No._____

**IN THE SUPREME COURT OF THE UNITED STATES**

---

ANTONIO RENE MARTINEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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**On Petition For A Writ of *Certiorari* To The United States Court of Appeals for the Ninth Circuit**

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# PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

In United States v. Soltero, 510 F.3d 858, 863-64 (9th Cir. 2007) (per curiam), an opinion that the Ninth Circuit applied here to foreclose Petitioner's claim under Rule 32(i)(1)(A) of the Federal Rules of Criminal Procedure, the Ninth Circuit – consistent with an approach that four of its sister circuits have adopted – held that a defendant must demonstrate actual prejudice resulting from a district court's not inquiring whether he had reviewed a Presentence Report with his counsel. Contrarily, however, Soltero noted that the Sixth Circuit has held that a Rule 32(i)(1)(A) violation is a structural error that does not require the defendant to make such a showing. See id. (discussing United States v. Osborne, 291 F.3d 908, 910-11 (6th Cir. 2002).

The question presented is as follows:

Did the Ninth Circuit's disposition of Petitioner's claim under Rule 32(i)(1)(A) of the Federal Rules of Criminal Procedure conflict with the Sixth Circuit's opinion in United States v. Osborne, 291 F.3d 908, 911 (6th Cir.2002), which held contrarily that the district court's violating that provision by not inquiring whether the defendant had reviewed the Presentence Report with counsel is a structural error, resulting categorically in a remand for resentencing?

## LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

## LIST OF DIRECTLY RELATED PROCEEDINGS

1. United States District Court for the Eastern District of California, United States of America v. Antonio Rene Martinez, No. 1:14-cr-00158-LJO-SKO. The district court entered judgment on August 29, 2016.

2. United States District Court for the Eastern District of California, United States of America v. Antonio Rene Martinez, No. 1:14-cr-00158-LJO-SKO. The district court entered judgment on November 13, 2018, denying Petitioner's motion under 28 U.S.C. § 2255 and issuing a limited certificate of appealability.

3. United States Court of Appeals for the Ninth Circuit, United States of America v. Antonio Rene Martinez, No. 19-15046. The Ninth Circuit entered judgment on November 22, 2019, remanding to the district court.

4. United States District Court for the Eastern District of California, United States of America v. Antonio Rene Martinez, No. 1:14-cr-00158-LJO-SKO. The district court entered an amended judgment on January 28, 2020.

5. United States Court of Appeals for the Ninth Circuit, United States of America v. Antonio Rene Martinez, No. 20-10056. The Ninth Circuit enteredjudgment on April 8, 2021. It denied Petitioner's petitioner for panel rehearing on April 27, 2021.

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No._____

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**On Petition For A Writ of *Certiorari* To The United States Court of Appeals for the Ninth Circuit**

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Petitioner Antonio Rene Martinez respectfully requests that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered on April 8, 2021.

## OPINION BELOW

A three-judge panel of the Ninth Circuit originally issued an unpublished memorandum disposition and entered judgment on April 8, 2021, affirming Petitioner's conviction and sentence.[1] The panel later denied Petitioner's petition

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[1] A copy of the memorandum disposition is included in the Appendix. See App. 1-3 (United States v. Martinez, 852 Fed. App'x 271 (9th Cir. 2021)).

for panel rehearing on April 27, 2021.[2] App. 1-3, 22.

## JURISDICTION

The Ninth Circuit entered judgment in this case on April 8, 2021, and denied rehearing on April 27, 2021. App. 1-3, 22. This Court has jurisdiction under 28 U.S.C. § 1254(1). See also S. Ct. R. 13.3; S. Ct. Miscellaneous Order, July 19, 2021.

## STATUTORY PROVISION INVOLVED

Rule 32(i)(1)(A) of the Federal Rules of Criminal Procedure reads as follows: "(i) SENTENCING. *In General.* (1) At sentencing, the court: (A) must verify that the defendant and the defendant's attorney have read and discussed the presentence report and any addendum to the report . . . ."

## STATEMENT OF THE CASE

Petitioner draws the following factual rendition from the district court record, including the preliminary presentence report that the district court and the parties ultimately used foundationally during a rushed hybrid hearing on August 29, 2016, that involved both a change-of-plea and the district court's meting out a custodial sentence for Petitioner. See App. 4-17.

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[2] A copy of the order denying rehearing is included in the Appendix. See App. 22.

### A. Petitioner Emigrates to the United States from El Salvador

Petitioner Antonio Rene Martinez was born in El Salvador in 1973. His father is now deceased, and his mother eventually emigrated to the United States, ultimately settling in Northern California. App. 174.

After completing only the ninth grade in his home country, Petitioner later came to the United States on an unspecified date (apparently before 1992), ostensibly to find work. During his employment tenures here, Petitioner worked regularly as a landscaper. App. 174.

### B. Petitioner Apparently Seeks Relief from Removal, But the Government Ultimately Removes Him Based on Two Criminal Convictions

On an unspecified date, Petitioner apparently sought relief from a putative removal order. See App. 74; see also Martinez v. Sessions, 768 Fed. App'x. 568 (9th Cir. 2018) (unpublished). But two convictions – only one of which apparently remains extant (see infra at 3-5 & n.4) – created criminal-and immigration-related ramifications that continue to hinder Petitioner, and ultimately led to this second appeal that at least tangentially involves his § 2255 motion.

The first such conviction occurred in September 1992. Then, Petitioner pleaded no contest to violating California Penal Code § 288(a) by having committed lewd and lascivious acts on a minor. The Superior Court sentenced

him to a three-month custodial term and three years of probation.[3] But a Superior Court judge later vacated that conviction on May 18, 2015, granting a motion by Petitioner under California Penal Code § 1016.5 based on a judge's not having advised him pre-plea of the adverse immigration consequences that could result from pleading guilty to that offense. App. 74, 95-99, 105-08.

Regarding the second conviction, the procedural history is more intricate. A Superior Court judge entered a judgment on May 6, 2001, convicting Petitioner of violating California Penal Code § 245(a)(1) by having committed an assault with a deadly weapon. Combined with Petitioner's then-extant offense under § 288(a), the judge sentenced Petitioner to a seven-year custodial term in state prison. App. 74, 173.

Following that term, the Department of Homeland Security served Petitioner in early 2005 with a Notice to Appear in immigration court, charging him with having committed two offenses – namely, the two convictions that Petitioner discussed supra – constituting grounds for removal from the United States. App. 92-93. Ultimately, an immigration judge ordered the government on March 29, 2005, to remove Petitioner from the United States, having concluded that DHS

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[3] That led to the government's deporting Petitioner to El Salvador in 1996. App. 92, 115.

had proffered "clear, unequivocal, and convincing evidence" to support the government's so doing. App. 94-95, 116.

Using that order, DHS then effectuated Petitioner's removal on June 22, 2005. App. 23, 171. He later filed a motion in the Board of Immigration Appeals to reopen his underlying immigration proceedings, and also made a parallel motion in the California Superior Court to vacate his 2001 conviction. Neither effort was successful, however, culminating in the Ninth Circuit's dismissing his petition for review in part and denying it in part on April 13, 2018.[4] See App. 74-75, 110-114.

### C. Petitioner Reenters the United States, and Following His Contacts with Law Enforcement, a Federal Grand Jury Indicts Him for Violating 8 U.S.C. § 1326

At some unknown date, Petitioner decided to reenter the United States, presumably because he has several close relatives (including his mother and three U.S. citizen children) who reside in California. App. 86-89, 174. But on June 15, 2014, a police officer in Los Banos, California, arrested Petitioner, suspecting that he had been driving under the influence. App. 174.

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[4] In an unpublished memorandum disposition, the Ninth Circuit determined that Petitioner had failed to exhaust his claim that the 2001 conviction was not a "particularly serious crime" that barred him from obtaining either asylum or withholding of removal. Martinez, 768 Fed. App'x at 568.

That arrest apparently did not result in a conviction, but it did alert federal law enforcement personnel about Petitioner's ostensibly unlawful presence in the United States. Consequently, on July 31, 2014, a grand jury empaneled in the Eastern District of California returned an indictment, charging Petitioner with violating 8 U.S.C. § 1326(a) and (b)(2) by having been "found" in the United States following his removal in June 2005. The indictment further alleged that Petitioner's removal had occurred after his conviction under § 245(a)(1) in May 2001. App. 23-24.

After the government ultimately apprehended Petitioner in the Northern District of California – and a magistrate judge there ordered his transfer to the Eastern District of California (App. 25-32) – Petitioner appeared at an arraignment on September 10, 2015. Then represented by Peggy Sasso of Federal Defender's Fresno office, Petitioner pleaded not guilty. App. 33-35.

### D. The Government Offers Petitioner a Fast-Track Plea Agreement, But Petitioner Rejects It and Instead Enters an Open Guilty Plea

Sasso and Federal Defenders later withdrew as Petitioner's counsel. In their stead, Kevin Little (a member of the Eastern District of California's Criminal Justice Act trial panel) substituted in as counsel on September 27, 2015. App. 36-37, 91.

What happened during the next few months between Petitioner and Little is a hotly contested subject, one that ultimately resulted in the government's ostensibly conceding that at least part of Petitioner's later motion under 28 U.S.C. § 2255 was meritorious. As typically happens in § 1326 cases such as this, the government offered Petitioner at least two plea agreements, one of which was a "fast track" version. That is, if Petitioner were to agree to plead guilty to the indictment's § 1326 count, the government would in turn recommend that Petitioner receive up to a two-level departure under U.S.S.G. § 5K3.1 from his adjusted base offense level. It also agreed that Petitioner should receive up to a "three-level" reduction under U.S.S.G. § 3E1.1, and it would recommend a low-end custodial term. App. 77-78, 80-81.

Petitioner contended that Little advised him during attorney-client consultations that if he were to have accepted the government's fast-track offer, he would have been sentenced to no more than 24 months in custody for the § 1326 offense. But Petitioner rejected the offer, allegedly following Little's counsel, because in Little's estimation, he likely would receive a shorter term without being bound by an agreement's terms. App. 65-66. And, consequently, that would have permitted Petitioner to have continued via state court post-conviction proceedings to attempt to vacate his 2001 state conviction, a putative result he then at least

theoretically could have parlayed into a successful motion to reopen his immigration proceedings and later convince an immigration judge to vacate the 2005 removal order. See App. 68.

Alternatively, Petitioner alleged, Little – knowing that Petitioner as of August 2016 had pending state court post-conviction proceedings and parallel efforts in immigration court – should have pursued remedies under § 1326(d) to require the government to defend the immigration court order "if he proceeded to trial." App. 68.

But Little had a decidedly different account. In a declaration accompanying the government's response to Petitioner's later § 2255 motion, Little averred that he had never advised Petitioner that Petitioner would not be sentenced to a custodial term lengthier than 24 months. App. 77. He also claimed that Petitioner and Petitioner's relatives were hopeful that his state post-conviction proceedings and parallel ones in immigration court would be propitious, therefore potentially making it advantageous to "delay" the present case and keep it off of an expeditious change-of-plea track. Id.

And Little contended that with so many different litigation efforts pending in three different forums, he and Petitioner had determined that it would not be wise strategically to waive (as the draft plea agreements contemplated) Petitioner's

rights to appeal directly to this Court and/or later file a § 2255 motion. App. 77-78.

Consequently, after approximately eleven months of negotiations that did not result in an agreement (see App. 38-56), Little told the district court during a hearing on August 29, 2016, that Petitioner wished to enter an open guilty plea – in other words, without any agreement whatsoever with the government – to the § 1326 count that the indictment charged. App. 4-6.

### E. The District Court Immediately Sentences Petitioner to a 41-Month Custodial Term

Quite ironically, although Petitioner rejected the government's fast-track offers, his change-of-plea hearing morphed into an expeditious two-for-one package arrangement when the district court – after taking Petitioner's guilty plea and with the parties' consent – decided to sentence Petitioner within mere minutes after determining that the plea was knowing, voluntary, and intelligent under Rule 11 of the Federal Rules of Criminal Procedure. App. 11-17. Because the Probation Office had already prepared a preliminary Presentence Investigation Report during the plea-bargaining phase for Petitioner's counsel's benefit (see App. 11), the district court thought it had sufficient information to sentence Petitioner. App. 11-12.

Before making that awkward procedural transition, however, the district court conducted a manifestly deficient Rule 11 colloquy. Among other things, despite Rule 11(b)(1)'s lengthy list of mandatory tasks that a district court had to accomplish before even determining that the plea was knowing, voluntary, and intelligent, the district court plainly did not do the following: (a) notify Petitioner that any false statement that he might make in open court could later subject him to criminal liability "for perjury or false statement"[5] (Fed. R. Crim. P. 11(b)(1)(A)); (b) inform Petitioner that he had a right to persist in maintaining his earlier not-guilty plea (Fed. R. Crim. P. 11(b)(1)(B)); (c) notify him that he had a right to a jury trial[6] (Fed. R. Crim. P 11(b)(1)(C)); (d) inform Petitioner that he had a right to have counsel represent him at trial[7] (Fed. R. Crim. P. 11(b)(1)(D)); (e) notify him that he had a right to confront adverse witnesses at trial (Fed. R. Crim. P. 11(b)(1)(E); and (f) inform Petitioner that it was obligated to impose a

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[5] Indeed, there is no indication in the transcript that the district court ever placed Petitioner under oath before beginning the hearing – which is customary during a Rule 11 colloquy. See App. 6.

[6] The district court asked Petitioner, "Do you understand that if you wanted to go to trial, you could?" App. 7. But that omitted any reference to Petitioner's constitutional rights under the Sixth Amendment to a jury trial.

[7] Mentioning what would occur if Petitioner were to proceed to trial, the district court stated only that "[y]our lawyer would cross-examine any of those witnesses" the government would call during its case-in-chief. App. 8.

special assessment of $100 (Fed. R. Crim. P 11(b)(1)(L)). App. 6-11.

Further, the district court did not query Petitioner about whether he understood "in determining a sentence, the [district] court's obligation to calculate the applicable sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. § 3553(a) . . . ." Fed. R. Crim. P. 11(b)(1)(M). App. 9. Also, the district court did not query Petitioner regarding whether he, as someone who is not a U.S. citizen, understood that he "may be removed from the United States, denied citizenship, and denied admission to the United States in the future." Fed. R. Crim. P. 11(b)(1)(O). App. 8.

Additionally, the district court did not ask Petitioner whether he had received any "promises" to induce him to plead guilty. Fed. R. Crim. P. 11(b)(2); App. 9. And although the government prosecutor – perhaps cognizant on a certain level of the plea colloquy's deficiencies – prompted the district court to allow her to recite a supplemental purported factual basis for Petitioner's change-of-plea (see Fed. R. Crim. P. 11(b)(3)), the district court did not query Petitioner about whether he agreed with the prosecutor's recitation. App. 9-10.

* * *

Notwithstanding that neither party had filed a pre-hearing memorandum –

nor had an opportunity to file written objections to the PSR (see Fed. R. Crim. P. 32(f); App. 162-63) – the district court then transitioned the hearing to its second phase. And most significantly for this petition's purposes, without asking Petitioner – as Rule 32(i)(1)(A) required it to do – whether he had reviewed the PSR with Little, the district court then proceeded to calculate the Guidelines range. App. 13-14.

The district court determined that Petitioner had a base offense level of 8, with a 16-level enhancement for Petitioner's "crime of violence" offense in 2001 (see supra at 4). A three-level downward adjustment for accepting responsibility timely under U.S.S.G. § 3E1.1 resulted in an adjusted base offense level of 21. Coupled with Petitioner's falling within Criminal History Category II, that yielded an advisory Guidelines range of 41-51 months. App. 13-14, 171-172.

Following brief arguments from Little and a short allocution by Petitioner (App. 13-14)), the district court, without meaningfully analyzing applicable factors under 18 U.S.C. § 3553(a), sentenced Petitioner to a low-end custodial term of 41 months. It did not impose a supervised release period. App. 14-15.

Because Petitioner did not execute a plea agreement with the government, he necessarily did not waive his appellate rights. But Petitioner did not file a notice of appeal. App. 17, 163.

### F. After the District Court Denies Petitioner's § 2255 Motion, the Government Stipulates in the Ninth Circuit to a Remand So That Petitioner Could File a Notice of Appeal from the District Court's Judgment

In a nutshell, Petitioner eventually filed a motion under 28 U.S.C. § 2255 in the district court. Most pertinent to this petition, he contended that Little rendered ineffective assistance of counsel by not having filed a notice of appeal from the district court's judgment, notwithstanding Petitioner's having directed him to do so. App. 61-72.

Even before the evidentiary hearing for the § 2255 motion began, however, Petitioner had finished his sentence on June 14, 2018.[8] After Petitioner's being released from the Federal Bureau of Prisons' custody, the Department of Homeland Security then removed him to El Salvador. App. 90.

Following the hearing's conclusion, the district court took Petitioner's § 2255 motion under submission. App. 133. In a written order dated November 13, 2018, the district court denied it in its entirety. App. 134-154.

Regarding Petitioner's claim that Little had rendered ineffective assistance of counsel by not having filed a notice of appeal in September 2016, the district court found that neither Petitioner nor any of his relatives had explicitly directed

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[8] See <<http://bop.gov/inmateloc>> (BOP Register Number 20735-111).

Little to follow a notice of appeal in late-August or early-September 2016. App. 148-151. Although Petitioner's counsel had argued at the evidentiary hearing that Petitioner's and his relatives' repeated references during that same time frame to a "motion to withdraw" his plea was functionally equivalent to requesting a direct appeal (App. 115-132), the district court did not reach that more-nuanced question. See App. 147-153

The district court did, however, issue a certificate of appealability regarding whether Little had rendered ineffective assistance concerning his not having filed a notice of appeal.[9] App. 153-154.

Given the district court's having issued a certificate of appealability, Petitioner responded by timely appealing to the Ninth Circuit. App. 155. After Petitioner filed his opening brief, the government – to its credit – determined that a remand to district court was appropriate.

Consequently, the parties filed a joint stipulation on October 16, 2019, requesting that the Ninth Circuit vacate and remand to the district court to re-enter

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[9] Separately, the district court denied Petitioner's sub-claims regarding whether Little had rendered ineffective assistance of counsel by either incorrectly promising Martinez that he would not receive a custodial sentence exceeding 24 months or failing to challenge Martinez's underlying removal order under § 1326(d). See App. 142-147. The district court did not issue a certificate of appealability regarding those particular issues. App. 153.

the judgment and commitment in Petitioner's underlying criminal case, therefore triggering a new 14-day period under Rule 4(b)(1)(A)(i) of the Federal Rules of Appellate Procedure in which to file a notice of appeal. The Ninth Circuit so ordered on November 22, 2019. App. 158.

Following the Ninth Circuit's mandate's issuing, the district court re-entered an amended judgment on January 28, 2020. Except for its date, the document functionally was identical to what the district court had issued originally in September 2016. Compare App. 18-21 to App. 57-60.

Petitioner then filed a timely notice of appeal in the district court on February 10, 2020, more than three years after he and several family members had apparently requested that Little do so on his behalf. App. 155-157.

### G. The Court of Appeals' Disposition

In a short unpublished memorandum disposition on April 8, 2021, a three-judge panel of the Ninth Circuit affirmed Petitioner's conviction and sentence. App. 1-3. Particularly pertinent to the present petition, the panel deemed itself bound by extant precedent regarding Rule 32(i)(1)(A). Reviewing that issue for plain error, the panel determined that despite the district court's apparently having violated the sub-provision, Petitioner did not demonstrate that the error prejudiced him during the sentencing hearing, a prerequisite to relief under Rule 32(i)(1)(A).

App. 3 (citing and discussing United States v. Soltero, 510 F.3d 858, 863-64 (9th Cir. 2007) (per curiam)).

The Ninth Circuit later summarily denied Petitioner's petition for panel rehearing on April 27, 2021. App. 22.

## ARGUMENT

1. Simply put, the rule that the Ninth Circuit applied based on extant precedent concerning Rule 32(i)(1)(A), such as Soltero, conflicts directly with the Sixth Circuit's opinion in United States v. Osborne, 291 F.3d 908, 910-11 (6th Cir. 2002). Contrastingly, Osborne held that a Rule 32(i)(1)(A) is a structural error that – unlike Soltero, its progeny, and similar rules that other federal courts of appeals have adopted – does not require a defendant to demonstrate actual prejudice to warrant the district court's vacating the sentence. Osborne, 291 F.3d at 911.

2. Consequently, because the question that this petition presents has percolated throughout the federal courts of appeals close-to forty years since the federal courts of appeals began construing Rule 32(i)(1)(A)'s antecedent, Petitioner's case presents an ideal vehicle to resolve the direct conflict that exists between – on the one hand – the structural-error approach that Osborne promulgated and – on the other – the harmless-error rule that Soltero and similar

opinions from other federal courts of appeals apply, requiring the defendant to demonstrate actual prejudice. At bottom, if the Court were adopt Osborne's approach, that would necessarily lead to the Ninth Circuit's vacating Petitioner's sentence on remand, and no additional issues remain to be litigated.

The Court should therefore grant Petitioner's petition for a writ of certiorari. See Sup. Ct. R. 10(a).

## I. AS THE SIXTH CIRCUIT HAS LONG RECOGNIZED, A RULE 32(i)(1)(A) VIOLATION IS A STRUCTURAL ERROR, REQUIRING RESENTENCING.

At bottom, the circuit split that exists regarding Rule 32(i)(1)(A) is relatively straightforward to identify.[10] That is, in Osborne, the Sixth Circuit

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[10] Another circuit split – not directly implicated here – exists regarding whether the district court must personally ask the defendant if he or she has reviewed the PSR with counsel. In United States v. Rone, 743 F.2d 1169, 1174-76 (7th Cir. 1984), the Seventh Circuit held that under an antecedent rule (Rule 32(c)(3)(A)), a district judge had to so query the defendant personally during a hearing. But every other federal court of appeals that has addressed the issue has concluded otherwise, holding instead that a district judge could infer circumstantially that the required attorney-client PSR review occurred. See, e.g., United States v. Rangel-Arreola, 991 F.2d 1519, 1525 (10th Cir. 1993); United States v. Manrique, 959 F.2d 1155, 1157 (1st Cir. 1992); United States v. Lewis, 880 F.2d 243, 245-46 (9th Cir. 1989); United States v. Victoria, 877 F.2d 338, 340 (5th Cir. 1989); United States v. Stevens, 851 F.2d 140, 143-44 (6th Cir. 1988); United States v. Miller, 849 F.2d 896, 897-98 (4th Cir. 1988); United States v. Cortez, 841 F.2d 456, 459-61 (2d Cir.), cert. denied, 468 U.S. 1058 (1988); United States v. Aleman, 832 F.2d 142, 144 (11th Cir. 1987); United States v. Mays, 798 F.2d 78, 80 (3d Cir. 1986).

deemed a district court's failing to ascertain whether the defendant had conferred with his counsel regarding the PSR to be a structural error that automatically necessitated resentencing – without considering whether the Rule 32(i)(1)(A) violation caused prejudice. Osborne, 291 F.3d at 911.

## II. CONTRARILY, THE NINTH CIRCUIT AND AT LEAST FOUR OF ITS SISTER CIRCUITS CONDUCT A HARMLESS ERROR ANALYSIS WHEN THEY IDENTIFY A RULE 32(i)(A)(1) VIOLATION.

By contrast, the Ninth Circuit in Soltero (see 510 F.3d at 863-64) and at least four other federal courts of appeals – the Third, Fourth, Seventh, and Tenth Circuits – apply a harmless error framework to an identifiable Rule 32(i)(1)(A) error. See, e.g., United States v. Jarigese, 999 F.3d 464, 472 (7th Cir. 2021); United States v. Stevens, 223 F.3d 239, 246 (3d Cir. 2000); United States v. Lockhart, 58 F.3d 86, 89 (4th Cir. 1995); United States v. Rangel-Arreola, 991 F.2d 1519, 1526 (10th Cir. 1993). That is, unlike the Sixth Circuit, those federal courts of appeals require the defendant to demonstrate actual prejudice to warrant a remand for resentencing. A deep conflict regarding Rule 32(i)(A)(1)'s application therefore exists, and the Court consequently should resolve it to create national uniformity.

## III. THIS CASE PRESENTS A STRONG VEHICLE TO RESOLVE THE QUESTION PRESENTED.

Although the Ninth Circuit elected not to publish its disposition, there are at least two reasons why this case represents a suitable vehicle to resolve this question – a vexing circuit split involving a procedural issue that recurs every day federal district courts in the United States convene for sentencing hearings.

First, because Petitioner does not currently challenge anything associated with the Rule 11 colloquy in his case – the only other issue that he raised on direct appeal in the Ninth Circuit – the Rule 32(i)(1)(A) question – is the only one that remains. Thus, if the Court were to grant certiorari and adopt a structural-error rule akin to what the Sixth Circuit currently uses in this context, that would necessarily result in a remand to the district court for resentencing. Indeed, the Ninth Circuit in its memorandum disposition implicitly suggested that the Rule 32(i)(1)(A) violation was an "error" that was "harmless." App. 3.

And second, as Petitioner suggested supra, Rule 32(i)(1)(A)'s mandatory determination impacts every sentencing hearing that occurs in federal district courts. National uniformity is therefore necessary to ensure not only that district courts do not sentence defendants in a federal criminal cases without ensuring that they have reviewed the PSR – a vital document that provides a framework that

district courts use routinely to help calculate the advisory sentencing Guidelines range, see, e.g., Rosales-Mireles v. United States, 138 S. Ct. 1897, 1904 (2018) – but also prescribe a nationally consistent remedy when violations occur.

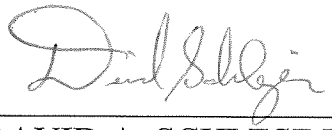
Consequently, this case is a suitable vehicle for the Court to resolve the deep circuit conflict that exists regarding the remedy for a Rule 32(i)(1)(A) violation. See Sup. Ct. R. 10(a).

## IV. CONCLUSION.

The Court should grant the petition for writ of certiorari.

Dated: September 24, 2021

Respectfully submitted,



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**PROOF OF SERVICE**

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I, David A. Schlesinger, declare that on September 24, 2021, as required by Supreme Court Rule 29, I served Petitioner Antonio Rene Martinez's MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on counsel for Respondent by depositing an envelope containing the motion and the petition in the United States mail (Priority, first-class), properly addressed to him, and with first-class postage prepaid.

The name and address of counsel for Respondent is as follows:

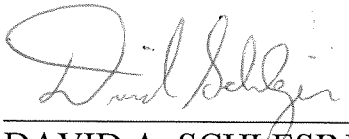
The Honorable Brian H. Fletcher, Esq.
Acting Solicitor General of the United States
United States Department of Justice
950 Pennsylvania Ave., N.W., Room 5614
Washington, DC 20530-0001
Counsel for Respondent

Additionally, I mailed a copy of the motion and the petition to my client, Petitioner Antonio Rene Martinez, by depositing an envelope containing the documents in the United States mail, postage prepaid, and sending it to the following address:

Alicia Esteves
c/o Antonio Rene Martinez
1316 Madera Avenue
Menlo Park, CA 94025

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 24, 2021



DAVID A. SCHLESINGER
Declarant