already served part of that sentence.[20] Second, holding otherwise would render the sentencing scheme unconstitutional. It was undisputed that a district court imposing a mandatory-minimum sentence may give *full credit* for time spent in state custody for the same offense conduct if the state sentence has not yet been imposed or if it has been only partially served—even if the defendant had only one day of the state sentence left to serve at the time of the federal sentencing. If a court cannot also give such credit where the state sentence has been fully served (in other words, when the defendant does not have that one day remaining), then the sentencing scheme is based on an arbitrary distinction that violates the Due Process Clause.[21]

The Ninth Circuit avoided these significant legal issues by ruling that "any error here was harmless" because the "district court below made clear that the sentence imposed was the term that it considered appropriate and that it would not have imposed a shorter sentence based on the time served on the discharged state sentence." App. 3-4a. It did not explain that conclusion. App. 3-4a. In a petition for panel rehearing / rehearing en banc, Torres pointed out that that conclusion cannot be reconciled with the facts described above, which show that the district court wrestled with the custody-credit issue, something it had no reason to do if it would have

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[20] AOB 54-60; ARB 25-31.

[21] AOB 60-68; ARB 31-35.

imposed the same sentence anyway.[22] The Ninth Circuit denied that petition, again without explanation. App. 6a.

# Reasons for Granting the Writ

## The Court should grant review to resolve a circuit conflict concerning whether the government meets its burden to prove that a sentencing error is harmless if it shows only that it is more probable than not that the district court would have imposed the same sentence but for the error (as the Ninth Circuit has held), or if something more is required (as the Second, Third, and Fifth Circuits have suggested).

Luis Alberto Torres received a 15-year mandatory-minimum sentence.[23] A key question at his sentencing and on appeal was whether the district court had discretion to grant credit against that sentence for 51 months he had already spent in state custody for the same conduct.[24] That is *not* the question presented in this petition. All that matters here is that that question presented significant statutory-interpretation and constitutional issues on which lower courts are split, and the Ninth Circuit has not yet considered those issues. To sidestep these complicated issues

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[22] PFR 1-17.

[23] ER 35, 727; PSR 52.

[24] AOB 50-68; GAB 40-59; ARB 25-37.

altogether, the Ninth Circuit found that any error in Torres' case was "harmless" because the "district court below made clear that the sentence imposed was the term that it considered appropriate and that it would not have imposed a shorter sentence based on the time served on the discharged state sentence." App. 3-4a. Because that unexplained finding cannot be reconciled with the district-court record, the Ninth Circuit's decision highlights the need for guidance from this Court concerning how to the apply the harmless-error standard in the sentencing context.

1. Under Fed. R. Crim. P. 52(a), "[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." In *Kotteakos v. United States*, the Court interpreted this rule's predecessor as creating a harmless-error standard. 328 U.S. 750, 757-65 (1946). This standard requires a court of appeals to "engage[] in a specific analysis of the district court record ... to determine whether the error was prejudicial." *United States v. Olano*, 507 U.S. 725, 734 (1993). The government bears the burden to prove that an error is harmless. *United States v. Davila*, 569 U.S. 597, 607 (2013).

In *Kotteakos*, the Court recognized that the task of applying this rule "is not simple, although the admonition is":

> By its very nature no standard of perfection can be attained. But one of fair approximation can be achieved. Essentially the matter is one for experience to work out. For, as with all lines which must be drawn between positive and negative fields of law, the precise border may be indistinct, but case by case determination of particular points adds up in time to discernible direction.

328 U.S. at 761-62. The Court nevertheless articulated a general standard, at least for trial errors:

> If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress. But if one cannot say, *with fair assurance*, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not *substantially swayed* by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had *substantial influence*. If so, *or if one is left in grave doubt*, the conviction cannot stand.

*Id*. at 764-65 (emphasis added) (citation omitted).

2. The Court has not clearly defined the standard applicable to the government's burden to prove that a sentencing error is harmless under Rule 52(a). Under *Kotteakos*, it appears that the government must do enough to provide the court of appeals with *fair assurance* that the district judge was not *substantially swayed* or *substantially influenced* by the error, or at least eliminate any *grave doubt* about that. But what exactly does that mean?

Recently, in *Molina-Martinez v. United States*, the Court considered what it means to "affect substantial rights" in the sentencing context, albeit with regard to the plain-error standard of Rule

52(b) rather than the harmless-error standard of Rule 52(a). 136 S. Ct. 1338, 1345-49 (2016). Subsections (a) and (b) require the same kind of inquiry, with one significant difference: under subsection (b), the defendant rather than the government bears the burden of persuasion with respect to prejudice. *Id*. at 1348 (citing *Olano*, 507 U.S. at 734). Ordinarily, that requires a defendant proceeding under the plain-error standard to "'show *a reasonable probability* that, but for the error,' the outcome of the proceeding would have been different[.]" *Id*. at 1343 (emphasis added) (quoting *United States v. Dominguez Benitez*, 542 U.S. 74, 76, 82 (2004) (concerning plain error during plea colloquy)). This standard has its roots in *Strickland v. Washington*, 466 U.S. 668 (1984). *See Dominguez Benitez*, 542 U.S. at 82 (citing *Strickland*). In that case, the Court explained that a "reasonable probability is a probability sufficient to undermine confidence in the outcome." 466 U.S. at 694.[25] Thus, a defendant must show more than the error "had some conceivable effect" on the sentence, but he does not need to show the error "more likely than not altered" the sentence. *See id*. at 693.

So what about when the burden flips and the government has to prove that a sentencing error did *not* affect substantial rights? Because a defendant meets his burden to prove prejudice with a showing significantly less than a probability that the sentence would have been different—in other words, something meaningfully below a 50% chance of that—it necessarily follows that the government can only meet its burden to *disprove* prejudice with a showing *significantly more*

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[25] *Strickland* adopted this standard from the test for materiality of undisclosed exculpatory information. *Id*.

*than mere probability*. The Court, however, has not addressed that issue, let alone articulated a standard for the courts of appeals.

3. In the absence of such guidance, the lower courts have adopted different standards.

a. The Ninth Circuit has defined the appropriate standard as requiring the government to prove that "it is more probable than not that the error did not materially affect" the sentence such that if the court finds itself "in equipoise as to the harmlessness of the error, reversal is required." *United States v. Beng-Salazar*, 452 F.3d 1088, 1096 (9th Cir. 2006) (quotation marks omitted). Under this standard, the government can meet its burden if it can show that the likelihood that the defendant would have received the same sentence was just over fifty percent. The Eleventh Circuit has also apparently adopted a mere-probability standard. *See United States v. Scott*, 441 F.3d 1322, 1329 (11th Cir. 2006) (remand not required if district court "would have likely sentenced [defendant] in the same way without the error.").

b. The Second and Third Circuits require the government to establish that it is "highly probable" that an error did not affect the sentence. *See United States v. Zabielski*, 711 F.3d 381, 387 (3d Cir. 2013); *United States v. Stevens*, 211 F.3d 1, 5 (2d Cir. 2000). And the Fifth Circuit has held that the government bears a "heavy burden" to overcome the "high hurdle" to "convincingly demonstrate[] both (1) that the district court would have imposed the same sentence had it not made the error, and (2) that it would have done so for the same reasons it gave at the prior sentencing." *United States v. Halverson*, 897 F.3d 645, 652 (5th Cir. 2018) (quotation marks omitted); *see also United States v. Lewis*, 802 F.3d 449, 458 n.11 (3d Cir. 2015) (en banc) (government must meet "heavy burden" to show error would have made no

difference to sentence). Thus, the standard applied in these circuits requires something more than the mere probability that the sentence would have stayed the same. Such a higher standard is more consistent with the Court's authority, discussed above.

c. Other courts have not articulated any workable harmlessness test for sentencing errors. The First and Fourth Circuits, echoing this Court's broad language, simply require a "fair assurance" that the district court would have imposed the same sentence even without the error. *See United States v. Fernandez-Garay*, 788 F.3d 1, 5 (1st Cir. 2015); *United States v. Lewis*, 633 F.3d 262, 271 (4th Cir. 2011). Similarly, the Eighth Circuit has held that a sentencing error is harmless if it did not "substantially influence" the sentencing proceedings such that "it is clear from the record" that the defendant would have received the same sentence. *See United States v. McGrew*, 846 F.3d 277, 280 (8th Cir. 2017) (quotation marks omitted). And the Sixth Circuit requires the government to "convince[]" the appellate court that the error did not cause the defendant to receive a more severe sentence. *See United States v. Susany*, 893 F.3d 364, 368 (6th Cir. 2018) (quotation marks omitted). None of these expressions of the harmlessness standard provide any meaningful guidance for determining whether the government has met its burden.

4. The Court should resolve this circuit conflict. Clarity and consistency in decisions regarding harmless-error review of criminal-sentencing errors is necessary so litigants and courts of appeals can know exactly what is necessary for the government to meet its burden. As some Justices have noted, allocation of the burden of proving harmlessness can be outcome determinative. *Gamache v. California*, 562 U.S. 1083, 131 S. Ct. 591, 593 (2010) (Sotomayor, J,

joined by Ginsburg, Breyer, and Kagan, JJ, respecting denial of petition for writ of certiorari). By the same token, the extent of that burden—showing only a mere probability of the same outcome or something more—can also make the difference between affirming a sentence and remanding for resentencing.

In recent years, the Court has used its certiorari discretion to clarify the low bar for plain-error relief in Guidelines-miscalculation cases. *See Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1906 (2018); *Molina-Martinez*, 136 S. Ct. at 1345. The Court should be just as diligent in ensuring that where, as here, criminal defendants preserve their sentencing-error claims, misapplication of the harmless-error standard does not unjustly result in them spending more time in prison than necessary to fulfill the purposes of incarceration. Thus, the Court's recent observation in a plain-error case is also relevant here:

> To a prisoner, this prospect of additional time behind bars is not some theoretical or mathematical concept. Any amount of actual jail time is significant and has exceptionally severe consequences for the incarcerated individual and for society which bears the direct and indirect costs of incarceration. The possibility of additional jail time thus warrants serious consideration in a determination whether to exercise discretion under Rule 52(b). It is crucial in maintaining public perception of fairness and integrity in the justice system that courts exhibit regard for fundamental rights and respect for prisoners as people.

*Rosales-Mireles*, 138 S. Ct. at 1907 (citations and quotation marks omitted). Again, Torres' case involves the more defendant-friendly harmless-error standard of Rule 52(a). *See Molina-*

*Martinez*, 136 S. Ct. at 1348. He and other defendants who preserve their sentencing-error claims therefore similarly deserve fair and consistent application of this important standard and the significant burden it puts on the government.

5. This case presents an excellent vehicle to address this important issue. Because the Ninth Circuit refused to even reach the merits of the significant statutory-construction and constitutional custody-credit issues of first impression due to purported harmless error, its decision rested entirely on that finding. Moreover, it cannot reasonably be claimed that the government could establish harmlessness in this case under all conceivable standards. Given the district court's criticism of the sequential state and federal prosecutions, its serious consideration of the legal issue before deciding it lacked discretion to grant the requested custody credit, and its conclusion that 15 years is the appropriate sentence for Torres' conduct, it probably would have granted credit for some, if not all, of the 51 months he already served in state prison *for that conduct*. After all, the district court continued the sentencing for a day for the sole purpose of considering the custody-credit issue. *See supra* Statement of the Case. The district court would not have devoted so much time to this issue if it made no difference. But the Ninth Circuit offered no analysis whatsoever supporting its contrary finding of harmlessness. App. 3-4a. The Ninth Circuit's conclusion that the government met its harmlessness burden in this case despite the district court's clear indication that it felt constrained by the mandatory minimum in granting custody credit reflects that that burden has been improperly weakened, to the serious detriment of criminal defendants. In light of the record, the Ninth Circuit erred even under its mere-probability standard for harmlessness. But if something more is required—as suggested by the

Second, Third, and Fifth Circuits—the government certainly cannot meet its burden. Accordingly, articulating and applying the correct harmlessness standard for sentencing errors in this case will allow the Court to provide much-needed guidance to the courts of appeals.

# Conclusion

For the foregoing reasons, the petitioner respectfully requests that this Court grant his petition for writ of certiorari.

September 25, 2019

Respectfully submitted,

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