

No. 18-

IN THE
SUPREME COURT OF THE UNITED STATES

PEDRO MEZA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

WILLIAM R. BIGGS
Counsel of Record

WILLIAM R. BIGGS, PLLC
115 W. 2nd St., Suite 202
Fort Worth, TX 76102
817.332.3822 (t)
817.332.2763 (f)
wbiggs@williambiggslaw.com

QUESTION PRESENTED

Is the Fifth Circuit correctly conducting its harmlessness inquiry when reviewing preserved Guidelines-calculation errors arising under Rule 52(a) of the Federal Rules of Criminal Procedure, particularly in light of this Court's decision in *Molina-Martinez v. United States*, 136 S. Ct. 1338 (2016)?

PARTIES

Petitioner: Pedro Meza

Respondent: United States of America

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Pedro Meza, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The unpublished opinion for the United States Court of Appeals for the Fifth Circuit is captioned as *United States of America v. Pedro Meza*, No. 17-10233, 708 Fed. Appx. 190 (5th Cir. Jan. 5, 2018)). *See* Appendix A.

JURISDICTIONAL STATEMENT

The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). This petition has been filed within 90 days of the opinion of the court of appeals and is therefore timely. *See* Sup. Ct. R. 13.1.

FEDERAL RULE OF CRIMINAL PROCEDURE INVOLVED

The question presented involves Rule 52(a) of the Federal Rules of Criminal Procedure, which provides: "[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded."

STATEMENT OF THE CASE

Petitioner pleaded guilty to producing and distributing child pornography and was sentenced to 50 years (600 months) imprisonment, the statutory maximum. *Meza*, 708 Fed. Appx. at 190. The district court had sentenced Petitioner under the belief that the recommended sentence under the Federal Sentencing Guidelines was Life. (ROA. 226.)

But the district court had overruled two objections Petitioner had made to the calculation of the Guidelines. (ROA. 140-141, 301-302, 317-319.) Specifically, Petitioner had challenged the application of a two-level use-of-computer enhancement under USSG § 2G2.2(b)(6), and a five-level pattern-of-sexual- activity enhancement under USSG § 4B1.5(a). If Petitioner had prevailed on these objections, the applicable sentencing range would have been 360 months to Life—instead of Life (and nothing less). Petitioner moved for a sentence below the advisory guidelines. (ROA. 364-379.) He argued, among other things, that Petitioner had low intellectual functioning and had been molested as a minor, and further that the child pornography guidelines lacked an empirical basis. (ROA. 364-375.)

In pronouncing the 600-month sentence, the court noted that it would have imposed this sentence even if the Guidelines range had been 360-Life. *Meza*, 708 Fed. Appx. at *190.

Petitioner appealed, raising the two preserved Guidelines objections made in the district court. The court of appeals refused to address these claims, concluding that

any error was harmless in light of the district court’s sentencing comments. *Meza*, 708 Fed. Appx. at 190.

REASONS FOR GRANTING THE PETITION

I. The Fifth Circuit has set too low a bar for the government to demonstrate a preserved Sentencing Guidelines error is harmless.

Petitioner respectfully submits that the Fifth Circuit continues underestimate the influence of the Guidelines when reviewing Guidelines errors for harm under Rule 52(a) of the Federal Rules of Criminal Procedure. In *Molina-Martinez*, this Court held that when reviewing unpreserved errors arising under Rule 52(b), a defendant can “in most cases” show a reasonable probability of harm where a Guidelines error causes a defendant to be sentenced under an incorrect Guidelines range. *See Molina-Martinez*, 136 S. Ct.1338, 1347 (2017). The Court rejected the Fifth Circuit’s overly “rigid” standard of review it had used for unpreserved Guidelines errors. *Molina-Martinez*, 136 S.Ct. at 1341. Because the Guidelines “are not only the starting point for most federal sentencing proceedings, but also the lodestar,” *Id.* at 1346, the Court concluded that “in most cases the Guidelines range will affect the sentence.” *Id.* at 1349.

Critically, *Molina-Martinez* considered review of the harmless error standard under Rule 52(b), which applies to unpreserved error—where the *defendant* bears the burden to show a reasonable probability of a different outcome. *See Molina-Martinez*, 136 S. Ct. at 1349; *United States v. Olano*, 507 U.S. 724, 734 (1993). The Court held that a defendant can typically satisfy this burden merely by showing that the district

court's "starting point and initial benchmark" was the wrong Guidelines range. *Gall v. United States*, 552 U.S. 38, 49 (2007); see *Molina-Martinez*, 136 S.Ct. at 1346 ("The Guidelines inform and instruct the district court's determination of an appropriate sentence. [I]n the usual case, then, the systematic function of the selected Guidelines range will effect the sentence."). And this will remain true even where a judge may have varied from the erroneous range. See *Molina-Martinez*, 136 S.Ct. at 1345 ("Even if the sentencing judge sees a reason to vary from the Guidelines, if the judge uses the sentencing range as the beginning point to explain the decision to deviate from it, *then the Guidelines are in a real sense the basis for the sentence.*") (emphasis in original) (quoting *Peugh v. United States*, 133 S.Ct. 2072, 2083 (2013)).

The reasoning of *Molina-Martinez* compels the conclusion that *preserved* Guidelines errors arising under Rule 52(a) should rarely, if ever, be found to be harmless. For preserved claims arising under Rule 52(a), the *government* instead of the defendant bears the burden of showing a Guidelines error was harmless. See *United States v. Vonn*, 535 U.S. 55, 62 (2002) (for errors arising under Rule 52(a), government "carr[ies] the burden of showing that any error was harmless, as having no effect on the defendant's substantial rights"); *Olano*, 507 U.S. at 734. This Court held in *Molina-Martinez* that a defendant can affirmatively establish a reasonable probability of harm in most cases *solely* with proof that an unpreserved Guidelines error led him to be sentenced under the wrong Guidelines range. *Molina-Martinez*, 136 S. Ct. at 1346-1349. This holding would seem to compel the conclusion that for

preserved errors, the government could rarely if ever affirmatively demonstrate that a district court's consideration of the wrong Guidelines range "did not affect the district court's selection of the sentence imposed." *Williams v. United States*, 503 U.S. 193, 203 (1992) (discussing Rule 52(a)).

But that is not the state of affairs in the Fifth Circuit. Even after *Molina-Martinez*, the Fifth Circuit continues to underestimate the "real and pervasive effect the Guidelines have on sentencing." *Molina-Martinez*, 136 S. Ct. at 1346. It sets far too low a bar for the government to establish harmlessness for preserved claims of Guidelines error.

In this case, the district court sentenced Petitioner under the erroneous belief that the applicable Guidelines range was Life (only) instead of 360-Life. While the ranges may be close to one another on the Sentencing Table, they recommend significantly different outcomes. The district court sentenced Petitioner under the impression that the Guidelines recommended a life sentence. The statutory maximum sentence of 600 months that the court imposed was thus the *only* sentence the Court could impose that would comport with the Sentencing Commission's recommendation. *Any* other sentence would have been a downward variance and thereby required "compelling" justification. *Gall v. United States*, 552 U.S. 38, 50 (2007). But under the correctly calculated Guidelines, a sentence as much as *twenty* years lower would have still complied with the Commission's recommendation.

Importantly, Petitioner had several significantly mitigating factors that the

Court may have found supported a sentence beneath the top of the Guidelines under 18 U.S.C. § 3553(a), even if they didn't apparently support a downward variance. Among other things, Appellant 1) had low intellectual functioning due to a brain injury; 2) had been molested as a child; and 3) had an abusive father. (ROA. 144-152, 183-187, 196, 221-224.) The Court even acknowledged Appellant's prior sexual abuse and rough childhood. (ROA. 157.)

Furthermore, the Court might not impose the same sentence upon resentencing if it found that the BOP had made positive strides in rehabilitating Petitioner. *See Pepper v. United States*, 562 U.S. 476, 481 (2011) (holding that district courts may consider postsentencing rehabilitation upon resentencing). Petitioner recognizes that this theoretical possibility exists in every case. But in this particular case the district court specifically premised the sentence on its conclusion that Petitioner was "a very dangerous sexual predator who is unlikely to be rehabilitated." (ROA. 179.) It made similar remarks in its statement of reasons. (ROA. 344.)

During the hearing, the court showed on the record its struggles with what to do with Petitioner. When defense counsel questioned a psychologist who testified during the hearing, the Court interjected its sympathy for Petitioner's background. But it noted nevertheless its belief that Petitioner remained dangerous:

Q: So if you're exposed as a child to, say violence, say someone, for example in this case Mr. Meza's father was very violent. If someone were exposed to that, that might have an impact on their behavior?

COURT: Well, in addition to that, the uncle who abused him

sexually, which is exactly consistent with what we see here, and it's a horrible thing to have happened to him, and I wish I could do something about that, either do a preventative, which you can't, or take account of that, but the fact is whatever he was made when he was young, he still is.

I'm sorry. I cut you off on your point, but I do get it, that he had a terrible childhood, and he was sexually abused, apparently seriously sexually abused by a male relative, and I'm sure Dr. Fallis can agree with us that that is a common precursor to sexual predators. Whether they are predators or not, it's persons with propensity for acting out against minors and others. (ROA. 157-158.)

Thus, the Court's ambivalence regarding Petitioner demonstrates that the Court may not impose the exact "same sentence for the same reasons" were it shown that Petitioner had made some rehabilitative progress during his ongoing incarceration with the BOP. *Tanksley*, 848 F.3d at 353 (emphasis omitted).

It finally merits emphasis that district courts will in fact impose a lower sentence on remand notwithstanding their earlier remarks. For example, in *Bazemore*, a judge in the very same judicial district was confronted on remand with a reduced sentencing range of 151 months-188 months instead of 292-365 months. *United States v. Bazemore*, 839 F.3d 379, 383-85 (5th Cir. 2016). Even though the court had said during the first sentencing that it would have imposed the same sentence had it been wrong about the Guidelines, it did in fact significantly reduce the sentence at resentencing from 292 months to 188 months. *Id.* at 385. The district court reduced the sentence by nearly nine years on remand in spite of what it had said during the first sentencing. The district court here should similarly have an opportunity to

reconsider its sentencing decision here if the Guideline calculation is erroneous.

This Court must clarify to the Fifth Circuit that it needs far more evidence in the record before it can ever find that the government has sustained its burden of proving that an incorrect Guidelines range had zero effect “on the district court’s selection of the sentence imposed.” *Williams*, 503 U.S. at 203. The Court should grant this petition.

CONCLUSION

Petitioner respectfully requests that this Court grant his petition for a writ of certiorari.

DATE: April 5, 2018

Respectfully Submitted,

/s/ William R. Biggs

WILLIAM R. BIGGS

Counsel of Record

WILLIAM R. BIGGS, PLLC

115 W. 2nd St., Suite 202

Fort Worth, TX 76102

817.332.3822 (t)

817.332.2763 (f)

wbiggs@williambiggslaw.com

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MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Petitioner, Pedro Meza, pursuant to Rule 39 and 18 U.S.C. § 3006A(d)(7), asks leave to file the accompanying Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit without prepayment of costs and to proceed *in forma pauperis*. Petitioner was represented by counsel appointed under the Criminal Justice Act, 18 U.S.C. § 3006A(b) and c) in the United States District Court for the Northern District of Texas and on appeal to the United States Court of Appeals for the Fifth Circuit.

Respectfully Submitted,

/s/ William R. Biggs

WILLIAM R. BIGGS

Counsel of Record

WILLIAM R. BIGGS, PLLC

115 W. 2nd St., Suite 202

Fort Worth, TX 76102

817.332.3822 (t)

817.332.2763 (f)

wbiggs@williambiggslaw.com

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PROOF OF SERVICE

I, William R. Biggs do certify on this date, April 5, 2018, I served the foregoing Motion for Leave to Proceed In Forma Pauperis, and Petition for Writ of Certiorari on each party to the above proceeding, or that party's counsel, and on every other person required to be served. I have served the Supreme Court of the United States via United States mail, with first-class postage prepaid. The remaining parties listed below were each served by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid. I am a member of the bar of this Court.

The names and addresses of those served are as follows:

Clerk
Supreme Court of the United States
1 First Street, N.E.
Washington, DC 20543

Noel Francisco
Solicitor General
Department of Justice
Washington D.C. 20530

Brian W. Stoltz
Assistant United States Attorney
1100 Commerce St., 3rd Floor
Dallas, TX 75242-1699

Respectfully Submitted,

/s/ William R. Biggs

WILLIAM R. BIGGS

Counsel of Record

WILLIAM R. BIGGS, PLLC
115 W. 2nd St., Suite 202
Fort Worth, TX 76102
817.332.3822 (t)
817.332.2763 (f)
wbiggs@williambiggsllaw.com