No.

In the Supreme Court of the United States

CYRANO R. IRONS, PETITIONER

v.

UNITED STATES OF AMERICA

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether errors in calculating the Sentencing Guidelines are rendered categorically harmless by the district court's assertion that the Guidelines would make no difference to the choice of sentence.

RELATED PROCEEDINGS

United States v. *Irons*, 4:19-CR-00390 (W.D. Mo. July 27, 2021)

United States v. *Irons,* 21-2750 (8th Cir. Mar. 23, 2022)

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OPINION BELOW

The opinion of the court of appeals (App. 1a–2a) is unreported, but available at 2022 WL 852853.

JURISDICTION

The judgment of the court of appeals was entered on March 23, 2022. The court denied a timely petition for rehearing on April 26, 2022. App. 3a. On June 21, 2022, Justice Kavanaugh extended the time for filing a petition for a writ of certiorari until September 13, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

1. Title 18, United States Code, Section 3553 provides, in relevant part:

(a) Factors to be considered in imposing a sentence. — * * * The court, in determining the particular sentence to be imposed, shall consider — * * *

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission * * *.

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission * * *.

2. Federal Rule of Criminal Procedure 52 provides:

(a) **Harmless error.** Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

(b) **Plain error.** A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

INTRODUCTION

Every year, tens of thousands of individuals are sentenced to terms of imprisonment for violations of federal law. This case concerns what courts of appeals must do in the all-too-common situation when the district court has made a mistake in calculating the defendant's sentencing range, after asserting that the Sentencing Guidelines would make no difference to its choice of sentence. The courts of appeals are divided on how to handle that frequently recurring situation. Most have held that such calculation errors must be corrected, vacating the sentence and remanding for resentencing. Others—like the Eighth Circuit below—hold that a judge's boilerplate disclaimer categorically makes any Guidelines calculation errors *per se* harmless and immune from appellate review.

The Guidelines play a "central role in sentencing" and frequently are determinative of the actual sentence. *Molina-Martinez* v. *United States*, 136 S. Ct. 1338, 1341 (2016). "The post-*Booker* federal sentencing scheme aims to achieve uniformity by ensuring that sentencing

decisions are anchored by the Guidelines and that they remain a meaningful benchmark through the process of appellate review." *Peugh* v. *United States*, 569 U.S. 530, 541 (2013).

Because of the centrality of the Guidelines, "district courts *must* begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process," and "improperly calculating[] the Guidelines range" constitutes "significant procedural error." *Gall* v. *United States*, 552 U.S. 38, 50 n.6, 51 (2007) (emphasis added). Even if the sentencing court "decides that an outside-Guidelines sentence is warranted," it "must give serious consideration" to "the extent of the deviation" and variances from the Guidelines range must be accompanied by a "justification * * * sufficiently compelling to support the degree of the variance." *Id.* at 50; see also *Pepper* v. *United States*, 562 U.S. 476, 508 (2011) (Breyer, J., concurring in part and concurring in judgment) ("[T]he law permits the court to disregard the Guidelines only where it is 'reasonable' for a court to do so." (citing *United States* v. *Booker*, 543 U.S. 220, 261–262 (2005)). After all, the Guidelines warrant respect as "the product of careful study based on extensive empirical evidence derived from the review of thousands of individual sentencing decisions." *Gall*, 552 U.S. at 46. They therefore serve as the "benchmark" for any sentence, even a non-Guidelines one. *Id.* at 49.

This Court has squarely held that "a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range." *Gall*, 552 U.S. at 49. And when reviewing a sentence on appeal, "the appellate court * * * must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range * * * or failing to adequately explain the chosen

sentence—including an explanation for any deviation from the Guidelines range." *Id.* at 51.

Despite this unequivocal guidance, there is an entrenched circuit split over whether "improperly calculating[] the Guidelines range" is rendered categorically harmless if the sentencing court announces that it considers the Guidelines unimportant for its sentence. In the decision below, the Eighth Circuit, applying long-established circuit precedent, held that when the sentencing court states that it would have imposed the same sentence regardless of the Guidelines, *any* error by the sentencing court in calculating the Guidelines is categorically harmless. App. 2a. The Eleventh Circuit disposes of sentencing appeals similarly. See *United States* v. *Henry*, 1 F.4th 1315, 1327 (11th Cir. 2021).

But had petitioner been sentenced in the Second, Third, Fifth, Seventh, Ninth, or Tenth Circuits, the court of appeals would have vacated the sentence and remanded so that the sentencing court could resentence the defendant having first considered the presumptively reasonable properly calculated Guidelines sentencing range. Indeed, in courts just *four miles* to the west of where petitioner was sentenced, "[i]t is not enough for the district court to say that its conclusion would be the same even if all the defendant's objections to the presentence report had been successful" because "simply citing the § 3553 factors does not insulate the sentence from procedural error." *United States* v. *Porter*, 928 F.3d 947, 963 (10th Cir. 2019) (adopting government's argument that Guidelines error was not harmless).

And while the Fourth and Sixth Circuits give some deference to the district court's assertion that any Guidelines miscalculations would be harmless, they additionally require an independent assessment of the reasonableness of the sentence to be "certain" the error was harmless on appeal. Thus, in most circuits, petitioner's case would

have been reversed and remanded for a new sentencing hearing. Only in the Eighth and Eleventh Circuits can a district court effectively opt out of Guidelines sentencing and immunize its Guidelines calculation errors by announcing that "the Sentencing Commission's expert judgment" (*Spears* v. *United States*, 555 U.S. 261, 266 (2009) (per curiam)) matters so little to it that the sentencing court need not even bother calculating that benchmark correctly.

The Eighth Circuit's rule is wrong—grievously wrong, fundamentally incompatible with Congress's decision to adopt a nationwide system of Guidelines sentencing to promote uniformity. It conflicts with Congress's establishment of defined sentencing factors which provide that sentence courts *must* consider "the sentencing range established * * * by the Sentencing Commission." 18 U.S.C. § 3553(a)(4)(A)(i). And it conflicts with this Court's precedent, which establishes that sentencing "should begin" with "correctly calculating the applicable Guidelines range," and that appellate courts "must first ensure" the district court did not "improperly calculat[e] the Guidelines range," *Gall*, 552 U.S. at 49–51, to facilitate appellate review and ensure it can assess the substantive reasonableness of the sentence. See *Rosales-Mireles* v. *United States*, 138 S. Ct. 1897, 1910 (2018) ("Before a court of appeals can consider the substantive reasonableness of a sentence, '[i]t must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range.'" (quoting *Gall*, 552 U.S. at 51)).

The Guidelines remain the benchmark for sentencing; regardless of what they say, judges tend to sentence in the shadow of the Guidelines, and so changes in calculation matter even to non-Guidelines sentences. Reflecting that fact, this Court has repeatedly held that even unobjected-to Guidelines calculations errors must ordinarily

be corrected under the more-exacting rubric of plain error review because the failure to correctly calculate the range "can, *and most often will*, be sufficient to show a reasonable probability of a different outcome absent the error." *Rosales-Mireles*, 138 S. Ct. at 1907 (emphasis added). And by creating an irrebuttable presumption that the district court's blanket statement as to the irrelevance of the Guidelines is dispositive to the harmless error analysis, the Eighth Circuit's rule is contrary to Rule 52(a), which places the burden on the government to prove error is harmless after reviewing the entire record. *United States* v. *Davila*, 569 U.S. 597, 607 (2013).

The question recurs frequently and is unquestionably important in light of the centrality of the Guidelines in sentencing. Petitioner's case is an ideal vehicle to settle this frequently occurring issue. The sole reason offered by the Eighth Circuit to affirm the sentence was the district court's statement it would have "come out in the same place" even if the defendant had "won every one" of his objections to the Guidelines calculations. App. 2a. There is no question that this issue was squarely presented and addressed below. And this case starkly illustrates the consequences of the split; if petitioner had been sentenced in Kansas City, *Kansas* instead of Kansas City, Missouri, he would have had the benefit of the Tenth Circuit's diametrically different rule. This Court's review is warranted to restore uniformity to federal sentencing law.

STATEMENT

1. Petitioner pleaded guilty to being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). App. 1a.

Before the sentencing hearing, petitioner objected that the Probation Office's presentence report (PSR) calculated his advisory Guidelines range improperly. App. 6a–15a. Petitioner argued that the PSR miscalculated his

criminal history score by improperly counting two of his prior state convictions for Missouri armed criminal action, Mo. Rev. Stat. § 571.015, as "crime[s] of violence," although they did not qualify under the definition set forth in United States Sentencing Guideline ("U.S.S.G.") §4B1.2, because the offense did not have "as an element the use, attempted use, or threatened use of physical force against the person of another." App. 6a–9a. Without the additional criminal history point per conviction provided under U.S.S.G. §4A1.1(e), his criminal history category would have been IV, as opposed to V. *Ibid.* Petitioner also objected that the PSR failed to lower his base level offense three levels for acceptance of responsibility because of his guilty plea under U.S.S.G. §3E1.1. App. 10a–13a. The PSR concluded petitioner's sentencing range was 77–96 months; without the "crime of violence" enhancement, it would have been 63–78 months; with acceptance of responsibility also, it would have been 46–57 months. Pet. C.A. Br. 34.

The district court overruled both of petitioner's objections. App. 11a–12a. The court de-emphasized the importance of calculating the Guidelines, concluding that while "we do calculate the [G]uidelines," "really the main—the main analysis we do here is—has to do with this statute called 18 U.S.C. 3553(a), and in that—in that statute Congress has given the [c]ourt factors to consider in every case * * * ." App. 16a. The district court sentenced petitioner to 108 months' imprisonment, close to the 10-year statutory maximum penalty for the offense, see 18 U.S.C. § 922(g). App. 18a. As factors supporting its non-Guidelines sentence, the court cited petitioner's "criminal history," the "fact that [petitioner was] on supervision" at the time of his offense, and his "behavior while incarcerated" (petitioner had been involved in fights) as "the drivers of [the] large sentence." App. 17a–19a. The court stated at the outset of his explanation that

"notwithstanding any of these guideline calculations, if you had won every one of the [objections] that [defense counsel] had advanced, I would come out in the same place because of 18 U.S.C. 3553(a). So this is more dependent on the factors, I guess, in my sentence." App. 17a.

2. The court of appeals affirmed. App. 1a–2a. The panel did not reach the sole issue petitioner had raised regarding whether his Guidelines range was properly calculated. Rather, in two sentences of analysis, the court concluded that it did not need to determine whether the Guidelines were correctly calculated because any error was categorically harmless. The panel relied on the fact that the district court had "explained that 'notwithstanding any of these calculations, if [petitioner] had won every one of the objections advanced, it would have come out in the same place because of 18 U.S.C. [§] 3553(a),' meaning that petitioner's sentence was based on the statutory sentencing factors rather than the allegedly erroneous criminal-history calculation." App. 2a (quoting sentencing transcript). The panel reasoned, "[t]his is as clear a statement as any that [petitioner] would have received the same sentence regardless of which criminal-history score applied." *Ibid.*

The panel examined no facts about petitioner's criminal history, or the crime for which he was sentenced. App. 1a–2a. Nor did it analyze the 18 U.S.C. § 3553 factors. Nor did the panel consider whether petitioner's sentence was substantively reasonable—even though petitioner had pleaded guilty and was sentenced to nearly the statutory maximum sentence. *Ibid.*

REASONS FOR GRANTING THE PETITION

A. The Circuits Are Deeply Divided Over Whether All Sentencing Guidelines Errors Are Rendered Harmless By The District Court's Assertion That The Guidelines Were Irrelevant To Its Choice Of Sentence

In the Eighth and Eleventh Circuits, all errors in calculating a defendant's Sentencing Guidelines are rendered categorically harmless by the district court's assertion that the Guidelines made no difference to the choice of sentence. But the Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, and Tenth Circuits have rejected district courts' efforts to exempt themselves from appellate scrutiny, and require a more extensive and detailed harmless error analysis before affirming a defendant's sentence notwithstanding the Guidelines error. Other courts have taken intermediate positions. This entrenched circuit split warrants this Court's immediate review.

1. Six Circuits Have Held That Blanket Harmless Error Findings By The District Court Cannot Immunize Guideline Miscalculations From Appellate Scrutiny

The majority approach—adopted by the Second, Third, Fifth, Seventh, Ninth, and Tenth Circuits—provides that a Guidelines calculation error is not harmless merely because the district court stated it would have sentenced the defendant to the same sentence regardless of any Guidelines errors.

The Seventh Circuit's recent analysis of the issue exemplifies the majority rule's rationale for rejecting district judges' efforts to exempt their non-Guidelines sentences from appellate scrutiny. In *United States* v. *Asbury*, the sentencing court rejected the defendant's objections to the PSR, and added: "[I]f I made an error in the guideline calculation in terms of offense level, that would

not affect my sentence. I'm basing my sentence on the Section 3553(a) factors and the exercise of my discretion after placing a lot of thought into this sentencing hearing." 27 F.4th 576, 579 (2022). The Seventh Circuit rejected the conclusion that the sentencing court's statement rendered its sentencing errors harmless, holding that while sentencing courts have discretion to fashion sentences under 18 U.S.C. § 3553, this discretion does not "permit the judge to nullify the guidelines by way of a simple assertion that any latent errors in the guidelines calculation would make no difference to the choice of sentence." *Id.* at 581. Reasoning that sentencing decisions at every level of the judiciary must be made by reference to the appropriate Guidelines calculation, "'a conclusory comment tossed in for good measure' is not enough to make a guidelines error harmless." *Ibid.*; accord *United States* v. *Loving*, 22 F.4th 630, 636 (7th Cir. 2022) ("[W]e cannot infer, based on the district court's terse comments about the sentencing factors under 18 U.S.C. § 3553(a) that the court believed a 71-month prison sentence would be appropriate regardless of the correct guideline range.").

As the Seventh Circuit explained, permitting such conclusory assertions to insulate sentencing errors from appellate review would circumvent the need for the judge in every case to correctly calculate a baseline Guidelines sentencing range and explain sentencing decisions departing from that range, and therefore is fundamentally inconsistent with Guidelines sentencing. "There are no 'magic words' in sentencing." *Asbury*, 27 F.4th at 581. "If there were, the judge would have no incentive to work through the guideline calculations: she could just recite at the outset that she does not find the [G]uidelines helpful

and proceed to sentence based exclusively on her own preferences." *Ibid.*[1]

Similarly, the Second Circuit has held "the district court cannot insulate its sentence from our review by commenting that the Guidelines range made no difference to its determination" because "the Guidelines, although advisory, are not a body of casual advice, to be consulted or overlooked at the whim of a sentencing judge." *United States* v. *Seabrook*, 968 F.3d 224, 233–34 (2d Cir. 2020). The Second Circuit has "often recognized the powerful 'anchor[ing]' effect of a 'miscalculated Guidelines range' on a district court's thinking about the appropriate sentence, even where the court 'asserted it was not moved by the Guidelines.'" *Id.* (quoting *United States* v. *Bennett*, 839 F.3d 153, 163 & n.8 (2d Cir. 2016)). This is important because a Guidelines error can affect substantial rights when the judge *rejects* the Guidelines: "'[e]ven 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*.'" *Bennett*, 839 F.3d at 163 (quoting *Molina-Martinez*, 136 S. Ct. at 1345 (emphasis original)).

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[1] The Seventh Circuit went on to explain that "a district court's statement purporting to inoculate its chosen sentence against errors identified on appeal will be effective only if two conditions are satisfied. First, the inoculating statement must be 'detailed,' meaning that the judge "must give specific * * * attention to the contested guideline issue in her explanation" rather than "[a] generic disclaimer of all possible errors." 27 F.4th at 581. "Second, the inoculating statement must explain * * * why the potential error would not 'affect the ultimate outcome.' When an inoculating statement fails to satisfy either of these two criteria, we cannot say with confidence that the district court would have reached the same sentence despite the [G]uidelines error. It follows that we cannot say whether the error was harmless." *Id.* at 581–582.

The Third, Fifth, Ninth, and Tenth Circuits have reached similar holdings. See, *e.g.*, *United States* v. *Wright*, 642 F.3d 148, 154 n.6 (3d Cir. 2011) ("a statement by a sentencing court that it would have imposed the same sentence even absent some procedural error does not render the error harmless" because "it must still begin by determining the correct alternative Guidelines range and properly justify the chosen sentence" in relation to it); *United States* v. *Smalley*, 517 F.3d 208, 212 (3d Cir. 2008) (sentencing error was not harmless despite district court's statement that "it would have given the same sentence * * * if it had applied" the Guidelines as the defendant requested does not make the error harmless); *United States* v. *Williams*, 5 F.4th 973, 978 (9th Cir. 2021) (reversing because of district court's Guidelines miscalculation notwithstanding the district court's statements "that it would have imposed the same sentence" regardless of the Guidelines); *United States* v. *Tanksley*, 848 F.3d 347, 353 (5th Cir. 2017) (remanding for new sentencing because "it is not enough for the district court to say the same sentence would have been imposed but for the error"). Most noteworthy here, if petitioner had been prosecuted a few miles to the west in Kansas City, Kansas, the Tenth Circuit undoubtedly would have addressed his claim on the merits: That "court has rejected the notion that district courts can insulate sentencing decisions from review by making * * * statements" that "its conclusion would be the same 'even if all of the defendant's objections to the presentence report had been successful.'" *United States* v. *Gieswein*, 887 F.3d 1054, 1062–1063 (2018) (collecting cases).

2. Two Circuits Give Some Deference To The District Court's Harmless Error Findings, But Will Not Find The Guidelines Error Harmless Unless The Sentence Is Also Substantively Reasonable

By contrast, the Fourth and Sixth Circuits give some degree of deference to the district court's assertion that any errors in Guidelines calculations would be harmless, yet still require a more probing analysis than the Eighth or Eleventh Circuits before concluding any error was harmless. The Fourth Circuit has explained: "For us to find harmless error, we must be *certain* that "(1) the district court would have reached the same result even if it had decided the [G]uidelines issue the other way, and (2) [make] a determination that the sentence would be reasonable even if the Guidelines issue had been decided in the defendant's favor." *United States* v. *Gomez*, 690 F.3d 194, 203 (2012) (emphasis added).

The Sixth Circuit has taken a similar approach, under which Guidelines errors are reversed unless there is "certainty that the error at sentencing did not cause the defendant to receive a more severe sentence." *United States* v. *Collins*, 800 F. Appx. 361, 362 (2020). That "showing is not easy," requiring the appellate court to find that "an upward variance from the correct [G]uidelines range would have been reasonable." *Ibid.*

3. Two Circuits Conclude That All Guidelines Errors Are Rendered Harmless By The District Court's Blanket Assertion That The Guidelines Did Not Matter To Its Sentence

In sharp contrast, the Eighth and Eleventh Circuits affirm all Guidelines error based solely on the district court's assertion that the Guidelines made no difference to its choice of sentence. The Eighth Circuit has repeatedly held that "a district court's incorrect application of the Guidelines is harmless error when the court specifies the resolution of a particular issue did not affect the

ultimate determination of a sentence, such as when the district court indicates it would have alternatively imposed the same sentence even if a lower [G]uideline range applied." *United States* v. *Still*, 6 F.4th 812, 818 (8th Cir. 2021). Thus, even a cursory assertion that the Guidelines calculation would not affect the sentence—such as the one in this case—suffice to insulate mistaken Guidelines calculations from appellate review.

The Eighth Circuit often avoids reaching the merits of whether there was a Guidelines miscalculation because "[w]hen the district court explicitly states that it would have imposed the same sentence of imprisonment regardless of the underlying Sentencing Guideline range, *any* error on the part of the district court is harmless." *United States* v. *Peterson*, 887 F.3d 343, 349 (2018) (emphasis added). In this context, the Eighth Circuit does not require review of the record as a whole, or ensure that the sentence was grounded in an alternative Guidelines range, or even determine if the sentence was substantively reasonable. *Ibid.*; see also *Still*, 6 F.4th at 818; *United States* v. *Foston*, No. 21-2435, 2022 WL 1510689, at *1 (May 13, 2022) (unpublished) (concluding in two sentences of analysis that any Guidelines error was harmless because "the district court stated that it 'would still impose [the same] sentence'" regardless of the error).[2]

The Eleventh Circuit takes a similar approach. "[B]ecause the district court stated on the record that it would have imposed the same sentence either way, that is all we need to know to hold that any potential error was

[2] In two cases decided more than 15 years ago, the Eighth Circuit required more probing harmless error analysis from the district court before affirming. See *United States* v. *Icaza*, 492 F.3d 967, 970–71 (2007); *United States* v. *Bah*, 439 F.3d 423, 432 (2006). But the Eighth Circuit treats those cases as a dead letter and instead follows inconsistent later precedent. No panel of the Eighth Circuit has reversed on this basis since *Icaza*.

harmless." *United States* v. *Henry*, 1 F.4th 1315, 1327 (2021); accord *United States* v. *Grady*, 18 F.4th 1275, 1291 (2021) ("a [G]uidelines error is harmless if the district court unambiguously expressed that it would have imposed the same sentence * * * regardless of how the guidelines objections had come out").[3]

The First Circuit takes an intermediate position. It has held that a district court's conclusory statement that "I would impose precisely the same sentence even if the applicable sentencing [G]uidelines range would have been reduced by any or all of the objections made" is enough to render error generally harmless, at least where the sentence is "outside of the Guidelines range." See *United States* v. *Ouellette*, 985 F.3d 107, 110–111 (2021). However, before affirming, the court must "still review the sentence for substantive reasonableness" before it may affirm. *Ibid.*

* * * * *

The circuits thus are intractably divided on a frequently recurring and fundamental question regarding the review of sentencing errors on appeal. The split is sufficiently deep that there is no prospect that the courts will

[3] At times, the Eleventh Circuit has added "one thing" to its harmless error analysis: "that the sentence imposed through the alternative or fallback reasoning of Section 3553(a) must be reasonable." *United States* v. *Keene*, 470 F.3d 1347, 1349 (2006). But the Eleventh Circuit has only rarely granted relief as it pertains to the substantive reasonableness of a sentence as part of it harmless error analysis, as highlighted in *Henry* and *Grady*. See also *United States* v. *Tampas*, 493 F.3d 1291, 1304–1305 (2007) (district court's improper imposition of 16-level enhancement after government conceded district court's calculation was "imprecise" was harmless error because "the district court would have imposed the same sentence regardless of the Guidelines"); *United States* v. *Ortiz-Santizo*, 766 F. App'x 890, 896 (2019) (unpublished) (refusing to address guidelines calculation error "because the district court said expressly that it would impose the same sentence regardless").

resolve the split absent this Court's intervention. And the Eighth and Eleventh Circuits have both declined to reconsider their positions en banc, even when litigants have pointed out that their positions diverge from most other courts of appeals. See App. 3a; Order, *United States* v. *Foston*, No. 21-2435 (June 21, 2022) (Eighth Circuit denied petition for rehearing, rejecting argument that sentencing courts "should not be allowed to inoculate a Guideline" error through blanket statements); *United States* v. *Henry*, 18-15251 (Aug. 17, 2021) (Eleventh Circuit denied petition for rehearing en banc). Only this Court can restore uniformity to federal sentencing law.

B. The Eighth Circuit's Rule Is Wrong

The Eighth Circuit is wrong in holding that when a sentencing court states it would have imposed the same sentence regardless of the Guidelines, a reviewing court may conclude that any Guidelines calculation error is rendered categorically harmless. Blanket harmless error findings conflict with what Congress and this Court require courts to perform at every sentencing hearing, and also conflict with how harmless error review must be conducted under Federal Rule of Criminal Procedure 52(a).

1. This Court's Precedent Provides That Sentencing Courts Must Properly Calculate The Sentencing Guidelines, And That Reviewing Courts Should Ordinarily Correct Guidelines Errors

Properly calculating the Guidelines is not an optional step for sentencing courts. "[D]istrict courts *must* begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process." *Gall*, 552 U.S. at 50 n.6. (emphasis added). "The starting point of any federal sentencing proceeding is 'correctly calculating the applicable Guidelines range[,]' which serves as the 'initial benchmark' in determining an appropriate sentence." *United States* v. *Khatallah*, 41 F.4th 608, 643 (D.C. Cir.

2022) (quoting *Gall*, 552 U.S. at 49). The Guidelines are central to sentencing, even when the sentencing judge chooses to depart or vary the sentence imposed, because "while not binding, the Guidelines are "the product of careful study based on extensive empirical evidence derived from the review of thousands of individual sentencing decisions." *Ibid.* (quoting *Gall*, 552 U.S. at 46). And the Sentencing Commission "base[s] its determinations on empirical data and national experience, guided by a professional staff with appropriate expertise." *Kimbrough* v. *United States*, 552 U.S. 85, 109 (2007).

Thus, even when a sentencing court chooses not to impose a Guidelines sentence, it ordinarily must explain its sentencing decision in relation to the properly calculated Guidelines sentence because it is "uncontroversial" that a "major departure [from the Guidelines] should be supported by a more significant justification that a minor one," and sentencing courts "must adequately explain the chosen sentence * * * to promote the perception of fair sentencing." *Gall*, 552 U.S. at 50. And determining substantive reasonableness ordinarily requires knowing the correct Guidelines sentencing range because "[e]ven 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*." *Peugh*, 569 U.S. at 542 (emphasis in original). Stated another way, although the district court has discretion to depart from the Guidelines, the court "must consult those Guidelines and take them into account when sentencing." *Booker,* 543 U.S. at 264.

Similarly, in *Molina-Martinez* and *Rosales-Mireles*, this Court twice held that properly calculating the Guidelines range is the touchstone of all sentencing hearings. So central to sentencing are the Guidelines that

"[w]hen a defendant is sentenced under an incorrect Guidelines range—whether or not the defendant's ultimate sentence falls within the correct range—the error itself can, and *most often will*, be sufficient to show a reasonable probability of a different outcome absent the error." *Molina-Martinez*, 578 U.S. at 203 (emphasis added); accord *Rosales-Mireles*, 138 S. Ct. at 1903 (holding a plain Guidelines error "in the ordinary case" warrants a remand for a new sentencing hearing because "it seriously affect[s] the fairness, integrity, or public reputation of the judicial proceedings."). Those holdings reflect the "anchoring" effect of the Guidelines—shaping judges' sentencing decisions whether or not they choose to impose a Guidelines sentence.

The Guidelines also play a critical role in reviewing sentences on appeal. "The post-*Booker* federal sentencing scheme aims to achieve uniformity by ensuring that sentencing decisions are anchored by the Guidelines and that they remain a meaningful benchmark *through the process of appellate review*." *Peugh*, 569 U.S. at 541 (emphasis added). And when reviewing a sentence on appeal, "the appellate court * * * must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range * * * or failing to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range." *Gall*, 552 U.S. at 51.

2. Rule 52(a), Like Rule 52(b), Requires That Guidelines Errors Should Ordinarily Be Corrected

Knowing the correct Guidelines range is of such paramount importance to sentencing that Rule 52(b) ordinarily requires Guidelines miscalculations to be corrected even on plain error review when a defendant fails to object. *Rosales-Mireles*, 138 S. Ct. at 1907. The error also should ordinarily be corrected on harmless-error review

because "ensuring the accuracy of Guidelines determinations also serves the purpose of providing certainty and fairness in sentencing on a greater scale," in light of the fact that "[w]hen sentences based on incorrect Guidelines ranges go uncorrected, the Commission's ability to make appropriate amendments is undermined." *Id.* at 1908. Finally, Guidelines errors should ordinarily be corrected because the anchoring effect of the guidelines means that "the risk of unnecessary deprivation of liberty particularly undermines the fairness, integrity or public reputation of judicial proceedings in the context of plain Guidelines error because the role the district court plays in calculating the range and the relative ease of correcting the error." *Ibid.*

Those principles *a fortiori* require reversal when, as here, the defendant has preserved the error and the claim is "governed by the more lenient harmless-error standard of Rule 52(a) rather than the more exacting plain-error standard of Rule 52(b)." *Greer* v. *United States*, 141 S. Ct. 2090, 2093 (2021). "When Rule 52(a)'s 'harmless-error rule' governs, the prosecution bears the burden of showing harmlessness." *United States* v. *Davila*, 569 U.S. 597, 607 (2013) (quoting *United States* v. *Vonn,* 535 U.S. 55, 62 (2002)). However, the Eighth Circuit's test has the effect of improperly flipping the burden under Rule 52(a), placing it on the defendant to prove prejudice when the district court has stated "that it would have imposed the same sentence of imprisonment regardless of the underlying Sentencing Guideline range." *Peterson*, 887 F.3d at 349. This is a burden the defendant cannot overcome on appeal because the Eighth Circuit uncritically accepts even boilerplate assertions at face value, without otherwise examining the record. *Ibid.* ("Here, the district court specifically stated at the sentencing hearing that it would have imposed the same sentence regardless of the Sentencing Guidelines calculations. Therefore, we find that

any procedural error on the part of the district court in calculating Peterson's sentence was harmless."). Thus, the Eighth Circuit's harmless error review is tantamount to no review at all on appeal, because it always affirms if the judge has made a boilerplate disavowal of the Guidelines' importance.

The Eighth Circuit's application of Rule 52(a) is also improper because it neglects that "the Court has consistently made clear that it is the duty of a reviewing court to consider the trial record *as a whole*" when conducting harmless error review. *United States* v. *Hasting*, 461 U.S. 499, 509 (1983) (citations omitted and emphasis added). This Court held of the mandatory Guidelines that "once the court of appeals has decided that the district court misapplied the Guidelines, a remand is appropriate unless the reviewing court concludes, *on the record as a whole,* that the error was harmless." *Williams* v. *United States*, 503 U.S. 193, 203 (1992) (emphasis added). But in finding Guidelines calculation errors harmless, the Eighth Circuit looks *only* to the district court's harmless error statements, instead of the entire record. *Peterson*, 887 F.3d at 349; see also *Still*, 6 F.4th at 818.

Finally, unlike almost every other circuit, the Eighth Circuit does not bother determining whether the sentence imposed was substantively reasonable once the district judge makes a boilerplate recitation that the Guidelines were unimportant in its sentence. Thus, it appears that the Eighth Circuit routinely affirms Guidelines miscalculation errors even when the final sentence is *unreasonable*, because of its reflexive deference to the district court's harmless error findings.

C. The Question Presented Is Important And Recurring

The disagreement over the proper scope of harmless error review regarding Guidelines error has severe consequences for individual liberty, frustrates proper

application of the Sentencing Guidelines, and undermines uniformity in federal sentencing, which was Congress's "principal purpose" in adopting Guidelines sentencing. *Hughes* v. *United States*, 138 S. Ct. 1765, 1774 (2018).

Federal sentencing procedures affect the lives of tens of thousands of individuals every year. Nearly 65,000 federal defendants were sentenced in 2020 alone, and more than a quarter of defendants—nearly 17,000—received sentences that represented variances from the Guidelines. U.S. Sentencing Comm'n, Table 29, "Sentence Imposed Relative to the Guidelines Range," *FY2020 Sourcebook of Federal Sentencing*, https://bit.ly/3zAXFCz. Across broad areas of the United States, the sentencing judge could avoid appellate scrutiny of such sentences through the simple expedient of claiming it would impose the same sentence regardless of the Guidelines. In such areas, judges effectively can simply "opt out" of the Guidelines sentencing system that Congress sought to establish.

Just this year, the Seventh Circuit "noticed the frequency with which sentencing judges are relying on inoculating statements" in an effort to immunize Guidelines miscalculations on appeal. *Asbury,* 27 F.4th at 581. District judges face incentives that encourage them to make blanket assertions about their sentencing conclusions to insulate their Guidelines calculations from appellate review. Indeed, one Fourth Circuit judge has even "encourage[d] district courts to consider announcing alternate sentences in cases * * * where the guidelines calculation is disputed." *United States* v. *Montes-Flores*, 736 F.3d 357, 374 (4th Cir. 2013) (Shedd, J., dissenting). It is important for this Court to resolve whether that practice is proper, and how appellate courts should assess such situations for harmlessness.

Ensuring that harmless error review of Guidelines miscalculations is properly conducted also benefits the

government when it appeals Guidelines miscalculations. See *Porter*, 928 F.3d at 968 (remanding after the government demonstrated the Guidelines miscalculation was not harmless, even though district court made blanket harmless error findings). Because Guidelines errors "seriously affect[s] the fairness, integrity, or public reputation of the judicial proceedings," *Rosales-Mireles*, 138 S. Ct. at 1903, the entire justice system has an interest to make sure that harmless error review of Guidelines miscalculations is properly conducted.

This Court has often granted certiorari to resolve circuit conflicts to ensure harmless error review is properly conducted under Rule 52(a). See, *e.g.*, *Williams*, 503 U.S. at 203 (whether incorrect application of the mandatory Guidelines is harmless error); *Davila*, 569 U.S. at 605 (whether violations of Rule 11(c)(1) are harmless); *Neder* v. *United States*, 527 U.S. 1, 7 (1999) (whether an erroneous jury instruction is harmless error); *Peguero* v. *United States*, 526 U.S. 23, 24 (1999) (whether the failure to advise a defendant of his right to appeal is harmless error).

D. This Case Is An Ideal Vehicle

This case is an excellent vehicle for resolving this important and recurring question. The case presents a single purely legal issue. Petitioner squarely preserved the issue that the judge's boilerplate statement did not insulate claims of error from appellate review. And the Eighth Circuit squarely rejected the argument, holding that the district court's blanket statement it would have "come out in the same place" regardless of the Guidelines, App. 2a, rendered any sentencing errors categorically harmless. Solely because of a happenstance of geography, Eighth Circuit law foreclosed a claim that would have succeeded if petitioner had been sentenced less than four miles to the west. There are no disputed issues of fact nor any jurisdictional questions that would prevent the Court

from resolving the issue. And nearly every circuit has thoroughly analyzed the issue, creating an entrenched split. The issue is ripe for review, and nothing would be gained from delaying review.

This case is also a compelling vehicle to decide the question because it highlights how blanket harmless error findings can insulate substantial claims of error from review. The Eighth Circuit reversed and remanded for a new sentencing hearing on the *very same* underlying sentencing issue that petitioner presented on appeal—that Missouri armed criminal action, Mo. Rev. Stat. § 571.015, is not a "crime of violence" under the Guidelines—with the court of appeals concluding the Guidelines miscalculation constituted plain error, even though the defendant failed to raise the objection before the district court. *United States* v. *Miranda-Zarco*, 836 F.3d 899, 901–903 (2016); see also *United States* v. *Brown*, No. 20-2847, 2021 WL 3732369, at *1 (8th Cir. Aug. 24, 2021) (concluding that this offense is not a "crime of violence"). On remand, the defendant in *Miranda-Zarco* prevailed in his objection, and had his sentence shortened by twenty months.

But despite timely raising the same objection, petitioner is worse off than the defendant in *Miranda-Zarco*, who did not. That cannot be right.

* * * * *

Sentencing courts in a few jurisdictions are routinely relying on boilerplate assertions that the Guidelines did not affect their sentencing decision to insulate their sentences from appellate scrutiny. Courts in the Eighth and Eleventh Circuits are reflexively deferring to such blanket findings instead of doing the important work Congress and this Court have mandated must be done before any defendant is sentenced, and before any sentence is affirmed on appeal. That must not be allowed to stand.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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