

No.

OCTOBER TERM 2018

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IN THE  
SUPREME COURT OF THE UNITED STATES

LEMUEL GAY,  
*Petitioner*,  
v.

UNITED STATES OF AMERICA,  
*Respondent.*

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On Petition for a 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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January 18, 2019

**QUESTION PRESENTED**

Can the sentencing court's statement—that it would impose the same sentence irrespective of any error in its application of a guideline enhancement—absolve the appellate court of its responsibility to ensure that the district court committed no significant procedural error in its calculation of the Guidelines?

## **LIST OF PARTIES**

All parties appear in the caption of the case on the cover page.

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## PETITION FOR A WRIT OF CERTIORARI

Mr. Lemuel Gay respectfully requests that this Court grant a writ of certiorari to review the Court of Appeals for the Eleventh Circuit's judgment.

### OPINIONS BELOW

The Court of Appeals' decision is unpublished.<sup>1</sup> The opinion is included in Petitioner's Appendix.<sup>2</sup>

### JURISDICTION

The Eleventh Circuit's opinion was issued on August 21, 2018, rendering Mr. Gay's Petition for Writ of Certiorari due in this Court on November 19, 2018. Mr. Gay requested and received an extension of time to file the petition until January 18, 2019. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

### RELEVANT STATUTORY PROVISIONS

Federal Rule of Criminal Procedure 52 provides:

- (a) Harmless Error.** 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.

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<sup>1</sup> *United States v. Gay*, 2018 WL 3996552 (11th Cir. 2018).

<sup>2</sup> Pet. App. 1a.

## STATEMENT OF THE CASE

In November 2016, a federal grand jury returned an indictment against Mr. Lemuel Gay, charging him with a single count of possession of firearms and ammunition by a convicted felon, in violation of 18 U.S.C. § 922(g)(1). Shortly thereafter, Mr. Gay pled guilty to the indictment without the benefit of a written agreement.

In preparing the presentence investigation report (“PSI”), the probation officer assigned Mr. Gay a total offense level of 25 and a criminal history category of III, corresponding to an advisory guideline range of 70-87 months. However, in calculating Mr. Gay’s offense level, the probation officer applied a four-level enhancement under U.S.S.G. § 2K2.1(b)(6)(B), because, allegedly, Mr. Gay possessed the firearms “in connection with another felony offense.” The only explanation provided for this enhancement was that Mr. Gay “admitted to going to a residence while possessing the firearms in an attempt to ‘settle’ an altercation involving his cousin. [Mr. Gay] further admitted to having a pistol in his hand when approaching the residence.” No other felony offense was identified by the PSI, or committed by Mr. Gay. Without the § 2K2.1(b)(6)(B) enhancement, Mr. Gay’s guideline range would have been 46-57 months.

Prior to sentencing, Mr. Gay objected to the application of the four-level § 2K2.1(b)(6)(B) enhancement, arguing that his possession of the firearms did not occur in connection with “another felony offense,” because no other felony

offense occurred. In particular, Mr. Gay emphasized that his subsequent statement to law enforcement officers—that he had been going to “settle” the matter—did not establish that he in fact committed any other felony offense. Mr. Gay acknowledged the commentary to § 2K2.1(b)(6)(B)—which clarifies that possession of a firearm occurs “in connection with” another felony offense if it “facilitated, or had the potential of facilitating” the other offense—but pointed out that this language did not modify the requirement that an actual felony offense must occur in order to support application of the four-level enhancement. In this context, the word “potential” clarified when a firearm facilitates or occurs “in connection with” another offense, not when “another felony offense” was committed. In short, Mr. Gay argued that the government could not meet its burden of demonstrating that his possession of the firearms occurred in connection with “another felony offense” without relying on pure speculation both as to what Mr. Gay meant by “settle,” and as to what might have occurred, but did not.

At sentencing, Mr. Gay, the government, and the district court itself were all in agreement that: (1) no other felony offense occurred; and (2) there was no Eleventh Circuit precedent addressing whether the § 2K2.1(b)(6)(B) applied in the absence of “another felony offense.” Nevertheless, the district court overruled Mr. Gay’s objection, and applied the four-level § 2K2.1(b)(6)(B) enhancement. The court explained that “[t]he objection is overruled, because I find that ‘in connection with another felony’ does not require it to be a specific

felony, either in progress or known to be about to occur. But even were that not the case, I would still overrule the objection because of the intent expressed by the defendant to go settle the matter.” The court further recited that it would impose the same sentence, “irrespective of whether these four levels applied.”

The district court adopted the factual findings and guideline calculations contained in the PSI, noting that, based on a total offense level of 25 and a criminal history category of III, the resulting guideline range was 70-87 months. Ultimately, the court sentenced Mr. Gay to 84 months’ imprisonment, to be served in a partially concurrent fashion with his state court sentence. The court reiterated that it would impose the same 84-month sentence, irrespective of its earlier ruling on the § 2K2.1(b)(6)(B) enhancement.

Mr. Gay appealed, arguing that his sentence was procedurally and substantively unreasonable. Specifically, Mr. Gay argued that the district court: (1) erroneously interpreted the Guidelines when it determined that the § 2K2.1(b)(6)(B) enhancement applied in the absence of “another felony offense”; and (2) committed clear error by applying the enhancement based upon pure speculation as to what might have, but did not, occur when he stated he was going to “settle” a matter. He argued that the district court committed significant procedural error, and he pointed out that his 84-month sentence was 27 months in excess of even the high end of the correctly-calculated guideline range. He further argued that his sentence was substantively

unreasonable because it was greater than necessary to achieve the sentencing purposes identified in § 3553(a), and the district court failed to provide a sufficiently compelling justification to support its unintended upward variance.

The Eleventh Circuit Court of Appeals affirmed. *United States v. Gay*, 2018 WL 3996552, \*2 (11th Cir. 2018) (unpublished). The court pointed out, as a preliminary matter, that there was no 11th Circuit precedent addressing whether the § 2K2.1(b)(6)(B) enhancement applied when the other “felony offense” was only potential and had not actually occurred. *Id.* at \*1. It noted that the sentencing court had recognized this lack of authority, and applied the enhancement based only on “a potential assault” or other unspecified felony stemming from Mr. Gay’s statement to police that he brought two guns to settle a dispute. *Id.* As a result, the court acknowledged that Mr. Gay’s appeal presented an issue of first impression that needed to be addressed “in a published opinion in the appropriate case.” *Id.*

However, the 11th Circuit expressly declined to review Mr. Gay’s challenge to the application of the four-level enhancement and the procedural reasonableness of his sentence. *Id.* The court explained that those issues were “unnecessary for us to decide because 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.” *Id.* (quoting *United States v. Keene*, 470 F.3d 1347, 1348 (11th Cir. 2006)). Accordingly,

because the district court stated that it would impose the same sentence irrespective of its ruling on the § 2K2.1(b)(6)(B) enhancement, the Eleventh Circuit concluded that the only issue it needed to decide on appeal was whether Mr. Gay's sentence was substantively reasonable. *Id.*

The 11th Circuit rejected Mr. Gay's remaining arguments, and concluded that his 84-month sentence was substantively reasonable. *Id.* It then affirmed his sentence. *Id.*

This petition for a writ of certiorari follows.

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

In the opinion below, the Eleventh Circuit Court of Appeals determined that it was “unnecessary” to determine whether the district court erred by applying the four-level § 2K2.1(b)(6)(B) enhancement, because the district court stated that it would impose the same sentence, irrespective of the applicability of the enhancement. This practice preterms any and all meaningful appellate review of whether the district court committed a significant procedural error by miscalculating the Guidelines. It is contrary to this Court’s precedent in *Gall v. United States*, 552 U.S. 38 (2007), *Molina-Martinez v. United States*, 136 S. Ct. 1338 (2016), and *Rosales-Mireles v. United States*, 138 S. Ct. 1897 (2018). It also misapplies harmless error review under Fed. R. Crim. P. 52(a), and upends traditional principles of appellate advocacy. This Court has not yet directly addressed how to apply harmless

error review in the context of an erroneous guideline ruling, and the federal Courts of Appeals have taken divergent approaches.

Therefore, Mr. Gay respectfully submits that certiorari is appropriate in this case.

**I. The 11th Circuit’s rule conflicts with this Court’s precedent, as announced in *Gall*, *Rosales-Mireles*, and *Molina-Martinez*.**

This Court’s precedent is clear. Appellate review of the reasonableness of a sentence is a two-part process. *See Gall v. United States*, 552 U.S. 38, 51 (2007). The appellate court “must *first* ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range.” *Id.* at 51 (emphasis added). Then, “[a]ssuming that the district court’s sentencing decision is procedurally sound,” the appellate court should proceed to step two, and “consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard.” *Id.*

The reasons for this two-part standard are equally clear. “The Guidelines are the starting point for every sentencing calculation in the federal system.” *Hughes v. United States*, 138 S. Ct. 1765, 1775 (2018). Procedurally, the sentencing court *must* begin its analysis with the Guidelines, and it must remain cognizant of them throughout the sentencing process. *Molina-Martinez*, 136 S. Ct. at 1345. Even if the sentencing court ultimately varies from the Guidelines—or imposes a sentence pursuant to an agreed-upon term of months—the Guidelines are still “in a real sense the basis for the sentence.”

*Peugh v. United States*, 569 U.S. 530, 542 (2013) (“[I]f the judge uses the sentencing range as the beginning point to explain the decision to deviate from it, then the Guidelines are in a real sense the basis for the sentence”); *Hughes*, 138 S. Ct. at 1775 (“The Court now holds that a sentence imposed pursuant to a Type-C agreement is ‘based on’ the defendant’s Guidelines range so long as that range was part of the framework the district court relied on in imposing the sentence or accepting the agreement”).

Empirically, the Guidelines have a “real and pervasive effect” on sentencing. *Molina-Martinez*, 136 S. Ct. at 1346. Absent a government motion, courts deviate from the Guidelines less than 20% of the time. *Id.* (analyzing statistics from the Sentencing Commission). Accordingly, “the Sentencing Guidelines have the intended effect of influencing the sentences imposed by judges,” and “when a Guidelines range moves up or down, offenders’ sentences [tend to] move with it.” *Id.* “In the usual case, then, the systemic function of the selected guidelines range will affect the sentence.” *Id.*

As a result, “[t]he Guidelines are not only the starting point for most federal sentencing proceedings but also the lodestar.” *Id.* “The Guidelines’ central role in sentencing means that an error related to the Guidelines can be particularly serious. A district court that improperly calculates a defendant’s Guidelines range, for example, has committed a significant procedural error.” *Id.* at 1345-46.

Against this doctrinal backdrop—which recognizes the pernicious and unavoidable impact of the Guidelines on federal sentencing—this Court has recently decided two cases dealing with the interpretation of Rule 52 and the scope of appellate review of an unpreserved error in the calculation of the Guidelines.

In the first of these cases, *Molina-Martinez*, the sentencing court miscalculated the Guidelines, and sentenced the defendant to the bottom of the erroneous guideline range. The defendant argued—for the first time on appeal—that by incorrectly calculating the Guidelines, the district committed an error that was plain, that affected his substantial rights, and that impugned the fairness, integrity, and public reputation of the judicial proceedings. The Fifth Circuit disagreed, concluding that the error did not affect the defendant's substantial rights because his ultimate sentence was within the correctly calculated guideline range. The Fifth Circuit reasoned that, when a correct sentencing range overlaps with an incorrect range, the appellant cannot demonstrate a reasonable probability of a different result unless he can put forth additional evidence in the record showing that the Guidelines had an effect on the district court's selection of its sentence.

Reversing, this Court explained that, “[t]he Guidelines inform and instruct the district court's determination of an appropriate sentence.” *Molina-Martinez*, 136 S.Ct. at 1346. Accordingly, in the usual case, “the systemic function of the selected Guidelines range will affect the sentence. This fact is

essential to the application of Rule 52(b) to a Guidelines error. From the centrality of the Guidelines in the sentencing process it must follow that, when a defendant shows that the district court used an incorrect range, he should not be barred from relief on appeal simply because there is no other evidence that the sentencing outcome would have been different had the correct range been used.” *Id.*

This Court emphasized that its decision was intended to preclude appellate courts reviewing sentencing errors from applying a categorical rule requiring additional evidence under similar circumstances. *Id.* at 1348. Rejection of this categorical rule “means only that the defendant can rely on the application of an incorrect Guidelines range to show an effect on his substantial rights.” *Id.* Notably, in distinguishing between harmless error under Rule 52(a) and plain error under Rule 52(b), the court was careful to note the following: “Although Rules 52(a) and (b) both require an inquiry into whether the complained-of error was prejudicial there is one important difference between the subparts—under (b), but not (a), it is the defendant rather than the government who bears the burden of persuasion with respect to prejudice.” *Id.* at 1348 (internal quotations omitted).

In the second of the above-referenced cases, *Rosales-Mireles*, this Court once again reversed the Fifth Circuit for its erroneous interpretation of Rule 52 in the context of an unpreserved Guidelines error. Like in *Molina-Martinez*, the sentencing court incorrectly calculated the Guidelines, and then sentenced

the defendant within the erroneously calculated guideline range. *Rosales-Mireles*, 138 S.Ct. at 1905. The defendant did not object in the district court, but argued on appeal that the district court committed plain error by miscalculating his guideline range. *Id.* The Fifth Circuit agreed that the sentencing court committed plain error affecting the defendant’s substantial rights, but nevertheless declined to remand based on its determination that the error did not affect the fairness, integrity, or public reputation of the judicial proceedings. *Id.* Applying a heightened Rule 52(b) standard, the Fifth Circuit reasoned that neither the error nor the resulting sentence—which was within the correctly calculated guideline range—was so egregious as to “shock the conscience of the common man.” *Id.* at 1905-06.

Reversing, this Court explained that “an error resulting in a higher range than the Guidelines provide usually establishes a reasonable probability that a defendant will serve a prison sentence that is more than ‘necessary’ to fulfill the purposes of incarceration.” *Id.* at 1907. Because the possibility of additional jail time has severe consequences for the incarcerated individual, it warrants serious consideration in the appellate court’s decision to correct a forfeited error under Rule 52(b). *Id.* Therefore, in the ordinary case, “the failure to correct a plain Guidelines error that affects a defendant’s substantial rights will seriously affect the fairness, integrity, and public reputation of judicial proceedings.” *Id.* at 1911.

As in *Molina-Martinez*, this Court emphasized the inescapable impact of the Guidelines in federal sentencing: “even in an advisory capacity, the Guidelines serve as a meaningful benchmark in the initial determination of a sentence *and through the process of appellate review.*” *Id.* at 1904 (emphasis added). Unlike cases where a particular trial strategy might lead to a harsher sentence, Guidelines miscalculations result directly from judicial error. *Id.* at 1908. Therefore, ensuring the accuracy of the Guidelines determinations serves to promote certainty and fairness in sentencing, and the appellate court may abuse its discretion by failing to correct such an error under Rule 52(b).

*Id.*

Notably, in reaching this conclusion, this Court specifically rejected the government’s argument that the defendant could not establish the fourth prong of plain error because his sentence was within the correctly calculated guideline range. *Id.* at 1910. “A substantive reasonableness determination, however, is an entirely separate inquiry from whether an error warrants correction under plain-error review.” *Id.* Thus, “[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.” *Id.* (quoting *Gall*, 552 U.S., at 51) (emphasis added) (first brackets added).

The Eleventh Circuit finds it “unnecessary” to resolve whether the district court committed a significant procedural error in any case where the

sentencing court states that it would impose the same sentence, irrespective of any error affecting the Guidelines. *Gay*, 2018 WL 3996552 at 1; *Keene*, 470 F.3d at 1348 (“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.”).

As illustrated by the opinion below, the Eleventh Circuit will not even consider whether the district court incorrectly calculated the Guidelines if the sentencing court states as a matter of course that it would impose the same sentence regardless. This practice entirely pretermits meaningful appellate review with respect to the *procedural reasonableness* of the sentence. It is therefore in conflict with this Court’s precedent, as both *Gall* and *Rosales-Mireles* unequivocally provide that the appellate court must ensure *first* that the sentencing court committed no significant procedural error, and then, second—and assuming that the sentencing court’s sentencing decision is procedurally sound—that the sentence is substantively reasonable.

Moreover, the Eleventh Circuit has effectively established a categorical rule that a sentence can never be procedurally unreasonable if the district court states as a matter of course that it would impose the same sentence irrespective of the Guidelines, and that sentence is otherwise substantively reasonable. This is exactly the type of categorical rule that this Court disclaimed in *Molina-Martinez*, in consideration of the fact that, no matter

what the ultimate sentence, the correct calculation of the Guidelines is the foundational starting point for the district court's selection of its sentence.

Additionally, the Eleventh Circuit's *Keene* rule misapplies Rule 52, and leads to incongruous results. Pursuant to *Molina-Martinez* and *Rosales-Mireles*, an appellant who challenges the district court's calculation of his guideline range for the first time on appeal will receive meaningful appellate review of the procedural reasonableness of his sentence. Although the appellant would bear the burden of establishing plain error, the reviewing court would not be at liberty to bypass its obligation to ensure that the sentence is procedurally reasonable. Indeed, as this Court cautioned in *Rosales-Mireles*, the substantive reasonableness determination would be an entirely separate inquiry from whether an error warrants correction under plain error review. *Rosales-Mireles*, 138 S. Ct. at 1910.

In contrast, however, an appellant in the Eleventh Circuit who diligently objects to an erroneous guideline calculation—and thereby goads the district court into stating it would impose the same sentence regardless—is entitled to no appellate review of the procedural reasonableness of his sentence. This result is inconsistent with traditional principles of appellate advocacy, as it allows for greater access to appellate review in the case of unpreserved error than preserved error. It is also contrary to this Court's interpretation of Rules 52(a) and (b).

**II. This Court has not yet addressed how to apply harmless error review in the context of an erroneous guideline ruling, and the federal Courts of Appeals have taken divergent approaches.**

Following *Molina Martinez* and *Rosales-Mireles*, this Court has not yet addressed how to apply harmless error review in the context of an erroneous guideline decision. As already discussed, the Eleventh Circuit finds it unnecessary to decide whether a guideline enhancement was appropriately applied if the district court provides a conclusory recitation that the enhancement made no difference to its chosen sentence. *Keene*, 470 F.3d at 1348-49. The First, Eighth, and Fourth Circuits have followed suit. *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. 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”); *United States v. Gomez-Jimenez*, 750 F.3d 370, 382 (4th Cir. 2014) (“In this case, the district court made it abundantly clear that it would have imposed the same sentence against both Juarez-Gomez and Erasto regardless of the advice of the Guidelines”).

In contrast, the Third, Seventh, and Tenth Circuits have diverged from this approach, and determined that the district court’s conclusory statement

that it would impose the same sentence is, without more, insufficient to establish that fact and trigger harmless error review. *See e.g., 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) (quotations and alterations omitted); *United States v. Smalley*, 517 F.3d 208, 215 (3d Cir. 2008) (“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. Such a bare statement is at best an afterthought, rather than an amplification of the Court's sentencing rationale”); *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.”).

## CONCLUSION

For the above reasons, this Court should grant this petition for writ of *certiorari*.

Respectfully submitted,

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