No. 18-16

In The
Supreme Court of the United States

Larone Frederick Elijah,
Petitioner,
v.

United States of America,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

REPLY BRIEF FOR PETITIONER

Providence E. Napoleon
(Counsel of Record)
Brian Fitzpatrick
Derek Jackson
Allen & Overy LLP
1101 New York Ave., N.W.
Washington, D.C. 20005
(202) 683-3800
Providence.Napoleon@AllenOvery.com

Counsel for Petitioner

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I. Introduction

In his petition, Mr. Elijah explained that the law of the Fourth Circuit permits errors in calculating the Sentencing Guidelines to be declared "harmless" solely on the basis of a rote statement by the sentencing judge that he would have given the same sentence regardless of the Guidelines calculation. Mr. Elijah explained that the right to appeal has to mean something and the district court cannot take with one hand what it gives with the other hand—there is something inherently wrong and unfair when a district court informs a defendant at the sentencing hearing that there is a right to appeal the sentence, but insulates the sentence from appeal by using a few "magic words."

In its brief in opposition, the Government argues that this contention lacks merit, noting that "[t]his Court has repeatedly denied petitions for writs of certiorari that have raised similar issues." (BIO 6.) Contrary to the Government's assertion, the repeated occurrence of these petitions illustrates the substantive disagreement between the Circuits in this area, and the need for this Court to resolve that conflict.

It also illustrates the frequency with which district court judges, taking advantage of the flawed case law in certain Circuits, effectively insulate themselves from meaningful appellate review of their Guidelines calculations by the utterance of a

"few magic words." The effect is that serious errors affecting a defendant's substantial rights—in this case Mr. Elijah's right to liberty—go unchecked. This flies in the face of this Court's precedent, which recognizes that "when a Guidelines range moves up or down, offenders' sentences [tend to] move with it." *Molina-Martinez v. United States.*, 136 S. Ct. 1338, 1346 (2016) (internal quotations and citations omitted). Mr. Elijah asks this Court to resolve this conflict, and to do so in favor of the side that gives proper weight to the Sentencing Guidelines, as interpreted by this Court's own precedent.

II. The Decision Below Conflicts with Published Decisions of the Third, Eighth, and Tenth Circuits

As established in the petition, there is a divergence between approaches in the Circuits when a district court judge announces simply that he would have awarded the same sentence even if he miscalculated the Guidelines range. (Pet. 13–16.) While certain circuits, including the First, Fourth, Eighth, and Eleventh, treat this statement alone as sufficient to establish that an error was harmless, the Third, Seventh, and Tenth Circuits require greater justification from the Court. *Id.*

The Government, in its brief in opposition, casts this divergence as merely a matter of "formal differences," and ignores the clear substantive disagreement in the two approaches. (BIO 9.)

Namely, the Third, Seventh, and Tenth Circuit require a significant level of justification to announce an alternative variance sentence, whereas in the other circuits, almost no justification is required. As a result, appellants in the Fourth Circuit and the other Circuits on its side of the split are frequently denied appellate review of their substantive and procedural challenges to their Guidelines calculations where they would not be in other Circuits.[1]

The Government states that "[p]etitioner has failed to identify any court of appeals that would have declined to affirm the sentence imposed in this case under harmless-error review." (BIO 9-10.) Although Mr. Elijah is not merely asking the Court to review the Fourth Circuit's finding of harmlessness in this case, the Government's reliance on this point is both inaccurate and revealing. Mr. Elijah has identified

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[1] In Mr. Elijah's case, he raised three separate challenges the Career Offender enhancement to his Guidelines range on appeal: 1) that the district court erred in counting one of his predicate convictions as a separate sentence under the Guidelines; 2) that the court erred in counting one of his convictions as a career offender predicate under *Mathis v. United States*, 136 S. Ct. 2243 (2016); and 3) that the court erred in counting one of his predicates as a felony conviction where the sentence was premised on a clear error by the state court. *See* Opening Brief, *United States v. Elijah*, No. 17-4147 (4th Cir. Aug. 22, 2017), ECF No. 29. The Fourth Circuit declined to consider the merits of any of these arguments in its opinion, denying him meaningful appellate review. (Pet. App. 4–6.)

cases from three Circuits that would have declined to find the alternative variance sentence in this case sufficient to justify a finding of harmlessness. The Government's analysis of these cases falls flat on substance.

First, in discussing *United States v. Smalley*, the Government's reliance on the fact that the district court "did not explicitly set forth an alternative Guidelines range" leaves out the most significant holding of that case. 517 F.3d 208, 214 (3d Cir. 2008). While true that the Court in *Smalley* failed to even calculate the lower guidelines range that the defendant argued for, the Third Circuit was explicit that the correct calculation of the guidelines range is only step one in a three step process for sentencing. *Id.* at 211. In analyzing the district court's alternative sentence under this three step process, the Third Circuit held that "the District Court also committed procedural error in sentencing by failing to properly justify its brief alternative sentence." *Id.* at 215.

The Government suggests that the district court in Mr. Elijah's case provided such a justification when "the court expressly stated that it would have 'imposed the same sentence' regardless of that range," and the Court arrived at its sentence by analyzing the 3553(a) factors. (BIO 10.) However, Third Circuit precedent is clear that this is not a sufficient justification.

In *United States v. Wright*, the district court faced a nearly identical factual pattern to Mr. Elijah's case. At sentencing, the Court calculated the Guidelines range, applying an 8-level enhancement that the defendant objected to. 642 F.3d 148, 151 (3rd Cir. 2011). The court overruled the defendant's objection, but after an analysis of the 3553(a) factors, the court ultimately varied downward from the calculated Guidelines range. *Id.* at 152. The court then announced an alternative variance sentence, stating "that it would have imposed the same sentence whether or not it had applied the 8-level enhancement does not affect our disposition." *Id.* at 154 n.6. The Third Circuit vacated Wright's sentence and remanded for resentencing. *Id.* at 155. Citing *Smalley*, the Court explained that a sentencing error cannot be rendered harmless "unless th[e] 'alternative sentence' was, itself, the product of the three step sentencing process." *Id.* at 154 n.6. That requirement was not satisfied where the district court did not explain "why an upward departure or variance would be merited" from the Guidelines range without the enhancement. *Id.* The court's analysis of the 3553(a) factors, which were done in the context of justifying a downward variance from the arguably erroneous Guidelines range, was not sufficient. In such a case, the "alternative sentence is procedurally insufficient and does not render the error [ ] harmless." *Id.*

The Government's attempt to distinguish *United States v. Johns*, 732 F.3d 736 (7th Cir. 2013), also

fails. The Government points out that the district court's announcement of an alternative variance sentence "came only on prompting by the Assistant U.S. Attorney" and was "a conclusory comment tossed in for good measure." (BIO 10.) Again, this incomplete account of the case omits the Court's "more important[]" rationale that the court's statement "falls short of the 'detailed explanation' we have found sufficient to show harmless error." *Johns*, 732 F.3d at 741.

The lack of a rationale for the alternative sentence in Mr. Elijah's case likewise fall short of the Seventh Circuit's standard, as illustrated by the similar fact pattern in *United States v. Eubanks*, 593 F.3d 645 (7th Cir. 2010). In *Eubanks*, the defendant was sentenced to 192 months for two robberies and a consecutive 84 months for a firearm charge. *Id.* at 648. The sentence was based on an improper calculation of the Guidelines range, and was outside the range argued for by the defendant. *Id.* at 655. The district court "specifically stated that it would have given the same sentence" even if it had made a different finding with respect to the contested enhancement. *Id.* Although not prompted by the U.S. Attorney or a mere conclusory comment, the Seventh Circuit did not find this statement sufficient to render the alleged error harmless, noting that "[i]f the sentence imposed is outside the guidelines range, the district court must provide a justification that explains and supports the magnitude of the variance." *Id.* at 656 (internal citations omitted.) A

district court's bare statement that it would have imposed the same sentence on Mr. Elijah as an alternative variance sentence, without justification for the magnitude of the upward variance, is plainly insufficient under the Seventh Circuit's standard.

In addressing *United States v. Peña-Hermosillo*, 522 F.3d 1108 (10th Cir. 2008), the Government focuses on the Tenth Circuit's comment that it would not address when "an alternative holding based on the exercise of *Booker* discretion could render a procedurally unreasonable sentence calculation harmless." (BIO 11 (citing *Peña-Hermosillo*, 522 F.3d at 1117–18).) However, Mr. Elijah cited this case for the opposite principle, that it establishes when an alternative holding *cannot* render a procedurally unreasonable sentence calculation harmless. Indeed, the Government concedes that, under *Peña-Hermosillo*, the Tenth Circuit will not find such an error harmless where the "'alternative' sentence itself did not 'satisfy the requirement of procedural reasonableness' because the court 'offer[ed] no more than a perfunctory explanation' for it." (BIO 11.) This is precisely the argument that Mr. Elijah is making.

The Government attempts to distinguish Mr. Elijah's case from *Peña-Hermosillo* by noting that, here, "the district court stated that it had 'considered all [the Section 3553(a)] factors,' and discussed several factors at length." (BIO 11 (internal citations omitted).) This does not distinguish *Peña-*

Hermosillo at all—the Tenth Circuit went through the same exercise, ultimately concluding that the sentence awarded "is the most reasonable sentence upon consideration of all the factors enumerated in 18 U.S. Code Section 3553." *Peña-Hermosillo*, 522 F.3d at 1117. The Government states that "[n]o basis exists to conclude that the Tenth Circuit would have found reversible error in the particular circumstances of this case." (BIO 11.) Put bluntly, no basis exists for the Government's statement. Indeed, the Tenth Circuit is clear that where a substantial difference exists between the calculated Guidelines range and the Guidelines range argued for in the alternative, an alternative sentence "requires some explanation beyond a vague statement that the sentence is appropriate under § 3553(a)." *Id.* at 1117.

These cases illustrate that the Third, Seventh, and Tenth Circuit require more justification than what was provided in Mr. Elijah's case for an alternative sentence to render a Guidelines error harmless. However, the error of the Fourth Circuit is not confined to this one case but rather runs throughout its jurisprudence.

Indeed, since the Fourth Circuit first articulated the assumed harmless error rule in *United States v. Savillon-Matute*, 636 F.3d 119 (4th Cir. 2011), the Fourth Circuit has affirmed all but one sentence where the Government argued that any alleged procedural errors in sentencing were harmless and

the district court announce an alternative variance sentence.[2] The Fourth Circuit affirmed alternative sentences based on the *Savillon-Matute* test on forty-one occasions. In most of these cases, the Fourth Circuit required nothing more than the "magic words" and a vague reference to the 3553(a) factors to make a finding of harmlessness. *See, e.g.*, *United States v. Culp*, 733 F. App'x. 724, 725 (4th Cir. 2018) (finding harmlessness where "the district court stated that it would have given [defendant] an 84-month sentence even if it had calculated his Guidelines range without the weapon possession enhancement," with no further explanation); *United States v. Cummings*, 725 F. App'x. 238, 238–39 (4th Cir. 2018) (same where the court merely "stated on the record that it would have given [defendant] a 144-month sentence even if it had calculated his Guidelines range differently"); *United States v. Cordova*, 692 F. App'x. 692 (4th Cir. 2017) (same where court explained that "even if it had miscalculated [defendant's] advisory Guidelines

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[2] That case, *United Sates v. Baker*, presented a set of exceptional circumstances—the Fourth Circuit found that the district court had committed three separate reversible procedural errors in sentencing, all of which contributed to a life sentence Guidelines range for a drug offense whereas the co-defendants received thirty-year sentences for comparable conduct. 539 F. App'x. 299. 302–05 (4th Cir. 2013). As a result of the magnitude of these errors, the Fourth Circuit vacated the appellant's sentence on the substantive reasonableness prong of the *Savillon-Matute* test, rather than the prong Mr. Elijah challenges. *Id.* at 306.

range, it would impose the same sentence," with no further justification).

III. The Approach of the Fourth Circuit Does Not Give the Guidelines the Effect Required Under this Court's Precedent

This Court's precedent is clear that the Guidelines remain the starting point in any sentencing determination. *See Peugh v. United States*, 569 U.S. 530, 542, 549 (2013) (the Guidelines are "the framework for sentencing," and "anchor both the district court's discretion and the appellate review process"). The Government points out that "court of appeals have consistently recognized that ordinary appellate principles of harmless-error review nonetheless apply" to sentences. (BIO 7.) This point is not in dispute, and in fact the entire purpose of this petition is to move one step further in the analysis, and clarify the conflicting interpretations of those harmless-error review principles.

While the Government contends that the principles of harmless error review are correctly applied where the sentencing court "expressly state[s]" that it would have imposed the same sentence, "was aware of the alternative guidelines range advocated by the defendant," and walks through the 3553(a) factors, (BIO 8), this ignores the most important aspect of Mr. Elijah's challenge: the absence of any justification for an alternative sentence nearly 700 percent higher than the Guidelines range Mr. Elijah

contended was appropriate. In *Gall v. United States*, this Court explained that courts issuing outside-Guidelines sentences must "consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance." 552 U.S. 38, 50 (2007). Mr. Elijah contends that the same standard should be applied to alternative sentences under harmless error review.

Mr. Elijah cited to *Molina-Martinez v. United States*, 136 S. Ct. 1338 (2016), and *Rosales-Mireles v. United States*, 138 S. Ct. 1897 (2018), to illustrate that the importance of this principle runs through this Court's jurisprudence on appellate review of Guidelines calculations. The Government's selective quoting of those cases ignores the most significant principles they articulate. In *Molina-Martinez*, this Court recognized 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." 136 S. Ct. at 1345. In *Rosales-Mireles*, this Court stated that "[i]f the district court is unable properly to undertake [the sentencing] inquiry because of an error in the Guidelines range, the resulting sentence no longer bears the reliability that would support a 'presumption of reasonableness' on review." 138 S. Ct. at 1910. These statements underscore the centrality of the

Guidelines as a starting point for sentencing and the need for sufficient justification before deviating.

Indeed, the importance of a proper justification under *Gall* has been recognized by the Circuits that Mr. Elijah cites to in defense of his position. *See, e.g.*, *Peña-Hermosillo*, 522 F.3d at 1117 (citing *Gall* for the proposition that the justification for the alternative variance sentence "falls short of the explanation necessary . . . especially where the variance . . . is as large as this"). These cases stand for the proposition that *Gall*'s call for a sufficient justification proportionate to the magnitude of the variance should apply to alternative sentences just as much as the original sentence. This is the opposite of the approach taken by the Fourth Circuit. *United States v. Gomez-Jimenez*, 750 F.3d 370, 391 (4th Cir. 2014) (Gregory, J., dissenting in part) ("*Gall* is essentially an academic exercise in this circuit now, never to be put to practical use if district courts follow our encouragement to announce alternative, variant sentences.")

IV. This Case Presents an Excellent Vehicle for Review

While the government noted similar petitions that have been denied by this Court, Mr. Elijah's petition presents a unique opportunity for review. First, most of the petitions cited by the Government are from 2012 or before. In the intervening period, the Circuit split on this issue has developed and become

crystalized. In addition, the intervening decisions in *Molina-Martinez* and *Rosales-Mireles* shed further light on the importance of Guidelines calculations and the need for meaningful appellate review of Guidelines errors. Finally, the one recent petition cited by the Government, *Monroy* v. *United States*, 138 S. Ct. 1986 (2018) (No. 17-7024), involves markedly different circumstances than this case. In *Monroy*, the difference between the top-end of the Guidelines range the petitioner had argued for and the sentence actually awarded was, while substantial, roughly 135 percent. In contrast, in Mr. Elijah's case, the extent of the upward variance required for the alternative sentence was *nearly 700 percent*. This stark discrepancy makes this petition an excellent vehicle for review.

CONCLUSION

For the reasons set forth above, as well as those stated in the Petition, Petitioner respectfully requests that this Honorable Court grant a writ of certiorari, vacate the opinion of the court of appeals, and remand the case for further review.

Respectfully Submitted,

Providence E. Napoleon
(Counsel of Record)
Brian Fitzpatrick
Derek Jackson
Allen & Overy LLP
1101 New York Ave., N.W.
Washington, D.C. 20005
(202) 683-3800
Providence.Napoleon@AllenOvery.com
Counsel for Petitioner