No. 16-9493

IN THE

Supreme Court of the United States

FLORENCIO ROSALES-MIRELES,
Petitioner,

v.

UNITED STATES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF OF PETITIONER

JEFFREY T. GREEN
JOSHUA J. FOUGERE
JULIE M.K. SIEGAL
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

TIMOTHY CROOKS
2410 Avalon Place
Houston, TX 77019
(713) 823-4556

MAUREEN SCOTT FRANCO
FED. PUBLIC DEFENDER
KRISTIN L. DAVIDSON *
BRADFORD W. BOGAN
ASSISTANT FED. PUBLIC DEFENDERS
WESTERN DISTRICT OF TEXAS
727 E. César E. Chávez Blvd., B-207
San Antonio, TX 78206
(210) 472-6700
Kristin_Davidson@fd.org

Counsel for Petitioner

* Counsel of Record

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INTRODUCTION

The government sensibly concedes (U.S. Br. 34) that the shocks-the-conscience standard that the Fifth Circuit applied is wrong. Despite the government's half-hearted protests, moreover, there can be no serious question that the Fifth Circuit rested its decision on that erroneous legal standard when it "elect[ed] not to exercise [its] discretion" because it was unable to "say that the error or resulting sentence would shock the conscience." J.A. 37. The judgment therefore cannot stand.

The government nevertheless scrambles to invent an overly stringent fourth-prong standard that *no* court of appeals has adopted and that harkens back to the purportedly abandoned shocks-the-conscience test. The government embarks on this pursuit without ever once acknowledging that the Fifth Circuit stands as a solitary outlier in its treatment of Guidelines errors under the fourth prong. In fact, the government goes so far as to cast Mr. Rosales-Mireles's arguments as "petitioner's rule" or "petitioner's proposed rule," *e.g.*, U.S. Br. 22, 26, complete with doomsday prognostications about that rule's potential effects, with absolutely no recognition that this same "rule" is currently applied across most of the country. All now agree that the Fifth Circuit's standard is wrong, and the proper inference from that concession should be that the other courts of appeals have it right.

In its attack on this majority position, the government offers a handful of meritless assertions and attacks arguments that Mr. Rosales-Mireles never made. First, the government maintains that plain Guidelines calculation errors should be corrected only in the rare and exceptional case, rather than in "most

cases." *Molina-Martinez* v. *United States*, 136 S. Ct. 1338, 1342, 1346 (2016). Make no mistake: the government's position would turn the Court's holding in *Molina-Martinez* on its head and erase that decision's recognition that Guidelines errors, by their nature, warrant relief in most cases. Second, and related, the government repeatedly mischaracterizes Mr. Rosales-Mireles as seeking a fourth-prong "presumption" for Guidelines errors. But the fact that a court of appeals "should" exercise its discretion to correct an error when the fourth-prong standard is met, *United States* v. *Olano*, 507 U.S. 725, 736 (1993), simply does not mean it must do so—presumptively or otherwise. Finally, the government regularly seeks to lump Guidelines errors together with all other possible varieties of forfeited errors to contend, for example, that defendants would have no incentive to identify and apply the correct Guidelines range in the district court. The government's worries are irreconcilable with the way most courts of appeals already approach Guidelines errors, and the Court should not assume that defense counsel would violate ethical duties to clients and to the court.

At bottom, there is absolutely no good reason that, in the ordinary case, a defendant should have to stay in jail longer due to a clerical error that everyone—the Probation Officer, the prosecutor, the judge, the defense attorney, and the defendant—all overlooked in the first instance.

ARGUMENT

I. THE GOVERNMENT AGREES THAT THE FIFTH CIRCUIT APPLIED THE WRONG LEGAL STANDARD.

The question on which this Court granted certiorari was whether, in order to satisfy *Olano*'s fourth prong,

a defendant like Mr. Rosales-Mireles is required to meet the Fifth Circuit's shocks-the-conscience test. Pet'r Br. i. The government correctly concedes that the answer to that question is "no." U.S. Br. 33–35.[1] The Fifth Circuit's judgment is therefore infirm and resentencing warranted.

In the government's view, however, the Fifth Circuit did not really apply the standard it said it was applying and, in any event, the court of appeals properly exercised its discretion. *Id.* at 33–39. These arguments both collapse upon a straightforward reading of the opinion below.

The Fifth Circuit described its view of *Olano* this way: "the types of errors that warrant reversal are ones that would shock the conscience of the common man, serve as a powerful indictment against our system of justice, or seriously call into question the competence or integrity of the district judge." J.A. 36. The court of appeals then declined to exercise its discretion because it could not say "that the error or resulting sentence would shock the conscience." *Id.* at 37. Although the government speculates that "the Fifth Circuit's description of correctable errors is [not] intended to substantively modify the existing plain-error standard," U.S. Br. 35, the undeniable import of the Fifth Circuit's actual decision is that the error's

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[1] Although the government now disavows the shock-the-conscience standard, it has not shied away from urging the Fifth Circuit to rely on that standard to deny relief, and has continued to do so even after certiorari was granted in this case. *See, e.g.*, Brief of Plaintiff-Appellee at 28, *United States* v. *Fiallos*, No. 17-20423, 2017 WL 6552177, at *28 (5th Cir. Dec. 13, 2017); Appellee's Brief at 12, 17, *United States* v. *Fuentes*, No. 17-50407, 2017 WL 5759744, at *12, *17 (5th Cir. Nov. 20, 2017); Original Brief of Appellee at 15–16, *United States* v. *Washington*, No. 17-30434, 2017 WL 4708216, at *15–16 (5th Cir. Oct. 12, 2017).

purported failure to "shock the conscience" was the basis for the judgment, J.A. 37. And that error of law means that the Fifth Circuit "by definition abuse[d] its discretion." *Koon* v. *United States*, 518 U.S. 81, 100 (1996).

Although the Court need go no further to reject the entirety of the government's request for affirmance, the government's "case-specific" arguments, U.S. Br. 36–39, fail too. First, the government spends pages repeating the particular facts of Mr. Rosales-Mireles's criminal history in an apparent effort to portray him as a bad person deserving of his sentence. *Id.* at 5–7, 36–38. But the district court was fully aware of each and every one of the background facts that the government recites here when that court, which had seen and heard from Mr. Rosales-Mireles, sentenced him to one month above the bottom of the erroneously calculated Guidelines range. That same court—not this Court or the court of appeals—should have the opportunity to decide whether a proportionate sentence near the bottom of the correct range should or should not be imposed. There is no reason to credit the government's conjecture about what the district court "could … have" or "may have" done, *id.* at 38, under the proper Guidelines range.

Second, the government highlights the district court's statement that it "would have not sentenced Mr. Rosales[-Mireles] to anything less than the 78 months." *Id.* at 7, 37. But even the Fifth Circuit understood that this "statement, in context, does not go quite so far as saying that the court would have sentenced [Mr. Rosales-Mireles] to 78 months regardless of the guideline recommendation." J.A. 35. Nothing in the record demonstrates that the sentencing court arrived at the 78-month sentence independently of the (erroneously) calculated range. And the district

court's statement was infected by the same error that produced the incorrect range: a mistaken belief that Mr. Rosales-Mireles had one more prior conviction than he actually had.

The government's attempt to generate support for affirmance therefore only serves to demonstrate that a remand to the district court is the proper disposition of the case in its current posture. The government rests its argument upon the premise that "the *court of appeals'* decision" was "within the bounds of [*its*] discretion," but every point the government makes concerns what *the district court* did, could have done, or may have done. U.S. Br. 36–39. The court of appeals declined to remand the case because it misconstrued the legal standard, and, with that issue now cleared up, the district court should be one to decide what sentence it would impose in the first instance.

II. A GUIDELINES MISCALCULATION SATISFIES THE FOURTH PRONG OF PLAIN ERROR REVIEW IN THE ORDINARY CASE.

A. Rule 52 And *Olano* Recognize That Certain Categories Of Error Ordinarily Satisfy The Fourth Prong.

Both Rule 52 and this Court's precedent make clear that plain errors exist on a continuum: some rarely satisfy the criteria while others ordinarily do. Pet'r Br. 9–17. The nature of the error at issue is thus an important part of the fourth-prong analysis, and Guidelines errors are of a type that "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings" most of the time. As one court of appeals recently observed in a related context: "[a]dditional months in prison are not simply num-

bers. Those months have exceptionally severe consequences for the incarcerated individual. They also have consequences both for society which bears the direct and indirect costs of incarceration and for the administration of justice." *United States* v. *Jenkins*, 854 F.3d 181, 192 (2d Cir. 2017). Calculation errors unnecessarily leading to "[a]dditional months in prison," therefore, typically will "seriously affect the fairness, integrity, or public reputation of judicial proceedings."

Recognizing that the nature of the error at issue is essential to the *Olano* analysis is nothing new, and neither is recognizing the unique nature of Guidelines errors in particular. In *Molina-Martinez*, this Court found that, as a category, errors in the calculation of the Guidelines range are often "particularly serious" and therefore warrant correction "in the ordinary case." 136 S. Ct. at 1345–47. The fact that "the systemic function of the selected Guidelines range will affect the sentence" "[i]n the usual case," the Court continued, is "essential to the application of Rule 52(b) to a Guidelines error." *Id.* at 1346. That fact is just as essential to the application of Rule 52(b)'s fourth prong as it is to the third. Pet'r Br. 9–17. In short, as with other categories of errors, it is "rar[e]" that a Guideline-range error does not "bring[ ] to bear in some degree, serious, although not measurable, an improper influence upon the [sentencing court]." *Brasfield* v. *United States*, 272 U.S. 448, 450 (1926).

The government, however, accuses Mr. Rosales-Mireles of seeking an "exception" to the application of Rule 52(b) for Guidelines errors and repeats the facile refrain that all of Mr. Rosales-Mireles's arguments apply equally to any other plain error. U.S. Br. 27–31. This is simply wrong. Not all errors are as fun-

damental to the sentencing process as Guidelines calculations, nor do all errors analogously risk "allow[ing] individuals to linger longer in prison than the law requires," *Hicks* v. *United States*, 137 S. Ct. 2000, 2000–01 (2017) (Gorsuch, J., concurring), or comparably implicate probation officers acting as "arms of the court." Pet'r Br. 10–13. Not all steps in the sentencing process have the exactitude and priority of a proper Guidelines range calculation. *Gall* v. *United States*, 552 U.S. 38 (2007). Recognizing that Guidelines errors are unique in these respects does not imply any "exception" to the ordinary application of plain-error review. Rather, it simply recognizes the nature of the error for what it is and the practical consequences of that error within the established Rule 52(b) framework. See *Molina-Martinez*, 136 S. Ct. at 1346.

The government also seems to deny that the nature of the error matters at all, citing *Puckett* for the proposition that courts of appeals cannot "create exceptions to the rule or to otherwise soften its application for certain types of errors." U.S. Br. 14 (citing *Puckett* v. *United States*, 556 U.S. 129 (2009)). But that is not remotely what *Puckett* says. On the contrary, *Puckett* states that, "when the Government reneges on a plea deal, the integrity of the system may be called into question," and correction would thus ordinarily be appropriate, but goes on to note that there could always be "countervailing factors in particular cases." 556 U.S. at 142–43. And *Puckett* is not alone in considering the category of error at issue. Pet'r Br. 9–10.

B. There Is Still Room For Discretion In Particular Cases.

The courts of appeals retain discretion when facing Guidelines calculation errors under *Olano*'s fourth

prong, Pet'r Br. 17–18, and the government's responses to that point are baseless.

To begin with, the government persistently accuses Mr. Rosales-Mireles of seeking a "presumption" that Guidelines errors warrant reversal. U.S. Br. 22–27. That is false. Mr. Rosales-Mireles never argued for any "presumption" that would shift the burden of persuasion to the government on the fourth prong. As *Olano* says, the defendant retains the burden to show that the plain error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. See *Molina-Martinez*, 136 S. Ct. at 1348; see *id.* at 1351 n.4 (Alito, J. concurring) (noting that "the Court makes clear that today's decision does *not* shift the burden of persuasion from a forfeiting defendant to the Government"). Just because most Guidelines calculation errors that satisfy the first three prongs will also satisfy the fourth—because prolonging jail time in the face of a Guidelines error would seriously affect "the fairness, integrity, or public reputation of judicial proceedings" most of the time—does not create a presumption. It just reflects the empirical reality.

Next, the government similarly claims that Mr. Rosales-Mireles seeks to "collapse" the third and fourth prongs. U.S. Br. 10–11, 22. That is also false. The fourth prong remains an independent barrier to relief, and countervailing circumstances may counsel against such relief in a particular case. Pet'r Br. 17–18; see also, *e.g.*, *United States* v. *Tyson*, 863 F.3d 597, 600 (7th Cir. 2017) (denying relief for Guidelines error under fourth prong because "the court went out of his way to explain his view that the Guidelines range was too high and that the calculated recommendation was not serving as the basis for the sentence he imposed"). Although examples may not be

abundant, that merely reflects the fact that Guidelines errors ordinarily have a serious effect on the fairness, integrity, or public reputation of judicial proceedings.

Far from suggesting any problem with Mr. Rosales-Mireles's arguments, in other words, the substantial overlap between the third and fourth prongs makes perfect sense. The third prong focuses on the defendant, asking whether the plain error likely resulted in a longer sentence. *Molina-Martinez*, 136 S. Ct. at 1345. The fourth prong focuses on the judicial proceedings. *Olano*, 507 U.S. at 736. In the context of Guidelines errors, those focal points often converge, because the particular seriousness of Guidelines miscalculations affects both the defendant and the judicial proceedings as a whole. This reality reinforces Mr. Rosales-Mireles's position.

C. Agreeing With The Near-Unanimous View Of The Courts Of Appeals Will Not Wreak Havoc On Plain Error Review.

Mr. Rosales-Mireles has demonstrated that both Congress and the courts of appeals generally agree that most Guidelines errors seriously affect the fairness, integrity, or public reputation of judicial proceedings. Pet'r Br. 17–18. The government's brief misconstrues the point about Congress and ignores the near-unanimous view of the courts of appeals—all while proffering a series of hollow concerns about the future of plain error review.

As for Congress, Mr. Rosales-Mireles cited 18 U.S.C. § 3742(f)(1) because it reflects a congressional judgment about the seriousness of Guidelines errors. *Id.* at 16. The government confusingly maintains that the statutory provision "would not affect the application of the plain-error standard," U.S. Br. 31, but Mr.

Rosales-Mireles never argued it should. The statute is just one more indication, this time from the legislative body that established the Guidelines regime, that Guidelines errors "can be particularly serious." *Molina-Martinez*, 136 S. Ct. at 1345.

Even more fundamentally, the government's 40-page brief nowhere acknowledges that Mr. Rosales-Mireles has advanced the argument that almost all courts of appeals *already accept*. That alone eliminates the government's alleged concerns over a ruling for Mr. Rosales-Mireles. Indeed, the government expressed exactly the same "concern[s]" about the possible ramifications in *Molina-Martinez*, and this Court was not persuaded because, among other things, the "holding [wa]s consistent with the approach taken by most Courts of Appeals." *Id*. at 1348. The same is true here.

The government nevertheless frets that defendants would have reduced incentives to object contemporaneously to Guidelines errors and might try to "sandbag" district courts. U.S. Br. 17–18, 27. That is preposterous. Because the Guidelines range is the starting point for all sentencing decisions, no rational defendant would seek anything but the lowest range possible. There is absolutely no strategic benefit to allowing a sentencing court to base its sentence on an erroneously high range and then hoping for a correction and a lower sentence on remand. As this Court recently said, "[i]f there is a lawyer who would deliberately forgo objection now because he perceives some slightly expanded chance to argue for 'plain error' later, we suspect that, like the unicorn, he finds his home in the imagination, not the courtroom." *Henderson* v. *United States*, 568 U.S. 266, 276 (2013) (emphasis omitted); see also *Kimmelman* v. *Morrison*, 477 U.S. 365, 382 n.7 (1986) (finding it "virtually in-

conceivable that an attorney would deliberately invite the judgment that his performance was constitutionally deficient").

The government's argument also flies in the face of the reality that defense counsel, like prosecutors, are officers of the court and are bound by a code of ethics. See Am. Bar Ass'n, *Criminal Justice Standards for the Defense Function*, Standard 4-1.2, 4-1.4 (4th ed.). Because this Court does not decide cases on the basis that any of the actors in the process might deliberately cheat, see *Bracy* v. *Gramley*, 520 U.S. 899, 909 (1997) ("[o]rdinarily, we presume that public officials have properly discharged their official duties"), the government's implied concern about bad faith warrants not only rejection but disapprobation.

In addition, the government notes that, should resentencing occur, the "passage of time may provide the defendant with additional arguments." U.S. Br. 27 (citing *Pepper* v. *United States*, 562 U.S. 476 (2011)). Even setting aside the difficulty in seeing why that would be a bad thing, the possibility of new information arising after sentencing cuts both ways: it could lead to a lower *or* higher sentence, depending on what happens. *Pepper* is not just a defendant-friendly ratchet.

Finally, the government labels as "wrong" Mr. Rosales-Mireles's observation that remand for resentencing is a relatively "simple task." *Id.* at 32–33. But this Court heard and rejected the same exaggerated concerns in *Molina-Martinez*. To repeat: "a remand for resentencing, while not costless, does not invoke the same difficulties as a remand for retrial does." *Molina-Martinez*, 136 S. Ct. 1348–49. It is thus "doubtful that [ruling in Mr. Rosales-Mireles' favor] will result in much of an increased burden" because it would be "consistent with the approach taken by

most Courts of Appeals," and "[y]et only a small fraction of cases are remanded for resentencing because of Guidelines related errors." *Id.* at 1348.

That is equally true today, and it guts the government's claims about practical implications and about the proper disposition of this case more broadly. In fiscal year 2016, there were 310 successful sentencing appeals—under both harmless and plain-error review—that raised issues pertaining to Guidelines calculations. U.S. Sentencing Comm'n, *Sourcebook of Federal Sentencing Statistics*, tbl. 59 (2016). That comes from a universe of 5,222 appeals challenging a sentence. *Id.* tbl. 55. Given that "most" courts of appeals already deploy the approach Mr. Rosales-Mireles advances, a success rate of less than 6% hardly suggests that there should be any cause for concern about an "increased burden" and suggests, instead, that defendants' overall success in this area is actually quite rare.

III. THE GOVERNMENT'S NEWFOUND APPROACH WOULD EFFECTIVELY ELIMINATE PLAIN ERROR REVIEW OF GUIDELINES ERRORS, JUST LIKE THE SHOCKS-THE-CONSCIENCE STANDARD.

Despite never acknowledging the near-unanimous view of the courts of appeals, the government asks this Court to adopt a three-part test that no court of appeals has ever adopted. That "test" amounts to nothing more than a rebranding of the difficult-to-meet shocks-the-conscience standard disguised behind multiple "factors." The Court should reject it.

The government proposes that a court of appeals should seek to determine "whether the error impugns the sentencing process as a whole." U.S. Br. 20. To do so, the government maintains, the court of appeals

should consider three factors: (1) "whether the sentence reflects a reasonable application of the district court's sentencing discretion notwithstanding the error[,]" (2) the "magnitude of the Guidelines error in light of the sentencing as a whole[,]" and (3) "whether the defendant was afforded procedural protections necessary to ensure the fairness and integrity of the sentencing proceeding." *Id.* at 20–21. That three-factor test finds no support in this Court's precedent and for good reason.

First, the proposed focus on "reasonableness" inverts the inquiry from *Gall* and collides with *Williams*. Under *Gall*, a court of appeals must "first ensure that the district court committed no significant procedural error, such as … improperly calculating[ ] the Guidelines range," before considering "the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard." 552 U.S. at 51. The government offers no support for reversing that inquiry when the "significant procedural error" of a Guidelines miscalculation arises in the context of plain-error review. Nor could it, because, as *Williams* v. *United States* held, "it is the prerogative of the district court, not the court of appeals, to determine, in the first instance, the sentence that should be imposed in light of certain factors properly considered under the Guidelines." 503 U.S. 193, 205 (1992). When a district court incorrectly calculates the Guidelines range, it has not properly exercised its sentencing discretion, and the court of appeals should not be permitted to subvert such an error based on the court of appeals' own assessment of the "reasonableness" of the sentence imposed.

Second, the government's proposal to consider the "magnitude" of the error runs counter to this Court's decision in *Glover* v. *United States*, 531 U.S. 198

(2001). That case expressly counsels against using the duration of "extra" imprisonment as a proxy for significance and resulting prejudice. *Id.* at 203–04.

Third, asking "whether the defendant was afforded procedural protections necessary to ensure the fairness and integrity of the sentencing proceeding" is a make-weight. If the procedures were not fair, that would provide an independent basis for attacking the sentence. This Court has never conditioned satisfaction of the fourth prong for one error on the presence of other errors.

In sum, the government's proposal to reinstitute an overly strict standard, like the now-abandoned shocks-the-conscience standard, fails. The standard announced in *Olano* continues to govern, and there is absolutely nothing improper in recognizing, as most courts of appeals already do, that Guidelines calculation errors meet that standard in most cases.

CONCLUSION

For the foregoing reasons, as well as those stated in Mr. Rosales-Mireles' opening brief, the Court should reverse the judgment below and remand to the Fifth Circuit with instructions to vacate the sentence and remand to the district court for resentencing.

Respectfully submitted,

JEFFREY T. GREEN
JOSHUA J. FOUGERE
JULIE M.K. SIEGAL
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

TIMOTHY CROOKS
2410 Avalon Place
Houston, TX 77019
(713) 823-4556

MAUREEN SCOTT FRANCO
FED. PUBLIC DEFENDER
KRISTIN L. DAVIDSON *
BRADFORD W. BOGAN
ASSISTANT FED. PUBLIC DEFENDERS
WESTERN DISTRICT OF TEXAS
727 E. César E. Chávez Blvd., B-207
San Antonio, TX 78206
(210) 472-6700
Kristin_Davidson@fd.org

Counsel for Petitioner

* Counsel of Record

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