No. _____

In the

Supreme Court of the United States

JUAN AGUIERA-GUZMAN, 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

Petition for a Writ of Certiorari

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QUESTIONS PRESENTED FOR REVIEW

I. There is no question the district court procedurally erred in sentencing Juan Aguiera-Guzman[1] to a high-end Guidelines sentence of 41 months in prison, followed by 3 years of supervised release. The court failed to afford the government an opportunity to speak at the sentencing hearing, in clear violation of Federal Rule of Criminal Procedure 32, and the government did not otherwise have a chance to provide its sentencing position.

Because defense counsel failed to object at the hearing, Mr. Aguiera-Guzman's Rule 32 violation claim was reviewed on appeal for plain error. The third prong of the plain-error standard requires the appellant to show that the error affected his substantial rights. *See United States v. Olano*, 507 U.S. 725, 734 (1993). The problem here, however, was that, due to the nature of the court's error and counsel's failure to object, the record is silent as to what the court would have done had the government had a chance to speak at sentencing.

Under similar circumstances, where a clear error results in a silent record on the issue in question, this Court has held that evidence of "the error itself can, and most often will, be sufficient" to satisfy the third prong. *See*

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[1] Mr. Aguiera-Guzman's real name is Roberto Aguilera-Guzman. For the purposes of this petition, however, he will be referred to as "Juan Aguiera-Guzman" or "Aguiera-Guzman," in accordance with the case caption.

Molina-Martinez v. United States, 578 U.S. 189, 198 (2016). The clear error in *Molina-Martinez* was a Sentencing Guidelines-calculation error that resulted in an incorrect higher sentencing range and a silent record "as to what the district court might have done" absent the error. *Id.* at 201. But the reasons underlying this Court's holding in *Molina-Martinez* apply with equal force to the clear Rule 32 violation in this case.

The Ninth Circuit here ignored *Molina-Martinez* and did what this Court sought to avoid: it punished Mr. Aguiera-Guzman for failing to do the impossible—make an affirmative showing, on a silent record, that the district court's undisputed Rule 32 violation affected his substantial rights. (App. 4a–5a) (finding Mr. Aguiera-Guzman could not satisfy the third prong of the plain-error standard because there was nothing in the record showing the district court would have been influenced by the government's sentencing recommendation, and the court's sentence was otherwise justified)

The questions presented are:

Does the holding in *Molina-Martinez* apply to non-Guidelines-calculation sentencing errors, such as the clear Rule 32 violation here? If not, how does an appellant satisfy the third prong of the plain-error standard, where the nature of the plain error results in a silent record on what the court would have done absent that error?

II. There is no question the district court failed to address or explain its assessment of Mr. Aguiera-Guzman's extensive mitigation and sentencing arguments. Despite this Court's caselaw indicating an explanation is required, and published Ninth Circuit precedent requiring an explanation, the Ninth Circuit's unpublished memorandum dispositions—like the one here—follow a different set of rules. In the unpublished decisions, mere consideration, without any explanation, suffices. The incongruity between the Ninth Circuit's published precedent and unpublished decisions is representative of the deep split among the circuit courts of appeals on this very issue.

The question presented is:

Is a district court required to address or respond to a defendant's nonfrivolous mitigation and sentencing arguments in support of a particular sentence, or can the court ignore or silently consider them without explanation?

Statement of Related Proceedings

- *United States v. Juan Aguiera-Guzman,*
  No. 22-50248 (9th Cir. Jan. 16, 2024)

- *United States v. Juan Aguiera-Guzman,*
  No. 2:22-cr-00289-SVW-1 (C.D. Cal. Oct. 24, 2022)

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PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Juan Aguiera-Guzman petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit affirming his sentence.

I. OPINIONS BELOW

The Ninth Circuit issued an unpublished order affirming Mr. Aguiera-Guzman's sentence. (App. 1a) The district court sentenced Mr. Aguiera-Guzman on October 24, 2022. (App. 7a–27a)

II. JURISDICTION

The Ninth Circuit issued its order affirming the district court's sentence on January 16, 2024. (App. 1a) Mr. Aguiera-Guzman filed a petition for rehearing, which the Ninth Circuit denied on February 23, 2024. (App. 28a) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

III. STATUTORY PROVISION INVOLVED

18 U.S.C. § 3553(c)

***

(c) **Statement of Reasons for Imposing a Sentence.**—The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and if the sentence—

(1) is of the kind, and within the range, described in subsection (a)(4), and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in a statement of reasons form issued under section 994(w)(1)(B) of title 28, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

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IV. STATEMENT OF THE CASE

Mr. Aguiera-Guzman was charged with illegal reentry into the United States following deportation, in violation of 8 U.S.C. § 1326. (ER-23–62, 76)[2] He entered into a binding fast-track guilty-plea agreement with the

[2] Citations to "ER" refer to the Excerpts of Record filed in Mr. Aguiera-Guzman's appeal to the Ninth Circuit Court of Appeals, case number 22-50248. "PSR" refers to the Presentence Report Volume.

government under Federal Rule of Criminal Procedure 11(c)(1)(C). (ER-27–46) Pursuant to that agreement, Mr. Aguiera-Guzman and the government filed sentencing memoranda recommending a sentence of 27 months in prison, followed by 3 years of supervised release—the low end of the Sentencing Guidelines range for a total offense level of 11 and a criminal history category of VI. (PSR-1, 5, 41 56, 62)

To support his recommendation, Mr. Aguiera-Guzman raised extensive mitigation and sentencing arguments. (PSR-53–69)[3] This included Mr. Aguiera-Guzman's traumatic childhood in Chile, El Salvador, and the United States, characterized by abandonment and physical abuse; his marriage at 14 years old to a woman ten years his senior; the sudden, tragic death of his toddler son, launching Mr. Aguiera-Guzman into a severe depression; his ensuing drug addiction issues and theft-related offenses; his history of academic and professional success in the face of significant adversity; his medical conditions; and the sudden, tragic death of another son, which was the reason Mr. Aguiera-Guzman illegally returned to the United States (*i.e.*, the offense conduct here). (PSR-53–69)

[3] A more detailed recitation of Mr. Aguiera-Guzman's mitigation and sentencing arguments can be found in his opening brief and the record on appeal. *See* Appellant's Op. Br. 3–7, 9–10, *United States v. Aguiera-Guzman*, No. 22-50248 (9th Cir.), at Dkt. 8; (*see also* PSR-4–6, 29–34, 55–62).

At the beginning of the sentencing hearing, the district court rejected the parties' fast-track plea agreement without explanation. (App. 9a) The court suggested the parties set a trial date, but Mr. Aguiera-Guzman decided to enter an open plea, which the court accepted. (App. 9a–11a)

The court proceeded to sentencing, applying a Guidelines range of 33–41 months—*i.e.*, the range without a two-level downward departure for Mr. Aguiera-Guzman's fast-track guilty plea. (App. 12a; PSR-11) The court heard from defense counsel, who again requested a 27-month sentence and reiterated Mr. Aguiera-Guzman's mitigation and sentencing arguments. (App. 12a–23a) Counsel reminded the court of the tragic circumstances underlying Mr. Aguiera-Guzman's offense conduct and the resurgence of his drug addiction issues. (App. 17a) Counsel also explained that although Mr. Aguiera-Guzman's criminal history seemed lengthy, it consisted of theft-related offenses and not a single crime of violence. (App. 14a) The court then heard from Mr. Aguiera-Guzman, who expressed his deep and sincere remorse for his conduct. (App. 23a–24a) The court, however, did not hear from the government or afford it an opportunity to give its sentencing recommendation.

The court imposed a high-end Guidelines sentence of 41 months in prison, followed by 3 years of supervised release. (App. 24a) The court provided the following brief explanation for the sentence:

> The Court has considered the guidelines. The sentence is at the high end of the guideline. I've considered the nature and circumstances of the defendant, his particular circumstances as articulated by Counsel. I've considered the seriousness of the offense and the need to provide just punishment.
>
> I've considered the need to [*sic*] deterrence, which is very strong in this case, given ten prior felony convictions, the need to protect the public from further crimes of this defendant, which again is justified by his record. I've considered other sentences available, and this is the most appropriate sentence.

(App. 25a)

Mr. Aguiera-Guzman raised three arguments on appeal: 1) the government implicitly breached the plea agreement by unnecessarily referencing his criminal history and the need for deterrence; 2) the court committed plain procedural error under Rule 32(i)(4)(A)(iii) by failing to give the government an opportunity to speak at sentencing; and 3) the court committed plain procedural error by failing to address Mr. Aguiera-Guzman's specific, nonfrivolous sentencing arguments. (App. 2a–5a)

A panel of the Ninth Circuit Court of Appeals (the "Panel") issued an unpublished memorandum disposition affirming Mr. Aguiera-Guzman's sentence. (App. 1a–6a) The Panel found that the government did not implicitly breach the plea agreement because its statements were proper argument to justify the imposition of supervised release. (App. 2a–4a)

Next, the Panel rejected Mr. Aguiera-Guzman's argument regarding the district court's Rule 32 violation, finding that "even if there were a plain

violation of Rule 32(i)(4)(A)(iii), Defendant cannot show the requisite prejudice, and so his challenge fails." (App. 4a–5a) In concluding that he could not satisfy the substantial-rights prong of plain-error review, the Panel first found that Mr. Aguiera-Guzman's "assertion that the government would have advocated at the hearing for a sentence below forty-one months is speculative." (App. 4a) Then the Panel found that even if the government "had recommended a sentence below forty-one months at the hearing, the record does not support that the court would have been influenced by such recommendation." (App. 4a) The Panel noted that the district court had rejected the parties' prior joint recommendation of 27 months—which was not on the table at the time of sentencing—and the court stated its reasons for imposing a 41-month sentence. (App. 4a) Based on this, the Panel speculated that "the court would probably not have been persuaded to give a sentence lower than forty-one months, even had the government added to its prior recommendation at the sentencing hearing." (App. 4a)

Finally, the Panel rejected Mr. Aguiera-Guzman's claim that the district court failed to address his sentencing arguments, even though no explanation exists. (App. 5a) The Panel relied on *United States v. Perez-Perez*, 512 F.3d 514 (9th Cir. 2008)—which pre-dates the Ninth Circuit's *en banc* decision in *United States v. Carty*, 520 F.3d 984 (9th Cir. 2008) (en banc), and its progeny, requiring an *explanation*—to find it sufficient that the district

court "*heard and considered* [Mr. Aguiera-Guzman's] arguments and mitigation evidence but found them insufficient to warrant a lower sentence." (App. 5a) (emphasis added) In other words, the Panel found that just because "the court had a reasoned basis for the sentence it imposed and . . . *considered* [Mr. Aguiera-Guzman's] arguments and mitigation evidence, the court's *explanation* was sufficient." (App. 5a) (emphasis added)

Mr. Aguiera-Guzman filed a petition for panel rehearing or rehearing *en banc*, which the Ninth Circuit denied. (App. 28a)

Mr. Aguiera-Guzman now petitions this Court for a writ of certiorari: 1) to determine whether its holding in *Molina-Martinez* applies to non-Guidelines-calculation errors and, if not, to clarify how appellate courts should conduct third-prong plain-error analyses on a silent record; and 2) to resolve an incongruence between the Ninth Circuit's published and unpublished decisions, reflective of a deeper split among the circuit courts of appeals, about the district court's obligation to address or explain its assessment of a defendant's nonfrivolous mitigation and sentencing arguments.

V. REASONS FOR GRANTING THE WRIT

A. This Court Should Clarify Whether *Molina-Martinez v. United States*, 578 U.S. 189 (2016), Applies to Non-Guidelines-Calculation Errors, and If Not, Provide Much-Needed Guidance on How Reviewing Courts Should Conduct Third-Prong Plain-Error Review on Silent Records.

Federal Rule of Criminal Procedure 52(b) provides that "[a] plain error that affects substantial rights may be considered even though it was not brought to the court's attention." Fed. R. Crim. P. 52(b). This Court has established a four-prong standard that governs review of unpreserved errors. There must be: 1) an error; 2) that is plain; 3) that affects substantial rights; and 4) that "seriously affects the fairness, integrity or public reputation of judicial proceedings." *United States v. Olano*, 507 U.S. 725, 732 (1993) (internal quotations omitted). To satisfy the third, or "substantial rights," prong, the appellant "must show a reasonable probability that, but for the error, the outcome of the proceeding would have been different[.]" *Molina-Martinez v. United States*, 578 U.S. 189, 194 (2016) (internal quotation omitted). "Plain error review is not appellant-friendly." *United States v. Cortes-Medina*, 819 F.3d 566, 569 (1st Cir. 2016).

The already-unfriendly plain-error standard becomes practically impossible when an appellant is faced with a silent record on the claimed error. In *Molina-Martinez*, this Court acknowledged that practical impossibility and held that an appellant usually can establish that an error

affected his substantial rights where "the record is silent as to what the district court might have done" absent the error. *Molina-Martinez*, 578 U.S. at 194, 201. There, the district court incorrectly calculated the Guidelines range, mistakenly applying a higher range. *Id.* at 191. Because defense counsel did not object, the claim was reviewed for plain error. *Id.* at 194. Although the court had clearly erred, the record was silent as to what sentence the court would have imposed had it properly calculated the Guidelines range. *Id.* at 195. The Fifth Circuit "refused to correct" the district court's clear error because the appellant could not point to additional evidence in the record showing that the unpreserved error affected his substantial rights and, thus, could not satisfy the third prong of plain-error review. *Id.* at 191, 197.

This Court, however, refused to take such a "rigid" view of the third-prong standard in cases involving silent records. *Id.* at 192, 198, 201. Recognizing the practical difficulty of the defendant meeting the "ordinary" third-prong standard, this Court held that, "in most instances," the district court's incorrect Guidelines calculation alone would "suffice to show an effect on the defendant's substantial rights. . . . Absent unusual circumstances, [the defendant] will not be required to show more." *Id.* at 201. The Court explained that, in these situations where the defendant will necessarily be left with a silent record on the claim raised on appeal, he "should not be

prevented by a categorical rule from establishing" the third prong of plain-error review. *Id.*

Although *Molina-Martinez* involved a Guidelines-calculation error, the reasons underlying this Court's decision apply with full force to other fundamental sentencing errors, such as the district court's plain Rule 32 violation here. Indeed, Mr. Aguiera-Guzman's case involves a similarly "silent record on the claim raised on appeal," *id.*—the court's failure to afford the government an opportunity to speak at sentencing or otherwise provide its sentencing position. (App. 4a) Like the appellant in *Molina-Martinez*, Mr. Aguiera-Guzman identified a clear error by the court that defense counsel had failed to bring to the court's attention. Like the error in *Molina-Martinez*, the error here involved a fundamental feature of all federal sentencings. *See* Fed. R. Crim. P. 32(i)(4)(A)(iii) (*requiring* district courts to afford the government an opportunity to speak at sentencing); *see also United States v. Whitney*, 673 F.3d 965, 973 (9th Cir. 2012) (describing importance of government's sentencing recommendation). And, like *Molina-Martinez*, the combination of the court's clear error and counsel's failure to object resulted in a silent record on the issue on appeal and what the court would have done absent the error. Mr. Aguiera-Guzman, therefore, cited *Molina-Martinez* to argue that he satisfied the third prong of the plain-error standard.

The Ninth Circuit here ignored *Molina-Martinez* and instead did what *Molina-Martinez* sought to avoid: it foreclosed relief for a clear error due to the practical impossibility of Mr. Aguiera-Guzman affirmatively demonstrating, on a silent record, that the court's error affected his substantial rights. (App. 4a–5a) Under the Ninth Circuit's view, Mr. Aguiera-Guzman—who personally bore no fault in causing the court's clear error or in failing to object to it—nevertheless should suffer the consequences of the court's flawed sentence. This is so, even though "a remand for resentencing, while not costless, does not invoke the same difficulties as a remand for retrial does. . . . A resentencing is a brief event, normally taking less than a day and requiring the attendance of only the defendant, counsel, and court personnel." *Rosales-Mireles v. United States*, 585 U.S. 129, 140 (2018) (internal quotations and citations omitted). The Ninth Circuit's insistence on an affirmative showing of an effect on substantial rights, even on a silent record, is just as "rigid" and impractical as the Fifth Circuit's approach to Guidelines-calculation errors, which this Court firmly rejected in *Molina-Martinez*.

Standing in stark contrast to the Ninth Circuit, the Tenth Circuit, sitting *en banc*, applied *Molina-Martinez* to Rule 32 violations, holding that such errors—like the one Mr. Aguiera-Guzman suffered here—do not need to meet the third prong's ordinary standard. In *United States v. Bustamante-*

Conchas, the Tenth Circuit "grant[ed] en banc rehearing in order to refine the manner in which [it] conduct[s] plain-error review" following a Rule 32 violation. 850 F.3d 1130, 1133 (10th Cir. 2017) (en banc) (reviewing substantial-rights standard as applied to denial of defendant allocution under Rule 32(i)(4)(A)(ii)). The Tenth Circuit recognized that defendants who are denied allocution—thus resulting in a silent record as to what they may have said—"face a practical difficulty under the third prong because appellate courts 'cannot speculate as to the persuasive ability of anything [a defendant] may have said in his statement to the court.'" *Id.* at 1139 (quoting *United States v. O'Hallaren*, 505 F.3d 633, 636 (7th Cir. 2007)). To remedy that difficulty, the Tenth Circuit held that, "[a]bsent some extraordinary circumstances," clear Rule 32 violations based on the denial of a defendant's allocution are prejudicial where the "defendant could have received a lesser sentence." *Id.* The Tenth Circuit expressly relied on *Molina-Martinez* to reach that decision, finding that Rule 32 allocutions, like Guidelines calculations, "are ordinarily expected to have some impact on a sentence[.]" *Id.* at 1139–40.

Given this split between the Ninth Circuit's impractical approach to third-prong review on silent records and the *en banc* Tenth Circuit's reasoned, *Molina-Martinez*-based approach, this Court should grant review to decide whether *Molina-Martinez* applies to non-Guidelines-calculation errors, such as the Rule 32 violation here.

Even if it does not so apply, this Court should clarify how courts of appeals should conduct third-prong analyses based on silent records. Both this Court and the Tenth Circuit have already acknowledged the practical difficulty, if not impossibility, of an appellant making an affirmative showing that a clear error affected his substantial rights on a silent record. Indeed, any appellant, like Mr. Aguiera-Guzman, who raises a claim of procedural error on a silent record, where the silence is the result of the court's error, falls into a cruel Catch-22. Initially, he is deprived of important procedures that are in place to ensure fairness and reasoned sentencing decisions. *See* Fed. R. Crim. P. 32(i)(4)(A)(iii); *United States v. Carty*, 520 F.3d 984, 991–93 (9th Cir. 2008) (en banc). But, because of the nature of the court's error, he is forced to suffer the consequences of the silent record.

Given the lack of clarity on how third-prong plain-error review should be conducted in this context, the potential for injustice is great. Any appellate court can find as the Panel did here—that the third-prong plain-error argument is "speculative" and the appellant cannot show an effect on his substantial rights. (App. 4a–5a) In the end, clear errors go unaddressed and unredressed. And, courts may end up sanctioning repeated procedural violations without any acknowledgment that error occurred or any guidance to district courts on the proper procedures to follow. Against this backdrop, this Court's review is warranted and needed.

B. This Court Should Resolve a Split Within the Ninth Circuit and Among the Other Circuits About Whether a District Court Should Address or Explain Its Assessment of a Defendant's Nonfrivolous Mitigation and Sentencing Arguments, or Whether Mere Silent Consideration Without Explanation Suffices.

The district court has a duty to explain the sentence it imposes. 18 U.S.C. § 3553(c); *Chavez-Meza v. United States*, 585 U.S. 109, 111–12 (2018); *United States v. Carty*, 520 F.3d 984, 992–93 (9th Cir. 2008) (en banc). The court's explanation "should set forth enough to satisfy the appellate court that [it] has considered the parties' arguments and has a reasoned basis for exercising [its] own legal decisionmaking authority." *Rita v. United States*, 551 U.S. 338, 356 (2007). "Sometimes the circumstances will call for a brief explanation; sometimes they will call for a lengthier explanation." *Id.* at 357; *see also Carty*, 520 F.3d at 992.

The Ninth Circuit's published precedent requires an explanation concerning the defendant's nonfrivolous arguments. Indeed, the Ninth Circuit has interpreted *Rita* to impose an "obligat[ion] to address" such arguments. *United States v. Wright*, 46 F.4th 938, 953 (9th Cir. 2022). Beginning with its *en banc* decision in *Carty*, the Ninth Circuit held that "when a party raises a specific, nonfrivolous argument tethered to a relevant § 3553(a) factor . . . then the judge should normally explain why he accepts or rejects the party's position." *Carty*, 520 F.3d at 992–93. Then, in *United States v. Trujillo*, the

Ninth Circuit held that the district court's failure to "address any of [the defendant's nonfrivolous arguments], even to dismiss them in shorthand" constituted procedural error. 713 F.3d 1003, 1010–11 (9th Cir. 2013). The court emphasized that *Carty*'s requirement "is concerned with *explanation*, not merely *consideration*." *Id.* at 1010 (emphasis in original). The Ninth Circuit then reaffirmed its insistence on an explanation in *United States v. Emmett,* 749 F.3d 817, 820–22 (9th Cir. 2014). And, recently, the Ninth Circuit stated that a district court is "*obligated* to address" a defendant's nonfrivolous arguments. *Wright*, 46 F.4th at 953 (emphasis added).

Despite the Ninth Circuit's directives in its published precedent, its unpublished memorandum dispositions—like the Panel's decision here—play by a different set of rules. Based on this Court's and Ninth Circuit precedent, Mr. Aguiera-Guzman argued on appeal that the district court procedurally erred in failing to address or respond to his extensive nonfrivolous mitigation and sentencing arguments. (App. 5a) There is no question the court did not provide any such explanation. (*See* App. 25a) The Panel nevertheless rejected Mr. Aguiera-Guzman's claim, finding it sufficient that "the court *heard* and *considered* [Mr. Aguiera-Guzman's] arguments and mitigation," and otherwise had a "reasoned basis for the sentence." (App. 5a) (emphasis added) In other words, the district court's silent consideration without explanation was sufficient to comply with § 3553(c) and *Rita*.

In reaching this conclusion, the Panel relied on a Ninth Circuit decision that found *Rita*'s insistence on an explanation as "helpful," rather than a requirement. (App. 5a) (citing *United States v. Perez-Perez*, 512 F.3d 514, 516–17 (9th Cir. 2008), for the proposition that a court does not procedurally err if it justifies the sentence it imposes and the record shows "that the court *considered* the defendant's arguments") (emphasis added) It bears mentioning that *Perez-Perez* has effectively been overruled by subsequent Ninth Circuit precedent requiring an explanation. *See Carty*, 520 F.3d at 992–93; *Trujillo*, 713 F.3d at 1010–11; *Emmett*, 749 F.3d at 820–22; *Wright*, 46 F.4th at 953. But, that has not stopped the Ninth Circuit from ignoring that precedent and routinely affirming district courts' sentences without addressing or explaining their positions on a defendant's nonfrivolous sentencing arguments. *See, e.g.*, *United States v. Jimenez*, No. 22-50054, 2023 WL 4348101 (9th Cir. 2023), *cert denied*, 144 S. Ct. 865 (2024) (relying on *Perez-Perez*); *United States v. Ramirez*, No. 23-50009, 2023 WL 6879359 (9th Cir. 2023) (same); *see also*, *United States v. Floyd*, No. 22-50087, 2023 WL 6172010 (9th Cir. 2023) (rejecting failure-to-address claim, despite no explanation on the record, without relying on *Perez-Perez*); *United States v. Ontiveros*, 634 F. App'x 600, 600–01 (9th Cir. 2016) (same).

Regardless of the reason for the incongruence, the reality is that, for failure-to-address claims, precedent says one thing, but practice says the

opposite. In the current fractured system, defendants continue to raise legitimate failure-to-address claims based on *Rita* and Ninth Circuit precedent, only to be met with unpublished memorandum dispositions that appear to ignore them.[4]

The incongruence between the Ninth Circuit's published precedent and unpublished decisions is emblematic of the split among the circuit courts of appeals regarding the interpretation this Court's decision in *Rita*. At least four circuits have held that district courts are required to address a party's nonfrivolous arguments for a non-Guidelines sentence. *See United States v. Friedman*, 658 F.3d 342, 359, 363 (3d Cir. 2011); *United States v. Lynn*, 592 F.3d 572, 575 (4th Cir. 2010); *United States v. Miranda*, 505 F.3d 785, 791–94 (7th Cir. 2007); *United States v. Lente*, 647 F.3d 1021, 1030–34 (10th Cir. 2011). Three circuits, however, have held that a district court is not obligated

[4] According to the United States Courts' latest statistics on appellate court dispositions, 86.4% of appellate court decisions in 2023 were unpublished. United States Courts, Table 2.5—U.S. Courts of Appeals Judicial Facts and Figures (Sept. 20, 2023), *available at* https://www.uscourts.gov/sites/default/files/data_tables/jff_2.5_0930.2023.pdf (last visited May 23, 2024). In 2022, the Ninth Circuit had the highest percentage of unpublished dispositions in the country, with 91.6% of its cases disposed of by unpublished decisions. United States Courts, Table B-12—Type of Opinion or Order Filed in Cases Terminated on the Merits, by Circuit, *available at* https://www.uscourts.gov/sites/default/files/data_tables/jb_b12_0930.2022.pdf (last visited May 23, 2024). Thus, the vast majority of cases, including failure-to-address claims such as the one here, are resolved in unpublished decisions that go largely undetected and unreviewed.

to respond to a party's nonfrivolous sentencing arguments. *See United States v. Thomas*, 628 F.3d 64, 72 (2d Cir. 2010); *United States v. Bonilla*, 524 F.3d 647, 657 (5th Cir. 2008); *Perez-Perez*, 512 F.3d at 517.

Given the dichotomous views concerning a district court's duty to address nonfrivolous sentencing arguments—not only within the Ninth Circuit, but also among the other circuits—this Court should grant review to clarify this area of the law. Is a district court required to address or respond to a defendant's nonfrivolous mitigation and sentencing arguments, or is mere silent consideration enough? The Court's resolution of that question not only would provide much-needed guidance to district courts on what is expected of them in imposing a sentence, but also would promote consistency and instill trust in the judicial system that conducts thousands of federal sentencings each year.

C. This Case Presents a Perfect Vehicle to Address the Questions Presented.

This case presents an excellent opportunity for this Court to address both questions presented, as they allow the Court to provide clarity on the law regarding third-prong plain-error analysis and failure-to-address sentencing claims.

First, the Panel's decision in this case presents the perfect opportunity for this Court to define the scope of *Molina-Martinez* and clarify how to

conduct third-prong review on a silent record. There is no question the district court here violated Rule 32 when it failed to afford the government an opportunity to speak at sentencing or otherwise provide its sentencing position. Likewise, there is no question the record is silent as to the sentence the district court would have imposed had the court complied with Rule 32 and heard the government's sentencing recommendation. This Court, therefore, does not have to concern itself with the first two prongs of the plain-error standard. Instead, it can focus exclusively on the question of the applicability of *Molina-Martinez* to non-Guidelines-calculation errors—and Rule 32 violations specifically—and how reviewing courts should conduct a third-prong analysis for clear errors on silent records.

Second, this case presents the perfect opportunity for this Court to clarify its decision in *Rita* and resolve the split within the Ninth Circuit and among other circuit courts of appeals regarding a district court's obligation to address a defendant's nonfrivolous sentencing arguments. Here, there is no question that Mr. Aguiera-Guzman presented extensive nonfrivolous mitigation and sentencing arguments. There is, likewise, no question that the district court did not address or respond to Mr. Aguiera-Guzman's arguments; instead, the court simply stated it had merely "considered the nature and circumstances of the defendant, his particular circumstances as

articulated by Counsel." (App. 25a) This Court, therefore, can focus on interpreting *Rita* and § 3553(c)'s explanation requirement.

VI. CONCLUSION

For the foregoing reasons, Mr. Aguiera-Guzman respectfully requests that this Court grant his petition for writ of certiorari.

Respectfully submitted,

CUAUHTEMOC ORTEGA
Federal Public Defender

DATED: May 23, 2024

By: /s/ *Michael Gomez*
MICHAEL GOMEZ*
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