No. _____

IN THE

Supreme Court of the United States

MICHAEL CLARK,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF *CERTIORARI*

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QUESTION PRESENTED

I. Since a defendant's criminal history category establishes the U.S Sentencing Guidelines' policy range of imprisonment upon revocation and can result in a higher prison classification within the Bureau of Prisons, did the Seventh Circuit erroneously decide that being placed in too high a criminal history category is not a harm for which a defendant can obtain relief?

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IN THE

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OCTOBER TERM 2018

MICHAEL CLARK,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Petitioner, MICHAEL CLARK, respectfully prays that a writ of *certiorari* be issued to review the published opinion of the United States Court of Appeals for the Seventh Circuit, issued on October 18, 2018 (and denying a petitioner for rehearing on November 16, 2018), which rejected part of his sentencing challenge.

OPINION BELOW

This decision of the United States Court of Appeals for the Seventh Circuit is published at 906 F.3d 667. (Pet. App. 1a-9a).

JURISDICTION

The appellate court entered judgment on October 18, 2018 (Pet. App. 10a). Mr. Clark moved for a rehearing and the appellate court denied the motion on November 16, 2018. (Pet. App. 11a).

RULES INVOLVED

In *Rita v. United States*, 551 U.S. 338, 347-48 (2007), this Court said "a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range". *See also Gall v. United States*, 552 U.S. 38, 49 (2007) (same, citing *Rita*). An improper criminal history calculation subjects a defendant to a greater policy range of imprisonment under the Guidelines in the event of an 18 U.S.C. § 3583(e)(3) revocation. *See, generally*, U.S.S.G. § 7B1.4 (imprisonment range escalates with increased criminal history score).

Rosales-Mireles v. United States, 138 S.Ct. 1897, 1907 (2018), explained that "[a] plain Guidelines error that affects a defendant's substantial rights is precisely the type of error that ordinarily warrants relief under [Federal] Rule [of Criminal Procedure] 52(b)." The possibility of a defendant serving extra imprisonment upon revocation where the defendant's policy range is improperly

high warrants exercising discretion under Rule 52(a) and "is crucial in maintaining public perception of fairness and integrity in the justice system that courts exhibit regard for fundamental rights and respect for prisoners 'as people.'" *Id.* (quoting T. Tyler, Why People Obey the Law 164 (2006)).

Furthermore, appellate courts should reject trial judges' attempts to insulate themselves from appeal review by saying 'the sentence would be the same irrespective of any error'. *See United States v. Gieswein*, 887 F.3d 1054, 1062-63 (10th Cir. 2018) (an appellate court should give little weight to the district court's statement that its conclusion would be the same even if PSR objections had succeeded); *United States v. Black*, 830 F.3d 1099, 1110 (10th Cir. 2016) (accepting concession that remand was appropriate after Guidelines calculation error despite district court's statement that "I think that a 360-month sentence is appropriate and that's what I would have imposed"). *Clark* parts company with that well-reasoned authority via a harmless error analysis that simply accepts a district court's assertion that the same sentence would be given notwithstanding the error.

STATEMENT OF THE CASE

This petition seeks review of Seventh Circuit precedent that allows a district court to miscalculate a defendant's criminal history category, accept at face value a district court's assertion that the sentence would be the same

regardless of the error, and disregard legitimate harms a defendant suffers as a result of the district court's error.

Although Mr. Clark argued those issues on appeal, the Seventh Circuit affirmed his sentence (other than to require correction of two supervised release conditions). (Pet. App. 9a). Mr. Clark asked for a rehearing, but the court denied that motion. (Pet. App. 11a).

REASONS FOR GRANTING THE WRIT

This Court should grant *certiorari* to resolve whether an appellate court can find harmless error by accepting a district court's statement that a sentence would be unchanged regardless of the asserted sentencing error. Relatedly, granting *certiorari* will allow this Court to decide whether an incorrectly high criminal history category that affects a defendant's policy range of imprisonment upon revocation and can affect a defendant's security classification within the Bureau of Prisons is a harm that warrants relief.

I. Since a defendant's criminal history category establishes the U.S. Sentencing Guidelines policy range of imprisonment upon revocation and can result in a higher prison classification within the Bureau of Prisons, the Seventh Circuit erroneously decided that being placed in too high a criminal history category is not a harm for which a defendant can obtain relief.

1. On appeal, Mr. Clark argued that the district court committed a significant procedural error by miscalculating his criminal history category. He contended the error placed him in a higher imprisonment range upon revocation

per U.S.S.G. § 7B1.4 because the Sentencing Guidelines rely on a defendant's criminal history category to determine a defendant's punishment. (Pet. App. 7a, n.1). He also argued that an improperly high criminal history category can adversely impact his security classification within the Bureau of Prisons. *Id.* Citing *United States v. Abbas*, 560 F.3d 660, 667 (7th Cir. 2009), *Clark* said there's harmless error "when the government has proved that the district court's sentencing error did not affect the defendant's substantial rights." (Pet. App. 6a). *Clark* then found harmless because the district court said it would impose the same sentence regardless of Mr. Clark's criminal history. (Pet. App. 7a).

2. *Clark* said Mr. Clark cited "no authority" that collateral effects a defendant suffers from a criminal history miscalculation affect the defendant's substantial rights. (Pet. App. 7a, n. 1) (citing *United States v. Smith*, 223 F.3d 554, 578–79 (7th Cir. 2000) (concluding any error in calculating the defendant's criminal history category was harmless because it did not affect his Guidelines range)). But neither *Rita* nor *Gall* allows an appellate court to use harmlessness to disregard a significant procedural error such as a Guideline miscalculation. *Rita*, 551 U.S. at 347-48; *Gall*, 552 U.S. at 50. And even if harmless error could be applied, the Government did not prove its applicability since the Government never contended that the collateral effects of an incorrect criminal history calculation don't impact a defendant's substantial rights. Rather than have the

Government meet its burden of proof, *Clark* improperly shifted the burden of proof to the defense to establish substantial harm. Should the *Clark* opinion go uncorrected, defendants will be strapped with a burden that has until now been the government's to bear. As for the *Clark* opinion's citation *Smith*, the fact that cases focus on the effect of a sentence does not mean there's nothing else that impairs a defendant's substantial rights. What is more, the Seventh Circuit has previously recognized an inflated criminal history category is an actionable harm. *See United States v. LeBlanc*, 45 F.3d 192, 193 n.1 (7th Cir. 1997).

3. Also, *Rosales-Mireles* explained that "[a] plain Guidelines error that affects a defendant's substantial rights is precisely the type of error that ordinarily warrants relief under [Federal] Rule [of Criminal Procedure] 52(b)." 138 S.Ct. at 1907. An improper criminal history category subjects a defendant to a greater imprisonment when there's an 18 U.S.C. § 3583(e)(3) revocation. *See, generally*, U.S.S.G. § 7B1.4 (imprisonment range escalates with increased criminal history score). The chance that Mr. Clark could be revoked and made to serve a sentence based on an improper policy range warrants exercising discretion under Rule 52(a). That "is crucial in maintaining public perception of fairness and integrity in the justice system that courts exhibit regard for fundamental rights and respect for prisoners 'as people.'" *Rosales-Mireles*, 138 S.Ct. at 1907 (quoting T. Tyler, Why People Obey the Law 164 (2006)).

4. Furthermore, district courts cannot insulate themselves from appeal review by saying 'the sentence would be the same irrespective of any error'. *See Gieswein*, 887 F.3d at 1062-63; *Black*, 830 F.3d at 1110. *Clark* contributes to a circuit split by accepting the trial court's statement that the sentence would be unchanged regardless of any error. If it was good policy to allow a decision maker to appeal-proof a case by saying the result wouldn't change regardless of a how a disputed issue was called, one would expect that the notion would take off in a host of setting. Administrative law judges, immigration judges, etc. could say the magical words and their decisions would be irreversible on appeal. But that is not what happens. Those decisions are reviewable on appeal to make certain that proper procedure was followed. The substantive conclusions are girded by that process. It should be no different for a criminal appeal. Given how the Guidelines anchor criminal sentencing, one cannot presume that a trial court is free from the bias that permeates a decision based on an incorrect Guidelines determination. *See, generally, Peugh v. United States*, 569 U.S. 530, 549 (2013). As such, this Court should abandon the *Abbas* line of harmless error cases and adopt the approach used in *Gieswein* and *Black* which gives little heed to district courts' pronouncements that their sentences weren't impacted by their own errors. The cost of a remand is not so great---and a defendant's rights are not so small---to permit that practice to continue. *See, generally, Rosales-Mireles*, 138 S.Ct. at 1907.

CONCLUSION

For the reasons stated above, this Court should grant Mr. Clark's petition for writ of *certiorari*.

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