

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

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IN THE  
**Supreme Court of the United States**

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FRANCISCO ROSALES HERNANDEZ,

*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**

The Sentencing Guidelines “anchor” a district court’s discretion by setting the “starting point and initial benchmark.” *Molina-Martinez v. United States*, 578 U.S. 189, 198-99 (2016) (quotation marks and ellipsis omitted). Miscalculation of the advisory Guidelines range is so significant that it almost always amounts to plain error. *See Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1903, 1911 (2018); *Molina-Martinez*, 578 U.S. at 198, 204. At the petitioner’s sentencing, the district court never announced the advisory range before it imposed a sentence three times the low end of the applicable range, almost twice the high end of that range, and higher than the sentences recommended by the probation office and both parties. The Ninth Circuit nevertheless found no plain error. This case therefore presents an excellent vehicle to consider this question:

When should a case be remanded for resentencing under the plain-error standard of review if the district court failed to announce its calculation of the advisory Sentencing Guidelines range?

## **Related Proceedings**

United States District Court (C.D. Cal.):

*United States v. Rosales Hernandez*, Case No. CR-18-00899-SVW (June 22, 2020).

United States Court of Appeals (9th Cir.):

*United States v. Rosales Hernandez*, Case No. 20-50169 (February 7, 2022).

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## **Petition for a Writ of Certiorari**

Petitioner Francisco Rosales Hernandez respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

### **Opinions Below**

The decision of the United States Court of Appeals for the Ninth Circuit (App. 1a-4a) is unpublished. The district court did not issue any relevant written decision.

### **Jurisdiction**

The court of appeals entered its judgment on February 7, 2022. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

### **Federal Rule Involved**

Federal Rule of Criminal Procedure 52(b) provides: “A plain error that affects substantial rights may be considered even though it was not brought to the court’s attention.”

## Statement of the Case

### A. Legal Background.

The Sentencing Guidelines provide the “essential framework” for sentencing proceedings by setting the “starting point and initial benchmark” that “anchor[s]” a district court’s discretion. *Molina-Martinez v. United States*, 578 U.S. 189, 198-99 (2016) (quotation marks and ellipsis omitted). Therefore, all sentencing proceedings must begin with the correct calculation of the applicable advisory range. *Id.* at 193, 198. The district court must then “remain cognizant” of that range “throughout the sentencing process.” *Id.* at 198 (quotation marks omitted). As a result, when a district court miscalculates the advisory range and that error is clear, satisfying the first two prongs of the plain-error standard of review, “the error itself can, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error”—the third prong of that standard. *Id.* In the ordinary case, such an error will also satisfy the standard’s fourth prong—that the error seriously affects the fairness, integrity, or public reputation of judicial proceedings—and thus will warrant a remand for resentencing. *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1903, 1911 (2018).

## **B. Factual Background and Proceedings Below.**

Francisco Rosales Hernandez was charged with being an alien found in the United States without permission following deportation. ER 220-22.<sup>1</sup> He pleaded guilty pursuant to a Federal Rule of Criminal Procedure 11(c)(1)(C) “binding” fast-track plea agreement, which provided that an appropriate sentence was the low end of the advisory Sentencing Guidelines range for offense level eight and whatever his criminal-history category turned out to be. ER 155-86, 203-19. The district court provisionally accepted the plea, but after seeing a presentence report, it decided that it would not accept the binding agreement. ER 116-18, 168. Hernandez then entered an open guilty plea. ER 80-94.

There was confusion about the applicable advisory Guidelines range during the district court proceedings. AOB 7-10. In the first presentence report, the probation office determined that Hernandez’s offense level was ten (eight after the two-level fast-track departure contemplated by the plea agreement) and his criminal-history category was IV, making the advisory range 15-21 months (10-16 months after the fast-track departure). PSR 99-106, 111. After the district court rejected the plea

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<sup>1</sup> The following abbreviations are for documents filed in the Ninth Circuit: “ER” refers to the appellant’s excerpts of record (docket no. 13). “PSR” refers to presentence reports and other sentencing documents filed under seal (docket no. 14). “AOB” refers to the appellant’s opening brief (docket no. 12). “GAB” refers to the government’s answering brief (docket no. 22). “ARB” refers to appellant’s reply brief (docket no. 28).

agreement, the probation office prepared a revised presentence report, determining that Hernandez's offense level was 13 and his criminal-history category was IV, making the advisory range 24-30 months; but it also mistakenly thought there was a new fast-track plea agreement, under which the offense level would go down to 11 and the advisory range would go down to 18-24 months. PSR 45, 47-55, 60. The government pointed out the mistake and argued that the advisory range was therefore 24-30 months. ER 73-74, 76-77.

Hernandez responded with proof that a prior conviction erroneously attributed to him actually belonged to someone else. ER 30-34. Therefore, his offense level was ten, his criminal-history category was III, and the advisory range was 10-16 months. ER 31, 34. In light of Hernandez's evidence, the probation office and the government conceded that he was not the defendant in the other case and agreed with his Guidelines calculations. ER 23-26; PSR 18-25, 30, 34-35.

The probation office recommended a low-end sentence of ten months, concluding that it was "a just punishment, and sufficient to comply with the purposes of sentencing set forth in" 18 U.S.C. § 3553. PSR 9, 12. Hernandez argued that no more than a time-served sentence of about 24 months was necessary in light of the § 3553(a) factors, including his significant intellectual deficits. ER 30-31, 34-36. The government joined in Hernandez's request for a time-served sentence, concluding that it would be sufficient, but not greater than necessary, to take into account all of the § 3553(a) factors. ER 24, 26-28.

At sentencing, the district court's questions suggested that it had not carefully reviewed the filings in the case. AOB 11-12. First, it asked if Hernandez had entered his plea pursuant to Rule 11(c)(1)(C), and the parties had to remind it that he had not. ER 4-5. Then it asked, "Does the guideline range include any adjustments other than acceptance of responsibility?" ER 5. The parties again had to inform the district court that the answer was no. ER 5. The district court responded, "But given this defendant's record, how is it that he is only in category history 3?" ER 5. When informed that both parties agreed that the criminal-history calculations were correct, the district court asked, "Is that because some of the convictions have a certain age to them?" ER 5. When defense counsel said yes, the district court asked if the government had "examined that evaluation[.]" ER 6. The prosecutor confirmed that it had and mentioned that a prior case initially included in Hernandez's criminal history did not, in fact, belong to him. ER 6. The district court asked, "Why is that? Did he commit that offense?" ER 6. Defense counsel explained (as he had in his sentencing memorandum) that it was a case of mistaken identity. ER 6-7. In response, the district court said, "I will accept that fact and conclude that the criminal history category of 3 has been correctly calculated." ER 7. But it never calculated the offense level or the advisory range. ER 7-11.

Defense counsel then repeated his request for a time-served sentence of 24 months, noting that the government's position was the same. ER 7-8. The district court said it felt "uneasy" about imposing that sentence because it believed

Hernandez would come back after being deported and present a danger to the public given his DUI convictions. ER 8. Defense counsel disagreed that Hernandez posed such a danger. ER 8-9. When the district court turned to the government, the prosecutor began to say, “I think that based on the length of time that the defendant has already served [...]” ER 9. The district court cut him off, asking, “Do you think having five convictions in a relatively narrow period of time for drunk driving poses defendant as a danger to the community?” ER 9. After the prosecutor said yes, the district court did not give him a chance to speak about the appropriate sentence generally. ER 9.

The district court then imposed a sentence of 30 months followed by a three-year term of supervised release. ER 9-11, 17-18. Although it stated, “the court’s consideration of the guidelines which in this case for the reasons stated are inadequate to provide deterrent [sic] and to ensure the safety of the community” (ER 11), it never said what advisory range it used, nor did it acknowledge that its sentence was three times the low end of the applicable range and almost twice the high end of that range. ER 4-11.

On appeal, Hernandez argued that the district court committed multiple procedural errors that, individually and cumulatively, amounted to plain error. AOB 18-33; ARB 1-24. First, it failed to calculate the advisory Guidelines range and use it as a starting point and initial benchmark. AOB 18; ARB 3-7. Second, it failed to provide the government with an opportunity to speak equivalent to that of

defense counsel as required by Federal Rule of Criminal Procedure 32. AOB 19; ARB 8-10. And third, it failed to explain the sentence enough to allow for meaningful appellate review and to promote the perception of fair sentencing. AOB 20-26; ARB 10-17. Hernandez also argued that his sentence was substantively unreasonable. AOB 33-40; ARB 24-26.

The Ninth Circuit affirmed Hernandez's conviction in a memorandum decision. App. 1a-4a. It acknowledged that the district court erred in failing to announce its calculation of the advisory Guidelines range but found that the error "did not affect Hernandez's substantial rights" because the "range of 10-16 months was undisputed, and the court indicated its awareness of this range when it stated that the Guidelines were inadequate to provide deterrence and ensure the safety of the community." App. 2a. It also concluded that the second error—not allowing the prosecutor a sufficient opportunity to speak—did not violate Hernandez's substantial rights. App. 2a-3a. Next, the Ninth Circuit found that the district court adequately explained the sentence. App. 3a-4a. Finally, it held that Hernandez's sentence was substantively reasonable. App. 4a.

### **Reasons for Granting the Writ**

The Court has held that miscalculation of the advisory Sentencing Guidelines range is so significant that it almost always amounts to plain error requiring a resentencing. See *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1903, 1911 (2018); *Molina-Martinez v. United States*, 578 U.S. 189, 198, 204 (2016). It should

grant review in this case to address whether the same relief is appropriate where a district court fails to even state what range it used in sentencing a defendant to a prison term.

Though advisory, the Sentencing Guidelines remain the “foundation” and “lodestone” of federal sentencing decisions. *Hughes v. United States*, 138 S. Ct. 1765, 1775 (2018) (quotation marks omitted). This “scheme aims to achieve uniformity by ensuring that sentencing decisions are anchored by the Guidelines.” *Id.* (quotation marks omitted). Given “the essential framework the Guidelines establish for sentencing proceedings[,]” the Court has emphasized that they are “the sentencing court’s starting point and initial benchmark.” *Molina-Martinez*, 578 U.S. at 198 (quotation marks and ellipsis omitted); *see also Rosales-Mireles*, 138 S. Ct. at 1904 (“[E]ven in an advisory capacity the Guidelines serve as a meaningful benchmark in the initial determination of a sentence and through the process of appellate review.”) (quotation marks omitted). Thus, a district court “*must* begin [its] analysis with the Guidelines and remain cognizant of them throughout the sentencing process.” *Rosales-Mireles*, 138 S. Ct. at 1904 (quoting *Peugh v. United States*, 569 U.S. 530, 541 (2013)) (emphasis in original). “The district court has the ultimate responsibility to ensure that the Guidelines range it considers is correct, and the failure to calculate the correct Guidelines range constitutes procedural error.” *Id.* (quotation marks and brackets omitted). Indeed, “failing to calculate”—

not just “improperly calculating”—the Guidelines range is a “significant” error.

*Gall v. United States*, 552 U.S. 38, 51 (2007).

The government argued below that this precedent does not require a district court to “formally” or “explicit[ly]” announce its calculation of the advisory Guidelines range. GAB 30-31. The suggestion that a sentencing judge need only determine the correct advisory range and use it as the initial benchmark for sentencing in his or her own head is refuted by precedent establishing the related obligation to explain the sentence imposed. *See generally Chavez-Meza v. United States*, 138 S. Ct. 1959, 1963-64 (2018); *Gall*, 552 U.S. at 50; *Rita v. United States*, 551 U.S. 338, 356-59 (2007). The explanation must be sufficient to assure an appellate court and the public that the sentencing process was a reasoned process. *Chavez-Meza*, 138 S. Ct. at 1964; *Rita*, 551 U.S. at 356-57. This requirement serves two functions—to allow for meaningful appellate review and to promote the perception of fair sentencing.” *Gall*, 552 U.S. at 50. The advisory range used by the district court as the starting point and initial benchmark is an indispensable part of any explanation of a sentence, but especially one that falls outside the range. Whenever a district court decides such a sentence is warranted, it “must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance.” *Id.* The Court has found it “uncontroversial that a major departure should be supported by a more significant

justification than a minor one.” *Id.* This obligation presupposes that a district court will actually announce the advisory range it used as the starting point.

That did not happen here. ER 4-11. The question is whether that amounted to plain error under Federal Rule of Criminal Procedure 52(b). When an objection was not raised in the district court, an appellate court may still grant relief if the district court erred, that error was plain, the error affected the appellant’s substantial rights, and the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Rosales-Mireles*, 138 S. Ct. at 1904-05. In this case, the Ninth Circuit found that the district court’s failure to announce the Guidelines range at sentencing satisfied the first two prongs of this standard. App. 2a (citing *United States v. Jones*, 696 F.3d 932, 938 n.2 (9th Cir. 2012) (“A district court is required to announce the Guidelines range.”)). But it concluded that the error did not affect Hernandez’s substantial rights—the third prong. App. 2a. That decision and the related issue of whether the error satisfied the plain-error standard’s fourth prong merit this Court’s review.

Granting this petition would be an appropriate next step given the Court’s recent cases addressing how the plain-error standard applies to Sentencing Guidelines issues. In *Molina-Martinez*, the Court considered the third prong of that standard, holding that “[w]hen a defendant is sentenced under an incorrect Guidelines range—whether or not the defendant’s ultimate sentence falls within the correct range—the error itself can, and most often will, be sufficient to show a

reasonable probability of a different outcome absent the error.” 578 U.S. at 198.

Two years later, the Court addressed the fourth prong in *Rosales-Mireles* and held that miscalculation of the Guidelines range will, in the ordinary case, seriously affect the fairness, integrity, or public reputation of judicial proceedings, and thus will warrant relief. 138 S. Ct. at 1903, 1911.

Because miscalculation of the advisory Guidelines range almost always requires reversal under the plain-error standard, the same should be true where a district court fails to announce the advisory range, thereby concealing possible calculation errors. The Sentencing Commission’s “statistics demonstrate the real and pervasive effect the Guidelines have on sentencing.” *Molina-Martinez*, 578 U.S. at 199. In most cases, district courts still impose within-range sentences. *Id.* Even when a district court imposes a sentence outside the range, “the Guidelines are in a real sense the basis for the sentence” if it properly uses the range as the starting point and initial benchmark. *Hughes*, 138 S. Ct. at 1775 (quotation marks omitted). “The Guidelines’ central role in sentencing means that an error related to the Guidelines can be particularly serious.” *Molina-Martinez*, 578 U.S. at 199. “The Guidelines are complex,” however, “so there will be instances when a district court’s sentencing of a defendant within the framework of an incorrect Guidelines range goes unnoticed.” *Id.* at 193-94. The risk of such an unnoticed mistake increases when the district court never even states on the record what range it used.

This case presents an excellent vehicle for addressing an important question—when should a case be remanded for resentencing under the plain-error standard of review if the district court failed to announce its calculation of the advisory Guidelines range? Although the Ninth Circuit acknowledged that such an error in this case satisfied the first two prongs of that standard, it found that the error “did not affect Hernandez’s substantial rights” because the “advisory range of 10-16 months was undisputed, and the court indicated its awareness of this range when it stated that the Guidelines were inadequate to provide deterrence and ensure the safety of the community.” App. 2a. Both halves of that sentence ignore the full story.

First, although the advisory range was undisputed by the parties *in the end*, that happened only after the range bounced around quite a bit—stated at times as 10-16 months, 15-21 months, 18-24 months, and 24-30 months—in multiple presentence reports and memoranda. ER 23-26, 31, 34, 73-74, 76-77; PSR 9, 30, 36, 60, 83, 88, 111. The district court’s questions at sentencing about things covered in these filings suggested that it had not carefully reviewed them, or otherwise did not understand them. ER 5-7; AOB 11-12. And because the 10-16 month advisory range was not mentioned by anyone during the sentencing hearing (ER 4-11), it cannot be presumed that the district court heard and adopted a range orally stated by an attorney.

Second, the Ninth Circuit invested too much significance in the district court's statement that "the court's consideration of the guidelines which in this case for the reasons stated are inadequate to provide deterrent [sic] and to ensure the safety of the community." ER 11. Even if that statement could establish that the district court did not use the highest range invoked during the sentencing proceedings (24-30 months), neither it nor any other comment made at sentencing reflects which of the lower ranges (10-16 months, 15-21 months, or 18-24 months) was used. It makes a difference because the degree of a variance matters to both the district court's evaluation of the sentencing factors and to the explanation required to justify it for an appellate court. *See Gall*, 552 U.S. at 50.

The Ninth Circuit is not alone in disregarding a district court's failure to announce the advisory range it used at sentencing. *See United States v. Miller*, 567 Fed.Appx. 45, 47 (2d Cir. 2014) ("[E]ven if a district court fails to mention the applicable Guidelines range, in the absence of record evidence suggesting otherwise, we presume that a sentencing judge has faithfully discharged her duty to consider the statutory factors.") (quotation marks omitted); *United States v. Mack*, 558 Fed.Appx. 656, 660 (7th Cir. 2014) ("A sentencing court must calculate the guidelines range before imposing a sentence, but Rule 32 does not include a command that the court formally announce the final range[.]") (citation omitted); *United States v. Lee*, 397 Fed.Appx. 533, 534 (11th Cir. 2010) ("[Defendant] cites no authority for the proposition that a court commits reversible error simply by failing

to verbally announce the Guidelines range.”); *United States v. Polihonki*, 543 F.3d 318, 324 (6th Cir. 2008) (“[T]he district court in the present case committed no error—much less a plain error—by failing to mention the § 3553(a) factors or the applicable Guidelines range.”). Doing so cannot be reconciled with the Court’s opinions in *Molina-Martinez* and *Rosales-Mireles*. Because incorrectly calculating the advisory Guidelines range requires reversal under the plain-error standard in the ordinary case, it must follow that failing to state the range at all, thereby concealing whether the district court’s Guidelines calculations were incorrect, requires the same relief in most cases. This important issue warrants the Court’s review.

## Conclusion

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

April 21, 2022

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