

No. 19-_____

IN THE
SUPREME COURT OF THE UNITED STATES



RICKY DAVIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.



On Petition for a Writ of Certiorari
to the United States Court of Appeals For The Ninth Circuit



PETITION FOR WRIT OF CERTIORARI



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QUESTION PRESENTED

When this Court held in *Rosales-Mireles v. United States*, 138 S. Ct. 1897 (2018) that a failure to correctly calculate the guideline range, which anchors all sentencing and serves as the benchmark by which all variances are to be measured, is a significant procedural error that typically impacts a defendant's substantial rights and seriously affects the fairness, integrity, and public reputation of judicial proceedings, did this Court intend to carve out an exception for judges that use an inflated Guideline anchor due to a failure to apply U.S.S.G. § 5G1.1(a) so long as the judge understood that he/she could not impose a sentence in excess of the statutory maximum?

LIST OF PARTIES AND RELATED CASES

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

Pursuant to Supreme Court Rule 15, there is no case directly related to the instant case.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Ricky Davis respectfully petitions this Court for a writ of certiorari to review the judgment of the Ninth Circuit in this case.



OPINIONS BELOW

The May 9, 2019 Memorandum of a panel of the United States Court of Appeals for the Ninth Circuit is unpublished and reproduced in the appendix to this petition at B1-B3. The Ninth Circuit's June 11, 2019 Order denying rehearing is unpublished and is reproduced in the appendix at A1.

The December 11, 2017 Amended Judgment in a Criminal Case in the United States District Court for the Eastern District of California, which is the subject of this Petition, is reproduced in the appendix at C1-C8.

The original Judgment in this case was imposed on July 20, 2015, and is reproduced in the appendix at E1-E6. In a published opinion issued on April 14, 2017, which is reproduced in the appendix at D1-D11, the Ninth Circuit vacated the original Judgment and remanded for the re-sentencing that occurred on December 11, 2017.



JURISDICTION

The Order of the United States Court of Appeals for the Ninth Circuit denying Davis' timely motion for rehearing was issued on June 11, 2019. Appendix

at A1. This Court therefore has jurisdiction over this timely petition pursuant to 28 U.S.C. § 1254(1) and Supreme Court Rule 13.3.



PROVISIONS OF LAW INVOLVED

U.S.S.G. § 5G1.1 (18 U.S.C. App'x § 5G1.1):

Sentencing on a Single Count of Conviction

- (a) Where the statutorily authorized maximum sentence is less than the minimum of the applicable guideline range, the statutorily authorized maximum sentence shall be the guideline sentence.
- (b) Where a statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence.
- (c) In any other case, the sentence may be imposed at any point within the applicable guideline range, provided that the sentence --
 - (1) is not greater than the statutorily authorized maximum sentence, and
 - (2) is not less than any statutorily required minimum sentence.

18 U.S.C. § 3553(a):

Imposition of a Sentence

- (a) Factors to be considered in imposing a sentence. The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—
 - (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
 - (2) the need for the sentence imposed—
 - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
 - (B) to afford adequate deterrence to criminal conduct;
 - (C) to protect the public from further crimes of the defendant; and

- (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- (3) the kinds of sentences available;
- (4) the kinds of sentence and the sentencing range established for—
 - (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—
 - (i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
 - (ii) that, except as provided in section 3742(g) [18 USCS § 3742(g)], are in effect on the date the defendant is sentenced; or
 - (B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);
- (5) any pertinent policy statement—
 - (A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
 - (B) that, except as provided in section 3742(g) [18 USCS § 3742(g)], is in effect on the date the defendant is sentenced.[]
- (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
- (7) the need to provide restitution to any victims of the offense.

INTRODUCTION

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,” which means that it is critical for courts to “[e]nsur[e] the accuracy of Guidelines determinations . . . [to] provid[e] certainty and fairness in sentencing.” *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1908 (2018) (internal quotations omitted). Even if a sentence is substantively reasonable, if that sentence “lacks reliability because of unjust procedures [allowing that sentence to stand] may well undermine public perception of the proceedings.” *Id.* at 1919. Indeed, as this Court asked, “what reasonable citizen wouldn’t bear a rightly diminished view of the judicial process and its integrity if courts refused to correct obvious errors of their own devise that threaten to require individuals to linger longer in federal prison than the law demands?” *Id.* (quoting *United States v. Sabillon-Umana*, 772 F.3d 1328, 1333-34 (10th Cir. 2014) (Gorsuch, J.)).

Yet some courts, such as the Ninth and Sixth Circuits, are giving judges a pass for using an inflated Guideline anchor if the judge recognizes that he/she is ultimately bound by the statutory maximum. That reasoning seems deeply flawed given that the Guideline range is the anchor and lodestar for all federal sentences, not the statutory maximum, and it is the Guideline range, not the statutory maximum, which is the benchmark by which judges are required to measure all variances. To be sure, the statutory maximum will cap the exercise of the judge’s

discretion, but it is very different to be varying down from an anchor that exceeds the statutory maximum rather than varying down from an anchor that *is* the statutory maximum. In other words, as the Second Circuit recognizes, it is impossible to achieve the fairness and consistency in sentencing mandated by Congress when one judge is using as his anchor a Guideline range that exceeds the statutory maximum and another judge is correctly using as his anchor the statutory maximum.

Davis requests certiorari to provide much needed clarification to ensure that the U.S. Sentencing Guidelines continue to perform the role Congress envisioned – providing uniformity and proportionality for *all* defendants, including those whose guideline calculation exceeds the statutory maximum prior to application of U.S.S.G. § 5G1.1(a). Where the Guideline sentence is the anchor that serves as the lodestar throughout the entire sentencing process, and is the benchmark by which all variances are measured, surely this Court did not intend to create an exception for judges who, while understanding that their authority to impose a sentence is capped by a statutory maximum, nevertheless calculate as their Guideline anchor a range that is in excess of the statutory maximum due to their failure to apply U.S.S.G. § 5G1.1(a).

STATEMENT OF THE CASE

The government filed a two-count indictment against Ricky Davis charging him in Count One with sexual exploitation of a minor in violation of 18 U.S.C.

§ 2251(a), and in Count Two with attempted sex trafficking of a minor child in violation of 18 U.S.C. §§ 1591(a) and 1594(a).

The offense conduct was limited in time and scope. At age thirteen, Bianca M. had a MocoSpace account online in which she represented herself to be nineteen, and she came across Davis' profile in which he advertised his services as a tattoo artist. Excerpts of Record, *United States v. Davis*, Case No. 17-10547 (9th Cir.) (hereafter "ER") 79, 83, 250, 664, 675, 714, 758, 760. Bianca contacted Davis about getting a tattoo. ER 79, 676, 680, 724-25. Having spent his 20's in custody, Davis was an immature 32. Bianca sent Davis an unsolicited provocative adult-like selfie she had modified through a photo app to include bright pink lips in the corner of the picture, and the two agreed to meet the next day.¹ ER 330, 342, 721-22, 522, 680-81, 732, 753. As the district court observed, Bianca was "past puberty" and thus could be between twelve and eighteen years old. ER 262. Knowledge of Bianca's age was not an element of the offense. 18 U.S.C. § 2251(a).

Davis picked Bianca up and brought her back to his parents' house where he lived. ER 681. The planned tattoo never happened, either because Davis' tattoo equipment did not work (Bianca's version) or because Bianca did not have any money (Davis' version). ER 82, 684.

¹ At trial Bianca testified that maybe she had met Davis on two prior occasions. In sharp contrast to the details she recalled about the meeting that occurred at Davis' parents' house, she could recall virtually no details about the purported two prior meetings, and she ultimately was not sure the two prior meetings had occurred. ER 676-79, 715-17.

At some point the conversation turned to how Bianca could make money. Davis told Bianca that she could make money as an escort on Redbook. ER 83-84. Davis took some sexually explicit photos of Bianca and they had sexual relations that night. ER 694-95. Davis helped Bianca post a Redbook ad using the sexually explicit photos he had taken. ER 81, 685-86. Bianca and Davis did not discuss whether sex was involved in escort work, and no money was ever exchanged between Bianca and Davis. ER 694-95, 699, 725-27.

The following day Davis put Bianca in touch with Ben Martinez. ER 421, 756. Bianca testified that Davis gave her Ben's number and gave Ben her number, and that Ben contacted her directly. *Id.* Davis appeared entirely indifferent to what, if anything, they did with each other's contact information. There was no evidence that Ben contacted Davis because of the Redbook ad. ER 727. There was no money exchanged between Ben and Davis. ER 756. And there was no evidence that Ben ever paid Bianca for sex.

The night after she was with Davis, Bianca went on a date with Ben Martinez, and during that date she learned that she could make money by having sex with men. ER 694-96, 701. Bianca reached out to Davis early the next morning, and told him that she needed to make money and asked him to get her customers. ER 282-84, 700. According to Bianca, Davis not only refused to get her customers he "disconnected from the whole thing." ER 418, 699-701, 723, 727. Davis took down the Redbook ad; the only evidence that the ad ever existed is Bianca's and Davis' statements. ER 89, 298.

The case went to trial and a jury convicted Davis on both counts. The district court sentenced Davis to 25 years.

The statutory maximum for Count One was 30 years whereas the statutory maximum for Count Two was life. The Presentence Report (“PSR”) correctly calculated Davis’ Guidelines for Count One as 360 months pursuant to application of U.S.S.G. § 5G1.1, which mandates that a defendant’s Guidelines can never exceed the statutory maximum. The PSR likewise correctly calculated Davis’ Guidelines for Count Two as 360 to life.

At sentencing the district court noted that “the serious nature of these types of offenses and the need to impose a sentence that does deter both the defendant and the public and others from this type of conduct” were “the factors that [the court was] considering in this case.” ER 67. The district court also opined that there did “not appear to be any, significant mitigating factors in this case that would warrant consideration to 3553(a).” ER 66. Without further explanation, the district court then varied down by five years to impose a total sentence of 300 months, 25 years on each of Counts One and Two, to run currently. ER 68-69.

Davis appealed his conviction and sentence to the Ninth Circuit. The Ninth Circuit vacated Davis’ conviction for attempted sex trafficking – the offense that carried a statutory maximum of life – because it had been secured in violation of Davis’ Fifth Amendment right to be tried only on the charges presented on an indictment returned by a grand jury. The court also vacated Davis’ entire sentence.

The government subsequently dismissed Count Two and the district court resentenced Davis on Count One.

At Davis' resentencing on December 11, 2017, the district court once again imposed a sentence of 25 years. At sentencing the district court announced that not only had it "reviewed the transcript of the original sentencing," but that the court would be "working off of the pre-sentence report that was revised June 19, 2015" for the original sentencing. ER 11, 25. The court assured the parties that while it was working off the PSR from Davis' original sentencing two and half years earlier when Davis stood convicted of an offense that supported a life sentence, it was doing so "with the understanding that anything relating to Count 2 [would] be removed, and [the court would not] consider anything as to Count 2." ER 25.

Nevertheless, the district court then went on to calculate its Guideline anchor as 360 months to life, which had been the Guideline range for Count Two – the very count that had been vacated. That was plain error under U.S.S.G. § 5G1.1(a), which mandates that "where the statutorily authorized maximum sentence is less than the minimum of the applicable guideline range, the statutorily authorized maximum *shall be* the guideline sentence." U.S.S.G. § 5G1.1 (emphasis added). Because the statutory maximum upon re-sentencing was 30 years, Davis' recommended guideline sentence was 30 years – period. In other words, the district court failed to appreciate that the Sentencing Commission was not in any way recommending or suggesting that Davis should be sentenced up to life but for the statutory maximum of 30 years.

Where the district court used the very same Guideline range as its framework for resentencing that was premised on the count the Ninth Circuit had vacated and the government had dismissed, this was not just any procedural error. The court's miscalculation of the applicable Guideline anchor is particularly concerning when immediately before imposing sentence, the court opined that "nothing has really changed" from Davis' first sentencing where he stood convicted of attempting to sexually traffic a minor for personal gain, and proceeded to impose the exact same sentence as when Davis' Guideline anchor had in fact been 30 years to life. ER 35.

Of course, a Guideline range that supports a sentence up to life is very different from a Guideline range that supports a sentence no greater than 30 years. If a sentencing judge believes the Guidelines would support a sentence of life but for the statutory maximum, the judge's decision to vary down to 25 years is quite significant (particularly when the defendant is in his 30's). By comparison, if the Guidelines actually support a sentence of no more than 360 months, a judge's decision to impose a 300-month sentence does not reflect a variance of the same significance. Indeed, if, as the sentencing judge believed, nothing had really changed from Davis' first sentencing, and if a sentence of 25 years reasonably accounted for all the § 3553(a) factors when the Guideline anchor was 30 years to life, then presumably a lower sentence would represent a sentence that was "sufficient, but not greater than necessary" if the Guideline anchor dropped to a flat 30 years. 18 U.S.C. § 3553(a).

The Ninth Circuit issued an unpublished decision affirming the procedural and substantive reasonableness of Davis' 25-year sentence without even mentioning, yet alone addressing, the district court's plain procedural error in calculating the Guideline anchor that was the benchmark by which it was required to measure all variances. Believing this to be an oversight, Davis requested a rehearing solely on the basis of the court's failure to address the sentencing judge's failure to apply § 5G1.1(a). Not only did the Ninth Circuit not grant a rehearing, it declined to amend its decision to even acknowledge the issue. Apparently in its zeal to uphold Davis' 25-year sentence as reasonable, the Ninth Circuit could not be bothered with the district court's plain error in calculating the anchor that informed the entire sentencing process.

Where the judge imposed a sentence under the belief that Davis' Guideline anchor still supported a life sentence notwithstanding the statutory maximum, no reviewing court can be confident that the sentence imposed was not overstated as a result of the judge basing his analysis on a skewed framework premised on an inflated Guideline anchor. In other words, if courts, such as the Ninth Circuit, are permitted to carve out an exception to this Court's mandate, that all failures to properly calculate the Guideline anchor constitute procedural error, whenever a sentencing judge fails to apply U.S.S.G. § 5G1.1 and thus imposes a sentence using an inflated Guideline anchor, there can be no uniformity and proportionality in sentencing, and no assurance that courts are adequately considering the § 3553(a) factors in the context of the proper sentencing framework.

◆

REASONS FOR GRANTING THE WRIT

A. Because the Guidelines Anchor All Federal Sentences, a Court’s Failure to Apply U.S.S.G. § 5G1.1(a) Inevitably Distorts the Sentencing Process and Undermines Congress’ Goal of Uniformity and Proportionality in Federal Sentencing.

“[T]o ensure certainty and fairness in sentencing, district courts must operate within the framework established by Congress.” *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1903 (2018) (internal quotations omitted). Congress intended the Guidelines promulgated by the United States Sentencing Commission to provide the requisite framework by anchoring all federal sentences to ensure uniformity and proportionality in federal sentences imposed across the country. *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1342 (2016).

At the outset of the sentencing proceedings, the district court must determine the correct Guideline anchor, and “[a]lthough the district court has discretion to depart from the Guidelines, the court ‘must consult those Guidelines and take them into account when sentencing.’” *Id.* (quoting *United States v. Booker*, 543 U.S. 220, 264 (2005)). In other words, “district courts must treat the Guidelines as the starting point and the initial benchmark” for all federal sentences. *Kimbrough v. United States*, 552 U.S. 85, 108 (2007) (internal quotations omitted). It is only after the district court has correctly calculated the Guideline anchor that “the district judge should then consider all the § 3553(a) factors to determine whether they support the sentence requested by a party.” *Gall v. United States*, 552 U.S. 38, 49-50 (2007).

Critically, if a district court judge “decides that an outside-Guidelines sentence is warranted, he must consider the extent of the deviation [from the Guidelines] and ensure that the justification is sufficiently compelling to support the degree of the variance. *Gall*, 552 U.S. at 50. In other words, “the Guidelines are not only the starting point for most federal sentencing proceedings but also the lodestar,” and thus judges must “remain cognizant of them throughout the entire sentencing process.” *Molina-Martinez*, 136 S. Ct. at 1345-46 (internal quotations omitted). The Guidelines therefore “are ‘the framework for sentencing’ and ‘anchor . . . the district court’s discretion.’” *Id.* at 1342 (quoting *Peugh v. United States*, 569 U.S. 530, 542, 549 (2013)) (alterations in original). Thus, even though the Guidelines are advisory, they “serve as a meaningful benchmark in the initial determination of a sentence and through the process of appellate review.” *Rosales-Mireles*, 138 S. Ct. at 1904 (internal quotations omitted).

Indeed, it is precisely because the Guideline anchor is the starting point for all federal sentences, that the fact “[t]hat a district court may ultimately sentence a given defendant outside the Guideline range does not deprive the Guidelines of force as the framework for sentencing.” *Peugh*, 569 U.S. at 542. Because the sentencing judge must use the Guidelines “as the beginning point to explain the decision to deviate from it, . . . *the Guidelines are in a real sense the basis for the sentence.*” *Molina-Martinez*, 136 S. Ct. at 1345 (emphasis in original); *see Beckles v. United States*, 137 S. Ct. 886, 898 (2017) (Ginsburg, J., dissenting) (“The Guidelines anchor every sentence imposed in federal district court”).

Because the Guidelines anchor every federal sentence imposed, “[b]efore a court of appeals can consider the substantive reasonableness of a sentence, it must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range.” *Rosales-Mireles*, 138 S. Ct. at 1910. Specifically, where “the district court is charged . . . with determining whether, taking all sentencing factors into consideration, including the correct Guidelines range, a sentence is ‘sufficient, but not greater than necessary,’” and where the Guidelines provides the anchor that informs the district court’s analysis, when a district court judge fails to properly calculate the Guidelines, by definition the judge did not perform the requisite analysis to ensure that the sentence imposed was “not greater than necessary” as required under § 3553(a). *Id.* (quoting 18 U.S.C. § 3553(a)). And, because “the district court has the ultimate responsibility to ensure that the Guidelines range it considers is correct. . .the “[f]ailure to calculate the correct Guidelines range constitutes procedural error.” *Id.* at 1904 (quoting *Peugh*, 569 U.S. at 537). And not just any “procedural error,” but “a significant procedural error.” *Molina-Martinez*, 136 S. Ct. at 1346.

As this Court has recognized, district courts “sometimes make mistakes” in calculating the correct Guidelines, and “[g]iven the complexity of the calculation,” the mistake may go unnoticed, as it did here, until sentencing transcripts are reviewed as part of the appellate process. *Rosales-Mireles*, 138 S. Ct. at 1904. Because of the critical role a correct Guideline calculation plays in ensuring fairness

in federal sentencing, defendants whose sentencing judges incorrectly calculated the applicable Guidelines are not without recourse.” *Id.*

“The Guidelines’ central role in sentencing means that an error related to the Guidelines can be particularly serious.” *Molina-Martinez*, 136 S. Ct. at 1345. Accordingly, in most cases “a defendant who has shown that the district court mistakenly deemed applicable an incorrect, higher Guidelines range has demonstrated a reasonable probability of a different outcome,” and thus “the court’s reliance on an incorrect range in most instances will suffice to show an effect on the defendant’s substantial rights.” *Id.* at 1346-47. In other words, “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.” *Id.* at 1345; *see, e.g.*, *Sabillon-Umana*, 772 F.3d at 1333 (Gorsuch, J.) (observing that where “the whole point of the guidelines is to affect the defendant’s ‘substantial rights’ by guiding the district court’s analysis of how much of his liberty he must forfeit to the government,” “[w]hen the court’s starting point is skewed a ‘reasonable probability’ exists that its final sentence is skewed too”).

Given the central role that the Guidelines play in ensuring the neutrality, accuracy, consistency, trustworthiness and fairness in federal sentencing, and the reality that a reasonable person would have “a diminished view of the judicial process and its integrity if courts refused to correct obvious errors of their own devise,” “a plain Guidelines error that affects substantial rights. . . ordinarily will satisfy *Olano*’s fourth prong.” *Rosales-Mireles*, 138 S. Ct. at 1908 (internal

quotations omitted). As Justice Gorsuch observed, “we can think of few things that affect an individual’s substantial rights or the public’s perception of the fairness and integrity of the judicial process more than a reasonable probability an individual will linger longer in prison than the law demands only because of an obvious judicial mistake.” *Sabillon-Umana*, 772 F.3d at 1335. Accordingly, “[i]n the ordinary case, as here, 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.” *Rosales-Mireles*, 138 S. Ct. at 1911.

Not surprisingly, as this Court has repeatedly recognized, “when a Guideline range moves up or down, offenders’ sentences [tend to] move with it.” *Molina-Martinez*, 136 S. Ct. at 1346 (quoting *Peugh*, 569 U.S. at 544) (alterations in original). As Judge Calabresi explained, the reason for this is simple – it is known by “cognitive scientists and behavioral economists” as the ““anchor effect[].”” *United States v. Ingram*, 721 F.3d 35, 40 (2d Cir. 2013) (Calabresi, J., concurring).

“Anchoring refers to the tendency to rely on numeric reference points to make numeric judgements, even when such estimates are arbitrary, irrelevant, or ludicrous.” Jeffrey J. Rachlinskic et al., *Can Judges Make Reliable Numeric Judgments? Distorted Damages and Skewed Sentences*, 90 Ind. L.J. 695, 701, 739 (2015) (demonstrating that anchors “have a distorting and sometimes dramatic, impact” on “the duration of discretionary sentences”). In other words, whatever Guideline anchor is used at the outset of the analysis “also anchors the final outcome, even when the starting point is not meaningful.” *Id.* at 703. Indeed, that

is the whole point of the Guidelines – to anchor sentences in a uniform and consistent manner. *Rosales-Mireles*, 138 S. Ct. at 1908.

It is because of the anchoring effect that “the starting, guidelines-departure point matters, even when courts know they are not bound to that point.” *Ingram*, 721 F.3d at 40. As Judge Calabresi explained, countless studies have convincingly demonstrated that “[w]hen people are given an initial numerical reference, even one they know is random, they tend (perhaps unwittingly) to ‘anchor’ their subsequent judgments—as to someone’s age, a house’s worth, how many cans of soup to buy, or even what sentence a defendant deserves—to the initial number given.” *Id.*

Anchoring is a cognitive bias – and one that is intentionally built into the Guidelines – that causes decisionmakers to reach a result that is tied to the initial anchor used. Judge Mark W. Bennett, *Confronting Cognitive “Anchoring Effect” and “Blind Spot” Biases in Federal Sentencing*, 104 J. Crim. L. & Criminology 489, 495 (2014) [hereafter “Judge Bennett”]. While “[r]eliance on these heuristics facilitates good judgment most of the time, . . . it can also produce systematic errors in judgment.” Chris Guthrie, et al., *Inside the Judicial Mind*, 86 Cornell L. Rev. 777, 780 (2001). Errors in judgment arise because “decisionmakers tend to focus their attention on the anchor value and to adjust insufficiently to account for new information.” Judge Bennett, 104 J. Crim. L. & Criminology at 495 (quoting Robert A. Prentice & Jonathan J. Koehler, *A Normality Bias in Legal Decision Making*, 88 Cornell L. Rev. 583, 602-03 (2003)). Indeed, “overwhelming psychological research demonstrates that people . . . evaluate numbers by ‘anchoring’ on a preliminary

number and then adjusting, usually inadequately, from the initial anchor.” *Id.* (quoting Alafair S. Burke, *Prosecutorial Passion, Cognitive Bias, and Plea Bargaining*, 91 Marq. L. Rev. 183, 201 (2007)). Critically, the cognitive bias will distort the final result whether or not the initial anchor is legitimate. “Amazingly, repeated studies show that the ‘anchor’ produces an effect on judgment or assessment even when the anchor is incomplete, inaccurate, irrelevant, implausible, or random.” Judge Bennett, 104 J. Crim. L. & Criminology at 495.

“Even more troubling, research indicates that sentencing judges are influenced by anchors, even irrelevant anchors, to the same extent as lay people and that the effects of the anchors are not reduced by the judges’ actual experience.” *Id.* at 492. That means that the initial Guideline calculation has a powerful impact on the entire sentencing process and the ultimate sentence imposed. Precisely because a judge’s Guideline calculations “serve[s] as the starting point for the district court’s decision and anchor[s] the court’s discretion in selecting an appropriate sentence. . . in most cases the Guidelines range will affect the sentence,” and thus “a defendant sentenced under an incorrect Guidelines range should be able to rely on that fact to show a reasonable probability that the district court would have imposed a different sentence under the correct range.” *Molina-Martinez*, 136 S. Ct. at 1349; *see, e.g.*, Judge Bennett, 104 J. Crim. L. & Criminology at 533 (explaining that “exposure to a numerical ‘anchor’ undermines the soundness of subsequent judgments by anchoring those judgments to that numerical anchor”).

Given the dispositive role that a court's Guideline calculation has in determining the ultimate outcome at sentencing and the reality that once a judge has established his/her Guideline anchor, it is unlikely the judge will be able to sufficiently account for new information, the Guideline anchor the judge incorrectly calculated at the outset will inevitably distort the whole sentencing process. In other words, even where a judge is aware of a statutory maximum, if the judge does not factor that information into the actual Guideline calculation, awareness of this additional information is unlikely to effectively mitigate the anchoring effect of the judge's actual Guideline calculation. *Cf. Judge Bennett*, 104 J. Crim. L. & Criminology, at 495. Not surprisingly, therefore, "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" in violation of 18 U.S.C. § 3553(a). *Rosales-Mireles*, 138 S. Ct. at 1907.

B. Circuit Courts are Split as to Whether a Sentencing Judge's Use of an Inflated Guideline Anchor Resulting from a Failure to Apply U.S.S.G. § 5G1.1(a) Constitutes a Significant Procedural Error If the Judge Evinces Awareness of the Applicable Statutory Maximum.

Notwithstanding that a failure to properly calculate the Guideline anchor constitutes a significant procedural error, circuit courts appear split as to whether there should be an exception when the erroneous Guideline anchor results from a judge's failure to apply U.S.S.G. § 5G1.1(a). Section 5G1.1(a) provides that when a statutory maximum is less than what would otherwise be the Guideline anchor, "the statutorily authorized maximum sentence *shall* be the guideline sentence."

(emphasis added). In other words, where, as was the case here, § 5G1.1(a) applies there are not two numeric guides – a Guideline anchor *and* the statutory maximum. There is only one lodestar – the Guideline anchor – which *is* the statutory maximum. Accordingly, as occurred here, when the sentencing judge calculates a Guideline range above the statutory maximum, the judge has by definition incorrectly calculated the Guideline anchor, which constitutes a significant procedural error.

Yet some circuits, such as the Ninth Circuit, appear to believe the error is of so little significance that it does not even merit mention, let alone constitute a cause for concern. While the Ninth Circuit was silent regarding its decision to give the district court a pass for failing to apply U.S.S.G. § 5G1.1(a) and using as his sentencing framework an inflated Guideline anchor tied to the very count the court had vacated, presumably the Ninth Circuit followed the reasoning of the Sixth Circuit, which at least the Sixth Circuit articulated, albeit in an unpublished opinion in *United States v. Murphy*, 591 F. App'x 377 (6th Cir. 2014).

In *Murphy*, the Sixth Circuit upheld as procedurally reasonable the district court's incorrect Guideline calculation because, as in this case, the district court evinced awareness that his discretion was capped by the statutory maximum. *Id.* at 382. Just like in this case the district court judge calculated as his Guideline anchor a sentencing range in excess of the statutory maximum but ultimately imposed a sentence below the statutory maximum. *Id.* at 379, 382. Because the district court judge recognized that he could not impose a sentence in excess of the

statutory maximum, the Sixth Circuit, like the Ninth Circuit, was untroubled that the judge’s Guideline anchor, the lodestar for sentencing and the benchmark for measuring all variances, was incorrectly inflated even though this Court has repeatedly observed, and countless cognitive bias studies affirm, that when a Guideline anchor is increased, the sentences judges ultimately impose will also increase. *Id.* at 382-83. The Sixth Circuit simply observed that “the district court could have more clearly indicated that the statutory maximum sentences determined the Guidelines sentence,” as “it is *preferable* for district judges to specify that the statutory maximum determines the Guidelines sentence when section 5G1.1(a) applies.” *Id.* (emphasis added).²

Of course it is more than simply “preferable” that district court judges correctly calculate the Guideline anchor; their failure to do so is a “significant procedural error.” *Molina-Martinez*, 136 S. Ct. at 1346. This Court should therefore endorse the Second Circuit’s treatment of § 5G1.1(a) errors resulting in overstated Guideline anchors that distort the entire sentencing process over the Sixth and the Ninth Circuit’s caviller dismissal of the issue.

In *United States v. Dorvee*, 616 F.3d 174 (2d Cir. 2010) the Second Circuit held that even though the district court judge clearly recognized his sentencing discretion was capped by the statutory maximum, the fact that the judge

² The Sixth Circuit sought support for its “preference” for correctly calculated Guideline anchors in the Fourth Circuit’s unpublished opinion, *United States v. Guerra*, 535 F. App’x 214 (4th Cir. 2013). *Guerra*, however, is inapposite. In *Guerra*, the sentencing judge explicitly applied § 5G1.1(a) “noting that a statutory maximum sentence would not be a variance, but a Guidelines sentence.” *Id.* at 217.

nevertheless calculated a Guideline anchor above the statutory maximum in violation of § 5G1.1(a) constituted procedural error requiring the court to vacate the sentence imposed. *Id.* at 181-82. In *Dovree*, the PSR noted that the statutory maximum for the offense was twenty years and thus the Guideline range was twenty years. *Id.* at 176-77. At sentencing the district court nevertheless stated “the guideline imprisonment range is 262 to 327 months, but the statutory maximum is 240 months.” *Id.* at 178. The district court “never correctly stated that the operative Guidelines range was 240 months’ imprisonment, either by indicating the Guidelines range on the record at sentencing or by adopting at sentencing the PSR’s statement of the applicable Guidelines range,” which meant “that the district court failed to apply section 5G1.1(a) correctly.” *Id.* at 181. The fact that the “district court understood that it could not give *Dovree* a sentence above the statutory maximum” was irrelevant. *Id.* at 181. The issue is that the Guideline anchor that a court calculates is the “benchmark for any variance,” and thus when that anchor is overstated the entire sentencing process is likely distorted. *Id.* at 181-82.

The district court in *Dovree*, just like the district court here, explained the reasoning for its sentence by referencing the penological objectives for sentencing codified at § 3553(a)(2). *Id.* at 178. But as the Second Circuit explained, it is of no moment whether the sentence *could be* justified under § 3553(a)(2), an appellate court cannot skip over the requisite first step in the analysis. Specifically, as a threshold matter, the reviewing court must make sure the district court’s

framework for sentencing was anchored by the proper Guideline calculation. As the Second Circuit observed, when a “district court miscalculates the typical sentence at the outset, it cannot properly account for atypical factors and we, in turn, cannot be sure that the court has adequately considered the § 3553(a) factors.” *Id.* at 182. Accordingly, even though, as in this case, Dovree did not object to the district court’s failure to apply § 5G1.1(a) and recognize that the Guideline anchor *was* the statutory maximum, the Second Circuit held the error constituted a significant procedural error requiring remand so that the district court could properly calculate Dovree’s Guideline anchor – the lodestar of sentencing. *Id.* at 179, 182.

The Second Circuit reaffirmed its holding in *United States v. Bennett*, 839 F.3d 153 (2d Cir. 2016), again on plain error review. In *Bennett*, the sentencing judge stated that the “maximum here is ten [years], the guidelines are 11 to 14 [years],” and then sentenced the defendant to seven years. *Id.* at 154, 162. At no time during the sentencing did the district court apply § 5G1.1(a) “by indicting that the statutory maximum and the Guidelines range (both the minimum and the maximum) *were the same*: ten years.” *Id.* at 162 (emphasis in original). Recognizing that in light of “contemporary research on judicial decision making, which indicates that anchoring and other ‘contextual factors’ can effect the exact sentence imposed,” the Second Circuit held that the district court’s failure to apply § 5G1.1(a) during the sentencing hearing “affected [the defendant’s] substantial rights and seriously affected the fairness of the judicial proceedings.” *Id.* at 162-63, 163 n.8. Thus, even though the district court had “asserted it was ‘not moved by’

the Guidelines,” and in fact sentenced the defendant three years under his correctly calculated Guideline, the district court’s failure to properly calculate the Guideline anchor nevertheless “may well have anchored the District Court’s thinking as to what an appropriate sentence would be,” constituting a significant procedural error requiring remand. *Id.* at 163.

In a recent decision the Third Circuit appears likely to be in accord with the Second Circuit. In *United States v. Payano*, 930 F.3d 186 (3d Cir. 2019), the issue was not the district court’s failure to properly calculate the Guideline anchor but a failure to appreciate that the statutory maximum was ten years, not twenty. *Id.* at 191. The Third Circuit observed that “[u]nlike the Guidelines, which district courts are required to use as the ‘starting point’ for sentencing, to ‘remain cognizant of . . . throughout the sentencing process,’ and to ‘explain the decision to deviate from,’ statutory ranges merely set the floor and the ceiling within which a district court must sentence.” *Id.* at 193-94. Statutory maximums “thereby function[] not to ‘anchor’ the district court’s discretion, but rather to limit the extent to which a district court may permissibly stray from the Guidelines range,” and thus “a Guidelines range and a statutory range do not have commensurate effects on the final sentence imposed.” *Id.* at 193-94 (quoting *Molina-Martinez*, 136 S. Ct. at 1345, 1349) (alterations in original). That being said, and even though the district court referenced the incorrect statutory maximum only once during the sentencing and even though “permissible considerations alone *may* have accounted for the District Court’s upward variance,” because there is “a ‘reasonable possibility’ that the

sentence imposed was based on the district court’s “mistaken belief as to the applicable statutory maximum,” “if not corrected, [the error] would ‘seriously affect[] the fairness, integrity or public reputation of judicial proceedings.’” *Payano*, 930 F.3d at 198-99 (quoting *United States v. Olano*, 507 U.S. 725, 732 (1993)) (emphasis in original).

Action is urgently needed by this Court to ensure that circuit courts appreciate that when this Court has repeatedly held that all Guideline errors constitute significant procedural errors, it meant *all* errors, and did not intend to give a pass to sentencing judges that fail to apply U.S.S.G. § 5G1.1(a) and proceed to use an inflated Guideline anchor as the benchmark by which they measure all variances so long as they recognize that their sentencing authority is capped by the statutory maximum. “Guidelines miscalculations ultimately result from judicial error, and “the relative ease of correcting the error” when balanced against the “risk of unnecessary deprivation of liberty. . . undermines the fairness, integrity, or public reputation of judicial proceedings.” *Rosales-Mireles v. United States*, 138 S. Ct. at 1908.

C. This Case Is an Excellent Vehicle for this Court to Provide Much Needed Clarification on Whether a Judge’s Use of an Inflated Guideline Anchor Due to a Failure to Apply U.S.S.G. § 5G1.1(a) Constitutes a Significant Procedural Error.

The issue is squarely presented here. As Davis pointed out in both his Opening Brief (pp. 17-19) and his Reply Brief (pp. 7-8), the district court did not properly calculate the Guideline anchor at the outset of sentencing, or at any other time, which constitutes a significant procedural error that undermines the public’s

perception of the fairness and integrity of the judicial process, and requires a remand for resentencing using the correct Guideline anchor as the lodestar for sentencing. The Ninth Circuit issued an unpublished decision upholding the reasonableness of Davis' 25-year sentence but failed to even acknowledge that at the resentencing hearing the judge used as his Guideline anchor the Guideline anchor applicable to the count that had been vacated rather than the reduced Guideline anchor that should have been used as the framework for the resentencing and by which the judge should have been measuring all variances to arrive at a sentence that was sufficient, but not greater than necessary.

Believing the Ninth Circuit's omission was simply an oversight, Davis filed a motion for rehearing that raised solely the issue of the district court's failure to correctly calculate its Guideline anchor under U.S.S.G. § 5G1.1. By electing not to amend its decision to even acknowledge the concern raised by the district court's use of an inflated Guideline anchor at resentencing, the Ninth Circuit made clear that its omission was not an oversight. To the contrary, the Ninth Circuit and the Sixth Circuit, with its unpublished decision in *Murphy*, and possibly other Circuits who like the Ninth are simply declining to acknowledge the issue, are seemingly of the belief that the issue of sentencing judges using inflated Guideline anchors as a result of their failure to apply § 5G1.1 is too mundane to be of concern.

Of course, protecting “the fairness[] [and] integrity. . . of judicial proceedings’ and prevent[ing] the erosion of public confidence in our judicial system writ large,” and “ensuring [the defendant’s] sentence is procedurally sound are neither pointless

endeavors, nor mere formality.” *United States v. Hester*, 910 F.3d 78, 91-92 (3d Cir. 2018) (quoting *Rosales-Mireles*, 138 S. Ct. at 1908) (alterations in original). Moreover, “[a]ny amount of actual jail time is significant . . . and has exceptionally severe consequences for the incarcerated individual and for society which bears the direct and indirect costs of incarceration.” *Rosales-Mireles*, 138 S. Ct. at 1907 (internal quotations and alterations omitted).

Were this Court to hold that a sentencing judge’s error in calculating the Guideline anchor that arises under § 5G.1.1(a) and results in an inflated anchor as the lodestar for sentencing is in fact a significant procedural error that seriously affects the fairness, integrity, and public reputation of judicial proceedings, there is a real possibility that Davis’ 25-year sentence would be reduced as it seems likely that a sentence that was sufficient, but not greater than necessary when the Guideline anchor was 30 years to life would be greater than necessary when the anchor by which all variances must be measured is reduced to a flat 30 years. And, even if Davis’ sentence was not ultimately reduced, there are “few things that affect. . . the public’s perception of the fairness and integrity of the judicial process more than a reasonable probability an individual will linger longer in prison than the law demands only because of an obvious judicial mistake.” *Sabillon-Umana*, 772 F.3d at 1335.

◆

CONCLUSION

The petition for a writ of certiorari should be granted, or alternatively, Davis respectfully requests that this Court grant his petition for writ of certiorari, vacate the Ninth Circuit's decision and remand in light of the Ninth Circuit's failure to consider *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1903 (2018).³

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³ Although *Rosales-Mireles* was decided approximately ten months before the Ninth Circuit's summary affirmance in this case, this Court has questioned what constitutes "sufficient 'opportunity'" for an appellate court to "appraise itself (or be appraised by the parties) of the new, potentially relevant Supreme Court decision," and even where an appellate court has been apprised of the potential application of the new decision, where the appellate court's decision "shows no sign of having applied the precedents that were briefed," this Court can exercise its power to grant, vacate and remand in the interests of justice. *Lawrence v. Chater*, 516 U.S. 163, 169-70 (1996).