No._____

IN THE SUPREME COURT OF THE UNITED STATES

MIGUEL ANGEL MOTA,

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

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PETITION FOR A WRIT OF CERTIORARI

DAVID A. SCHLESINGER
JACOBS & SCHLESINGER LLP
The Douglas Wilson Companies Building
1620 Fifth Avenue, Suite 750
San Diego, CA 92101
Telephone: (619) 230-0012
david@jsslegal.com

Counsel for Petitioner

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 Southern District of California, United States of America v. Miguel Angel Mota, No. 3:20-cr-01521-CAB-1. The district court entered judgment on October 15, 2021.

2. United States Court of Appeals for the Ninth Circuit, United States of America v. Miguel Angel Mota, No. 21-50231. The Ninth Circuit entered judgment on September 20, 2022.

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Petitioner Miguel Angel Mota 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 September 20, 2022.

OPINION BELOW

A three-judge panel of the Ninth Circuit originally issued an unpublished memorandum disposition and entered judgment on September 20, 2022, affirming Petitioner's conviction and sentence.[1]

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[1] A copy of the memorandum disposition is included in the Appendix. See App. 1-5 (United States v. Mota, No. 21-50231 (9th Cir. Sept. 20, 2022)).

JURISDICTION

The Ninth Circuit entered judgment in this case on September 20, 2022. App. 1, 5. 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 presentence report.

A. Petitioner Receives Little Formal Education in Mexico, and Marries and Fathers Two Children There

Petitioner Miguel Angel Mota was born in Xalapa, a municipality in the Mexican State of Veracruz, in 1980. App. 69. Although the family's large household (he was "eldest of eight children" (App. 76)) was "stable," Petitioner ultimately decided to move to Mexico City when he was fourteen years old "in search of employment." Id. Consequently, Petitioner dropped out of school

during the Mexican equivalent of either the "eighth or ninth grade . . . ." App. 77.

Petitioner married Isabel Hernandez in 1998. His wife gave birth to two children in Mexico before the couple separated in 2000. App. 76.

B. As a Young Adult, Petitioner Decides to Emigrate to the United States, Without Authorization, Leading to a Formal Removal Order Following a Criminal Conviction

Perhaps unsurprisingly given his limited education and difficult financial circumstances, Petitioner decided in 2000 to move to the United States, without receiving legal authorization to do so. Thus, on June 22, 2000, Border Patrol officials "apprehended" Petitioner after he entered this country, and he received a formal "voluntary removal" the following day. App. 76.

Undaunted, Petitioner later reentered the United States in August 2002, and apparently remained here for approximately six years, ostensibly residing in Utah. App. 76-77. During that period, Petitioner had a brief relationship with Roxana Hernandez, who now resides with the couple's fourteen-year-old daughter in Mexico. App. 76.

Rather unfortunately, federal authorities charged Petitioner in the United States District Court for the District of Utah in December 2006 with violating 18 U.S.C. § 922(g)(5) by unlawfully possessing a firearm while he was not legally authorized to be in the United States. After pleading guilty to that offense on

October 5, 2007, a district judge sentenced Petitioner to an 18-month custodial term. App. 22, 72.

Following his release from Federal Bureau of Prisons custody on April 4, 2008, immigration authorities removed Petitioner from the United States three days later. App. 72, 76.

C. Petitioner Returns to the United States, Has a Serious Romantic Relationship in Utah That Results in a Child, But He Once Again Runs Afoul of Federal Authorities

Undaunted, Petitioner eventually reentered the United States without authorization on May 15, 2011, and returned to Utah. Once there, he began a romantic relationship in West Valley City with Odalis Savala, who gave birth to the couple's daughter in 2013. App. 76.

After an arrest following purported state law offenses in November 2014, however, Petitioner admitted that he was a Mexican citizen who was not present legally in the United States. Consequently, that resulted in his being charged in the United States District Court for the District of Utah on December 1, 2014, with having violated 8 U.S.C. § 1326. App. 73, 76.

Petitioner later pleaded guilty to the § 1326 offense, and a district judge sentenced him on February 9, 2015, to a year and a day in federal custody, followed by a three-year period of supervised release. After his release on

November 10, 2015, immigration authorities removed him from the United States to Mexico that same day. App. 22, 73-76.

D. Petitioner Reenters the United States, and Has Additional Adverse Encounters with State and Federal Authorities in Utah

Ostensibly determined to reunite with his family members in the United States, Petitioner reentered this country in February 2018, and eventually returned to Utah. App. 74. Soon thereafter, however, an undercover police officer in Salt Lake City arrested him in May 2018, resulting in his being charged with patronizing a prostitute. App. 74.

Following Petitioner's guilty plea to a misdemeanor count, a judge in Utah's Third District Court sentenced Petitioner in July 2018 to 365 days in jail, followed by a two-year probationary period. App. 22, 74. And this apparently resulted in federal law enforcement authorities taking renewed prosecutorial interest in Petitioner.

Contemporaneously, Petitioner was once again charged in the United States District Court for the District of Utah with having violated § 1326. Following a guilty plea, a district judge sentenced him in January 2019 to a 24-month custodial term, to be followed by a three-year supervised release period. Concurrently, the district judge imposed a six-month custodial term because Petitioner had violated

his then-extant supervised release conditions. App. 22, 74.

The Federal Bureau of Prisons released Petitioner on May 1, 2020. App. 74. That same day, immigration authorities removed Petitioner to Mexico. App. 76.

E. Petitioner Triggers the Present Underlying Case by Being Found North of the U.S.-Mexico Border in May 2020

Apparently not content to remain in Mexico, Petitioner and at least two other persons climbed over the fencing on the U.S.-Mexico border in Southern California – more particularly, Imperial County, approximately sixteen miles east of a port of entry in Calexico – on May 22, 2020, and walked north for about 1.5 miles. App. 20, 70. Petitioner's father now has a "heart condition," and Petitioner wanted to return to the United States to earn money to help his father pay for "very expensive" medicine. App. 71.

Unfortunately for them, a Border Patrol officer in the area spotted Petitioner's and his two companions' "attempting to conceal themselves in brush" close to a nearby state highway shortly after 10:00 p.m. App. 20, 70. Following the arrest, Petitioner apparently made statements to federal law enforcement officers, indicating among other things that he may he crossed the border in duress because of threatening comments from a smuggler. App. 20-21, 70-71.

F. The Government Files a Complaint Against Petitioner

After apprehending and arresting Petitioner, the government filed a complaint on May 26, 2020, in the United States District Court for the Southern District of California. It alleged that Petitioner had violated § 1326 by being found in the United States after the government had previously removed him. App. 18.

During a hearing that same day, a magistrate judge ordered Petitioner to be detained. App. 23-30.

G. A Grand Jury Indicts Petitioner, Who Pleads Not Guilty

Shortly thereafter, a grand jury empaneled in the Southern District of California indicted Petitioner on June 9, 2020, on one count of having violated §§ 1326(a) and (b). App. 16-17. Two weeks later, Petitioner was arraigned before a magistrate judge, and through his counsel, he pleaded not guilty. App. 32-34.

H. Shortly Before the District Court Is About to Invite Prospective Jurors into the Courtroom, Petitioner Decides to Plead Guilty, But as the District Court Takes Petitioner's Plea, the District Court Does Not Conduct a Complete Colloquy Regarding Petitioner's Voluntariness, as Rule 11(b)(2) Requires

Shortly after 9:00 a.m. on June 14, 2021, the rescheduled first trial day, the district court stated in open court that Petitioner had decided to plead guilty, without executing a plea agreement, to the § 1326 count instead of proceeding to trial. App. 46. But although the district court's resulting Rule 11 colloquy apparently complied with the mandated advisals and queries in Rule 11(b)(1) and (b)(3) (see App. 46-56), it unfortunately was deficient in several respects under Rule 11(b)(2) – which requires the district court to determine that the plea is "voluntary and did not result from force, threats, or promises (other than promises in a plea agreement). Fed. R. Crim. P. 11(b)(2) (emphasis added).

First, although the district court asked Petitioner whether "anyone had threatened you or forced you to plead guilty," (App. 51), it did not query him about whether he had also received "promises" that induced him to do so. Id; Fed. R. Crim. P. 11(b)(2); see, e.g., United States v. Fuentes-Galvez, 969 F.3d 912, 916 (9th Cir. 2021) (holding that Rule 11(b)(2) requires "direct inquiries regarding force, threats, or promises") (emphasis added).

Second, the district court did not ask Petitioner's sentencing counsel,

"whether he thought [Petitioner] was pleading knowingly and voluntarily," (Fuentes-Galvez, 969 F.3d at 916) and indeed did not pose any particular questions to the defense counsel during the Rule 11 colloquy, including "whether he thought [Petitioner] was pleading knowingly and voluntarily." App. 46-56; Fuentes-Galvez, 969 F.3d at 916. Third, the district court failed to query Petitioner, who had limited formal education in Mexico (see supra at 2-3), regarding "how far he had gone though school . . . ." Fuentes-Galvez, 969 F.3d at 916.

And fourth, the district court "did not ask [Petitioner] whether he understood his attorney or felt fully satisfied with the counsel, representation, and advice given to him by his attorney." Fuentes-Galvez, 969 F.3d at 915.

Despite those multiple Rule 11(b)(2) errors, the district court ultimately accepted Petitioner's change of plea, deeming it to be knowing and voluntary. App. 56.

I. The District Court Sentences Petitioner to a 36-Month Custodial Term, Without Querying Petitioner About Whether He Had Reviewed the PSR with His Counsel

Continuing to be represented by counsel, Petitioner appeared at his sentencing hearing on October 15, 2021. At the outset, the district court asked Petitioner's counsel if he had any objections to the PSR, but did not query

Petitioner – as Rule 32(i)(1)(A) requires – regarding whether he had conferred with his defense counsel to review that document. App. 7.

Following arguments by Petitioner's counsel, who emphasized that Petitioner principally reentered the United States "to earn money to take care of his father who has been very sick, and to see his daughter," (see App. 7) and the government's prosecutor concerning applicable factors under 18 U.S.C. § 3553(a), Petitioner briefly allocuted. Among other things, Petitioner emphasized that he came back to the United States because he "wanted to help" his "sick" father and has "two children that depend" on him. App. 10.

Turning to the Guidelines calculations, the district court noted that Petitioner's adjusted base offense level was 16 – a base offense level of 8 (U.S.S.G. § 2L1.2(a)), enhanced by four levels because of "prior immigration convictions" (U.S.S.G. § 2L1.2(b)(1)(D)) and six for a "prior felony conviction" (U.S.S.G. § 2L1.2(b)(2)(C)), but adjusted downward by two levels because he accepted responsibility shortly before the trial commenced (U.S.S.G. § 3E1.1(a)). App. 10, 71-72. Coupled with Petitioner's falling within Criminal History Category V (see App. 75), that yielded an advisory Guidelines range of 41 to 51

months. App. 10, 77.

Noting among things that this is Petitioner's third § 1326 conviction, and that he faces a parallel supervised release revocation proceeding in the United States District Court for the District of Utah (see App. 80), the district court sentenced Petitioner to a 36-month custodial term. It did not impose a supervised release period. App. 77-78.

J. The Court of Appeals' Disposition

In an unpublished memorandum disposition that it issued on September 20, 2022, a three-judge panel of the Ninth Circuit affirmed Petitioner's conviction and sentence. App. 1-5. 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 in a footnote 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. 2 (citing and discussing United States v. Soltero, 510 F.3d 858, 863-64 (9th Cir. 2007) (per curiam)).

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 they 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.[2] That is, in Osborne, the Sixth Circuit 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.

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[2] 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. Aleman, 832 F.2d 142, 144 (11th Cir. 1987); 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. Mays, 798 F.2d 78, 80 (3d Cir. 1986).

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 SUITABLE 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 or a putative irreconcilable conflict that Petitioner had with his sentencing counsel – the only other issues that he raised on direct appeal in the Ninth Circuit (see App. 2-5) – 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 presumably 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. 2.

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 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).

CONCLUSION

The Court should grant the petition for writ of certiorari.

Dated: December 16, 2022

Respectfully submitted,

DAVID A. SCHLESINGER
JACOBS & SCHLESINGER LLP
The Douglas Wilson Companies Building
1620 Fifth Avenue, Suite 750
San Diego, CA 92101
Telephone: (619) 230-0012
david@jsslegal.com

Counsel for Petitioner

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PROOF OF SERVICE

I, David A. Schlesinger, declare that on December 16, 2022, as required by Supreme Court Rule 29, I served Petitioner Miguel Angel Mota'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 her, and with first-class postage prepaid.

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

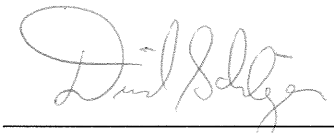
The Honorable Elizabeth B. Prelogar, Esq.
Acting Solicitor General of the United States
United States Department of Justice
950 Pennsylvania Ave., N.W., Room 5614
Washington, DC 20530-0001
Counsel for Respondent

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

Miguel Angel Mota
Register No. 14289-081
FCI Victorville Medium I
Federal Correctional Institution
P.O. Box 3725
Adelanto, CA 92301

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

Executed on December 16, 2022



DAVID A. SCHLESINGER
Declarant