No. _____

IN THE SUPREME COURT OF THE UNITED STATES

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ELVIS EDGARDO MOLINA,

Petitioner,

- v -

UNITED STATES OF AMERICA,

Respondent.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether the district court's failure to disclose gun statistics from unknown sources of questionable validity to justify an unprecedented 30-month upward variance from the calculated Guidelines range which ultimately doubled petitioner's sentence is a violation of the Due Process clause under the Fifth Amendment and is contrary to this Court's decision in *Burns v. United States*, 501 U.S. 129 (2008)?

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 Central District of California, *United States v. Elvis Edgardo Molina,* 21cr00545-PA and 13cr00826-PA. The district court entered the judgment on July 11, 2022. *See* Appendix B and C.

2. United States Court of Appeals for the Ninth Circuit, *United States v. Elvis Edgardo Molina,* Nos. 22-50161, 22-50162. *See* Appendix A.

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Petitioner, Elvis Edgardo Molina, respectfully petitions for a writ of certiorari to review the memorandum decision of the United States Court of Appeals for the Ninth Circuit issued on December 18, 2023.

OPINION BELOW

In an unpublished memorandum decision, the United States Court of Appeals for the Ninth Circuit affirmed the sentence imposed by the district court. The Ninth Circuit held the district court did not impermissibly rely upon

undisclosed materials outside the record in imposing a substantial upward variance. Appendix A.

JURISDICTION

The Court of Appeals issued a memorandum decision on December 18, 2023. No petition for rehearing was filed. This petition is being filed within the 90-day time limit for certiorari petitions. The Court has jurisdiction under 28 U.S.C. §1254(1).

INVOLVED FEDERAL LAW

The Appendix to the petition includes the relevant provisions of 18 U.S.C. § 3553 (Appendix D), Fed. R. Crim. P. 32 (Appendix E), Fed. R. Crim. P. 32.1 (Appendix F), and the Fifth Amendment (Appendix G).

STATEMENT OF THE CASE

A. Proceedings Before the District Court.

Case No. 21cr00545-PA

On November 30, 2021, the government charged petitioner in a one count indictment alleging a violation of 18 U.S.C. § 922(g)(1), Felon in Possession of a Firearm and Ammunition 18 U.S.C. § 924(d)(1) and 28 U.S.C. § 2461(c), Criminal

Forfeiture. [2-CR-1; ER-85.][1] On February 14, 2022, petitioner entered a plea of guilty pursuant to a plea agreement. [2-CR-18, 21; ER-63.]

Supervised release revocation in 13cr00826-PA

As a result of the pending federal case, probation filed a petition for revocation of supervised release in Case No. 13cr00826-PA.[2] The petition alleged petitioner tested positive for marijuana, failed to report for drug testing on multiple occasions, committed the pending federal offense, failed to report the law enforcement contact to his probation officer, and failed to notify the probation officer of a change of address. [ER-52-55, PSR 11-12.] On March 22, 2022, petitioner admitted allegations one through three and seven through nine. [1-CR-157 ; ER-52-55.] He also admitted to corrected allegations four through six. [1-CR-157; ER-52-55.] The government agreed to dismiss allegation 10. [ER-46]

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[1]"ER" refers to the Excerpts of Record which were filed with the Ninth Circuit Court of Appeals. "CR" refers to the Clerk's Record.

[2]In Case No. 13cr00826-PA, the government charged Mr. Molina and a co-defendant in an indictment with violating two counts of 21 U.S.C. § 841, Distribution of Methamphetamine and 18 U.S.C. § 2, Aiding and Abetting. [1-CR -1; ER-83.] On September 2, 2014, Mr. Molina entered a plea of guilty to one count of 21 U.S.C. § 841 pursuant to a plea agreement. [1-CR-61, 67, 68.] On November 17, 2014, the court sentenced Mr. Molina to 70 months custody, three years supervised release, and a $100 special assessment. [1-CR-85, 86; ER-5.] On November 25, 2019, the court held a supervised release revocation hearing and found Mr. Molina in violation. [1-CR-125; ER-4.] The court revoked supervised release and continued Mr. Molina on the same terms and conditions with the added requirement of 90 days home detention. [1-CR-125; ER-4.]

B. The Combined Sentencing Hearings.

Prior to sentencing, petitioner filed a sentencing memorandum and requested the court impose a sentence of 27 months with any sentence imposed on the revocation to run concurrent. [2-CR-31.] Petitioner highlighted his efforts upon his release in 2019: he lived with family members; worked long hours; and invested in his carpentry business. [2-CR-31.] The government and probation were in agreement and recommended a sentence of 30 months custody, with any revocation sentence to be served concurrently. [2-CR-22, 29.] All parties were in agreement that the supervised release proceeding involved primarily the same conduct at issue in the pending case. [1-CR-24.] As part of the plea agreement, the government agreed to recommend that the sentences in both matters run concurrent. [2-CR-18, 29; ER-67.]

The district court began the sentencing hearing by informing the parties of the proposed conditions of supervised release. [ER-19-23.] Petitioner did not object to any of these conditions. [ER-23.] The parties did not have any factual objections to the PSR. [ER-23-34.] Probation calculated:

U.S.S.G. § 5K2.1(a)(4)(A) (Base Offense Level)	20
U.S.S.G. § 3E1.1 (Acceptance of Responsibility)	-3
Total Offense Level	17
Criminal History Category	III

Resulting Guidelines Range	30-37 Months

(PSR 3, 5-6.) The parties were in agreement as to the Guidelines calculations. [ER-24.]

Defense counsel then addressed the court regarding the pertinent 18 U.S.C. § 3553(a) factors and requested a sentence of 27 months. [2-CR-31; ER-24.] Defense counsel stated that the conduct was an outlier for petitioner as he had substantially complied with the terms of his supervised release, maintained consistent employment, and he had considerable family and community support. [ER-24-25.]

The government recommended a sentence of 30 months based on petitioner's prior criminal history and the supervised release violation. [ER-26.] During his allocution, petitioner expressed his remorse and desire to shift his life in a different direction. [ER-28.] He shared with the court that he had developed healthy relationships with friends and family. [ER-28.] He was focused on improving himself, his life, and rebuilding his relationship with his probation officer. [ER-28.]

The district court calculated the applicable Guidelines range, adopted the calculations in the PSR, and found a total offense level of 17, a criminal history category of III, and a Guidelines range of 30-37 months. [ER-29.] The court then

turned to its consideration of the 3553(a) factors. In doing so the court noted the Guidelines had accounted for the nature of the offense, petitioner's criminal history, and his acceptance of responsibility. [ER-30.] The court then stated that the Guidelines had not accounted for the defendant's extensive substance abuse history, his many drug and alcohol convictions that did not garner any criminal history points, and his persistent pattern of violating probation and supervised release. [ER-30.]

The court proceeded to give a very lengthy statement regarding "gun related violence, drive by shootings, mass shootings, car jackings, home invasion, and loss of innocent life." [ER-30.] The court emphasized that we all know someone who has been adversely affected by gun violence and that it threatens the fundamental right to human life. [ER-31.] The court noted that people are forced to live as prisoners in their homes for fear of gun violence and that children are unable to walk in their neighborhood. [ER-31.] The court then reviewed a number of statistics regarding mass shootings:

1. There have been more than 300 mass shootings so far in 2022. [ER-31.]

2. The July 4th Highland Park shooting left six people dead and dozens injured. This was one of 14 mass shootings that weekend. [ER-31.]

3. There have been over 100 mass shootings since the rampage at a Texas elementary school that left 19 children and two teachers dead. [ER-31.]

4. Mass shootings where four or more people, not including the shooter, are injured or killed, have averaged more than one per day this year. [ER-32.]

5. Not a single week in 2022 has passed without at least four mass shootings. [ER-32.]

6. More than 99% of gun deaths in the U.S. are from shootings other than mass shootings. [ER-32.]

7. These shootings are often committed by someone who is legally prohibited from possessing a firearm and perpetrated by someone who's displayed prior warning signs, intermingled with acts of domestic violence. [ER-32.]

8. Illegal possession of guns like the one in this case are part of the epidemic. [ER-32.]

9. The Los Angeles police department has linked illegal guns to 24 killings since January. [ER-32.]

10. In 2020, California accounted for 65 percent of all ghost guns seized by the Bureau of Alcohol, Tobacco, and Firearms. [ER-32-33.]

11. When people are afraid of gun related violence, this can have a negative impact on people's right to access schools and healthcare facilities. [ER-33.]

The court noted that most importantly the sentence imposed must protect the public. [ER-33.] The court concluded the Guidelines were insufficient to meet the statutory goals of sentencing and imposed an upward variance of 30 months, effectively doubling petitioner's sentence to 60 months. [ER-34-36.] The court also imposed a $100 special assessment, followed by three years supervised release. [ER-35-36.]

The district court then proceeded to sentencing on the supervised matter. The court revoked supervised release and sentenced petitioner to 18 months custody, 12 of which were to run consecutive to the 60 month sentence imposed in Case No. 21cr00545-PA, for a total sentence of 72 months. [1-CR-163, 164; ER-39.] The court imposed an additional 24 months supervised release to run concurrent to the supervised release term imposed in 21cr00545-PA. [1-CR-163, 164; ER-39.]

On July 21, 2022, petitioner filed a notice of appeal in each case. [1-CR-165, 2-CR-40; ER-89, 90.] Petitioner pursued his appeal before the United States Court of Appeals for the Ninth Circuit. On December 18, 2023, the Ninth Circuit issued an unpublished memorandum decision affirming the sentence imposed by the district court.

This petition follows.

REASON TO GRANT THE WRIT

The writ should be granted to allow this Court to correct the erroneous decision by the Ninth Circuit Court of Appeals that affirmed petitioner's sentence. The district court relied upon numerous undisclosed statistics from unknown sources to justify a sentence that constituted a 100% increase from the recommended Guidelines range. Regardless of the propriety of these considerations, the district court employed a calculated effort to deprive petitioner

of his constitutional right to due process of law and to receive a fair sentencing hearing.

Petitioner received no advance notice the court was considering an upward variance from the calculated Guidelines range or an opportunity to review the basis for that decision (*e.g.* numerous statistics from undisclosed sources, etc.). By waiting until the parties had finished their respective arguments before discussing the numerous undisclosed statistics, petitioner was deprived of any reasonable or meaningful opportunity to address a significant basis for the court's sentencing decision.

The district court's reliance on numerous undisclosed statistics regarding mass shootings and gun violence failed to comply with Rule 32 and petitioner's due process right to a full, focused, and adversarial hearing.

"Due process demands an opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Gray v. Netherland*, 518 U.S. 152, 182 (1996) (Ginsburg, J., dissenting). Moreover, "absent a full, fair, potentially effective opportunity to defend against state's charges the right to a hearing would be 'but a barren one.'" *Gray*, 518 U.S. at 182. "Federal Rule of Criminal Procedure 32, which governs sentencing procedures in the federal courts, emanates from Congress' concern for protecting a defendant's due process rights in the sentencing process." *United States v. Nappi*, 243 F.3d 758, 763 (3d Cir. 2001). "[T]o safeguard this right, Rule 32 contains specific requirements that ensure that

the defendant is sentenced based on accurate information." *Nappi*, 243 F.3d at 763.

In particular, Rule 32(i)(1)(C) requires that the district court provide the parties the opportunity "to comment on the probation officer's determination [in the presentence report] and other matters related to an appropriate sentence." Fed. R. Crim. P. 32(i)(1)(C). This Court has explained that the "opportunity to comment" language in Rule 32(i)(1)(C) "provides for focused, adversarial development of the factual and legal issues relevant to determining the appropriate Guidelines sentence." *Burns v. United States*, 501 U.S. 129, 134 (1991). In short, a district court violates Rule 32 when it relies on "factual information that ha[s] not been disclosed to [the defendant] and to which [the defendant] had no opportunity to respond before sentence was imposed." *United States v. Gray*, 905 F.3d 1145, 1148 (9th Cir. 2018) (per curiam); *see also United States v. Warr*, 530 F.3d 1152, 1162-63 (9th Cir. 2008) (finding Rule 32(i)(1)(c) error where the district court relied on a Bureau of Prisons study but did not "notif[y] [the defendant] of it before the sentencing hearing."). In other words, when "counsel [is] faced with having to review and address the contents of an additional document on which the Court intends to rely at sentencing, a meaningful opportunity to comment requires the Court, in accordance with Rule 32[(i)(1)(C)], to provide a copy of the document to counsel for the defendant and

the government with sufficient time prior to the sentencing hearing to afford them with a meaningful opportunity to comment on it at sentencing and, depending on the document, prepare a response or contest it." *Nappi*, 243 F.3d at 764.

This Court has recognized the necessity of affording defendants advance notice of a district court's intention to impose an upward adjustment from a properly calculated Guideline range:

> [s]ound practice dictates that judges in all cases should make sure that the information provided to the parties in advance of the hearing, and in the hearing itself, has given them an adequate opportunity to confront and debate the relevant issues. We recognize that *there will be some cases* in which the factual basis for a particular sentence will come as a surprise to a defendant or the Government.

Irizzary v. United States, 553 U.S. 708, 715 (2008) (emphasis added). Although courts have traditionally limited *Irizzary's* notice requirements to instances involving upward departures, due process necessitates that a defendant receive an adequate opportunity to prepare for and contest extraneous information that a district court intends to consider as a basis for an upward variance. In fact, *Irizzary* "left open the possibility of relief when a party demonstrates that the facts or issues on which the district court relied to impose a variance came as a surprise and that his or her presentation to the court was prejudiced by the surprise." *Irizarry*, 553 U.S. at 715-716.

A recent case from the Sixth Circuit Court of Appeals held that while *Irizzary* notice requirements do not *per se* apply to upward variances, Rule 32(i)(1)(B) requires sentencing courts to employ a procedure that affords the defendant a reasonable opportunity to respond to extraneous information that a district court intends to rely upon in imposing an upward adjustment. *United States v. Fleming,* 894 F.3d 764 (6th Cir. 2018). In *Fleming*, the defendant was convicted of a cocaine offense and his Guidelines called for a 60 month sentence. At sentencing, the district court doubled his sentence to 120 months in large part based on a local news article that described a recent surge in drug deaths mostly due to powerful opioids like fentanyl. *Fleming*, 894 F.3d at 766. However, neither the article or the state report on which it was based was disclosed to the parties prior to the sentencing hearing. *Id.*

At the beginning of the sentencing hearing, the district court provided the parties with a copy of the article, which primarily focused on overdoses due to opioids. *Id.* at 767. The article briefly mentioned cocaine. *Id.* All parties presented their arguments to the court requesting a 60 month Guidelines sentence. *Id.* The court then considered the 3553 factors and imposed a 120 month sentence based in large part on its concern in the increase in overdose deaths reflected in the article. *Id.* at 768. The court quoted extensively from the article and then concluded that based on Fleming's possession of the cocaine and

the numerous drug deaths in this country a long prison sentence was appropriate. *Id.*

On appeal, Fleming argued his sentence was both procedurally and substantively unreasonable. *Id.* The Sixth Circuit concluded the district court's reliance on information about mixed cocaine-opioid overdose deaths in the news article was a surprise, and that surprise was prejudicial to Fleming's sentencing presentation, thus rendering his sentence procedurally unreasonable. *Id.* The Sixth Circuit also noted that the "the weight the court ultimately assigned to [unexpected] considerations" may contribute to the surprise. *Fleming*, 894 F.3d at 769 citing *United States v. Coppenger*, 775 F.3d 799, 804-05 (6th Cir. 2015). The district court's consideration of statistics regarding mixed cocaine-opioid overdose deaths was not just made in passing; in the court's own telling, it was central to the decision to double Fleming's sentence. Consequently, Fleming was prejudiced by the surprise because his counsel did not have a meaningful opportunity to contest the veracity or relevance of the information contained in the article. *Id*. at 769.

Moreover, although the article was distributed to the parties at the start of the hearing, Fleming's counsel did not know for certain how the district court planned to use it until after counsel had already made his argument. The court's entire discussion of the issues raised in the article came after Fleming's argument

and allocution were complete. By waiting until after Fleming's opportunity to speak had passed, the district court made it even more likely that Fleming would never address this key information on which the five-year upward variance was based. The Sixth Circuit noted that a sentencing hearing is meant to provide an opportunity for "full adversary testing of the issues relevant to a Guidelines sentence," but the way the hearing was conducted in Fleming's case ensured that meaningful adversarial testing would not occur. *Fleming*, 894 F.3d at 764 quoting *Burns*, 501 U.S. at 135.

The Sixth Circuit recognized that while a district court must give notice before it can impose a departure, the same is not true for a variance under *Irizarry*, 553 U.S. at 708. However, the question posed in Fleming's case was whether a district court must provide notice of the specific issues it plans to consider in imposing a variance if those issues will come as a surprise to the parties. *Fleming*, 894F.3d at 770-71. Thus, *Irizarry* "left open the possibility of relief" where, as here, the district court's consideration of certain information came as a surprise, and that surprise prejudiced the defendant by preventing him from effectively addressing the information at sentencing.

Similarly, in petitioner's case, the district court relied on numerous undisclosed statistics from unknown sources that it did not provide to the parties prior to the sentencing hearing. [ER-31-33.] Even more egregious than *Fleming*,

here the district court never provided the statistics or their source to the parties. Nor did the district court give any indication that it would be considering undisclosed evidence until it proceeded to its consideration of the 3553(a) factors.

The court's *sua sponte* decision to rely upon the statistics as a basis to impose an upward variance violated petitioner's right to due process. Without advance notice, counsel had no opportunity to conduct any review of the statistics or the undisclosed sources of the statistics. Counsel was denied the ability to challenge the accuracy or relevance of the undisclosed information. Moreover, the procedure employed by the district court during the sentencing hearing effectively deprived the parties of any meaningful opportunity to debate the statistics relied upon. Here, the parties had concluded their arguments and the district court first discussed the undisclosed statistics while it was in the process of imposing its sentence.

This Court's decision in *Irizzary* serves as a protection of a defendant's due process rights by ensuring that he has ample notice and opportunity to address information that the district court intends to rely upon in support of an upward deviation from the applicable Guidelines range. The failure to provide such reasonable notice materially prejudices the defendant's ability to adequately debate the legitimacy of the district court's variance determination.

In the present case, the following facts are not in dispute: the district court never provided the parties with the statistics it relied upon at sentencing; nor did the parties receive the sources of the information from which the statistics were derived; and the district court did not indicate its intention to impose an upward variance based upon the statistics until after the parties' respective arguments had concluded. As a result of the foregoing circumstances, petitioner was effectively denied any meaningful opportunity to contest the basis for the district court's decision to impose a sentence twice that recommended by the parties and 30 months in excess of the Guidelines range. *See Gray*, 905 F.3d at 1148 (finding Rule 32 violation where district court "relied on ... factual information that had not been disclosed to [defendant] and to which [defendant] had no opportunity to respond before [sic] sentence was imposed"); *Warr*, 530 F.3d at 1162–63 (finding Rule 32 violation where district court relied on a Bureau of Prisons' study when sentencing defendant without "notif[ying] [him] of it before the sentencing hearing").

CONCLUSION

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

Dated: March 15, 2024

Respectfully submitted,

s/Marisa L. D. Conroy

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