No. 19-6086

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

Reply Brief for the Petitioner

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Having recently clarified how the plain-error standard of review applies to unpreserved claims of sentencing error, the time is ripe for the Court to clarify how the harmless-error standard of review applies when such a claim has been preserved. The Court's precedent suggests that the hurdle for deeming a sentencing error harmless is relatively high. But the courts of appeals have articulated conflicting tests, with the Ninth Circuit using a low more-probable-than-not standard. This case presents an excellent vehicle to resolve this circuit conflict. The Court should reject the government's arguments to the contrary.

1. The parties agree that Fed. R. Crim. P. 52(a) and the Court's precedent puts the burden on the government to prove a sentencing error is harmless, which equates to an effect on substantial rights, otherwise described as prejudice or an effect on the outcome of the sentencing proceedings. Pet. 9; BIO 6, 11. And the government does not dispute that the Court's trial-error precedent suggests that the government must do enough to provide the court of appeals with fair assurance that the district court was not substantially swayed or substantially influenced by the sentencing error, or at least eliminate any grave doubt about that. *See* Pet. 9-10 (discussing *Kotteakos v. United States*, 328 U.S. 750 (1946)). Luis Alberto Torres explained that some guidance about what this means can be found in *Molina-Martinez v. United States*, 136 S. Ct. 1338 (2016). Applying the holding of that plain-error case to harmless-error review (where the burden flips on the substantial-rights issue) leads to the conclusion that the government can only

meet its burden to disprove prejudice with a showing significantly more than mere probability. Pet. 10-12. The government's brief discussion of *Molina-Martinez* ends with this observation: "If the reviewing court determines that the district court would have imposed the same sentence without regard to any asserted error, as the court of appeals did here, the putative error cannot be said to have affected the defendant's substantial rights." BIO 8. That, however, completely ignores the question presented in the petition, namely, how does the reviewing court make that determination—using a more-probable-than-not standard or something stronger? Pet. ii, 11-14.

Contrary to what the government suggests, Torres did not contend that the Ninth Circuit's decision is "in tension" with *Rosales-Mireles v. United States*, 138 S. Ct. 1897 (2018). BIO 8-9. He merely pointed out that, just as the Court used its certiorari discretion to clarify the low bar for plain-error relief in *Rosales-Mireles* and *Molina-Martinez*, it should now clarify the government's high harmless-error burden where criminal defendants preserve their sentencing-error claims. Pet. 14-15.

2. The government acknowledges "differences" in how the courts of appeals articulate the harmless-error standard in the sentencing context but insists there is no "meaningful, substantive disagreement." BIO 5, 9-11. It's wrong. Although many courts of appeals have not established any workable harmlessness test for sentencing errors, there is a stark contrast between the Ninth Circuit (which allows the government meet its harmlessness burden by showing it is "more probable than not" that the district court would have imposed the same sentence but for the error) and the Second and Third Circuits (which require the government to establish it is "highly probable" that an error did not affect the sentence), and the Fifth Circuit (which places a "heavy

burden" on the government to overcome a "high hurdle" to "convincingly demonstrate" harmlessness). Pet. 12-13.[1]

The government's denial of a conflict rests upon its misinterpretation of *United States v. Beng-Salazar*, 452 F.3d 1088 (9th Cir. 2006). BIO 10-11. It does not, and cannot, contest that the Ninth Circuit equated "a fair assurance of harmlessness" to it being "more probable than not that the error did not materially affect" the sentence such that anything in the government's favor slightly more than mere "equipoise as to the harmlessness" meets its burden. *Beng-Salazar*, 452 F.3d at 1096 (quotation marks omitted). The government nevertheless insists that the Ninth Circuit intended to apply the harmless-error standard in the same way as other circuits. BIO 10-11. But the Ninth Circuit cited those other circuits only for the proposition that preserved *Booker* error (treating the Sentencing Guidelines as mandatory) should be reviewed for

[1] Torres explained that the Eleventh Circuit's standard, which requires the government to prove only that the district court "likely" would have imposed the same sentence but for the error, is akin to the Ninth Circuit's mere-probability standard. Pet. 12 (citing *United States v. Scott*, 441 F.3d 1322, 1329 (11th Cir. 2006)). The government responds that the Eleventh Circuit's "language was intended to follow this Court's precedent[,]" as reflected by its citation to *Williams v. United States*, 503 U.S. 193 (1992). BIO 11. But the Eleventh Circuit apparently failed to appreciate that the text it quoted from *Williams* did not support the "likely" standard it adopted. *See Scott*, 441 F.3d at 1329 (quoting *Williams*, 503 U.S. at 203 ("[O]nce the court of appeals has decided that the district court misapplied the Guidelines, a remand is appropriate unless the reviewing court concludes, on the record as a whole, that the error was harmless, *i.e.*, that the error did not affect the district court's selection of the sentence imposed."). Again, the problem is that the Court has not yet articulated—in *Williams* or any other case—whether *mere probability* that the sentence would have been the same is enough to satisfy the government's burden, and *Molina-Martinez* suggests that it isn't. Pet. 9-12.

harmlessness. *Beng-Salazar*, 452 F.3d at 1095-96. With regard to how to quantify a fair assurance of harmlessness, the Ninth Circuit relied on its own precedent. *Id*. at 1096. Anyway, it doesn't matter whether the Ninth Circuit intended to create a circuit split; it matters only that the more-probable-than-not standard it uses does create such a conflict.

The government also tries to minimize the significance of the circuit conflict by asserting that the Court has "repeatedly denied" petitions raising "similar issues" about the harmless-error standard as applied in the sentencing context. BIO 5-6. Assuming that is true,[2] that would demonstrate that this is a recurring issue worthy of the Court's attention. After all, in two of the government-cited cases, the government filed optional responses to the certiorari petitions. *See Shrader v. United States*, Case No. 12-5614; *Savillon-Matute v. United States*, Case No. 11-5393. And in the other four cases, the Court asked the government to file responses. *See Elijah v. United States*, Case No. 18-16; *Monroy v. United States*, Case No. 17-7024; *Effron v. United States*, Case No. 10-10397; *Rea-Herrera v. United States*, Case No. 08-9181. Having repeatedly shown interest in cases about how to gauge harmless error at sentencing, the Court should grant review in this case to finally address the matter. Furthermore, all but two of the government-cited cases pre-date *Rosales-Mirales* and *Molina-Martinez*. Now that the Court has delved into plain sentencing errors, it makes sense to take a case examining harmless sentencing errors,

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[2] *But see, e.g.*, *Elijah v. United States*, Case No. 18-16 (petition presented question concerning particular situation where district court expressly stated it would impose same sentence even if different Sentencing Guidelines calculations); *Monroy v. United States*, Case No. 17-7024 (same).

especially given that harmlessness is the flipside of the plain-error standard's prejudice prong discussed in *Molina-Martinez*. *See* Pet. 10-12.

3. This case presents an excellent vehicle to address this important issue and resolve the circuit conflict, notwithstanding the government's arguments to the contrary.

a. In a cursory and conclusory paragraph, the government contends that the harmless-error issue is "ultimately of no practical consequence" because the district court purportedly didn't err in concluding that it could not grant the requested custody credit against the mandatory-minimum sentence. BIO 12. That question is far more complicated than the government portrays it to be, taking up 18 pages of the opening brief, 17 pages of the answering brief, and ten pages of the reply brief.[3] As explained in the petition (and ignored by the government) the custody-credit question presented significant statutory-interpretation and constitutional issues on which lower courts are split, and the Ninth Circuit has not yet considered those issues. Pet. 6-8, 15. Again, however, that is not the question presented in this petition. Pet. 8. Rather, the sole issue is whether the Ninth Circuit misapplied the harmless-error standard to avoid dealing with that complicated question altogether. Thus, this case presents a clean scenario where the court of appeals' ruling rested entirely on its harmless-error finding. If the Court ultimately concludes that that finding cannot withstand scrutiny, then it will remand for the Ninth Circuit to address the custody-credit issues in the first instance. Regardless of whether Torres ends up winning or losing those issues down the road, he is entitled to have the Ninth

[3] AOB 50-68; GAB 40-57; ARB 25-35.

Circuit actually rule on their merits instead of sidestepping the subject using its improperly-low harmless-error standard.

b. The government also contends that the Ninth Circuit correctly applied the harmless-error standard because the district court purportedly "made clear" that it would have imposed the same sentence regardless of any discretion to grant credit for the time Torres spent in state custody. BIO 6-8; *see also* BIO 4-5 (describing sentencing). Again, it fails to acknowledge the key facts noted in the petition—the district court's criticism of the sequential state and federal prosecutions, and its serious consideration of the legal issue (including continuing the sentencing for a day for the sole purpose of studying the matter) before deciding it lacked discretion to grant the requested custody credit. Pet. 4-6, 15. The district court would not have devoted so much time to this issue if it made no difference. The record certainly doesn't support the government's claim that "the district court indicated that it would not have [granted credit] even if it could have." BIO 8. The district court's relatively-brief justification for imposing the 15-year mandatory-minimum sentence merely noted that it was "obligat[ed]" to impose that sentence, which it also thought was the "appropriate sentence" under the circumstances; it said nothing about the state-custody time.[4] Whether Torres could get credit for that time *against* the mandatory-minimum sentence—in other words, whether the district court could recognize that he had *already served* part of that "appropriate sentence" in state prison *for the same conduct*—

[4] ER 39-40.

was an entirely separate issue that the district court had already resolved against Torres at the start of the hearing.[5]

c. Under these circumstances, the correct harmless-error test could be outcome determinative. Even if any district court error could be dismissed as harmless under the Ninth Circuit's more-probable-than-not test, it could not qualify as harmless if the government must prove that it is "highly probable" that the error did not affect the sentence, or if the government had a "heavy burden" to overcome a "high hurdle" to "convincingly demonstrate" harmlessness. *See* Pet. 12-13.

For the foregoing reasons, and for the reasons set forth in the petition, the Court should grant the petition for writ of certiorari.

January 21, 2020

Respectfully submitted,

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[5] ER 26.