

No. \_\_\_\_\_

IN THE SUPREME COURT OF THE UNITED STATES

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MARCIAL CARRILLO-SERNA,

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

When the district court fails to calculate the guideline range at sentencing, 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 it considered the correct Guidelines range," *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1347 (2016).

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Petitioner Marcial Carrillo-Serna respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit entered on August 24, 2021.

**JURISDICTION**

Petitioner pled guilty to importation of methamphetamine, in violation of 21 U.S.C. §§ 952 and 960, in the United States District Court for the Southern District of California. The district court sentenced him to a 57-month sentence and three years of supervised release. Reviewing his sentence under 28 U.S.C. § 1291, the Ninth Circuit affirmed Petitioner's sentence in an unpublished disposition. *See United States v. Carrillo-Serna*, 848 F. App'x 787, 788 (9th Cir. 2021) (attached to this petition as Appendix A). Petitioner filed a petition for panel rehearing and rehearing en banc, which the court denied on August 24, 2021. *See* Order Denying

Petition for Rehearing (attached to this petition as Appendix B). This Court has jurisdiction to review the Ninth Circuit's decision under 28 U.S.C. § 1254(1)(1).

#### **RELEVANT PROVISIONS**

##### **U.S.S.G. § 5D1.1 Imposition of a Term of Supervised Release**

(a) The court shall order a term of supervised release to follow imprisonment—

- (1) when required by statute (*see* 18 U.S.C. § 3583(a)); or
- (2) except as provided in subsection (c), when a sentence of imprisonment of more than one year is imposed.

(b) The court may order a term of supervised release to follow imprisonment in any other case. See 18 U.S.C. § 3583(a).

(c) The court ordinarily should not impose a term of supervised release in a case in which supervised release is not required by statute and the defendant is a deportable alien who likely will be deported after imprisonment.

##### **U.S.S.G. § 5D1.2(a) Term of Supervised Release**

(a) Except as provided in subsections (b) and (c), if a term of supervised release is ordered, the length of the term shall be:

- (1) At least two years but not more than five years for a defendant convicted of a Class A or B felony. See 18 U.S.C. § 3583(b)(1).
- (2) At least one year but not more than three years for a defendant convicted of a Class C or D felony. See 18 U.S.C. § 3583(b)(2).
- (3) One year for a defendant convicted of a Class E felony or a Class A misdemeanor. See 18 U.S.C. § 3583(b)(3).

##### **18 U.S.C. § 3583(b)**

(b) Authorized Terms of Supervised Release.—Except as otherwise provided, the authorized terms of supervised release are—

- (1) for a Class A or Class B felony, not more than five years;
- (2) for a Class C or Class D felony, not more than three years; and
- (3) for a Class E felony, or for a misdemeanor (other than a petty offense), not more than one year.

## STATEMENT OF THE CASE

### A. District Court Proceedings.

Petitioner was a lawful permanent resident and a married father of three. He gained lawful status to reside and work in the United States in 2004 and held jobs as a mechanic and landscaper. He used his earnings to support his wife and children, his elderly father, and his two sisters' families. Despite his hard work, Petitioner found himself in debt and when approached by a drug smuggler offering thousands of dollars to cross drugs into the United States, he accepted. He was indicted and pleaded to importation of methamphetamine.

The court began the sentencing hearing by calculating the sentencing guidelines for the custodial sentence. Because Petitioner had no prior criminal history, he sat in Criminal History Category I. With a base offense level 38, an offense-level role cap at 34 and additional two-level reduction for minor role, a two-level reduction for Safety Valve, and a three-level reduction for accepting responsibility, the resulting guideline range was 70 to 87 months. Ultimately, the court departed under U.S.S.G. § 5K2.0 for a combination of mitigating circumstances, which it considered to be “overwhelmingly positive,” and arrived at a sentence of 57 months.

With the custodial sentence announced, the district court needed to decide whether to impose supervised release and, if so, how much. The United States Probation Department prepared a Presentence Report (“PSR”) which recommended



a mandatory-minimum five-year term, but that proposal had been based on the assumption that Petitioner was not eligible for Safety Valve under 18 U.S.C. § 3553(f). Because of the mandatory minimum, the PSR stated the guideline term of supervised release is five years. But by the time sentencing arrived, all parties agreed that Petitioner met the criteria for Safety Valve, so no mandatory minimum term applied.

The district court, however, never re-calculated the sentencing guidelines applicable to the term of supervised release. First, the court ignored U.S.S.G. § 5D1.1(c), which states, “The court ordinarily should not impose a term of supervised release in a case in which supervised release is not required by statute and the defendant is a deportable alien who likely will be deported after imprisonment.” The court failed to reference the guideline even after Petitioner acknowledged he would lose his green card as a result of his convictions. The court also ignored U.S.S.G. § 5D1.2(a)(1), which called for a two-to-five-year range even assuming some supervision were appropriate.

Instead, without calculating the guidelines or identifying any need for supervision upon release, the court’s entire analysis vis a vis supervised release was: “Three years of supervised release.”

Petitioner timely appealed.

**B. Appeal to the Ninth Circuit.**

On appeal, Petitioner argued *inter alia* that the district court had plainly erred by failing to calculate the applicable sentencing guidelines for a term of supervised release under U.S.S.G. § 5D1.2. Petitioner further explained that this plain error affected his substantial rights. Whereas the district court had imposed a significant departure after correctly calculating the guidelines for imprisonment based on overwhelmingly positive mitigation, the court inexplicably imposed a mid-range term of supervised release after failing to consult the guidelines. Petitioner argued that this unexplained discrepancy was ample evidence of prejudice.

The Ninth Circuit disagreed and affirmed Petitioner's sentence in an unpublished memorandum disposition. *Carrillo-Serna*, 848 F. App'x at 788. The panel reasoned that Petitioner had not shown a "reasonable probability that he would have received a different sentence if the district court had expressly calculated the supervised release Guideline range or provided a fuller explanation for the three-year term." *Id.*

Petitioner challenged the panel's reasoning in a petition for rehearing and rehearing en banc. Petitioner explained that the panel's decision broke from this Court's precedent in *Molina-Martinez*, which provided that the calculation of the wrong guideline range was sufficient evidence of prejudice absent unusual circumstances. *See* 136 S. Ct. at 1347. Petitioner explained that the same general presumption necessarily extended to a district court's complete failure to

calculate the guidelines. He also urged en banc review in light of a growing trend of district courts failing to calculate guideline ranges for supervised release and the Ninth Circuit's summary affirmance of those procedurally erroneous sentences.

See, e.g., *United States v. Jones*, 829 F. App'x 782 (9th Cir. 2020); *United States v. Avalos-Rivera*, 816 F. App'x 110, 111 (9th Cir. 2020); *United States v. Meliton-Salto*, 738 F. App'x 525 (9th Cir. 2018); *United States v. Reyes-Quintero*, 712 F. App'x 708 (9th Cir. 2018); *United States v. Romero-Payan*, 696 F. App'x 245 (9th Cir. 2017); *United States v. Mendoza-Zazueta*, 693 F. App'x 557 (9th Cir. 2017).

The Ninth Circuit denied the petition without ordering a response from the government nor providing any explanation for its decision.

#### **REASONS FOR GRANTING THE PETITION**

This Court should grant certiorari to correct the Ninth Circuit's drastic departure from this Court's sentencing jurisprudence. This Court explained in *Molina-Martinez* that "[w]here [] the record is silent as to what the district court might have done had it considered the correct Guidelines range, the court's reliance on an incorrect range in most instances will suffice to show an effect on the defendant's substantial rights." 136 S. Ct. at 1347. Where, as here, the district court indicated *no awareness* of the correct range at all, the same rule must apply: if there are no "unusual circumstances," *id.*, nor any indication of what the district court would have done had it calculated the guidelines correctly, a defendant should "not be required to show more" to prove prejudice to his substantial rights. *See id.*

The Ninth Circuit's contrary rule creates a perverse incentive for district courts to avoid calculating the guidelines, as shown by a disturbing string of affirmed sentences where district courts entirely failed to announce the applicable sentencing guidelines as required by statute and this Court's rulings. This Court should grant certiorari, review the Ninth Circuit's erroneous rule, and reverse.

**A. The Court's Decisions Dictate that When a District Court Fails to Calculate the Guideline Range at Sentencing, a Defendant May Later Rely on the District Court's Failure to Show Prejudice to His Substantial Rights Under Plain Error Review.**

"Although the district court has discretion to depart from the Guidelines, the court 'must consult those Guidelines and take them into account when sentencing.'" *Molina-Martinez*, 136 S. Ct. at 1342 (quoting *United States v. Booker*, 543 U.S. 220, 264 (2005)). "[T]he Guidelines are not only the starting point for most federal sentencing proceedings but also the lodestar." *Id.* at 1346. Accordingly, "failing to calculate (or improperly calculating) the Guideline range" is "significant procedural error." *Gall v. United States*, 552 U.S. 38, 51 (2007).

This Court explained the inherent prejudicial impact of a guideline error in *Molina-Martinez*: "From 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.

True, this Court clarified that its general rule applied to most cases, not all. As the Court explained, “[t]here may be instances when, despite application of an erroneous Guidelines range, a reasonable probability of prejudice does not exist.” *Id.* at 1346. But those are “unusual circumstances” where the district court’s explanation for its sentence “make[s] it clear that the judge based the sentence he or she selected on factors independent of the Guidelines.” *Id.* at 1347. 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 sentencings where the district court entirely fails to calculate the guidelines. First, as this Court has often explained, “[t]he Guidelines’ central role in sentencing means that an error related to the Guidelines can be particularly serious.” *See id.* at 1343. Without a “lodestar” guiding the district court’s sentencing decision, the sentence loses the important guarantees of “[u]niformity and proportionality” protected by the guidelines. *Id.* at 1342. In other words, when a district court fails to calculate the guidelines, a reviewing court has no way to tell whether the sentencing court is exercising its discretion by whim or bias. Thus, “[w]here . . . the record is silent as to what the district court might have done had it considered the correct Guidelines range,” the ultimate sentence cannot stand. *See id.* at 1347.

In addition, failing to extend *Molina-Martinez* from cases involving the *wrong* guideline range to cases involving *no* guideline calculation would create a perverse incentive for district courts to avoid mandated procedure. Under such a regime, a district court uncertain about the correct range might avoid calculating the guidelines—rather than risk a mistake—in order to insulate his or her sentencing decision from appellate review. In the same vein, a district court might deliberately fail to calculate the guidelines to avoid the difficult task of explaining any deviation from the guidelines or its decision to sentence at the high-end or low-end of the applicable range. This Court’s law must discourage this sort of “appeal proofing.” Extending the general presumption of prejudice from *Molina-Martinez* to a district court’s failure to calculate the guidelines easily and smartly accomplishes that task.

**B. The Ninth Circuit’s Affirmance of the Sentence After the District Court Failed to Calculate the Guidelines Conflicts with the Rule Established in *Molina-Martinez*.**

The Ninth Circuit panel erroneously affirmed Petitioner’s sentence after the district court failed to calculate the applicable supervised release guidelines. Here, the district court never explained whether its decision to impose a mid-end, statutory-maximum term of supervised release was anchored to the correct guidelines. 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 his appeal. As described above, the district court’s

unfettered, unguided decision to impose a sentence above the minimum is all that Petitioner needs to show under *Molina-Martinez*. The Ninth Circuit thus erred in rejecting Petitioner's appeal due to a lack of prejudice.

The district court had discretion below to impose anywhere between two and five years of supervised release under 18 U.S.C. § 3583(b)(2). But the Sentencing Commission provided further guidance. Under U.S.S.G. §§5D1.1 and 5D1.2, specific guideline ranges applicable to Petitioner's case. First, § 5D1.1(c) states "[t]he court ordinarily should not impose a term of supervised release in a case in which supervised release is not required by statute and the defendant is a deportable alien who likely will be deported after imprisonment." Because each of those circumstances applied to Petitioner's case, the guidelines accordingly urged the district court to impose *no* supervised release. But even assuming the court exercised discretion to depart from § 5D1.1(c)'s recommendation, § 5D1.2 became operable. Petitioner's applicable guideline range for a term of supervised release under § 5D1.2(a)(2) was two-to-five years.

Here, the district court indicated *no awareness* of the correct range at all. And this is not an "unusual" case where the reviewing court can be sure that the district court would have imposed the same sentence had it properly calculated the guidelines. See *Molina-Martinez*, 136 S. Ct. at 1347. Instead, because "the record is silent as to what the district court might have done had it considered the correct

Guidelines range,” the guideline error was all Petitioner needed to proffer in order to prove prejudice to his substantial rights. *See id.*

Moreover, Petitioner did not rely *solely* on the district court’s error in failing to calculate the guideline range to establish prejudice. After the district court conducted a thorough § 3353(a) analysis—including expressly considering the applicable guideline range for *imprisonment*—the court chose a low-end custodial sentence after granting a downward-departure for mitigation. It did so after expressly stating that Petitioner’s mitigation was “overwhelmingly positive.” That adherence to the guidelines after a downward departure for the custodial sentence creates a “reasonable probability” that the court would have selected a low-end term, or departed downward even further, had it considered the correct guideline range for supervised release.

In short, Petitioner easily carried his low burden of proving prejudice to his substantial rights, and this Court should reverse the Ninth Circuit’s erroneous decision.

**C. 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 calculate the guidelines 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, this case presents a perfect opportunity for this Court to correct a pervasive error in the Ninth Circuit. District courts have failed to calculate supervised release guidelines in a number of cases, yet the Ninth Circuit has consistently affirmed those sentences based on the same erroneous reasons applied to Petitioner's case. *See, e.g., United States v. Jones*, 829 F. App'x 782 (9th Cir. 2020); *United States v. Avalos-Rivera*, 816 F. App'x 110, 111 (9th Cir. 2020); *United States v. Meliton-Salto*, 738 F. App'x 525 (9th Cir. 2018); *Reyes-Quintero*, 712 F. App'x at 708; *Romero-Payan*, 696 F. App'x at 245; *Mendoza-Zazueta*, 693 F. App'x at 557.

The prevalence of these decisions heightens the importance of this Court's review. Together with Petitioner's appeal, these cases indicate that district courts are failing to calculate the guidelines, a trend that ought to concern this Court. Further, these cases show that the district courts' plainly erroneous sentences stand uncorrected, and the error is likely to repeat without this Court's intervention.

Summarily affirming plain guideline errors, which this Court has called "particularly serious," *see Molina-Martinez*, 136 S. Ct. at 1343, abdicates the appellate court's responsibility. While defendants bear a burden to prove prejudice, the Ninth Circuit's rule creates an insurmountable hurdle rejected by this Court in *Molina-Martinez*. This Court accordingly should seize the

opportunity to reverse the Ninth Circuit's error and terminate a disturbing trend of procedurally erroneous sentences.

#### CONCLUSION

For the foregoing reasons, this Court should grant this Petition for a Writ of Certiorari.

Respectfully submitted

Dated: 11/18/21

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