

19-6953

No. 19A241

IN THE  
SUPREME COURT OF THE UNITED STATES

# ORIGINAL

Donovan Davis, Jr.,

Petitioner,

v

United States of America,

**Respondent.**

Supreme Court, U.S.  
FILED

DEC 09 2019

**OFFICE OF THE CLERK**

On Petition for Writ of Certiorari to the  
Eleventh Circuit Court of Appeals

**PETITION FOR WRIT OF CERTIORARI**

Donovan Davis, Jr.  
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## QUESTIONS PRESENTED

### Question One

The Constitution guarantees the assistance and choice of counsel for a critical-stage in a criminal proceeding. Ancient statute guarantees every individual the right to self-representation. The uncertain nature of a federal new-trial motion filed during the pendency of a direct appeal caused the Eleventh Circuit Court of Appeals to deny Donovan Davis, Jr. both rights. Is a new trial motion filed during the pendency of a direct appeal a critical stage in the criminal proceeding or a separate collateral proceeding?

### Question Two

An abbreviated, incomplete, or incorrect sentencing process impugns the public reputation and the integrity of the administration of justice. *Rosales-Mireles v. United States*, 138 S. Ct. 1987 (2018); *Molina-Martinez v. United States*, 136 S. Ct. 1338 (2016). The court of appeals recognized, but nonetheless affirmed the district court's truncated and summary sentencing procedure, which did not permit adversarial testing or apply the Guidelines's framework for determining relevant conduct. In the absence of a mandatory minimum sentence, does failure to apply the Sentencing Guidelines methodology constitute procedural error that requires vacatur and remand?

**LIST OF PARTIES**

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

**RELATED CASES**

United States v. Donovan Davis, Jr.,  
No. 18-12165 (11th Cir. 2019)(41(g) proceeding)(pending reconsideration)  
No. 19-10535 (11th Cir. 2019)(Successive Rule 33 proceeding)(pending)

Donovan Davis, Jr. v. Federal Bureau of Investigation, et al.,  
No. 1:18-cv-86-CRC (D.D.C. 2019)(FOIA proceeding)

## TABLE OF CONTENTS

	<u>Page</u>
QUESTIONS PRESENTED .....	i
LIST OF PARTIES .....	ii
RELATED CASES .....	ii
TABLE OF CONTENTS .....	iii
TABLE OF AUTHORITIES .....	v
PETITION FOR A WRIT OF CERTIORARI .....	1
OPINIONS BELOW .....	1
JURISDICTION .....	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED .....	2
STATEMENT OF THE CASE .....	4
REASONS FOR GRANTING THE WRIT .....	5
I. The law guarantees Mr. Davis the right to represent himself in any proceeding before the district court. The district court denied Mr. Davis that right. In upholding the district court's ruling, the court of appeals illuminated a twenty-year-old circuit split on the nature of a Rule 33 motion filed during the pendency of a direct appeal. Compare <i>Kitchen v. United States</i> , 227 F.3d 1014 (7th Cir. 2000) with <i>United States v. Williamson</i> , 706 F.3d 405 (4th Cir. 2012). This Court should resolve the circuit disagreement, and decide whether a new-trial motion submitted during the pendency of a direct appeal is a critical stage in the criminal proceeding.....	7
II. This Court's decisions provide that a sentence is inherently unreasonable if the the district court either used the wrong framework when calculating the initial Guidelines range, or based the sentence on clearly erroneous facts or failed to adequately explain the chosen sentence. The district court did all three, and did not allow Mr. Davis to present contrary evidence. Further, it did not conduct the required Guidelines's relevant-conduct analysis. The Eleventh Circuit upheld the sentence under a harmless test that conflicts with the decisions of this Court and the rule in other federal circuits.....	10
CONCLUSION .....	13

VERIFICATION .....	14
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**APPENDIX**

July 17, 2019 Eleventh Circuit Order Denying Rehearing .....	App. A
March 27, 2019 Opinion of Eleventh Circuit Affirming the Conviction .....	App. B
September 3, 2015 Judgment and Commitment .....	App. C
Composite of District Court Orders Denying Various Motions .....	App. D
May 17, 2017 Order Denying Motion for Self-Representation .....	App. E
December 21, 2016 Order Denying Motion for New Trial .....	App. F
September 2019 Letter Extending Time .....	App. G
Sentencing Transcripts .....	App. H

## TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
Barnes v. United States, 437 F.3d 1074 (11th Cir. 2006) .....	9
Faretta v. California, 422 U.S. 806 (1975) .....	6, 7
Gall v. United States, 552 U.S. 38 (2007) .....	11
Kitchen v. United States, 227 F.3d 1014 (7th Cir. 2000) .....	7, 8, 9
McAfee v. Thaler, 630 F.3d 383 (5th Cir. 2011) .....	8
McKaskle v. Wiggins, 465 U.S. 168 (1984) .....	8
Molina-Martinez v. United States, 136 S. Ct. 1338 (2016) .....	i, 11
Pennsylvania v. Finley, 481 U.S. 551 (1987) .....	6
Peugh v. United States, 569 U.S. 530 (2013) .....	11
Powell v. Alabama, 287 U.S. 45 (1932) .....	7
Rita v. United States, 551 U.S. 338 (2007) .....	11
Rosales-Mireles v. United States, 138 S. Ct. 1987 (2018) .....	i, 10, 11
Trenkler v. United States, 268 F.3d 16 (1st Cir. 2001) .....	8, 9
United States v. Berger, 375 F.3d 1223 (11th Cir. 2004) .....	8
United States v. Brady, 417 F.3d 326 (2d Cir. 2005) .....	12
United States v. Brown, 843 F.3d 74 (2d Cir. 2016) .....	12

**TABLE OF AUTHORITIES**  
**Continued**

<u>Cases</u>	<u>Page</u>
United States v. Davis, 679 F.3d 190 (4th Cir. 2012) .....	12
United States v. Gonzalez-Lopez, 548 U.S. 140 (2006) .....	7
United States v. Grant, 636 F.3d 803 (6th Cir. 2011) .....	12
United States v. Harrington, 410 F.3d 598 (9th Cir. 2005) .....	9
United States v. Williamson, 706 F.3d 405 (7th Cir. 2012) .....	7, 8, 9
 <u>Constitutional Provisions</u>	
Sixth Amendment .....	2
 <u>Statutes</u>	
28 U.S.C. § 1254 .....	1
28 U.S.C. § 1654 .....	2, 6, 8
 <u>Rules</u>	
Federal Rules of Criminal Procedure 33 .....	passim
Federal Rules of Criminal Procedure 12 .....	2
 <u>Guidelines</u>	
U.S.S.G. § 1B1.3 .....	3, 10
U.S.S.G. Amendment 790 .....	3
 <u>Other Authority</u>	
Jonathan G. Neal, "Critical Stage" 45 Wm. & Mary L. Rev. 783 (2003) .....	8

## PETITION FOR WRIT OF CERTIORARI

A conflict in the circuit courts' definition of a Rule 33 motion denied Mr. Davis his right to choose counsel, including the right to represent himself. For twenty years the courts of appeal have struggled to define the true nature of a motion for new trial. The appellate courts agree that a new-trial motion filed prior to the notice of appeal is a critical stage in the criminal proceeding. Also, the appellate courts agree that a new-trial motion filed after an appeal is complete is a collateral challenge. What the appellate courts disagree about—and what should be decided by this Court—is the nature of a new-trial motion filed while a direct appeal is pending.

Mr. Davis's case and circumstance provide a proper vehicle for this Court to answer that question and resolve the mature dispute within the Court of Appeals.

### OPINIONS BELOW

The opinion of the United States Court of Appeals appears at Appendix B to the petition and is unpublished. The district court orders relevant to the petition are included in Appendix D, E, and F.

### JURISDICTION

On July 24, 2019, the Eleventh Circuit for the Court of Appeals denied a timely motion for rehearing. (App. A). On September 9, 2019, Justice Thomas extended the period for submitting a petition for certiorari until December 14, 2019. (App. G). This Court's jurisdiction—to the extent is other than anomalous—arises under 28 U.S.C. § 1254.

Subsequent to the petition for rehearing in separate proceedings, the government produced evidence showing that the out-of-district attorney

initiating and conducting the grand jury lacked legal authority, thereby nullifying the lower court's jurisdiction and limiting this Court's current authority to determine whether any court had jurisdiction. A contemporaneously filed Rule 12(b) motion to dismiss more thoroughly discusses the facts and law related to this Court's jurisdiction to adjudicate the merits of this petition.

#### **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

##### **Sixth Amendment**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

##### **28 U.S.C. § 1654**

In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.

##### **Fed. R. Crim. P. 33**

(a) Defendant's Motion. Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires. If the case was tried without a jury, the court may take additional testimony and enter a new judgment.

(b) Time to File.

(1) Newly Discovered Evidence. Any motion for a new trial on newly discovered evidence must be filed within 3 years after the verdict or finding of guilty. If an appeal is pending, the court may not grant a motion for a new trial until the appellate court remand the case.

(a) Chapters Two (Offense Conduct) and Three (Adjustments).

Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:

(1) (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and

(B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of the others in furtherance of the jointly undertaken criminal activity,

that occurred during the commission of the offense of conviction, in preparation for the offense, or in the course of attempting to avoid detection or responsibility for that offense;

(2) ...

U.S.S.G. Amendment 790

Section 1B1.3(a)(1)(B) is amended by striking "all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity," and inserting the following:

"all acts and omissions of others that were—

(i) within the scope of the jointly undertaken criminal activity,

(ii) in furtherance of that criminal activity, and

(iii) reasonably foreseeable in connection with that criminal activity;"

## STATEMENT OF THE CASE

The United States indicted, tried, and convicted Donovan Davis, Jr. of various conspiracy and fraud charges. (App. B, at 7). The district court sentenced Mr. Davis to 204 months. (*Id.*). Mr. Davis, among other things, challenged the sentencing court's methodology for determining loss and number of victims. (App. B, at 17-20); (App. G, at 2 Tr. p. 7-10)(transcript of error). The Eleventh Circuit involuntarily recharacterized the counseled claim as "the court erred in estimating the amount of the loss ...." (App. B, at 18).

Mr. Davis also challenged the district court's refusal to allow him to represent himself with a Rule 33 motion and related proceedings. (*Id.*). Included in that claim was the district court's refusal to conduct a Faretta hearing. (*Id.*).

It is not disputed that the district court did not apply the procedure required by decisional authority and the Sentencing Guidelines. (App. A, at 18) The Eleventh Circuit articulated that the district "court did not err procedurally in calculating the loss. While the court did not make specific findings, the failure to make specific findings does not ...." (*Id.*)<sup>1</sup>. Despite acknowledging the district court's lack of specific findings, the Eleventh Circuit conducted a merits review of the loss amount because, in its twist to this Court's procedural reasonableness test, appellate review was not precluded, since the district "court's decisions are based on clearly identifiable evidence." (*Id.*). The Eleventh Circuit affirmed the sentence despite the district court's failure to use the appropriate methodology. (*Id.*).

Similarly, the Eleventh Circuit affirmed the conviction (and denial of the Rule 33 motion) based on the contemporaneous business records that substantiated the less-than-credible trial testimony. (*Id.*, at 19). "Bromfield's trial

<sup>1</sup>1 A position inconsistent with this court's rule.

testimony was supported by extensive contemporaneous documentation ...." (*Id.*). Among other things, Mr. Davis's Rule 33 motion was meant to challenge the authenticity and reliability of the contemporaneous business documentation: the photocopies of certain emails. (*Id.*, at 19-20) ("extensive contemporaneous documentation"). The district court did not permit Mr. Davis to submit his evidence, because the district court refused to permit Mr. Davis to represent himself. "The [district] court struck Davis's motion for clarification [and others] ... noting that he was represented by counsel ...." (*Id.*, at 20). Further, the district court "summarily denied" a "hearing under Faretta." (*Id.*). This created an odd whipsaw effect for Mr. Davis. The district court refused to allow Mr. Davis to represent himself in the seemingly separate Rule 33 proceedings. Presumably because the Rule 33 proceeding was not a separate proceeding but part of the criminal proceedings. In that scenario, this Court's decisions permit an appeals court to limit the choice of self representation. But, under that premise, the district court violated this Court's more prominent decision in that in a trial-level criminal action there is a constitutional right to self-representation. Mr. Davis unequivocally requested that he be allowed to represent himself in the district court, a request the district court summarily denied without a hearing.

Ultimately, the appeals court side-stepped, without explanation, the denial of choice of counsel and affirmed the conviction and sentence.

After an unsuccessful petition for rehearing, this petition ensued.

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

The appeals court opinion rests on unresolved fundamental questions:

1. is a new-trial motion filed prior to completion of direct appeal a critical stage in the prosecution, such that the right to the assistance of counsel attaches;

2. if the new-trial-motion stage is a separate proceeding from direct appeal, does a statute or the Constitution guarantee a person the right of self-representation; and
3. when a sentencing court uses an incorrect framework to determine the Guidelines range, then should a reviewing appeals court remand the sentencing matters in order for correct proceedings, instead of conducting a harmlessness test based on inherently inaccurate (untested) information.

The district court refused to allow Mr. Davis to proceed pro se with the Rule 33 motions, (App. D)(Docket Entry 213, 215, 221, 229, 231, 290, 296); (App. F), even though Mr. Davis showed that he lacked the personal resources to both engage counsel and adequately present his arguments

The district court expressly found that Mr. Davis had counsel on appeal, thus could not represent himself in the Rule 33 action. By necessary implication: the Rule 33 motion must have been part of the direct appeal. If it were otherwise, then the district court's basis for denying Mr. Davis's pro se requests—he had counsel—was plainly wrong.

Stated differently, if the Rule 33 motion is not part of the direct appeal, then Mr. Davis was not represented in that proceeding and should have been allowed to represent himself. 28 U.S.C. § 1654. In essence, if the Rule 33 motion was a critical stage, then the district court should have conducted a Faretta hearing. See **Faretta v. California**, 422 U.S. 806, 832 (1975). On the other hand, if the Rule 33 motion is a distinct collateral proceeding, rather than part of the direct appeal, then the district court denied Mr. Davis the right to represent himself. See **Pennsylvania v. Finley**, 481 U.S. 551 (1987).

In either scenario (critical stage or not), the Eleventh Circuit sanctioned the district court's leap away from the ordinary course of judicial proceedings. Implicitly adopting a rule of law that places it in conflict with both this circuit's decisions and that of its sibling circuits within the Court of Appeals.

Also, Mr. Davis shows that the Eleventh Circuit's harmlessness test for an erroneous sentencing procedure amounts to disregard of this Court's holdings on what is required to assure confidence in the administration of criminal justice. And places the Eleventh Circuit in direct conflict with the other federal appellate circuits.

I. The law guarantees Mr. Davis the right to represent himself in any proceeding before the district court. The district court denied Mr. Davis that right. In upholding the district court's ruling, the court of appeals illuminated a twenty-year-old circuit split on the nature of a Rule 33 motion filed during the pendency of a direct appeal. Compare Kitchen v. United States, 227 F.3d 1014 (7th Cir. 2000) with United States v. Williamson, 706 F.3d 405 (4th Cir. 2012). This Court should resolve the circuit disagreement, and decide whether a new-trial motion submitted during the pendency of a direct appeal is a critical stage in the criminal proceeding.

The district court refused to allow Mr. Davis to represent himself in prosecuting his Rule 33 motion. (App. B, at 14). The district court stated that the local rules generally prohibit hybrid proceedings. (*Id.*). But Mr. Davis did not seek hybrid representation, he believed the Rule 33 proceeding was separate from the direct appeal. A necessary implication of the district court "hybrid" ruling was that the new-trial motion was a part of the direct appeal. Thus, also necessarily, it is a critical stage in the criminal proceedings. Nonetheless, the district court refused to comply with this Court's precedent to conduct a Faretta, 422 U.S. at 806 (1975), hearing in order to determine if Mr. Davis could proceed without counsel. (App. E).

The denial of choice of counsel, including self-representation, punctures the structural integrity of the proceedings and requires vacatur without regards to harmlessness. See United States v. Gonzalez-Lopez, 548 U.S. 140, 147-48 (2006); Powell v. Ala., 287 U.S. 45, 53 (1932).

Alternatively, the district court may have been wrong, and the new-trial motion may have been a distinct collateral proceeding, in which scenario the

district court's initial mistake blossomed into a second one: the denial of the statutory right to self-representation. See 28 U.S.C. § 1654. Once again, this is an error that is not amenable to a harmlessness inquiry. See **McKaskle v. Wiggins**, 465 U.S. 168 (1984).

In order to establish why this distinction (critical or collateral) makes a substantial difference, we recount the history of the circuit split.

More than two decades ago, a circuit divide began on whether a federal motion for a new trial constituted a critical stage in the criminal proceedings. See, e.g. **Kitchen**, 227 F.3d at 1014 (holding that a new trial motion filed during the pendency of a direct appeal constituted a critical stage and required the appointment of counsel); **Trenkler v. United States**, 268 F.3d 16, 20-21 (1st Cir. 2001)(A Rule 33 is not part of a direct appeal unless expressly incorporated into the appeal by Federal Rule of Appellate Procedure 4(b)(1)); see generally **Williamson**, 706 F.3d at 405 (new trial motion is not a critical stage); **Jonathan G. Neal**, "**Critical Stage**" : Extending the Right to Counsel to the Motion for New Trial Phase, 45 Wm. & Mary L. Rev. 783 (2003).

The upshot of the two decade debate, the federal circuits reached consensus on Rule 33 motions filed prior to the notice of appeal—those are critical-stage proceedings. Similarly, the consensus developed on Rule 33 motions filed after the direct appeal concludes—those are not critical stage. See, e.g., **United States v. Berger**, 375 F.3d 1223, 1226 (11th Cir. 2004)(new trial motion after direct appeal is completed is a collateral proceeding); **McAfee v. Thaler**, 630 F.3d 383, 391 (5th Cir. 2011)(“Every federal circuit to address the question of whether the post-trial, pre-appeal time period ... is a critical stage has concluded it is.”)

The unresolved question, the one presented here, is whether a new-trial motion filed during the pendency of a direct appeal constitutes a critical stage, and by corollary requires the assistance of counsel.

The Eleventh Circuit has indicated that it is not a critical stage, both in the proceedings below and its reasoning for its decision in **Barnes v. United States**, 437 F.3d 1074, 1079 (11th Cir. 2006). Accord **Williamson**, 706 F.3d at 405. On the other hand, the Seventh Circuit and Ninth Circuit have reached different conclusions. The Seventh found that a new trial motion filed before the direct appeal had been decided is a critical stage and a constitutional right to counsel exists. **Kitchen**, 227 F.3d at 1018. The Ninth says, "[w]e hold that after completion of direct appeal of a federal conviction, appointment of counsel for a new trial motion is not constitutionally guaranteed[ , ]" thus, by implication, a constitutional guarantee exists prior to the direct appeal's completion. **United States v. Harrington**, 410 F.3d 598, 599-600 (9th Cir. 2005).

As previously discussed, the First Circuit hedged its bet based on whether the rules permit consolidation of the appeal of a Rule 33 ruling into the pending direct appeal. **Trenkler**, 268 F.3d at 21.

All told, every circuit has opined on one part of the dispute or another, and no consensus has emerged. Out of this unsettled law percolates Mr. Davis's Rule 33 motion, the efficacy of which turns on whether the district court denied Mr. Davis the choice of critical-stage counsel.

An answer that is only properly provided by this Court resolving the mature circuit disagreement on whether a Rule 33 motion filed during the direct appeal is a critical stage.

**II. This Court's decisions provide that a sentence is inherently unreasonable if the district court either used the wrong framework when calculating the initial Guidelines range, or based the sentence on clearly erroneous facts, or failed to adequately explain the chosen sentence. The district court did all three and did not allow Mr. Davis to present contrary evidence. Further, it did not conduct the required Guidelines's relevant-conduct analysis. The Eleventh Circuit upheld the sentence under a harmlessness test that conflicts with the decisions of this Court and the rule in other federal circuits.**

The Sentencing Guidelines set forth a mandatory framework for determining a conspiracy's losses attributable to an individual. See, e.g., U.S.S.G. § 1B1.3 (as clarified by Guidelines Amendment 790). In calculating Mr. Davis's relevant conduct and imposing a 20 level enhancement to Mr. Davis's base offense level, the district court did not use the required framework. That is, the district court did not:

1. determine when Mr. Davis allegedly joined the conspiracy;
2. identify the scope of the jointly-undertaken criminal conduct;
3. specify which of the conspirators' independent criminal conduct was foreseeable to Mr. Davis; and
4. consider which portion of the losses were attributable to market forces rather than fraud.

#### **U.S.S.G. § 1B1.3**

If the district court had, like other circuits, applied the correct framework, then the loss attributable to Mr. Davis would have been significantly lower. Correspondingly, a lesser sentence should have resulted.

In affirming the conviction, the Eleventh Circuit departed from this Court's rule that an appellate court review a criminal sentence in two parts (procedural error and substantive reasonableness), and that if either part is erroneous, then the Constitution requires a new sentencing. See, e.g., *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1905 (2018) ("A plain Guidelines error that affects a defendant's substantial rights is precisely the type of error

that ordinarily warrants relief...."). As to the first part of the review, this Court provides that "district courts must begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process." **Peugh v. United States**, 569 U.S. 530, 541 (2013)(quoting **Gall v. United States**, 552 U.S. 38, 50 n.6 (2007)).

Of course, this task is complex. The Guidelines's sentencing advice arises from a combination of many factors, such as offense characteristics, offender characteristics, et cetera. **Rita v. United States**, 551 U.S. 338, 342 (2007); see **Molina-Martinez v. United States**, 136 S. Ct. 1338 (2016). Even so a district court's "failure to calculate the correct Guidelines range constitutes procedural error" that inherently affects the integrity of the sentence. **Rosales-Mireles**, 138 S. Ct. at 1904 (quoting **Peugh**, 569 U.S. at 537).

This Court and the majority of circuits conclude that when a district court adopts the wrong framework or misapplies sentencing factors, then the sentence is presumptively unreasonable. **Molina-Martinez**, 136 S. Ct. at 1341. The Eleventh Circuit, however, follows a different path and conducted a harmless error inquiry. The reason it affirmed the district court sentence despite the district court's failure to make specific findings. (App. B, at 19, 22 n.8).

In contrast, this Court recognized that "[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**, 136 S. Ct. at 1345. This Court further identifies that the "public legitimacy of the justice system relies on procedures that are neutral, accurate, consistent, trustworthy, and fair, and that provide opportunities for correction." **Rosales-Mireles**, 138 S. Ct. at 1908

(internal marks omitted). Here, the district court provided no opportunity to correct its error, nor did it allow Mr. Davis to present arguments or evidence to contradict its conclusion.

Various circuits have recognized that a failure to comply with the proper Guidelines procedure leads to an inherently unreliable sentence. See **United States v. Davis**, 679 F.3d 190, 194 (4th Cir. 2012)(finding jurisdiction to review district court's sentencing methodology); cf. **United States v. Grant**, 636 F.3d 803, 809 (6th Cir. 2011)(en banc)(finding jurisdiction to review district court's methodology where the district court misapprehended the factors it was allowed to consider). In affirming the district court's spontaneous and summary sentencing proceeding, the Eleventh circuit permitted the district court to apply the wrong framework, and then the appellate court based its ruling on information drawn from the defective analysis. A double whammy on the integrity of the judicial process.

#### **A Constitutional-Magnitude Error**

It is noteworthy that incorrect procedures generally indicate that a sentence emerges from erroneous factual findings, thereby amplifying the guideline error to constitutional proportions. See **United States v. Brown**, 843 F.3d 74, 91 (2d Cir. 2016)(Pooler, J. dissenting)(“Defendants have a constitutional right to be sentenced based on ‘accurate information’ rather than guesses” or mistakes); **United States v. Brady**, 417 F.3d 326, 323-33 (2d Cir. 2005). Pointedly, even if the sentence coincidentally is reasonable or even correct, the procedural error creates uncertainty which justifies *vacatur* and *de novo* resentencing. See **Molina-Martinez**, 136 S. Ct. at 1346 (showing an incorrect range reveals a reasonable probability of an incorrect sentence).

The Eleventh Circuit inverts the test and, necessarily, concludes that a sentence otherwise deemed reasonable insulates a procedurally flawed sentence from remand for either procedural error or constitutional error. (App. B, at 11-13).

This Court should grant the writ, vacate the judgment, and remand the case to the Eleventh Circuit with instructions to set aside the sentence and remand the matter to the district court for a de novo resentencing that utilizes the correct Guidelines methodology and framework.

## **CONCLUSION**

This Court should grant the writ of certiorari in order to align the Eleventh Circuit's sentencing-review practices with this Court's decisions and the predominant procedure throughout federal circuits.

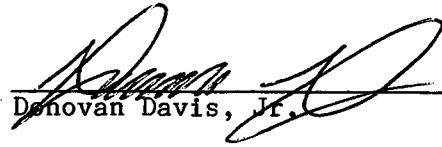
Furthermore, this Court should issue the writ in order to bring before it the substantial question of whether a new-trial motion filed during the pendency of a direct appeal constitutes a critical stage, which requires the effective assistance of counsel.

Respectfully submitted by Donovan Davis, Jr. on this 6th day of December,  
2019:

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**VERIFICATION**

Under penalty of perjury as authorized in 28 U.S.C. § 1746, I declare the factual allegations and factual statements contained in this document are true and correct to the best of my knowledge.

  
\_\_\_\_\_  
Donovan Davis, Jr.