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IN THE SUPREME COURT OF THE UNITED STATES

NO. \_\_\_\_\_

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**Zachery Joseph Cooley,**

**Petitioner,**

**VS.**

**United States of America,**

**Respondent.**

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**Petition for Writ of Certiorari to  
The United States Court of Appeals  
For the Eleventh Circuit**

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**PETITION FOR WRIT OF CERTIORARI**

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## QUESTION PRESENTED

This Court recently reaffirmed that consideration of a defendant's Guideline range is a necessary factor that a sentencing judge must consider under 18 U.S.C. § 3553, and that "[b]efore 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.' *Gall*, 552 U.S., at 51, 128 S.Ct. 586." *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1910 (2018) (quoting *Gall v. United States*, 128 S. Ct. 586, 597 (2007)).

The question presented by the Petition is: When a defendant appeals his sentence on the grounds that his Guideline range was miscalculated, may an appellate court disregard any error in the guideline range based on the bare statement of the sentencing judge that the sentence would have been awarded regardless of any guideline error.

## CORPORATE DISCLOSURE STATEMENT

Counsel for Petitioner notes that there are no corporations, subsidiaries or corporate affiliates involved in this proceeding.

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Petitioner Zachery Joseph Cooley respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

**OPINION BELOW**

On September 5, 2018, the Eleventh Circuit entered judgment affirming the final judgment of the district court of October 25, 2017.

**JURISDICTION**

The Eleventh Circuit entered judgment on September 5, 2018. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

**CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

**The Due Process Clause:**

No person shall . . . be deprived of life, liberty, or property, without due process of law.

**Federal Rule of Criminal Procedure 52(a):**

Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

**STATEMENT OF THE CASE**

Petitioner Zachery Cooley was convicted of Conspiracy to Possess with the Intent to Distribute Methamphetamine (as well as several other charges) after a three-day trial in the United States District Court for the Southern District of Alabama. The evidence during trial showed that 188.94 gm of methamphetamine attributable to Petitioner had been seized, tested, and shown to meet the 80% purity

threshold to qualify as methamphetamine “ice” under the Guidelines. There was additional testimony concerning Petitioner’s involvement with methamphetamine; however, these witnesses neither testified to the purity of any alleged substances, nor did they testify that they understood that term “ice” under the Guidelines referred to methamphetamine with a minimum purity of 80%. Nonetheless, a Presentence Investigation Report subsequently attributed 3 kg of methamphetamine “ice” to Petitioner as relevant conduct, which provided for a base offence level of 36 under the Guidelines, rather than the base level of 32 that 188.94 gm of “ice” would warrant. With Petitioner’s criminal history if III, the increase of the base level from 32 (151-188 months) to 36 (235–293 months) represents a 56% increase in his base sentence.

Petitioner objected to the Report’s finding that 3 kg of methamphetamine “ice” should be attributable to him as relevant conduct, and protested that such a finding improperly inflated his base offense level. These objections were rejected by the district court, which ultimately attributed 3 kg of methamphetamine “ice” to Petitioner, found that a base level of 36 was proper, and sentenced Petitioner to 223 months on the conspiracy count. The district court further proclaimed “that the sentence is appropriate, given all of the evidence presented in the case, regardless of what the guideline calculations turn out to be.” The district court did not specify which particular evidence it was referring to.

Petitioner appealed to the Eleventh Circuit in part on the grounds that the district court erred in attributing 3 kg of methamphetamine “ice” to him as relevant conduct, in the absence of competent evidence as to the purity of the substances

attributed to him. Petitioner's conviction was affirmed by the Eleventh Circuit on September 5, 2018, finding that:

The district court stated that its sentence was appropriate regardless of any guidelines error. Moreover, the ultimate sentence was substantively reasonable even assuming a guidelines error. Thus, we need not address Cooley's challenge to the calculation of his guidelines range, specifically the use of methamphetamine "ice" in the calculation.

While the Eleventh Circuit outlined the elements of its "substantively reasonable" review prior to this holding, it failed to enumerate any case-specific factors that it used to find that Petitioner's particular sentence was substantively reasonable apart from the district court's declaration that the sentence was appropriate despite any errors in the Guidelines range.

### **REASONS FOR GRANTING THE WRIT**

- 1. There Exists a Split Between the Circuits Concerning the Application of the Harmless Error Standard as it Applies to Guidelines Calculations. A Review by This Court is Necessary to Resolve these Unnecessary and Detrimental Inconsistencies.**

This Court has addressed the procedure for confronting guideline miscalculations on appellate review: "[O]nce 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, i.e., that the error did not affect the district court's selection of the sentence imposed." *Williams v. United States*, 503 U.S. 193, 203 (1992). However, a significant split between the circuits exists concerning what standards will be applied in judging

whether an error is harmless, particularly when a sentencing judge claims that the guideline calculations (or miscalculations) did not affect the sentence ultimately imposed. This split should be addressed by this Court as it is significant and contrary to truism that “the public legitimacy of our justice system relies on procedures that are ‘neutral, accurate, consistent, trustworthy, and fair,’ and that ‘provide opportunities for error correction.’” *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1908 (2018) (citation omitted).

The court below succinctly outlined the current procedure in the Eleventh Circuit for reviewing a sentence when a defendant objects to his guideline calculations as Petitioner has:

If the district court states that its sentence would not have changed with a different guidelines calculation, we assume there was an error, calculate the guideline range without the error, and analyze whether the sentence would be substantively reasonable under that guideline range.

However, the Eleventh Circuit did not reveal its controlling jurisprudence guiding its review of whether a sentence is “substantively reasonable” under those circumstances. In fact, the Eleventh Circuit has effectively negated any real review in such a situation. In *United States v. Keene*, 470 F. 3d 1347 (11th Cir. 2006) the Eleventh Circuit was confronted with the question of whether a sentencing enhancement improperly affected the appellant’s guidelines. As in Petitioner’s case, the trial judge in *Keene* stated that the sentence the appellant received would be “reasonable and appropriate” regardless of any guideline errors. *Id.* at 1349. Resting

on the sentencing judge's position without question, the Eleventh Circuit declined to conduct its own inquiry into the substantive reasonableness of the appellant's sentence and made clear that it would show unquestioning deference to the district court:

The reason it is unnecessary for us to decide the enhancement issue is that a decision either way will not affect the outcome of this case. We know it will not because the district court told us that the enhancement made no difference to the sentence it imposed.

*Keene*, 470 F. 3d at 1348.

In Petitioner's case, the Eleventh Circuit followed the same course of action. After highlighting Eleventh Circuit jurisprudence related to substantive reasonableness review, the court below summarily declared that

The district court stated that its sentence was appropriate regardless of any guidelines error. Moreover, the ultimate sentence was substantively reasonable even assuming a guidelines error. Thus, we need not address Cooley's challenge to the calculation of his guidelines range, specifically the use of methamphetamine "ice" in the calculation.

The Eleventh Circuit did not give any reasoning behind its determination that Petitioner's sentence was "substantively reasonable even assuming a guidelines error." The court did not discuss the difference in months of incarceration between the two base levels at issue, nor the fact that the higher base level constituted a 56% increase in the Guideline range.

Unfortunately, this failure to review is a trend that has been followed in a number of circuits, including the First, Fourth, and Eighth. *See United States v. Marsh*, 561 F.3d 81, 85 (1st Cir. 2009) ("This Guideline issue is not one we need to

resolve. As previously noted, the district court stated that it would have imposed the same sentence as a non Guideline sentence”); *United States v. Smith*, 701 F. App’x 239, 241 (4th Cir. 2017) (“[T]he court stated that it would have imposed the same 264-month sentence without the enhancement. We thus conclude that the first requirement of the assumed error harmless inquiry is satisfied”); *United States v. Ortiz*, 636 F.3d 389, 395 (8th Cir. 2011) (“[b]ecause the district court stated that ‘even in the absence of these departures under the Sentencing Guidelines, [the district court] would [have] impose[d] the same sentence,’ any procedural error was harmless as a matter of law”).

Nonetheless, the position taken by these courts neglects to recognize that sentencing guideline calculations are central to a defendant’s ultimate sentence, robs defendants of legitimate appellate review of their guideline calculations, and ignores this Court’s guidance on the issue.

As the Court has recognized, when a Guidelines range moves up or down, offenders’ sentences [tend to] move with it. These realities have led the Court to observe that there is considerable empirical evidence indicating that the Sentencing Guidelines have the intended effect of influencing the sentences imposed by judges.

*Molina-Martinez v. United States*, 136 S. Ct. 1338, 1346 (2016) (internal quotations and citations omitted). This evidence buttresses the Court’s mandate on reviewing defendants’ sentences:

“[b]efore 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." *Gall*, 552 U.S., at 51, 128 S.Ct. 586. This makes eminent sense, for the district court is charged in the first instance with determining whether, taking all sentencing factors into consideration, including the correct Guidelines range, a sentence is "sufficient, but not greater than necessary." 18 U.S.C. § 3553(a). If the district court is unable properly to undertake that 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. See *Gall*, 552 U.S., at 51, 128 S.Ct. 586. Likewise, regardless of its ultimate reasonableness, a sentence that lacks reliability because of unjust procedures may well undermine public perception of the proceedings.

*Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1910 (2018).

Several circuits—the Third, Seventh, and Tenth—have insisted that a trial court's bare assertion that it would have handed down the same sentence regardless of any guidelines calculations does not compel an appellate court to presume substantive reasonableness in the sentence. See *United States v. Johns*, 732 F.3d 736, 740-41 (7th Cir. 2013) ("[T]he court's statement that 'it would impose the same sentence for the reasons stated . . .'" "falls short of the 'detailed explanation' we have found sufficient to show harmless error. Instead, the court's comment appears to have been 'just a conclusory comment tossed in for good measure'" (internal citations omitted); *United States v. Smalley*, 517 F.3d 208, 215 (3d Cir. 2008) ("Here, the District Court committed procedural error because the alternative sentence is a bare statement devoid of any justification for deviating eight months above the upper-end of the properly calculated Guidelines range."); *United States v. Peña-Hermosillo*, 522 F.3d 1108, 1117 (10th Cir. 2008) ("Indeed, it 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.”).

The positions of the Third, Seventh, and Tenth Circuits are more cognizant of the reality that guideline calculations do in-fact influence sentences, regardless of whether a sentence ultimately falls inside or outside any given range. A review of properly calculated guidelines is necessary and indispensable element in a district court’s sentencing procedure. If a district court does not start its sentencing analysis with properly calculated guidelines, its ultimate conclusion is necessarily tainted and faulty. Courts should not be allowed to dispense with a necessary sentencing element and to insulate a sentence from appellate review.

### CONCLUSION

For the reasons set forth above, 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,



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