No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 2018

JESUS SANTIAGO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

---

PETITION FOR WRIT OF CERTIORARI

James P. Maguire
Assistant Federal Defender
Office of the Federal Defender
265 Church Street, Suite 702
New Haven, CT 06510
Phone: (203) 498-4200
Email: james_maguire@fd.org

Counsel of Record for Jesus Santiago

November 8, 2018

QUESTION PRESENTED

Whether a circuit court can competently conclude that the Sentencing Guidelines were immaterial to a district court's sentencing determination where the district court imposed an upward variance more than twice the top end of the correctly calculated Guidelines range, and characterized this sentence as "slightly below the Guidelines" by reference to the much higher, erroneously calculated Guidelines range.

TABLE OF CONTENTS[1]

[1] **LIST OF ALL PARTIES:** The caption contains the name of all parties

INDEX TO APPENDIX

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Guidelines

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 2018

JESUS SANTIAGO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

---

PETITION FOR WRIT OF CERTIORARI

Jesus Santiago ("Santiago") respectfully petitions this Court for a writ of certiorari to review the August 10, 2018 order of the United States Court of Appeals for the Second Circuit denying a petition for rehearing or rehearing *en banc* pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure.

INTRODUCTION

The Second Circuit summarily affirmed on harmless error grounds what the district court characterized as a "slightly below the Guidelines" 75-month sentence that more than doubled the high end of Santiago's procedurally correct 30-37 month Guidelines range. By declining to address the merits of the appeal, the Second Circuit failed to resolve recurring issues of exceptional importance that continue to divide district courts, including whether the Second Circuit's decision in *United States v. Savage*, 542 F.3d 959 (2d Cir. 2008), which endorses a modified categorical inquiry into the facts of a defendant's prior Connecticut drug convictions, survives the elements-based categorical inquiry required by this Court in *Mathis v. United States*, 136 S. Ct. 2243 (2016). The Court should grant certiorari for two principal reasons:

First, the Second Circuit misapplied the harmless error precedents of this Court and the Second Circuit. Borrowing language from *Molina-Martinez v. United States*, 136 S. Ct. 1338 (2016), the Second Circuit incorrectly employed what amounts to a clear statement rule. Per the decision, because the district court "made abundantly clear that it 'thought the sentence it chose was appropriate irrespective of the Guidelines range,'" App. B at 3 (quoting *Molina-Martinez*, at 1346), the district court's errors did not affect Santiago's sentence. But the Second Circuit's logic is flawed. *Molina-Martinez* concerned plain error review, which requires the defendant to establish a "reasonable probability that the district court would have imposed a different sentence under the correct range." *Molina-Martinez*, 136 S. Ct. at 1349. But here, the Government must prove harmlessness, and the Second Circuit must, by its own precedent, have a "sure conviction," *United States v. Dhinsa*, 243 F.3d 635, 649 (2d Cir. 2001) (quotation marks and citation omitted)), that the sentencing judge's errors did not "affect [Santiago]'s substantial rights." Fed. R. Crim. P. 52(a); *Williams v. United States*, 503 U.S. 193, 203 (1992) (Government's burden to prove, "on the

record as a whole," that any error "did not affect the district court's selection of the sentence imposed").

Here, Petitioner submits the Second Circuit could not be "sure" the district court's procedural errors did not affect its sentence where the district court:

(1) incorrectly calculated Santiago's Guidelines range as "77 to 96 months," App. D at 33, *i.e.*, more than *double* the procedurally correct range;

(2) characterized its 75-month sentence, in both its oral pronouncement and written judgment as "slightly below the Guidelines range" (App. C at 1; App. D at 53) and "close to the Guidelines range" (App. D at 58) when it was more than twice the *high end* of the procedurally correct range;

(3) highlighted the importance of a properly calculated Guidelines range in helping a court reach a "fair and just" sentence (*id.* at 9-10, 51-53);

(4) never calculated an alternative, *i.e.*, correct, Guidelines range;

(5) never explained its sentence in terms of an upward variance or provided reasons in support of the degree of that variance, as is required under the Second Circuit's precedents, *see United States v. Cavera*, 550 F.3d 180, 189 (2d Cir. 2008) (*en banc*) (when a district court deviates from an advisory Guidelines range, it "'must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance'" (quoting *Gall*, 552 U.S. at 50)); *United States v. Cassesse*, 685 F.3d 186, 193 (2d Cir. 2012) (noting that above-Guidelines sentences "trigger[ ] a higher descriptive obligation"); and

(6) never expressed any disagreement with the firearms Guideline—as applied in Santiago's case or as a policy matter more broadly—such that it cannot be inferred that the district court would have deviated so substantially from the procedurally correct Guidelines range.

Second, certiorari is warranted because the Second Circuit sidestepped (again, *see United States v. Acoff*, No. 16-2722-CR, 2017 WL 3978414 (2d Cir. Sept. 11, 2017)) the "heavily litigated," App. D at 2, and fully briefed questions of first impression raised by Santiago's appeal. These issues—*i.e.*, whether Connecticut drug and first-degree robbery offenses qualify as "controlled substance offenses" and "crimes of violence" respectively under the federal Sentencing Guidelines—have divided the courts and are of exceptional importance to both the outcome of

Santiago's sentencing challenge and the fair administration of criminal justice more broadly. Compare App. D at 27-32 (Conn. Gen. Stat. § 21a-277(a) is a "controlled substance offense" and Connecticut second-degree robbery, Conn. Gen. Stat. § 53a-135(a)(1), is a "crime of violence" under the Guidelines) with *United States v. Epps*, No. 3:18CR19(JBA), 2018 WL 2958442 (D. Conn. June 13, 2018) (Connecticut 21a-277(a) convictions not "controlled substances offenses") and *Shabazz v. United States*, No. 3:16CV1083(SRU), 2017 WL 27394 (D. Conn. Jan. 3, 2017) (Connecticut second-degree robbery convictions not "violent felonies").

Moreover, nothing in the Second Circuit's jurisprudence precludes reaching the merits of this appeal. In *United States v. Jass*, which the Second Circuit cited in support of its harmlessness finding, App. B at 3,4, the Court first concluded that error had, in fact, occurred before deeming such error harmless. 569 F.3d 47, 65-68 (2d Cir. 2009). Accordingly, the Supreme Court should—at a minimum—clarify that *Mathis* has displaced *Savage*'s modified categorical approach.

This case raises questions that go to the heart of the administration of justice and the fair and uniform treatment of criminal defenses. The Second Circuit's decision answers these questions incorrectly in ways that conflict with this Court's precedents and undermine public confidence. Certiorari is imperative.

OPINIONS BELOW

The Second Circuit's August 10, 2018 order denying a petition for rehearing or rehearing *en banc* is not published, but is Appendix A to this petition. The Second Circuit's July 28, 2018 summary order affirming the district court's judgment is not published, but is Appendix B to this petition. The district court's May 10, 2017 judgment is not published, but is Appendix C to this petition.

JURISDICTION

On August 10, 2018, the Second Circuit denied the petitioner's petition for rehearing or rehearing *en banc*. This Court has jurisdiction to grant a writ of certiorari to review the Second Circuit's denial of a petition for rehearing or rehearing *en banc* under 28 U.S.C. § 1254(1). This petition was timely filed. The district court had jurisdiction pursuant to 28 U.S.C. § 3231, and the Court of Appeals had jurisdiction pursuant to 18 U.S.C. § 3742(a) and 28 U.S.C. § 1291.

STATUTORY PROVISIONS INVOLVED

Federal Rule of Criminal Procedure 52(b) provides:

> (a) HARMLESS EROR. 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.

STATEMENT OF THE CASE

This petition arises from a May 10, 2017 judgment of the United States District Court for the District of Connecticut, following Santiago's plea of guilty to one count of possession of a firearm by a convicted felon in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). The district court, at sentencing, calculated Santiago's Guidelines range as 77 to 96 months. In that calculation, the district court increased Santiago's base offense level over Defendant's objections from 14 to 24 because it concluded Santiago had sustained one prior "controlled substance offense" and one prior "crime of violence" conviction under the Guidelines.

This Guidelines error resulted in a total offense level of 21 (after accounting for acceptance of responsibility). Combined with Santiago's criminal history category of VI, that yielded a Guidelines range of 77 to 96 months. Had the offense level been calculated correctly, Santiago's total offense level would have been 12 (after accounting for acceptance of responsibility), and the

resulting Guidelines range would have been 30 to 37 months. *See* U.S.S.G. ch. 5, pt. A (sentencing table).

Santiago argued below and on appeal that his conviction for a Conn. Gen. Stat. § 21a-277(a) violation is not a "controlled substance offense" in light of *Mathis*. Previously, the Second Circuit instructed district courts to determine whether a prior state drug offense qualified as "controlled substance offense" using a "modified" categorical approach under which district courts were to undertake a "two-part inquiry" by first, asking whether the predicate conviction "criminalizes conduct that falls exclusively within the federal definition of a predicate offense," and, second, asking whether the Government had shown . . . that "the plea 'necessarily' rested on a fact identifying the conviction as a predicate offense." *Savage*, 542 F.3d at 964 (emphasis added). But this Court's 2016 *Mathis* decision explained that such an approach may only be employed where a statute lists "elements in the alternative, and thereby defined multiple crimes" rather than where a statute simply "various factual means of committing a single element." *Mathis*, 136 S. Ct. at 2249. The modified categorical approach is not, the Court warned, "to be repurposed as a technique for discovering whether a defendant's prior conviction, even though for a too-broad crime, rested on facts (or otherwise said, involved means) that also could have satisfied the elements of a generic offense." *Id*. at 2254. As Santiago argued below, Connecticut prohibits certain actions (*e.g.*, a mere "offer to sell"), and certain drug types (*e.g.*, TFMPP) that the generic Guidelines definition of a "controlled substance offense" does not encompass. Because jury unanimity is not required as to either the prohibited actions or drugs, they are means, rather than elements, of the offense and the modified categorical approach has no application.

Santiago further argued below and on appeal that Connecticut's second-degree robbery statute sweeps more broadly than does the generic Guidelines definition of robbery. That is,

because robbery does not require, as an element, the use of violent force, and because it is broader than the generic definition of robbery under the Guidelines. The district court overruled both objections.

Before imposing sentence, the district court twice explained that it was obligated to "consider the Guidelines and calculate the range accurately." App. D at 9, 10. It noted that if the enhancements applied Santiago's base offense level would be 24, but if one conviction did not count, his base offense level would be 20, and if both convictions did not count, it could be "as low as 14." *Id.* at 11. At no point, however, did the district court calculate the sentencing range that would have applied if one or both of the enhancements applied. Nor did it ever explain its sentence in terms of an upward variance from those lower ranges. Instead, it adopted a Guidelines range of 77-96 months and then explained that its sentence as a downward variance:

> the law gives me discretion to impose a sentence that's outside the Guidelines system all together, which is sometimes called a non-guidelines sentence. I am going to exercise my discretion to do that. I'm going to impose a sentence that's slightly below the Guidelines range because I find a sentence—such a sentence is sufficient but not greater than necessary to serve the purposes of sentencing that are most at issue in this case.

Id. at 53. The district court later reiterated that sentence imposed was "close to the Guidelines range," *id.* at 58, and again indicated in its written judgment that it believed it had imposed on Santiago, a "slightly below the Guidelines" sentence, App. C at 1. And while the district court did state that "it's really not the Guidelines that are driving this sentence," App. D at 58, and that the resolution of the parties' Guidelines dispute would not "affect the ultimate sentence" imposed, *id.* at 26, it is clear the district court believed it was imposing a "below" Guidelines sentence. *Id.* at 53. Indeed, the district court made no attempt to calculate an alternative Guidelines range or explain its sentence as a significant upwards variance—a fact that assumes added significance

when one considers that in fiscal year 2016, there was only one upward variance of any kind in a firearms Guidelines case in the entire District of Connecticut.

Without deciding whether procedural error occurred, the Second Circuit summarily affirmed the sentence on the ground that any error was harmless. In support of its conclusion, the Second Circuit began by quoting dicta from *Molina-Martinez*, a plain error case, to the effect that "there are 'instances when, despite application of an erroneous Guidelines range, a reasonable probability of prejudice does not exist,'" App. B at 3 (quoting *Molina-Martinez*, 136 S. Ct. at 1346), when *Molina-Martinez* actually says "[t]here may be instances" when such a probability of prejudice does not exist, 136 S. Ct. at 1346. Using language erroneously borrowed from a plain error context, the Second Circuit proceeded to find that any procedural error in Santiago's sentence was "harmless" because "[t]he district court in Santiago's case made abundantly clear that it 'thought the sentence it chose was appropriate irrespective of the Guidelines range.'" App. B at 3 (again quoting *Molina-Martinez*, 136 S. Ct. at 1346). That is so because the district court "specifically noted" in its written judgment, that it would have imposed the same sentence regardless, and further "emphasized this point repeatedly during Santiago's sentencing hearing." *Id.*

The Second Circuit then proceeded to reject Santiago's alternative substantive unreasonableness challenge because the district court had "insisted that a lengthy sentence was necessary to protect the public and serve as a proper deterrent" and an appellate court must give "due deference" to that determination. *Id.* at 5. Since the Second Circuit declined to reach the issue of procedural error, it never considered whether the district court's reasons were sufficient to explain the extent of its upward variance—more than double the high end of the correct range—or whether the upward variance was substantively reasonable in relation to the correct range.

REASONS FOR GRANTING THIS PETITION

THE SECOND CIRCUIT MISAPPLIED THE HARMLESS ERROR STANDARD

The Second Circuit's conclusion that any error was harmless misinterprets this Court's precedent and misapplies its own precedent. The Second Circuit's approach amounts to a clear statement rule—if a district court indicates that it "would have imposed the same sentence" regardless of its Guidelines calculation error, then a defendant must not have been harmed by the error. But, such a rule is at odds with what we know about human nature and psychological anchoring, and deviates from the approach taken by the Supreme Court and at least five other circuits.

More than 25 years ago, this Court explained a procedural error during sentencing is harmless only if "the error did not affect the district court's selection of the sentence imposed." *Williams v. United States*, 503 U.S. 193, 203 (1992) (emphasis added). This requires that an appellate court review "the record as a whole," *id.* at 203, and not simply defer to "a bare statement devoid of any justification for deviating . . . above the upper-end of the properly calculated Guidelines range." *United States v. Smalley*, 517 F.3d 208, 214-15 (3d Cir. 2008). Although *Williams* was decided in the mandatory Guidelines era, the Guidelines continue to function as the "starting point and initial benchmark for federal sentences," *Gall*, 552 U.S. at 49, and continue to have a "real and pervasive effect" on sentences actually imposed, *Molina-Martinez*, 136 S. Ct. at 1346. As this Court stated, "the Guidelines are not only the starting point for most federal sentencing proceedings, but also the lodestar." *Id.* For that reason, "[i]n most cases a defendant who has shown that the district court mistakenly deemed applicable an incorrect, higher Guidelines range has demonstrated a reasonable probability of a different outcome." *Id.* Accordingly, appellate courts "cannot assume, without unambiguous indication to the contrary, that the sentence

would be the same absent the error" or "lightly assume that eliminating enhancements from the Guidelines calculation would not affect the sentence." *United States v. Feldman*, 647 F.3d 450, 459-60 (2d Cir. 2011).

The Second Circuit acknowledged, but misapplied, the right standard—whether the record as a whole "indicates clearly that the district court would have imposed the same sentence in any event," App. B at 3 (quoting *United States v. Mandell*, 752 F.3d 544, 553 (2d Cir. 2014) (*per curiam*)). In *Mandell*, the Second Circuit found harmless, a purported Guidelines error that was preceded by the district court rejecting the fraud Guidelines as producing a range "wildly out of balance" with the defendant's crimes, and where "using the figures proposed by" the appellant himself would still have resulted in a Guidelines range "far in excess of the sentence actually imposed." 752 F.3d at 553. In contrast, here the district court erroneously imposed an upward variance more than twice the top end of the correctly calculated range argued by Santiago, and nowhere expressed disagreement with the firearms Guideline. Unlike *Mandell*, the Second Circuit cannot competently conclude that the Guidelines were immaterial to the sentencing determination.

Other Circuit Courts of Appeal have clearly recognized that "when the starting point for the § 3553(a) analysis is incorrect, the end point, *i.e.*, the resulting sentence, can rarely be shown to be unaffected," *United States v. Langford*, 516 F.3d 205, 217-18 (3d Cir. 2008) (emphasis added). Accordingly, it is not enough for a district court to simply state that it would have imposed the same sentence, regardless of its error. Rather, to prove that a procedural sentencing error was harmless, the Government must show that the district court (1) calculated an alternative (i.e., correct) Guidelines range, and (2) provided an explanation for why the extent of the variance from that alternative range was warranted. *See, e.g.*, *United States v. Zabielski*, 711 F.3d 381, 389 (3d Cir. 2013) ("a district court still must explain its reasons for imposing the sentence under either

Guidelines range."); *United States v. Munoz-Camarena*, 631 F.3d 1028, 1031 (9th Cir. 2011) (district court's "mere statement that it would impose the same above-Guidelines sentence" insufficient to "insulate the sentence from remand," because "the court's analysis did not flow from an initial determination of the correct Guidelines range" and court "must explain, among other things, the reason for the extent of a variance" (emphasis in original)); *United States v. Livesay*, 525 F.3d 1081, 1093 (11th Cir. 2008) (procedural error not harmless even though district court "clearly indicated that it would have imposed the same sentence" because court "gave no reasoning or indication of what facts justified such a significant variance . . . under its alternative sentence"); *United States v. Peña-Hermosillo*, 522 F.3d 1108, 1117 (10th Cir. 2008) ("[I]t is hard for us to imagine a case where it would be procedurally reasonable for a district court to announce that the same sentence would apply even if correct guidelines calculations are so substantially different, without cogent explanation."); *United States v. Icaza*, 492 F.3d 967, 971 (8th Cir. 2007) ("to support a finding of harmless error, the record clearly must show not only that the district court intended to provide an alternative sentence, but also that the alternative sentence is based on an identifiable, correctly calculated guidelines range" (emphasis added)); *but see, e.g., United States v. McCarty*, 628 F.3d 284, 294 (6th Cir. 2010) (error harmless where "district court indicated that its sentence would have been the same irrespective of the improper application" of enhancement).

The Supreme Court should take this opportunity to clarify that, for a procedural error to be found harmless where the resulting sentence is significantly above the correctly calculated Guidelines range, a district court must calculate the alternative correct range and adequately justify its sentence as an upwards variance from that range. Such a requirement more faithfully hews to the Court's admonition that a Guidelines variance requires a sentencing judge to "explain his

conclusion that an unusually lenient or an unusually harsh sentence is appropriate," *Gall*, 552 U.S. at 46, better promotes "meaningful appellate review" and the "perception of fair justice," *id.* at 50, and more accurately reflects the "real and pervasive effect the Guidelines have on sentencing." *Molina-Martinez*, 136 S. Ct. at 1346. Moreover, a district court's assertion that it would have imposed what it deemed a "slightly below the Guidelines range" sentence when the correct (but uncalculated) Guidelines range is two to three times as long, should be viewed with skepticism. Such an error can only be deemed harmless where the district court acknowledges the magnitude of the variance and its reasoning sufficiently supports the "degree of the upward variance." *United States v. Martinez*, 821 F.3d 984, 989 (8th Cir. 2016); *see also United States v. Ingram*, 721 F.3d 35, 40 (2d Cir. 2013) (Calabresi, J., concurring) ("'[A]nchoring effects' . . . show why the starting, guidelines-departure point matters, even when courts know they are not bound to that point."). Here, the Second Circuit nowhere explained how the district court's reasoning could support an upward variance that is double the length of the top end of the correctly calculated range.

THE SECOND CIRCUIT SHOULD HAVE OVERRULED *SAVAGE* IN LIGHT OF *MATHIS* AND RESOLVED AN ISSUE THAT CONTINUES TO DIVIDE THE COURTS

The Second Circuit's summary affirmance, as well as that in *Acoff*, are missed opportunities for the Second Circuit to ensure that its own precedents do not conflict with Supreme Court case law and do not continue to sow confusion below. Leaving aside the robbery statute, Santiago's appeal squarely presents the issue of whether this Court's embrace of the modified categorical approach in *Savage* survives the elements-based categorical inquiry required by the Supreme Court in *Mathis*. Resolution of that issue will impact not just the advisory Guidelines, but also statutory sentencing enhancements that require the imposition of mandatory minimum

sentences under the Armed Career Criminal Act (18 U.S.C. § 924(e)), the federal three strikes law (18 U.S.C. § 3559(c)), and our nation's drug laws (21 U.S.C. §§ 841 & 851).

As if to underscore the need for guidance from this Court on this issue, just a few weeks before the Second Circuit's decision, a different Connecticut judge (Arterton, J.) held that Conn. Gen. Stat. § 21a-277(a) convictions do not qualify as "controlled substance offenses" under the Guidelines, *Epps*, 2018 WL 2958442, in contradiction of the district court's decision here. The defendant, in *Epps*, received a within-Guidelines 40-month sentence that was substantially lower than the 84-105 month Guidelines range that would have applied had Judge Arterton adopted the same reasoning as the district court and the Government in this case. Santiago's 75-month sentence, by contrast, is more than double his correctly calculated Guidelines range. How can it possibly be said with certainty that the district court's sentence was not influenced by its significant procedural errors and that those errors do not "seriously affect the fairness, integrity, or public reputation of judicial proceedings," *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1903 (2018)?

At the very least, the Supreme Court should remand and instruct the Second Circuit to recognize that *Savage*'s modified categorical approach has been displaced by *Mathis* and is no longer to be followed. *See Epps*, 2018 WL 2958442 ("since the Connecticut statute is categorically broader than the generic Guidelines' 'controlled substance offense,' the Court is precluded from applying the modified categorical approach"). That will have the salutary effect of not only simplifying sentencing proceedings, but also clarifying the expectations of the Government and criminal defendants when entering into plea bargains. Neither party should be faced with entering into plea agreements (or not, as the case may be) without knowing whether the correct Guidelines

range is, for example, 30-37 versus 77-96 months. Yet, that is exactly the indeterminate exercise that the Second Circuit's summary orders in *Acoff* and *Santiago* condemn the parties to repeat.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that a writ of certiorari be granted, the order of the court of appeals vacated, and the case remanded to the district court for further proceedings.

Respectfully Submitted,

THE PETITIONER,
Jesus Santiago

FEDERAL DEFENDER OFFICE

Date: November 8, 2018

/s/ James P. Maguire
James P. Maguire
Assistant Federal Defender
Office of the Federal Defender
265 Church Street, Suite 702
New Haven, CT 06510
Phone: (203) 498-4200
Email: james_maguire@fd.org

Counsel of Record for Jesus Santiago