NO. ___

IN THE

SUPREME COURT OF THE UNITED STATES

JC CHRISTOPHER PULHAM,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court has held that appellate courts may presume that district courts know and correctly follow the law. But while this principle is sound in theory, its application in practice is often nuanced. This case, which concerns the application of a Sentencing Guidelines enhancement whose meaning is not at issue, presents the following question:

> When a district court does not articulate the legal standard it is applying, may an appellate court presume that the district court knew and correctly followed the law, even when there are indications to the contrary?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

PETITION FOR A WRIT OF CERTIORARI 1

OPINION BELOW 1

JURISDICTION 1

FEDERAL PROVISION INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 12

I. The Tenth Circuit's opinion is wrong, and this case is a good vehicle to give content to the limits of the important principle of appellate review that district courts are presumed to know and follow the law. 12

II. The plain error standard of review presents no obstacle to review, and Mr. Pulham is entitled to relief. 18

CONCLUSION 22

APPENDIX

Decision of the United States Court of Appeals for the Tenth Circuit in *United States v. Pulham*, 735 F. App'x 937 (10th Cir. May 24, 2018) A1

Order of the United States Court of Appeals for the Tenth Circuit denying petition for rehearing (July 17, 2018) A19

Letter from the Clerk of Court advising that application for extension of time in which to petition for certiorari has been granted by Justice Sotomayor (October 3, 2018) A20

TABLE OF AUTHORITIES

Page

Cases

Braxton v. United States, 500 U.S. 344 (1991) 20

Molina-Martinez v. United States, 136 S. Ct. 1338 (2016) 17, 19, 20

Rosales-Mireles v. United States, 138 S. Ct. 1897 (2018) 17, 19

United States v. Beaulieu, 893 F.2d 1177 (10th Cir. 1990) 16

United States v. Fennell, 65 F.3d 812 (10th Cir. 1995) 16

United States v. Olano, 507 U.S. 725 (1993) 19

United States v. Ruiz-Terrazas, 477 F.3d 1196 (10th Cir. 2007) 12

United States v. Tucker, 404 U.S. 443 (1972) 16

Wainwright v. Witt, 469 U.S. 412 (1985) 12

Walton v. Arizona, 497 U.S. 639 (1990) 12

Statutes

18 U.S.C. § 2246(2) 4

18 U.S.C. § 2252A 3

18 U.S.C. § 3231 1

18 U.S.C. § 3742 1

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291 1

Rules

Fed. R. App. P. 32.1 21

Fed. R. Crim. P. 32 15

Fed. R. Crim. P. 52 19

Sup. Ct. R. 12.7 3

Sup. Ct. R. 34.6 5

10th Cir. R. 25.5 5

10th Cir. R. 32.1(A) 21

Sentencing Guidelines

U.S.S.G. § 2G2.2 cmnt. n. 1 3

U.S.S.G. § 2G2.2(b)(5) ..... *passim*

PETITION FOR A WRIT OF CERTIORARI

Petitioner, JC Christopher Pulham, respectfully petitions for a writ of certiorari to review the order and judgment of the United States Court of Appeals for the Tenth Circuit entered on May 24, 2018.

OPINION BELOW

The unpublished decision of the United States Court of Appeals for the Tenth Circuit, *United States v. Pulham*, 735 F. App'x 937 (10th Cir. 2018), is found in the Appendix at 1.

JURISDICTION

The United States District Court for the District of Wyoming had jurisdiction in this criminal action pursuant to 18 U.S.C. § 3231. The Tenth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742. The circuit court entered judgment on May 24, 2018, and it denied rehearing on July 17, 2018. (Appendix at 1, 19.) Justice Sotomayor extended the time in which to petition for certiorari by 60 days, to and including December 14, 2018. (Appendix at 20.) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

FEDERAL PROVISION INVOLVED

Federal Sentencing Guideline Involved

U.S.S.G. § 2G2.2

. . .

(b) Specific Offense Characteristics

. . .

(5) If the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor, increase by 5 levels.

. . .

Application Notes:

1. Definitions.

. . .

"Pattern of activity involving the sexual abuse or exploitation of a minor" means any combination of two or more separate instances of the sexual abuse or sexual exploitation of a minor by the defendant, whether or not the abuse or exploitation (A) occurred during the course of the offense; (B) involved the same minor; or (C) resulted in a conviction for such conduct.

. . .

"Sexual abuse or exploitation" means any of the following: (A) conduct described in 18 U.S.C. § 2241, § 2242, § 2243, § 2251(a)-(c), § 2251(d)(1)(B), § 2251A, § 2260(b), § 2421, § 2422, or § 2423; (B) an offense under state law, that would have been an offense under any such section if the offense had occurred within the special maritime or territorial jurisdiction of the United States; or (C) an attempt or conspiracy to commit any of the offenses under subdivisions (A) or (B). "Sexual abuse or exploitation" does not include possession, accessing with intent to view, receipt, or trafficking in material relating to the sexual abuse or exploitation of a minor.

STATEMENT OF THE CASE

The dissent below described this sentencing challenge as "just the type of case for which plain-error review is suited." (Appendix at 14 (Hartz, J. dissenting).) The majority disagreed, and affirmed Mr. Pulham's sentence. (Appendix at 1-14.) Mr. Pulham now petitions this Court to grant certiorari to resolve an important legal question that goes to the heart of the appellate function—namely, what limits apply to the well-settled principle that appellate courts may presume that district courts know and correctly follow the law.

* * *

Mr. Pulham pleaded guilty to a single count of possession of child pornography, in violation of 18 U.S.C. § 2252A(a)(5)(B) and (b)(2). (Vol. 2 at 8-9).[1]

The Presentence Investigation Report ("PSR") applied U.S.S.G. § 2G2.2(b)(5), which provides for a five-level enhancement if the defendant engaged in a "pattern of activity involving the sexual abuse or exploitation of a minor." (Vol. 2 at 20.) A "pattern" is defined as "any combination of *two or more* separate instances of the *sexual abuse or sexual exploitation of a minor* by the defendant." U.S.S.G. § 2G2.2 cmt. n.1 (emphasis added). The phrase "sexual abuse or exploitation" has a specific—and

[1] Citations are to the record on appeal in the Tenth Circuit and the page number at the bottom, right-hand side of each page. The citations are provided for the Court's convenience in the event this Court deems it necessary to review the record to resolve this petition. *See* Sup. Ct. R. 12.7.

limited—meaning under the guideline: it only encompasses conduct that would be an offense under certain enumerated federal statutes. *Id.*

There is no dispute that the only enumerated statute potentially applicable here was 18 U.S.C. § 2241(c), which prohibits, in relevant part, "knowingly engag[ing] in a *sexual act* with another person who has not attained the age of 12 years . . . ." (emphasis added). And a "sexual act" is defined narrowly, to mean only:

> (A) contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight;
>
> (B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;
>
> (C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or
>
> (D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person[.]

18 U.S.C. § 2246(2)(A)-(D).

In recommending the pattern enhancement, the PSR did not state or even cite the relevant statute or this definition. Rather, it simply and summarily asserted that the enhancement applied without reference to this legal standard. (Vol. 2 at 20 ¶17.) The PSR went on to describe—and rely upon—three incidents alleged to have

occurred in 1988-89, over two and a half decades prior to Mr. Pulham's sentencing, and when he was a young teenager, which it recounted from Utah Department of Human Services and Utah Child Protective Services records that were themselves from the late 1980s. (*Id.* at 20-21 ¶¶ 28-30.) Mr. Pulham had contemporaneously denied these allegations back in the 1980s (and done so ever since), and no charges or even a juvenile delinquency petition were ever filed. (*Id.* at 37; Vol. 3 at 35-36.)

Most importantly here, and as everyone agreed by the time of Mr. Pulham's appeal, these allegations actually did not meet the legal definition of *sexual abuse or exploitation* necessary to apply the pattern enhancement. (*See* Appendix at 5 (majority opinion), 14-15 (dissent); *see also* Opening Br. at 10-13; Answer Br. at 12.) Because the allegations recounted in the PSR are relevant to the district court's ultimate ruling, they are briefly described here.

The first incident involved a 1988 claim made by the mother of a ten-year-old neighbor of Mr. Pulham's family. (Vol. 2 at 20-21.) The mother reported that Mr. Pulham had asked her daughter, J.H.,[2] to remove her clothing and then grabbed her between the legs and fondled her breasts. (*Id.* at 21.)

[2] Consistent with the practice in the proceedings below and the applicable privacy redaction requirements, *see* Sup. Ct. R. 34.6, Fed. R. App. P. 25, 10th Cir. R. 25.5, initials are used because the individuals discussed herein were minors during the pertinent periods.

The second and third incidents involved an allegation made in 1989 by Mr. Pulham's younger half-sister, C.P.

C.P. claimed that Mr. Pulham had "raped" her prior to the age of ten and done the same to their younger half-sister, S.J., who was then six years old. (*Id.* at 20.) A medical examination, however, revealed that neither girl had been the victim of sexual intercourse. (*Id.* at 20-21.) The PSR asserted, however, that the investigation determined that C.P. had been "fondled repeatedly." (*Id.* at 20.)

In the same allegation, C.P. also claimed that one time Mr. Pulham had been alone in his bedroom with a friend and S.J. (*Id.*) C.P. reported that S.J. had told her that the boys had made her take her clothes off. (*Id.* at 20-21.)

Defense counsel objected to the pattern enhancement, but did so only on reliability grounds—that is, he argued that the 1980s reports recounted in the PSR were unreliable given the internal inconsistencies therein, the lack of corroboration, and the passage of time. (*Id.* at 35-36.) Counsel did not object to the legal sufficiency of the allegations, however—that is, he did not argue that the events described in the PSR failed, as a matter of law, to meet the standard of "sexual abuse or exploitation" under the Guidelines.[3]

[3] Although, of course, as the dissent persuasively explains (Appendix at 14), he should have. Given that the facts set forth in the PSR plainly do not describe conduct that meets the definition of "sexual abuse or exploitation" under § 2G2.2(b)(5), they thus did not support application of the pattern enhancement.

At sentencing, defense counsel pressed the reliability objection to the pattern enhancement. (Vol. 3 at 35-40, 83-91.) He called two witnesses, S.J. and Mr. Pulham's stepfather, Terry Pulham, who raised Mr. Pulham, C.P., and S.J. (*Id.* at 40, 51; Vol. 2 at 22-23.)

S.J. testified that the allegations made in 1989 were not true, and that Mr. Pulham had neither molested her nor had any form of intercourse with her when they were children. (Vol. 3 at 42.) She explained that she had supported C.P.'s report of abuse at the time by telling her parents a story that C.P. had asked her to tell, but that the story was a lie. (*Id.* at 43-44, 49.)

Mr. Pulham's stepfather confirmed that he had been told by investigators in 1989 that no evidence of sexual intercourse was found on either C.P. or S.J. (*Id.* at 53.) He acknowledged that the investigation couldn't rule out whether there had been any touching because there was no way to prove that one way or the other. (*Id.*)

The government, in turn, put on its case agent, Shannon Reinert, whose testimony was limited to recounting unsworn telephone interviews that she had conducted with C.P. and J.H. (*Id.* at 67-69, 73.)

Agent Reinert told the court that she had learned of the allegations made against Mr. Pulham in the late 1980s from the PSR. (*Id.* at 69.) At the Assistant United States Attorney's request, she then contacted C.P. and J.H. (*Id.* at 68.) She contacted C.P. three days after defense counsel objected to the reliability of the

allegations in the PSR, and only spoke with J.H. earlier that day, on the morning of the sentencing hearing. (*Id.* at 69, 73.)

Agent Reinert reported that C.P., who previously had been diagnosed with paranoid schizophrenia (*id.* at 46), had told Agent Reinert that her relationship with Mr. Pulham was "very sexually charged" from a young age, and recounted various examples of sexualized behavior and sexual contact, including, as pertinent here, that he had "spread the lips of her vagina and place[d] his penis upon it." (*Id.* at 70-71.) She noted that C.P. also stated, contrary to her report in the late 1980s, that no penetration occurred that she could recall. (*Id.* at 70.) On cross examination, Agent Reinert acknowledged that C.P. had evidently withdrawn the allegations back in the 1980s (although the circumstances of that withdrawal were disputed), and that the allegations in fact may not have been true. (*Id.* at 71-72, 82.)

Agent Reinert also reported that J.H. had told her that when she was around ages nine, ten, or eleven, she had been made to strip and perform sexual acts with Mr. Pulham, including, eventually, oral sex and sexual intercourse. (*Id.* at 74-75.) Agent Reinert acknowledged that only a single incident had been contemporaneously alleged in the child services report in 1988 though—that is, the touching allegation recounted by the PSR. (*Id.* at 77.) Agent Reinert also disclosed that, at the time of her interview, J.H. was going through a medical board process for neurological injuries sustained during a military deployment. (*Id.* at 74.)

After hearing argument on the applicability of the pattern enhancement, the district court affirmatively accepted the PSR as its findings of facts and followed its recommendation to apply the enhancement. (*Id.* at 93.) The district court's holding is important to Mr. Pulham's claim, and so is recounted in full:

> Well, under the guidelines, the pattern is applied where there's two or more occasions of sexual abuse or sexual exploitation and as noted by both attorneys, the -- it doesn't matter whether the instances resulted in a conviction or any adjudication.
>
> The factors that seem persuasive to the Court in terms of the application of this enhancement are the -- to begin with, *the instance reported by [J.H.]. Whether that was one or more instances*, we have someone of a particular age that *correlates* with the age of [C.P.], and it also *correlates* with the age of images found on the defendant's computer associated with this particular offense. The types of conduct detailed by two separate individuals [i.e., C.P. and J.H.] also is similar which seems to *corroborate* the stories.
>
> The testimony from [Terry] Pulham and [S.J.] is a bit indeterminant, and it is obvious that [S.J.] has made every effort to search her memory and doesn't -- doesn't remember incidents. That's understandable. She was young.
>
> [Terry] Pulham, the testimony there is unusual. You have these accusations. You have this turmoil in the home. You have enough to have a young man go off to a behavioral facility and it seems as though [Terry] Pulham's attitude was well, as long as the police didn't arrest him or DFS didn't take him out of the home, and that to me just seems like a strange approach for a parental figure in the family to have taken with all this turmoil going on, particularly where there's *this reported incident by [J.H.]*.

> And so I don't -- I don't find those witnesses particularly persuasive in terms of what the point of their testimony was.
>
> I didn't hear [Terry] Pulham testify that [C.P.] victimized Mr. J.C. Pulham *by her report*. It was like, well, we -- the doctor couldn't tell us whether there was any touching, and so it sort of seems to kind of go out into the atmosphere as though that was the end of it, *when certainly sexual exploitation doesn't have to be sexual intercourse. It doesn't have to be really much of what was described by the girls to amount to sexual exploitation.*
>
> So the statements by the grown women, [J.H.] and [C.P.], the age that they were at *correlate* and it *correlates* with the images to which Mr. Pulham is attracted because of the offense conduct associated with child pornography. And so I believe that the -- that it is more probable than not that the defendant engaged in a pattern of activity, which is at least two, involving the sexual abuse or exploitation of minors.
>
> *With that conclusion*, *I'll accept the Presentence Report's findings of fact* and put the following guideline calculation on the record.

(*Id.* at 92–93 (emphasis added).)

After calculating Mr. Pulham's total offense level, the court ultimately varied downward by three levels, explaining that while it viewed the pattern enhancement as properly applied, a five-level increase "seems particularly punitive considering the amount of years that have passed, as [defense counsel] has noted, since *whatever—whatever happened back then*." (Vol. 3 at 112-14 (emphasis added).)

At this post-variance offense level of 30, Mr. Pulham's guideline range was 97 to 121 months. (*Id.* at 101, 113.) Had the court not applied the pattern enhancement,

the level would have been 28, corresponding to a guideline range of 78 to 97 months. The court sentenced Mr. Pulham to 97 months' imprisonment. (Vol. 3 at 113.)

Mr. Pulham timely appealed, arguing, *inter alia*, that the district court plainly erred in applying the pattern enhancement because the facts found by the court—i.e., those in the PSR—did not satisfy § 2G2.2(b)(5)'s definition of "sexual abuse or exploitation." (Vol. 1 at 20; Opening Br. at 9-16.)

In a 2-1 unpublished decision, the Tenth Circuit affirmed the sentence and application of the pattern enhancement. The majority concluded that the district court based its application of the pattern enhancement *not* on the facts in the PSR, but instead "tacitly" relied on the current-day, unsworn telephonic hearsay statements of C.P. and J.H. as relayed through Agent Reinert's testimony. And the worst of those allegations, the majority explained, undoubtedly fell within the definition of a "sexual act," and, therefore counted as "sexual abuse or exploitation" under the Guidelines. (Appendix at 4-9.)

In contrast, the dissent concluded that in the proceedings below "no one—not the probation office, defense counsel, the prosecutor, or the district court—had a correct understanding of the meaning of 'sexual abuse or exploitation of a minor' in U.S.S.G. § 2G2.2(b)(5)." (Appendix at 14 (Hartz, J. dissenting).) The dissent further explained that the record "strongly suggests" that the court "did not rely at all on" the parts of the hearsay statements that described conduct amounting to a "sexual act,"

but, rather, only referenced Agent Reinert's telephone interviews with C.P. and J.H. as supporting the reliability of the allegations of misconduct in the PSR—which was, of course, the sole basis of defense counsel's objection. (Appendix at 16-19.)

The Tenth Circuit denied rehearing (Appendix at 20), and this petition follows.

REASONS FOR GRANTING THE WRIT

I. The Tenth Circuit's opinion is wrong, and this case is a good vehicle to give content to the limits of the important principle of appellate review that district courts are presumed to know and follow the law.

It is a well-settled principle of appellate review, recognized by both this Court and the courts of appeal, that "[t]rial judges are presumed to know the law and apply it in making their decisions." *Walton v. Arizona,* 497 U.S. 639, 652 (1990), *overruled on other grounds by Ring v. Arizona,* 536 U.S. 584 (2002)); *see, e.g.*, *United States v. Ruiz-Terrazas*, 477 F.3d 1196, 1201 (10th Cir. 2007) (holding same).

This principle is, of course, sound. But it is not without limitations. After all, if the presumption was all-encompassing, there would be little need for any appellate review at all. Rather, the principle works only when a district court is silent about the legal standard it applied, and there are no other indications in the record that it applied an incorrect standard. As this Court has put it, in the context of a habeas review, "where the record does not indicate the standard applied by a state trial judge, he is presumed to have applied the correct one." *Wainwright v. Witt*, 469 U.S. 412, 431 (1985); *see also Ruiz-Terrazas*, 477 F.3d at 1201 (explaining that the court of appeals

"traditionally presume[s], *absent some indication in the record suggesting otherwise*, that '[t]rial judges are presumed to know the law and apply it in making their decisions'") (quoting *Walton*, 497 U.S. at 652) (emphasis added).

In this case, the dispute between the majority opinion and the dissent boils down to a disagreement about how far this presumption should apply. (Appendix at 6-7, 14-17.) That makes this case an excellent vehicle for this Court to give content to the scope of this important principle of appellate review, as well as the necessary limits on its application.

The majority decided that the district court knew and applied the correct law governing the application of the pattern enhancement, but that it did so without any clear exposition or explanation. That is, in the majority's view, the district court implicitly relied on the hearsay relayed through the case agent as its factual findings, and then applied those implicitly-found facts "tacitly" to the correct (but never articulated) legal standard. The dissent, in contrast, saw things completely differently. That is, in its view, both before and during Mr. Pulham's sentencing, "no one—not the probation office, defense counsel, the prosecutor, or the district court—had a correct understanding of the meaning of 'sexual abuse or exploitation of a minor' in U.S.S.G. § 2G2.2(b)(5)." For at least four reasons, the dissent has the far better view.

First, the *only* affirmative factual finding that the district court made was its acceptance of the PSR's findings. The district court *never* said, or even implied, that it

was adopting the current-day hearsay relayed by the case agent as its findings. Moreover, as the dissent noted, "[t]here is a big difference between saying that the interviews supported the PSR and saying that the most extreme allegations recited in the interviews are true. The district court did not say the latter." (Appendix at 17.)

Second, the entirety of the court's ruling applying the pattern enhancement demonstrates that its focus, and the basis for its decision, was on the allegations recounted in the PSR.

For one thing, the court began its ruling on the pattern enhancement by citing "the *instance reported* by [J.H.]." (Vol. 3 at 92.) It again referred to *"this reported incident*," and also noted "*the report*" filed by C.P. (*Id.*) The court's emphasis on the singular "instance," "incident," and "report" plainly demonstrates that it was analyzing the allegations set forth in the PSR, in which only *a single incident* was alleged as to J.H., and which recounted the report of abuse C.P. made in the 1980s. (Vol. 2 at 21.)

For another, the court relied on what had been "described *by the girls*." (Vol. 3 at 93. The court's phrasing demonstrates that its focus was on the allegations recounted in the PSR, which had been made in the 1980s when all the parties, Mr. Pulham, C.P., and J.H., were young. (Vol. 2 at 20-21.) This phrasing also stands in contrast to the subsequent mention of "the statements by the *grown women*," which the court mentioned in the context of observing that those statements "correlate[d]." (Vol. 3 at 93 (emphasis added.).)

Additionally, the court also remarked that "sexual exploitation doesn't have to be sexual intercourse. It doesn't have to be really much of what was described by the girls to amount to sexual exploitation." (*Id.*) But as the dissent observes, this "would be a very strange thing to say" if the court understood that it had to find particularly aggravated conduct to satisfy the definition of a "sexual act." Instead, this statement indicates that the court was saying it could disregard the most egregious allegations but still apply the enhancement. (Dissent at 7-8.)

Third, it makes perfect sense that the court's findings were limited to the facts in the PSR—after all, that's what was at issue at sentencing. As even the majority opinion recognized, "the bulk of the hearing was devoted to Mr. Pulham's objection to the pattern-of-activity enhancement." (Appendix at 3.) But the objection was that the allegations in the PSR were unreliable, not that they were legally insufficient.

It is far more likely that the district court was resolving the objection before it, rather than tacitly evaluating newly-raised hearsay allegations against a legal standard that no one even mentioned. *See generally* Fed. R. Crim. P. 32 (providing that at sentencing, the district court "must—for any disputed portion of the presentence report or other controverted matter—rule on the dispute or determine that a ruling is unnecessary . . . .).

Fourth, in light of the Tenth Circuit's case law governing the use of hearsay at sentencing, it is almost inconceivable that the district court would "tacitly" base its

application of a *five-level enhancement* on the hearsay testimony relayed by the case agent, as the majority opinion concluded.

It is true that the standard for considering hearsay as evidence at sentencing is fairly low—to comport with due process, it need only have a "minimal indicia of reliability." *See, e.g.*, *United States v. Beaulieu*, 893 F.2d 1177, 1181 (10th Cir. 1990) ("Due process requires that a defendant not be sentenced on the basis of 'misinformation of a constitutional magnitude.'") (quoting *United States v. Tucker,* 404 U.S. 443, 447 (1972)). But a *low* standard is not *no* standard, and the Tenth Circuit previously has found one type of hearsay insufficiently reliable to be used at sentencing—precisely the type at issue here, i.e., unsworn interviews conducted over the phone. *See United States v. Fennell*, 65 F.3d 812, 813-14 (10th Cir. 1995) (reversing where hearsay statements taken from telephone interview were the only evidence supporting a Guidelines enhancement and remarking that the probation officer recounting the hearsay "did not have an opportunity to observe [the declarant's] demeanor during the interview and therefore could not form any opinion as to her veracity").

The district court, of course, would be presumed to know and apply *Fennell* as well. And it is extremely unlikely that the district court would impose the pattern enhancement based on the same type of hearsay found unreliable in that case without clearly saying so. Indeed, even the majority opinion, which ultimately deemed *Fennell*

sufficiently distinguishable so as to support its view that the district court *could* rely on the hearsay recounted through the case agent, indicated that the reliability of those statements "was seriously undermined" by the holding in *Fennell*. (Appendix at 12-13.) Far more likely is what the dissent concluded—that the court viewed the unsworn hearsay introduced by the government as corroborating the reliability of the PSR's allegations. (Appendix at 16-17.)

There is, simply put, no clear indication in the record that the district court applied the correct legal standard, and there are compelling indications, including in the district court's own words, that it did not.[4] On this record then, the majority opinion assumed far too much, and its view that the district court "tacitly" applied the correct standard stretches the presumption that district courts know and follow the law to its breaking point. This Court should grant review to correct the error, and to provide guidance to the courts of appeals about the limitations on the presumption.

Indeed, this case presents an excellent vehicle for this Court to flesh out the limits of when the courts of appeals should decline to apply the presumption. One

[4] Moreover, it bears mention that it is completely unremarkable that the district court would err in this way. Not only had defense not objected to the legal sufficiency of the facts recounted in the PSR, but, as this Court recently recognized, "[g]iven the complexity of the [Guidelines] calculation, . . . district courts sometimes make mistakes." *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1904 (2018) ("It is unsurprising, then, that 'there will be instances when a district court's sentencing of a defendant within the framework of an incorrect Guidelines range goes unnoticed' by the parties as well, which may result in a defendant raising the error for the first time on appeal.") (quoting *Molina–Martinez v. United States,* 136 S. Ct. 1338, 1342 (2016)).

meaningful way, of course, to explain when the presumption should not apply is to decide cases in which that presumption is directly implicated. Moreover, here there is a fully-articulated dispute between a majority opinion and dissent about what the district court did. Finally, the erroneous application of the presumption here goes to the very heart of the appellate function. Accordingly, this Court should grant certiorari to reaffirm the soundness of the presumption, but also provide further content as to the important limits on its application.

II. The plain error standard of review presents no obstacle to review, and Mr. Pulham is entitled to relief.

As discussed above, defense counsel did not object in the district court to the legal sufficiency of the evidence supporting the pattern enhancement, thereby consigning Mr. Pulham to plain error review on appeal. But for two reasons, that standard of review presents no obstacle to this Court's review.

First, the issue presented squarely involves a narrow legal question about the level of deference an appellate court should pay to the district court's rulings based on unarticulated legal standards. And nothing in the answer to that question implicates the standard of review. Either the presumption applies (in which case there is no error because the district court would have employed the correct standard), or it does not (in which case the court applied the pattern enhancement based on an indisputably legally insufficient basis).

And that goes to the second reason why plain error review is no obstacle to review: that is, there is no dispute that *if* the district court relied on the PSR as its factual findings for imposing the pattern enhancement, that it erred, and plainly so under the plain text of U.S.S.G. § 2G2.2(b)(5) and the accompanying commentary. Thus, the first two conditions of plain error review are satisfied.[5] And this Court recently explained that the application of a demonstrably incorrect Guidelines range will, "[i]n most cases," satisfy the third and fourth prongs of plain error review. *See Molina-Martinez v. United States*, 136 S. Ct. 1338, 1345-47 (2016) (holding that application of an incorrect, higher, guideline range will, in "the ordinary case," indeed, "[i]n most cases," also satisfy plain error review's third prong); *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1907-08 (2018) (same as to fourth prong when first three are satisfied). The government has never argued to the contrary, nor could it on this record.

Finally, there are three additional reasons that counsel in favor of granting review in this case.

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[5] Federal Rule of Criminal Procedure 52(b) allows for correction of a "plain" error, and this Court has explained that to prevail under the plain error standard, a defendant must show: (1) error, (2) that is plain, and (3) that affected his substantial rights. *United States v. Olano*, 507 U.S. 725, 732 (1993). If the error meets these conditions, the reviewing court then may exercise its discretion to correct the error if it "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* (citation and internal quotation marks omitted). This latter consideration is "often called *Olano*'s fourth prong." *Rosales-Mireles*, 138 S. Ct. at 1905.

First, the fact that Mr. Pulham ultimately was sentenced within the Guidelines range that would apply *without* application of the pattern enhancement (i.e., to 97 months, which was the top end of that range) also presents no barrier to review, or to his ultimate relief in the form of resentencing. As this Court recently explained, "[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 v. United States*, 136 S. Ct. 1338, 1345 (2016) (emphasis added).

Second, it is important to note that this case is not about the meaning of a particular Guidelines provision, something that this Court has expressed hesitancy with respect to as a basis for review. *See Braxton v. United States*, 500 U.S. 344, 348 (1991) (explaining that the Sentencing Commission mission to periodically review and revise the Guidelines "might induce us to be more restrained and circumspect in using our certiorari power as the primary means of resolving such conflicts [over the meaning of a Guidelines provision]"). To the contrary, the meaning of U.S.S.G. § 2G2.2(b)(5) is not at issue in this petition, nor is there any dispute that the PSR failed as a matter of law to support application of the pattern enhancement. The sole question here is whether the district court should be presumed to have known and tacitly applied the correct law, even in the face of strong indications that it did not.

Third, the unpublished nature of the decision below also does not counsel against this Court's review. The Tenth Circuit, like others, relies on unpublished decisions as persuasive authority. *See, e.g.*, Fed. R. App. P. 32.1(a) (providing that courts may not prohibit or restrict citation to unpublished decisions); 10th Cir. R. 32.1(A) (permitting citation to unpublished decision for persuasive value and under preclusion doctrines). Moreover, the seemingly uncontroversial nature of the background presumption that district courts are presumed to follow the law likely will result in routine and reflexive application of the principle in future cases, which themselves likely would be unpublished. And finally, the unpublished nature of the decision does not change the impact on Mr. Pulham, whose sentencing range, even after the district court's downward variance, was still two levels higher than it would have been without the application of the pattern enhancement.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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