

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

IN THE SUPREME COURT OF THE UNITED STATES

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ROBERTO VILLARRUELQUINTANILLA

Petitioner.

-v-

UNITED STATES OF AMERICA,

Respondent.

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On Petitioner For A Writ Of Certiorari  
To The United States Court Of Appeals  
For The Ninth Circuit

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**Petition for Writ of Certiorari**

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## QUESTION PRESENTED

When determining if a sentencing Guideline error is harmless based on the district court's statement that it would impose the same sentence if the correct Guidelines applied, whether a court of appeals must review the procedural and substantive reasonableness of the district court's "alternative" sentence.

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IN THE SUPREME COURT OF THE UNITED STATES

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ROBERTO VILLARRUEL-QUINTANILLA,

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UNITED STATES OF AMERICA,

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**OPINION BELOW**

After Petitioner appealed his sentence based on the district court’s erroneous denial of a minor-role adjustment under § 3B1.2, the United States Court of Appeals for the Ninth Circuit affirmed Petitioner’s sentence in an unpublished memorandum disposition, ruling that any Guideline-calculation error was harmless. *United States v. Villarruel-Quintanilla*, 677 F. App’x 391 (9th Cir. 2017).<sup>1</sup> Petitioner moved the Court of Appeals to rehear his case, but the Ninth Circuit denied his petition on October 19, 2017.<sup>2</sup>

**JURISDICTION**

The court of appeals entered final judgment on October 19, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

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<sup>1</sup> A copy of the Ninth Circuit’s memorandum is attached to this brief at Appendix A under S. Ct. R. 14(i)(i).

<sup>2</sup> A copy of the Ninth Circuit’s order is attached to this brief at Appendix B.

## STATUTORY PROVISION<sup>3</sup>

U.S.S.G. § 3B1.2

## STATEMENT OF THE CASE

### I. Offense and Prosecution

Border officials arrested Petitioner attempting to smuggle cocaine, heroin, and methamphetamine into the United States from Mexico. The government charged Petitioner with importation of a controlled substance in violation of 21 U.S.C. §§ 952 and 960. He eventually pled guilty to conspiracy to import methamphetamine.

### II. Sentencing

At sentencing, Petitioner and the government jointly recommended a downward adjustment for Petitioner's mitigated role in the offense under U.S.S.G. § 3B1.2, resulting in a Guideline range of 46 to 57 months. The parties agreed on the facts warranting the adjustment, specifically, Petitioner's limited, two-week involvement in the conspiracy and his lack of independent decision-making or responsibility in carrying out the offense. Defense counsel also noted that the Sentencing Commission had recently voted to amend § 3B1.2, and was awaiting Congress' approval for the amendment to take effect.<sup>4</sup> Counsel argued that the amendment, though not yet binding on the district court, further weighed in favor of granting a minor-role adjustment.

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<sup>3</sup> A copy of this provision is attached to this brief at Appendix C under S. Ct. R. 14(1)(f) & (i)(v).

<sup>4</sup> Congress approved Amendment 794 to the Guidelines on November 1, 2015, approximately six months after the district court imposed its sentence. The changes are now reflected in the current version of U.S.S.G. § 3B1.2.

The court stated, “Obviously under Ninth Circuit law, I’m not obligated to consider those or to give them weight, and I’m disinclined to do that.” The district court further remarked:

I’m not necessarily in agreement with the proposed amendment to the extent it says, you know, proprietary interest in the drug is a very important factor. . . *I wouldn’t agree with that if it becomes law.*

After rejecting the language of the proposed amendment, the court invited argument from both parties. Both parties persisted in recommending a minor-role adjustment. The government argued for a low-end sentence; Petitioner argued for a downward variance.

Yet despite the parties’ joint recommendation for a minor-role adjustment, the district court ultimately denied the adjustment. The court calculated the Guidelines range at 108 to 135 months. The district court noted, however, that “108 is too much for a guy who’s never done anything like this before.” The district court ruled that a 36-month downward variance was appropriate and accounted for the mitigation in the case. The court added, “I find that it balances the harm that was done by this and that would have been done by this ha[d] this load gotten in with the defendant’s individual culpability.” The district court then selected a sentence of 72 months.

After announcing its sentence, the district court stated, “alternatively—if I’m wrong about this or someone second-guesses the factual findings I’ve made on the minor role consideration, and if I adopted the parties’ recommendation to reduce this by eight levels . . . if I’m wrong, the guideline range would have been 46 to 57 months.” The district court said that it would not give a low-end sentence of 46 months in that event. It added:

In fact, because of the amount [of drugs], I would have found that a 15-month variance to account for that amount and the harm that was done by that amount is in order; so alternatively, notwithstanding the finding that I made on minor role and the variance that I gave, if I were to adopt the parties’ recommendation, I certainly

would have found that there were aggravating circumstances, primarily the amount of drug involved and the defendant's culpability in that, that would have supported a 15-month variance from the high end of the guidelines, and I would have come out with the same 72-month sentence either way.

Defense counsel objected to the hypothetical upward variance. The district court overruled the objection and declined to modify its sentence. Petitioner filed a timely notice of appeal.

### III. Appeal

Petitioner appealed his sentence to the Ninth Circuit, arguing that the district court had erred in denying a minor-role adjustment. Petitioner's principal argument relied on the amended language of U.S.S.G. § 3B1.2, which the Ninth Circuit had later concluded was retroactive. See *United States v. Quintero-Leyva*, 823 F.3d 519 (9th Cir. 2016). He argued that the district court's express rejection of the binding, retroactive language of the amended Guideline required the court to vacate his sentence as well and remand for resentencing.

A screening panel of the Ninth Circuit affirmed in a memorandum disposition. See Appendix A. The panel declined to decide the minor-role issue, instead concluding that any Guideline error was harmless, *even though the government had never argued harmlessness in its briefing*. See *id.* The panel ruled, "Although the court rejected the parties' joint request for a minor role reduction, it explained that, even if it had granted a minor role reduction and started its sentencing analysis with the lower Guidelines range, it would have varied upwards and imposed a sentence of 72 months in light of the circumstances of the offense, particularly the large amount of drugs that [Petitioner] conspired to import." *Id.* The panel cited the Ninth Circuit's decision in *United States v. Munoz-Camarena*, 631 F.3d 1028, 1030 n.5 (9th Cir. 2011), for the rule that "harmless error may

result where the district judge ‘acknowledges that the correct Guidelines range is in dispute and performs his analysis twice, beginning with both the correct and incorrect range.’ ”

Petitioner requested panel rehearing and en banc review, arguing that the panel was wrong to reach the issue of harmlessness sua sponte and was, in any event, incorrect that the district court’s error was harmless. But the panel denied further review.

### REASONS FOR GRANTING THE PETITION

This is the rare case where this Court should grant review for purposes of error correction. See S. Ct. R. 10. Here, the Ninth Circuit blessed the district court’s attempt to “appeal-proof” its sentence by ruling that any Guideline calculation error was harmless simply because the district court noted the correct Guidelines and said it would impose the same sentence “if I’m wrong about this or someone second-guesses the factual findings I’ve made. . .” The panel’s harmlessness review condones a procedurally unsound sentencing practice that undermines the appearance of fairness in the courts and the effectiveness of appellate review; its decision is akin to no review at all. The decision also marks an extreme and improper deviation from this Court’s precedent, Ninth Circuit law, and the law of the majority of Circuits, which all require review of whether any “alternative” sentence is procedurally and substantive reasonable. This Court should grant certiorari to review the Ninth Circuit’s erroneous ruling.

#### **I. An alternate calculation of the correct Guideline range does not alone render a Guideline error harmless**

Calculation of the correct sentencing Guideline range is the “starting point and the initial benchmark” of a procedurally sound sentence. *Gall v. United States*, 552 U.S. 38, 49 (2007).

Accordingly, in reviewing a sentence, a court of appeals “must first ensure that the district court

committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range. . .” *Id.* at 51. The prejudice from a Guideline error is obvious: if the “initial benchmark” is off, a sentence based on that incorrect starting point is inherently flawed. Indeed, this Court ruled in *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1347 (2016) that *even on review for plain error*, “a defendant will satisfy his burden to show prejudice by pointing to the application of an incorrect, higher Guidelines range and the sentence he received thereunder.”

This Court has suggested, however, that in a particular case, the judge’s “explanation could make it clear that the judge based the sentence he or she selected on factors *independent* of the Guidelines.” *Id.* (emphasis added). Thus, “[t]he Government remains free to ‘poin[t] to parts of the record’—including relevant statements by the judge—‘to counter any ostensible showing of prejudice the defendant may make.’” *Id.* at 1347 (quoting *United States v. Vonn*, 535 U.S. 55, 68 (2002)). For example, a judge who exercises discretion under *Kimbrough* might make clear that the Guideline range is inappropriate as a matter of policy. Or a judge might make clear that some other 3553(a) factor is so weighty in a particular case that the Guidelines do not influence its sentencing discretion. In those cases, the sentence is truly “independent” of the Guidelines.

But this Court has never ruled that a sentence *anchored* to the *incorrect* guideline passes procedural muster merely because a judge announces he would arrive at the same sentence in light of the correct Guidelines. In that case, the sentence is not “independent” of the Guidelines, but rather tethered to the wrong Guidelines and further infected by a transparent attempt to shield the court’s Guideline calculation from review.

Mere citation of the correct Guidelines is insufficient to render a Guideline error harmless for several reasons. A district court must adequately explain its sentence, so the mere promise to impose the same sentence no matter what the correct calculation is insufficient. *See Gall*, 552 U.S. at 50 (ruling that the district court “must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing”). Moreover, a district court is required to keep the correct Guideline range in mind throughout sentencing. *See id.* at 50 n.6 (“The fact that § 3553(a) explicitly directs sentencing courts to consider the Guidelines supports the premise that district courts must begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process.”). But a district court does not give the same force to Guidelines it believes are incorrect (as occurred in Petitioner’s case). Perhaps most importantly, the district court must afford the defendant an opportunity to request the sentence he believes is warranted, *see id.* at 49, and that request is necessarily different depending on the initial guidelines calculation.

The Circuits have uniformly recognized these pitfalls and require review of the reasonableness of any “alternative sentence.” Notably, the Ninth Circuit in *United States v. Munoz-Camarena* held that:

A district court’s mere statement that it would impose the same above-Guidelines sentence no matter what the correct calculation cannot, without more, insulate the sentence from remand, because the court’s analysis did not flow from an initial determination of the correct Guidelines range. The court must explain, among other things, the reason for the extent of a variance.

631 F.3d 1028, 1031 (9th Cir. 2011). And of course, that explanation must be procedurally and substantively reasonable. *See id.* The majority of Circuits agree. *See United States v. Langford*, 516

F.3d 205, 218 (3d Cir. 2008) (“A ‘blanket statement’ that the sentence imposed is fair is not sufficient; a district court must determine a Guidelines range without the miscalculation error and explain any variance from it based on § 3553(a) factors.”); *United States v. Hargrove*, 701 F.3d 156, 163 (4th Cir. 2012) (ruling that the “dispositive question[s]” upon review for harmlessness are: 1) whether the district court would have sentenced the defendant to the same sentence based on the correct Guidelines; and 2) whether the resulting variance was substantively reasonable); *United States v. Funk*, 477 F.3d 421, 430 (6th Cir. 2007) (“If we were to view Funk’s sentence simply as a sentence where ‘the district court independently [chose] to deviate from the advisory guidelines range,’ we would still need to determine whether the district court adequately justified the extent of this deviation.”); *United States v. Icaza*, 492 F.3d 967, 971 (8th Cir. 2007) (“[T]he record must clearly show not only that the district court intended to provide an alternative sentence, but also that the alternative sentence was based on an identifiable, correctly calculated guidelines range.”). *But see United States v. Richardson*, 676 F.3d 491, 511 (5th Cir. 2012) (“Even if a court did not consider the correct range, an error in the guidelines calculation can still be considered harmless if the proponent of the sentence ‘convincingly demonstrates both (1) that the district court would have imposed the same sentence had it not made the error, and (2) that it would have done so for the same reasons it gave at the prior sentencing.’”)

With the government’s burden of proving harmlessness in mind, a reviewing court must look beyond the district court’s mere citation of the correct Guidelines. The court should consider the following factors when assessing whether a Guideline error is harmless because of an “alternative” sentence:

- Whether the district court provided a sufficient explanation for its alternate sentence;
- Whether the record reflects that the district court gave proper weight to the *correct* sentencing range in reaching the alternate sentence;
- Whether the defendant had a chance to argue and allocute *after* the district court announced the correct Guideline range.

Put differently, absent government proof of the procedural and substantive reasonableness of the district court’s “alternative” sentence, a Guideline calculation error is not harmless simply because the district court also calculates the correct range and promises to impose the same sentence.

Otherwise, there is nothing to differentiate between a judge who properly arrives at a sentence despite doubt over the correct range and a judge who merely hopes to “appeal-proof” a sentence based on the wrong Guidelines.

## **II. The panel applied the wrong rule in deciding whether any error in the calculation of Petitioner’s Guidelines was harmless.**

In affirming Petitioner’s sentence, the Ninth Circuit applied a far more permissive rule than that required by *Gall* and the majority rule of the Circuit’s. Casting aside any review of the reasonableness of the alternative sentence, the panel ruled that a Guideline error is harmless when the district court “acknowledges that the correct Guidelines range is in dispute and performs his analysis twice, beginning with both the correct and incorrect range.” See App’x A (quoting *Munoz-Camarena*, 631 F.3d at 1030 n.5). That rule is incorrect for several reasons.

First, the facts and procedural requirements at sentencing vary far too much between cases to justify the application of a one-size-fits-all rule. Complex cases or larger variances require more explanation, and a guideline calculation might result in a difference of a few months or (as in this case) several years. Subtleties in the district court’s colloquy with the defendant or renouncement

of sentence thus may make all the difference in indicating whether remand is required to correct an error. So a district court must do more than “perform[] his analysis twice.”<sup>5</sup> See *id.* Its dual analyses must *both* be procedurally reasonable or the judge must make clear that its analysis is independent of the Guidelines. The panel’s rule is inadequate because it has no such requirements.

Second, the panel’s categorical rule creates perverse incentives. A district court interested in the finality of its sentence has little reason to resolve a Guideline dispute if it can avoid appellate review by calculating two ranges (one correct and one incorrect) and indicating that its ultimate sentence would be the same regardless of which range was affirmed by the court of appeals. While a reviewing court may presume that district courts honestly apply the Guidelines, an “alternate sentence” approach creates an appearance of appeal-proofing rather than proper consideration of the Guidelines. See *Rita v. United States*, 551 U.S. 338, 356 (2007) (“Confidence in a judge’s use of reason underlies the public’s trust in the judicial institution.”). If the Guidelines are to remain more than a quaint, pre-*Booker* curiosity, it ought to be difficult to sustain a sentence that follows the district court’s error in deciding the correct sentencing range.

### **III. This court should grant review and correct the error in Petitioner’s case**

The fundamental error in the Ninth Circuit’s resolution of Petitioner’s case is that it failed adequately to address the procedural reasonableness of the “alternate” sentence. The court

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<sup>5</sup> While the panel quoted dictum in a footnote to *Munoz-Camarena* for the proposition that an error may be harmless when the district court performs the sentencing analysis twice, it ignored the holding of the case. *Munoz-Camarena* in fact *rejected* the government’s contention that a Guideline error was harmless, even after the district court remarked it would impose the same sentence if its Guideline calculations were wrong. See 631 F.3d at 1031.

merely noted that the district court expressed that it would have imposed the same sentence based on “the circumstances of the offense, particularly the large amount of drugs. . .” See Appendix A. But the court did not address: 1) whether the district court’s reasoning in support of the alternate sentence was sufficient to support its conclusion; 2) whether the district court’s alternate procedure was sound when it wholeheartedly rejected the correct guidelines and only addressed them in case the court of appeals “second-guessed” its reasoning; or 3) the fact that the court never gave Petitioner a chance to allocute and argue against an upward variance. Accordingly, while the Ninth Circuit was correct to state that the district court would have imposed the same sentence even had it calculated the Guidelines correctly, it never decided, as it is required to do, whether that alternative sentence was procedurally reasonable. That was error that this Court must correct.

Petitioner appealed the district court’s denial of a minor-role adjustment. The Ninth Circuit in *Quintero-Leyva* subsequently reversed the very same district judge because the record was not clear that he had considered an amendment to the minor role guideline, which took effect after *Quintero-Leyva* was sentenced. See 823 F.3d at 523-24. The Ninth Circuit subsequently vacated and remanded dozens of cases for resentencing in light of *Quintero-Leyva*.<sup>6</sup> Despite this

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<sup>6</sup> See, e.g., *United States v. Millan-Ortega*, 677 F. App’x 305 (9th Cir. 2017); *United States v. Nunez*, 672 F. App’x 671 (9th Cir. 2016); *United States v. Gutierrez*, 671 F. App’x (9th Cir. 2016); *United States v. Zamarripa-Baca*, 671 F. App’x 598 (9th Cir. 2016); *United States v. Rodriguez-Dominguez*, 671 F. App’x 597 (9th Cir. 2016); *United States v. Garcia-Aguilar*, 671 F. App’x 596 (9th Cir. 2016); *United States v. Soto*, 671 F. App’x 595 (9th Cir. 2016); *United States v. Ruiz-Burandt*, 671 F. App’x 593 (9th Cir. 2016); *United States v. Macias-Sandoval*, 671 F. App’x 592 (9th Cir. 2016); *United States v. Perez-Menchaca*, 670 F. App’x 457, (9th Cir. 2016); *United States v. Orellana*, 670 F. App’x 472 (9th Cir. 2016); *United States v. Bastidas-Castillo*, 670 F. App’x 458 (9th Cir. 2016); *United*

trend, a screening panel of Ninth Circuit affirmed Petitioner’s sentence despite the fact that he was similarly situated to dozens of other appellants. Why? Because the district court had claimed that, if the court of appeals “second-guessed” its fact-finding and ruled it was incorrect to deny the adjustment, it would vary upward to reach the same sentence anyway.

The inconsistency in these results undermines the appearance of fairness in the courts. The record below makes clear that the district court never gave any real weight to what it believed were the wrong Guidelines. Instead, the district court thumbed its nose at the court of appeals, brashly stating that it would impose the same sentence if the higher court “second-guessed” its ruling. And perplexingly, a *screening panel* of the Ninth Circuit condoned that bravado by ruling *sua sponte* that any error was harmless. That ruling was part of a growing trend that this Court must end. See *United States v. Rojo-Rivas*, 674 F. App’x 746 (9th Cir. 2017) (Ruling that a Guideline error was harmless where “[t]he district court calculated the Guidelines range with and without the minor role reduction and explained the basis for the 55-month sentence under each

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*States v. Centeno-Sepulveda*, 670 F. App’x 459 (9th Cir. 2016); *United States v. Maxson*, 670 F. App’x 460 (9th Cir. 2016); *United States v. Gonzalez*, 669 F. App’x 474 (9th Cir. 2016); *United States v. Corrales Edeza*, 669 F. App’x 437 (9th Cir. 2016); *United States v. Jeronimo-Carillo*, 669 F. App’x 426 (9th Cir. 2016); *United States v. Solano-Yanez*, 669 F. App’x 429 (9th Cir. 2016); *United States v. Gil-Velazquez*, 669 F. App’x 428 (9th Cir. 2016); *United States v. Nava-Maytorel*, 661 F. App’x 481 (9th Cir. 2016); *United States v. Altamirano*, 668 F. App’x 780 (9th Cir. 2016); *United States v. Tokunaga-Fujigaki*, 668 F. App’x 779 (9th Cir. 2016); *United States v. Cota-Chavez*, 668 F. App’x 778 (9th Cir. 2016); *United States v. Gonzalez-Garcia*, 668 F. App’x 728 (9th Cir. 2016); *United States v. Gallo-Tavizon*, 658 F. App’x 323 (9th Cir. 2016); *United States v. Velazquez*, 657 F. App’x 714 (9th Cir. 2016); *United States v. Navidad*, 657 F. App’x 715 (9th Cir. 2016); *United States v. Barrancas-Sanchez*, 657 F. App’x 713 (9th Cir. 2016); *United States v. Zatarain-Peña*, 656 F. App’x 377 (9th Cir. 2016); *United States v. Diaz*, 668 F. App’x 690 (9th Cir. 2016); *United States v. Enriquez*, 650 F. App’x 360 (9th Cir. 2016); *United States v. Lopez-Diaz*, 650 F. App’x 359 (9th Cir. 2016).

range.”); *United States v. Macias–Jimenez*, 658 F. App’x 333 (9th Cir. 2016); *United States v. Charlton*, 659 F. App’x 431, 433 (9th Cir. 2016).

The Ninth Circuit was wrong to bless Petitioner’s sentence and ignore the district court’s Guideline error. Rulings like the one here create a danger that district courts will be emboldened to resort to “alternative” sentences in the face of Guideline disputes in order to avoid review. The Guidelines are a crucial part of sentencing that strive to create consistency and fairness, *see Gall*, 552 U.S. at 49, and there must be *some* meaningful appellate review of district courts’ Guideline decisions. The panel’s ruling in Petitioner’s case is counter to that goal, and its decision here cannot stand.

#### CONCLUSION

The petition for a writ of certiorari should be granted so that this Court may review and reverse the Ninth Circuit’s erroneous ruling.

Respectfully submitted,

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s/ Michael Marks

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