

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

MARIA DE LOURDES ACOSTA,

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 either order a Pre-Sentence Report or make explicit on-the-record findings as to why a Pre-Sentence Report is unnecessary, 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 a Pre-Sentence Report been prepared?

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INTRODUCTION

Pre-Sentence Reports help to ensure fairness and consistency in sentencing proceedings throughout the United States by guaranteeing that an objective party—the probation officer—has provided the sentencing judge with information that is vital to sentencing. That information includes not only background information about the defendant, but also a calculation of the appropriate sentencing Guidelines, a criminal history computation, an analysis of sentencing options, the probation officer’s view of factors that may warrant a departure or a sentence outside the advisory Guidelines system, the probation officer’s analysis, and the probation officer’s recommendation as to the appropriate sentence for the offense of conviction.

See Fed. R. Crim. P. 32(d). Because of its critical role at sentencing, preparation of a Pre-Sentence Report is required unless “the court finds that the information in the record enables it to meaningfully exercise its sentencing authority under 18 U.S.C. § 3553, and the court explains its finding on the record.” Fed. R. Crim. P. 32(c)(1)(A)(ii).

But no Pre-Sentence Report was ordered in Petitioner’s case, nor did the district court make a finding that a Pre-Sentence Report was unnecessary. Yet her sentence was affirmed on appeal. The Ninth Circuit agreed that the district court plainly erred by failing to either order a Pre-Sentence Report or make a finding on the record that a Pre-Sentence Report was not necessary. But the Ninth Circuit held that Petitioner failed to demonstrate that this error affected her substantial rights and therefore affirmed under the plain error standard from *United States v. Olano*, 507 U.S. 725, 734 (1993).

The Court should correct the Ninth Circuit and apply the rule from *Molina-Martinez v. United States*, 136 S. Ct. 1338 (2016), to this comparable sentencing context. In *Molina-Martinez*, the Court analyzed a case where the district court had failed to calculate the correct Guidelines range. *Id.* Applying plain error review, the Court recognized that a defendant would often lack any additional evidence as to how the incorrect Guidelines range affected his ultimate sentence. *Id.* at 1347. The Court therefore held that “the court’s reliance on an incorrect range in most instances will suffice to show an effect on the defendant’s substantial rights” as long as “the record is silent as to what the district court might have done had it considered the correct Guidelines range.” *Id.*

In a situation like Petitioner’s where a Pre-Sentence Report was not ordered, a defendant will similarly lack any additional evidence as to how the absence of a Pre-Sentence Report affected her ultimate sentence. Thus, the rule from *Molina-Martinez* should equally apply in this context so that the failure to order a Pre-Sentence Report (without an explanation as to why a report was unnecessary) will suffice to show an effect on the defendant’s substantial rights. This case is a good vehicle for establishing this clear-cut rule, which will protect the vital role of Pre-Sentence Reports at sentencing.

OPINION BELOW

The Ninth Circuit’s unpublished memorandum disposition is appended to this Petition. See Pet. App. 1a-4a.

JURISDICTION

Petitioner was convicted of failure to self-surrender, in violation of 18 U.S.C. § 3146(a)(2), and was sentenced to 24 months in custody followed by two years of supervised release. Reviewing the judgment under 28 U.S.C. § 1291, the Ninth Circuit affirmed Petitioner's sentence in an unpublished disposition. *See United States v. Acosta*, 786 F. App'x 96 (9th Cir. 2019) (attached to this petition as Appendix A). This Court has jurisdiction to review the Ninth Circuit's decision under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

In December 2015, Petitioner was charged in Case No. 15-cr-3213-JAH with importation of methamphetamine, in violation of 21 U.S.C. §§ 952 and 960. She was released on bond on June 2, 2015, and she pled guilty on August 25, 2015. At the sentencing hearing in November 2016, the district court imposed a 48-month custodial sentence to be followed by four years of supervised release. The district court also granted Petitioner's request for a self-surrender date of no later than March 1, 2017. Petitioner did not report by that date, and she was later arrested and charged with failure to self-surrender in violation of 18 U.S.C. § 3146(a)(2). That is the conviction that is the subject of this appeal.

I. District court proceedings

Petitioner pled guilty to this new charge. After taking the plea, the district court set a later date for sentencing. The district court did not order a Pre-Sentence Report ["PSR"], nor did the district court make a finding that preparation of a PSR was unnecessary or state any reasons that a PSR was unnecessary.

On the date set for sentencing, the prosecutor requested “an addendum from pretrial—from probation in connection with what she’s been doing for the last year and a half while she’s been a fugitive.” The prosecutor pointed out that Ms. Acosta was “looking at consecutive time [to the 48-month custodial sentence from her importation case], so...there is no harm in continuing it to allow probation to look into some of these issues so that the court is fully aware of all the circumstances.” The district court continued the hearing and ordered the probation office to prepare “an updated P.S.R.” The district court did not specify on the record what the probation officer was supposed to include in the “update,” nor the district court explain its reasons for not ordering an entirely new PSR.

The probation officer filed a “Court-Ordered Updated Presentence Investigation Report” in Case No. 15-cr-3213-JAH—the drug importation case, not the failure to self-surrender case. On the top of the third page of that report, the probation officer wrote (in bold lettering):

***It is noted that on May 21, 2018, Your Honor ordered that an updated presentence report be filed with the Court in reference to this matter only. The updated information as gathered from a follow-up interview held on August 1, 2018, is highlighted by bold text where noted below. The guideline calculations, criminal history, and sentencing recommendations have not been amended, and only ACOSTA’s biographical information has been amended as requested by the Court.**

That “update” further stated that Petitioner had pled guilty to failure to self-surrender in violation of 18 U.S.C. § 3146(a)(2), “ancillary to this case before Your Honor,” and that “a presentence report was not ordered.” That meant that the update to the PSR did not have the Guidelines calculations for the failure to self-surrender offense for which Petitioner was being sentenced, a criminal history computation, the

an analysis of sentencing options, the probation officer's view of factors that may warrant a departure or a sentence outside the advisory Guidelines system, the probation officer's analysis, or the probation officer's recommendation as to the appropriate sentence for the failure to self-surrender.

At the next hearing, the prosecutor recommended that the district court impose a 24-month custodial sentence consecutive to the 48-month sentence from her importation case. The prosecutor did not recommend a term of supervised release orally at the sentencing hearing or in the Sentencing Summary Chart filed before the hearing.

Defense counsel recommended a one-month consecutive custodial sentence. At a later point in the hearing, defense counsel disputed the government's calculation of Petitioner's criminal history category. Defense counsel pointed out that the update to the PSR put Petitioner in criminal history category IV, not criminal history category V, which would lower her guideline range to be 12 to 18 months. The government responded that calculations in the update to the PSR were done at the time of the importation offense, not this offense, so they were not accurate.

The district court imposed a 24-month custodial sentence. Then, the district court asked the probation officer, "Can I place her on consecutive supervised release?" ER51. He responded, "Not consecutive, Your Honor. It has to be concurrent." Without inquiring about the Guidelines range or calculating it itself, the district court responded, "All right. Two years of supervised release."

II. Appeal to the Ninth Circuit

Petitioner appealed to the Ninth Circuit. She argued that the district court erred in two ways. First, Petitioner argued it was reversible error when the district court failed to order the probation office to prepare a PSR and did not make a finding on the record that preparation of a PSR was unnecessary, nor explain its reasoning for not ordering a complete PSR for this offense. She based this argument on Federal Rule of Criminal Procedure 32(c)(1), United States Sentencing Guidelines § 6A1.1, and the Ninth Circuit's previous decision in *United States v. Turner*, 905 F.2d 300 (9th Cir. 1990). She noted that the Ninth Circuit had reversed in *Turner* even though the defendant had waived preparation of the PSR and argued that meant that her sentence must be vacated even though she had not objected at the time of sentencing.

Second, Petitioner argued that the district court plainly erred by failing to appropriately calculate the Guidelines range for Petitioner's term of supervised release. She urged the Ninth Circuit to vacate her sentence and remand for resentencing.

The panel affirmed Petitioner's sentence. The panel agreed that the district court committed error that was plain when it failed to order a PSR and did not explain the reasons for that choice on the record. But the panel rejected Petitioner's argument that this type of error requires reversal regardless of whether the defendant objected, holding instead that it was subject to plain error review. The panel then held that Petitioner did not demonstrate that her rights were substantially affected, meaning that she had failed to demonstrate a reasonable probability that she would have

received a different sentence if the district court had not committed this error. Thus, the panel held that this error did not warrant reversal.

The panel also held that the district court did not commit plain error by failing to calculate the Guidelines range for her term of supervised release, noting that it imposed a term that fell within the correctly calculated range. Additionally, the panel determined that, even if it was error, it did not affect Petitioner's substantial rights given that it was a concurrent term of supervised release to that she would already be serving for her importation offense. Accordingly, the panel affirmed Petitioner's sentence.

REASONS FOR GRANTING THE PETITION

The Court should grant certiorari to correct the Ninth Circuit's departure from the Court's sentencing jurisprudence. Specifically, the Ninth Circuit's decision conflicts with the Court's reasoning in *Molina-Martinez v. United States*, 136 S. Ct. 1338 (2016). In that case, the Court evaluated how to review a district court's failure to calculate the correct Guidelines range when the error went unnoticed until the appeal was filed. *Id.* The Court held that "the court's reliance on an incorrect range in most instances will suffice to show an effect on the defendant's substantial rights" as long as "the record is silent as to what the district court might have done had it considered the correct Guidelines range." *Id.* at 1347. And in that very case, the Court observed the critical role that a PSR plays in sentencing—it is the first document filed for the Court that includes the applicable Guidelines range, as calculated by the probation office. *Id.* at 1342. A PSR also lays out the district court's sentencing options and provides information about the defendant's personal history and background. *Id.*

That is why preparation of a PSR is “required.” *Id.* at 1343. So where, as here, the district court skipped a critical step in the sentencing process by failing to order a PSR that would contain vital information such as the correct Guidelines range, the same rule from *Molina-Martinez* must apply. That means that, if there are no “unusual circumstances,” *id.* at 1347, nor any indication of what the district court would have done had it ordered a PSR, a defendant should “not be required to show more” to prove prejudice to her substantial rights. *See id.* The Ninth Circuit’s contrary rule creates a perverse incentive for district courts to skip ordering a PSR without stating on-the-record reasons why a PSR is unnecessary, thereby eliminating a critical component of a fair sentencing process. The Court should grant certiorari, review the Ninth Circuit’s erroneous rule, and reverse.

I. When a district court fails to either order a Pre-Sentence Report or make explicit on-the-record findings as to why a Pre-Sentence Report is not necessary, the district court’s failure is sufficient to demonstrate that the defendant suffered prejudice to her substantial rights under plain error review.

The PSR plays a critical role in a fair sentencing process. Its importance is recognized in the clear language of both Federal Rule of Criminal Procedure 32(c)(1) and United States Sentencing Guidelines Section 6A1.1. Both explain that a probation officer “shall conduct a presentence investigation and report to the court before the imposition of sentence unless the court finds that there is information in the record sufficient to enable the meaningful exercise of sentencing authority pursuant to 18 U.S.C. § 3553, and the court explains this finding on the record.” *Id.* at 301 (citation omitted). Given its critical role, a district court’s failure to follow the clear mandate of these rules and either order a PSR or state reasons for not ordering

a PSR should be held to be inherently prejudicial. In other words, a defendant should not have to point to any additional facts to demonstrate that the error affected her substantial rights.

This would not be the first time a procedural sentencing error would be deemed prejudicial under even plain error review absent evidence to the contrary. In *Molina-Martinez*, the Court explained the inherent prejudicial impact of a different sentencing error: that of failing to calculate the correct Guidelines range. The Court explained that, “[f]rom 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.

The Court clarified that its general rule applied to most cases, not all, because “[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.” *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 fails to order a PSR or state reasons for not ordering a PSR, given the PSR’s critical role for ensuring a fair sentencing process. Indeed, that is why, as the Court has noted, a PSR is “required.” *Id.* at 1343. The PSR is the document that

contains the sentencing Guidelines as calculated by the probation office, as well as information about the defendant and the district court's options for sentencing. When a district court does not have all of the information provided by a PSR, a reviewing court has no way to tell whether the sentencing court is even aware of all of its options. Thus, “[w]here . . . the record is silent as to what the district court might have done” had it been able to consider a PSR, just as when the record is silent as to what it would have done if it had calculated the correct Guidelines, the ultimate sentence cannot stand. *See id.* at 1347.

In addition, failing to extend *Molina-Martinez* from cases involving the wrong Guidelines range to cases where no PSR was ordered would create a perverse incentive for district courts to avoid mandated procedure. Under such a regime, a district court might skip ordering a PSR and thereby not be aware of all of the relevant information and all of the sentencing options, yet his or her sentencing decision would be insulated from appellate review. This Court's law must discourage this unjust outcome. Extending the general presumption of prejudice from *Molina-Martinez* to a district court's failure to order a PSR easily and directly accomplishes that task.

II. The Ninth Circuit was wrong to affirm the district court in Petitioner's case after the district court committed error that was plain by failing to either order a Pre-Sentence Report or make explicit on-the-record findings as to why a Pre-Sentence Report is not necessary.

The Ninth Circuit panel erroneously affirmed Petitioner's sentence after the district court failed to either order a PSR or state its reasons on the record for finding that a PSR was unnecessary. Here, the district court never explained whether it

understood all of its sentencing options before making its decision to impose a high-end custodial sentence. Under those circumstances, Petitioner obviously “lack[s] the additional evidence” to prove prejudice to a certainty, *see Molina-Martinez*, 136 S. Ct. at 1346, but that cannot undermine her appeal. As described above, the district court’s unguided decision to impose a high-end sentence is all that Petitioner needs to show under *Molina-Martinez* because there is no way to know what the district court would have done if he had reviewed all of the information that would have been contained in a PSR. The Ninth Circuit thus erred in rejecting Petitioner’s appeal due to a lack of prejudice.

But Petitioner’s case is not the “unusual” case where the reviewing court can be sure that the district court would have imposed the same sentence had it properly ordered and considered a PSR. *Accord Molina-Martinez*, 136 S. Ct. at 1347. Instead, the district court revealed its ignorance of the available sentence when it had to ask the probation officer at the end of the hearing what its options were regarding a term of supervised release. From that question, it is reasonable to infer that the district court had not considered all of its options for the custodial sentence either. And because “the record is silent as to what the district court might have done” had it had all of the information contained in a PSR, the error in failing to order the PSR was all Petitioner needed to proffer in order to prove prejudice to her substantial rights. *Accord 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.

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

Petitioner's case is the perfect case to resolve this important legal issue. Here, the sole issue is whether the district court's plain error prejudiced Petitioner. Whether the district court's failure to order a PSR or state its reasons that a PSR was unnecessary provides sufficient evidence of prejudice is entirely dispositive of the case. If, contrary to the Ninth Circuit's ruling, the district court's plain error caused prejudice to Petitioner's substantial rights, Petitioner will necessarily prevail.

Moreover, the district court's failure to order a PSR contributed to a second error in this case: the district court failed to calculate Petitioner's supervised release Guidelines. It then imposed a two-year term of supervised release, untethered to the Guidelines and without any justification. Had a PSR been prepared in this case, the district court would have known that the range for supervised release was one to three years, and also would have known that any term of supervised release would have to be imposed concurrently with the term of supervised release Petitioner would already be serving for her importation offense. With that knowledge, the district court may not have imposed any supervised release. But without the PSR, the district court had to inquire at the sentencing hearing as to whether he could impose a consecutive term of supervised release. This question reveals that the district court did not know his sentencing options—a problem that infected the whole hearing and that would have been solved if a PSR had been prepared. Thus, this case is an ideal vehicle to address this issue because the impact of the failure to prepare a PSR extended to the district court's ultimate decision as to the supervised release portion of Petitioner's sentence, which heightens the importance of this Court's review.

Summarily affirming abdicates the appellate court's responsibility to ensure fairness in uniformity in sentencing by requiring district courts to consider all of the information available in PSRs or be accountable for deciding not to order a PSR by stating reasons on the record that justify the decision to proceed without a PSR. While defendants bear a burden to prove prejudice, the Ninth Circuit's rule creates an insurmountable hurdle rejected by this Court in a comparable context in *Molina-Martinez*. But holding that the failure to order a PSR or state reasons for not doing so is sufficient on its own to demonstrate prejudice would re-affirm the PSR's vital role in ensuring fair sentencing hearings. This Court accordingly should seize the opportunity to reverse the Ninth Circuit's error.

CONCLUSION

This Court should grant the petition for writ of certiorari.

Respectfully submitted,

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