

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA

STEVEN DEDUAL, JR.,
Petitioner-Defendant

v.

UNITED STATES OF AMERICA
Respondent

On Petition for Writ of Certiorari from the
United States Court of Appeals for the Fifth Circuit.
Fifth Circuit Case No. 18-60216

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Can a district court that has erroneously applied a sentencing enhancement shield itself from appellate review by claiming, without providing specific support, that even without the enhancement it would have imposed the same sentence for other, unspecified reasons?

PARTIES TO THE PROCEEDING

All parties to this proceeding are named in the caption of the case.

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I. OPINIONS BELOW

On August 8, 2017, the Grand Jury for the Southern District of Mississippi returned an indictment alleging Petitioner Steven Dedual did knowingly access with intent to view at least one visual depiction of a minor engaging in sexually explicit conduct, in violation of 18 U.S.C. § 2252(a)(4)(B). Mr. Dedual pleaded guilty to this charge on November 6, 2017, and was sentenced to 159 months' imprisonment on March 19, 2018. The district court case number for this case is 1:17-cr-00079-HSO-RHW-1. The district court's Judgment of Conviction is attached as Appendix 1.

Petitioner timely filed his notice of appeal to the Fifth Circuit on March 27, 2018, arguing, *inter alia*, that the district court's sentence was based on an erroneously applied five-level sentencing enhancement under United States Sentencing Guidelines § 2G2.2(b)(3)(B). On January 30, 2019, the Fifth Circuit filed an unpublished opinion affirming the district court's decision, and remanding the case for the limited purpose of correcting a typographical error in the Judgment of Conviction. The Fifth Circuit case number is 18-60216. The Opinion and Judgment are attached as composite Appendix 2. The Opinion was not designated for publication in the Federal Reporter, but appears in the Westlaw electronic database at 2019 WL 404244. A copy of the Westlaw rendition of the Opinion is attached as Appendix 3.

II. JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Fifth Circuit filed both its Opinion and its Judgment in this case on January 30, 2019. This Petition for Writ of Certiorari is filed within 90 days after entry of the Fifth Circuit Judgment, as required by Rule 13.1 of the Supreme Court Rules. This Court has jurisdiction over the case pursuant to the provisions of 28 U.S.C. § 1254(1).

III. CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Circuit deprived Petitioner of his Due Process rights under the Fifth and Fourteenth Amendments. The Due Process Clause of the Fifth Amendment states: “No person shall … be deprived of life, liberty, or property, without due process of law[.]” Under the Fourteenth Amendment, “criminal prosecutions must comport with prevailing notions of fundamental fairness.” *California v. Trombetta*, 467 U.S. 479, 485 (1984).

IV. STATEMENT OF THE CASE

A. Basis for federal jurisdiction in the court of first instance

This case arises out of a criminal indictment levied against Petitioner Steven Dedual alleging he accessed child pornography with the intent to view in violation of 18 U.S.C. § 2252(a)(4)(B). The court of first instance, the United States District Court for the Southern District of Mississippi, had jurisdiction under 18 U.S.C. § 3231 because the criminal charges arose under the laws of the United States of America.

B. Statement of material facts

The criminal indictment in this case was brought against Petitioner Steven Dedual on August 8, 2017, and alleged that Mr. Dedual knowingly accessed child pornography with intent to view. Indictment, ROA.10. On November 6, 2017, Mr. Dedual pleaded guilty to the indictment, and a sentencing hearing was held on March 19, 2018. Judgement, ROA.90-96.

At the sentencing hearing, the district court calculated Mr. Dedual's recommended sentence of imprisonment under the Sentencing Guidelines as 135 to 168 months. Sen. Hr'g. Tr., ROA.167. This range was based on the application of a five-level enhancement under U.S.S.G. § 2G2.2(b)(3)(B) for "distribution for the receipt, or the expectation of receipt, of a thing of value, but not for pecuniary gain." Presentence Report (PSR), ROA.242. Prior to and at sentencing, counsel

for Mr. Dedual objected to this enhancement, arguing that the Guidelines permitted only a two-level enhancement rather than five levels. Sen. Hr'g. Tr., ROA.142. The district court overruled this objection and subsequently sentenced Mr. Dedual to 159 months' imprisonment, a sentence within the Guidelines as it had calculated them. *Id.* at 154-158. Had the district court sustained the objection and instead applied only a two-level enhancement, the Guidelines range would have been 97 to 121 months. *See* U.S.S.G. Ch. 5, Pt. A. After announcing its sentence, the district court noted that even if it had made any error in its calculation of the guidelines, or in resolving any objections, it still would have imposed the same sentence. Hr'g. Tr., ROA.198-199.

Mr. Dedual filed a timely notice of appeal with the Fifth Circuit on March 27, 2018. Notice of Appeal, ROA.97. In his appeal, Mr. Dedual argued that his sentence was procedurally unreasonable because the court erroneously applied the sentencing enhancement under U.S.S.G. § 2G2.2(b)(3)(B). In its unpublished Opinion, announced January 30, 2019, the Fifth Circuit acknowledged Mr. Dedual's argument, but refused to decide whether the district court erred by imposing the enhancement. Instead, the Fifth Circuit held that any potential sentencing error was harmless, based on the district court's claim that it would have imposed the same sentence even if it had made an error in its application of the Guidelines. Mr. Dedual now brings this petition for writ of certiorari.

V. ARGUMENT

A. Review on certiorari should be granted in this case.

As stated in Rule 10 of the Supreme Court Rules, “[r]eview on writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only for compelling reasons.” Rule 10(a) provides that certiorari may be granted when “a United States court of appeals has … so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for this Court’s supervisory power[.]” In this case, the Fifth Circuit sanctioned a violation of Petitioner’s rights under the Fifth and Fourteenth Amendment’s Due Process Clauses. By accepting the district court’s unsupported claim that it would have imposed the same sentence regardless of any error, the Fifth Circuit deprived Mr. Dedual of his liberty without due process of law, and allowed the district court to operate in a fundamentally unfair manner.

Based on the arguments presented below, this Court should grant certiorari to correct the errors made by the Fifth Circuit and the district court. Without a clear ruling from the Supreme Court on this issue, some district courts will continue their practice of inoculating sentencing decisions from meaningful appellate review by adding pro forma statements at sentencing claiming that they would impose the

same sentence regardless of any error. For this reason, the Court should grant Mr. Dedual’s Petition for Writ of Certiorari.

B. For a trial court’s error in sentencing to be harmless, the record must show that the imposed sentence was not influenced by the erroneously calculated Guideline range.

Although given wide latitude in sentencing decisions, “a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range.” *Gall v. United States*, 552 U.S. 38, 49 (2007). When reviewing a sentence imposed by a district court, a circuit court “must first ensure that the district court committed no significant procedural error[.]” *Id.* at 51. When a reviewing court determines that a district court has misapplied the Guidelines, “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).

Given this heavy burden to show that a sentencing error is in fact harmless, circuit courts have repeatedly expressed skepticism when a district court provides an alternative holding for its imposed sentence in anticipation of a potential sentencing error. The Second Circuit has warned that “a district court generally should not try to answer the hypothetical question of whether or not it definitely would impose the same sentence on remand if [a reviewing court] found particular enhancements erroneous.” *United States v. Feldman*, 647 F.3d 450, 460 (2d Cir.

2011). Moreover, “[a] district court's mere statement that it would impose the same above-Guidelines sentence no matter what the correct calculation cannot, without more, insulate the sentence from remand[.]” *United States v. Munoz-Camarena*, 631 F.3d 1028, 1031 (9th Cir. 2011). Recognizing the high degree of skepticism that such sentences should be given, reviewing courts have “refused to chalk up a sentence at the low end of an erroneously calculated range to “coincidence[.]”” *United States v. Martinez-Romero*, 817 F.3d 917, 926 (5th Cir. 2016). Even when some alternative grounds for the same sentence are provided, “such statements do not establish harmless error when they fail to show that the district court was not influenced by the improperly calculated range.” *United States v. Davalos-Cobian*, 714 F. App'x 371, 375 (5th Cir. 2017) (relying on *United States v. Juarez*, 866 F.3d 622 (5th Cir. 2017)).

When, as is in the instant case, the imposed sentence is within the erroneously calculated Guidelines range, but falls outside of the correctly calculated guidelines, reviewing courts are particularly skeptical. In order for such a sentence to survive harmless error analysis, a district court must provide significant support for its alternative sentence, or a reviewing court will make the natural conclusion that “the improper calculation was what called the court's attention to that range in the first instance.” *United States v. Juarez*, 866 F.3d 622, 634 (5th Cir. 2017). Put simply, “where the district court offers no more than a

perfunctory explanation for its alternative holding, it does not satisfy the requirement of procedural reasonableness.” *United States v. Pena-Hermosillo*, 522 F.3d 1108, 1118 (10th Cir. 2008). District courts cannot “be exempted from procedural review with the use of a simple incantation[.]” *Feldman*, 647 F.3d at 460.

C. The district court’s pro forma disclaimer failed to establish that the sentence imposed was not influenced by the erroneously calculated Guideline range.

At Mr. Dedual’s sentencing hearing, the district court first engaged in a lengthy discussion regarding the applicability of the five-level enhancement under U.S.S.G. § 2G2.2(b)(3)(B). After hearing argument from both the government and defense counsel, the district court explicitly held that “by a preponderance of the evidence, this enhancement is properly applied.” Sen. Hr’g. Tr., ROA.164. As the district court prepared to announce its sentence, it made reference to several facts specific to Mr. Dedual’s case: the number of images he possessed, the nature of the images found, the age of the victims depicted, as well as his distribution of those images, which was the conduct that led to the application of the § 2G2.2(b)(3)(B) enhancement. *Id.*, at ROA.191. The court explicitly noted that “[a]ll of those enhancements are factored in here.” *Id.* Finally, citing both the “advisory guidelines computations and the other sentencing factors” found in 18 U.S.C. 3553(a), the court imposed a sentence of 159 months’ incarceration, which is

within the erroneously calculated Guideline range, but 38 months above the top of what the range would have been without the § 2G2.2(b)(3)(B) enhancement.

The record provides ample suggestion that the 159 month sentence was influenced by the district court's calculation of the Guideline range. The court acknowledged that the sentence imposed was within the calculated guideline range, "which the Court finds to be appropriate." *Id.*, at ROA.193. The district court also noted that "[t]o the extent there is a request for a sentence below the guideline range, the Court finds that request is not well taken. It is denied." *Id.* Pursuant to the court's duty under 18 U.S.C. 3553(c)(1), the court made explicit its "reasons for imposing a sentence at a particular point within the range." *Id.* Those reasons, as stated by the court were the "circumstances and the other factors the Court has stated here today[.]" *Id.* At no time in its discussion of the sentence did the court make any effort to explain why it felt that, independent of the Guidelines, it would have arrived at a 159 month sentence.

To the extent that the district court offered any alternative reasons for its sentence, these statements were clearly boilerplate language not specific to Mr. Dedual's case. Before the court made its short and generalized statement regarding alternative reasons for its sentence, it went through a number of other matters standard to any sentencing hearing: restitution, fines, Mr. Dedual's ability to pay such fines, the terms and eleven special conditions of his eventual release, and the

two special assessments applicable in this case. Only then did the court make the following statement:

“The Court notes that in the event any of the guidelines were calculated incorrectly in this case or objections were resolved improperly, the Court would impose the same sentence as a variance or nonguideline sentence based upon the offense conduct in this case, the characteristics of the defendant and the other Section 3553 factors as the Court has discussed them here today.”

Sen. Hr’g. Tr., ROA.198-199.

This language is virtually identical to statements made in many other cases; it appears to be a boilerplate item recited at most sentencing hearings in the Southern District of Mississippi.¹ The court’s statement does not tie the imposed sentence to any factor specific to Mr. Dedual. Nor did the court attempt to explain the coincidence of its sentence falling within the advisory Guideline range when it maintained that it would have imposed such a sentence regardless of what the Guidelines recommended. This is exactly the sort of “serendipity” that the Fifth Circuit has previously warned against. Despite its disclaimer, it is clear that “the improper calculation was what called the court’s attention to that range in the first place.” *United States v. Juarez*, 866 F.3d 622, 634 (5th Cir. 2017). Other Circuit Courts have been similarly wary of allowing district courts to engage in hypothetical discussion of what they would have done if presented with a different

¹ See e.g., *United States v. Terry Redrix*, 1:17-cr-00068-LG-JCG-1, Dck. #260, Sen. Hr’g. Tr., p.10; *United States v. Garcia-Monterroso*, 1:18-cr-00022-HSO-JCG, Dck. #32, Sen. Hr’g. Tr., pp.20-21

Guideline range. “[S]uch predictions are only rarely appropriate.” *United States v. Feldman*, 647 F.3d 450, 452 (2d Cir. 2011). The district court’s decision in this case is contrary to widespread and well-established precedent, both within the Fifth Circuit and beyond, and has allowed the district court to deprive Mr. Dedual of his right to Due Process.

D. The practice of unsupported alternate sentences is common, and should be addressed by the Supreme Court.

There is a pressing need for the Supreme Court to take action on this issue since, despite the warning of the Circuit Courts, some trial courts routinely use boilerplate language at sentencing to insulate themselves from any potential errors made in calculating the proper Guidelines range. These disclaimers appear to be standard practice in the Southern District of Mississippi.

The effect of this practice is to erode the Circuit Courts’ power to find and correct procedural errors. In the individual case of Mr. Dedual, this amounts to a violation of Due Process, as Mr. Dedual was not given a fair chance to correct a procedural error which significantly increased his sentence. Just as importantly, when district courts are allowed to engage in this behavior as a matter of course, systematic errors in sentencing procedure can flourish unchecked. For these reasons, it is necessary for the Supreme Court to hear this case.

VI. CONCLUSION

This Court should grant Mr. Dedual's Petition for Writ of Certiorari. The Fifth Circuit's affirmation of the district court's use of a boilerplate incantation to protect it from meaningful appellate review is a violation of Due Process, and threatens to allow systematic errors in sentencing procedures to go uncorrected.

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CERTIFICATE OF SERVICE

I, Ellen M. Allred, a member of the bar of this Court and appointed under the Criminal Justice Act, certify that today, April 29, 2019, pursuant to Rule 29.5 of the Supreme Court Rules, a copy of the Petition for Writ of Certiorari and the Motion to Proceed In Forma Pauperis was served on Counsel for the United States by Federal Express, No. 7750 8260 6252, addressed to:

The Honorable Noel Francisco
Solicitor General of the United States
Room 5614, Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

I further certify that all parties required to be served with this Petition and the Motion have been served.

/s/ Ellen M. Allred
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