No. _____

In the

Supreme Court of the United States

_____

Ronald Lynn Thomas,

Petitioner,

v.

United States of America,

Respondent.

_____

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

_____

PETITION FOR A WRIT OF CERTIORARI

_____

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QUESTION PRESENTED

Whether Guideline error is necessarily harmless if the district court is presented with the Guideline range later vindicated on appeal and disclaims any effect of the Guidelines on the sentence imposed?

PARTIES TO THE PROCEEDING

Petitioner is Ronald Lynn Thomas, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Ronald Lynn Thomas seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The district court's judgement and sentence is attached as Appendix A. The unpublished opinion of the Court of Appeals is reported at *United States v. Thomas*, 793 Fed. Appx. 346 (5th Cir. Feb. 13, 2020)(unpublished). It is reprinted in Appendix B to this Petition.

JURISDICTION

The panel opinion and judgment of the Fifth Circuit were entered on February 13, 2020. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RULES, STATUTES , AND CONSTITUTIONAL PROVISIONS INVOLVED

Federal Rule of Criminal Procedure 52 reads as follows:

> (a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.
>
> (b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

Section 3553(a) of Title 18 reads as follows:

> (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), 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), 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.

Section 3742 of Title 18 provides in relevant part:

(f) Decision and Disposition.—If the court of appeals determines that—

(1) the sentence was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate.

Article III, Sec. 1 of the United States Constitution reads in relevant part:

The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.

Article III, Sec. 2 of the United States Constitution reads in relevant part:

The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;--to all cases affecting ambassadors, other public ministers and consuls;--to all cases of admiralty and maritime jurisdiction;--to controversies to which the United States shall be a party;--to controversies between two or more

states;--between a state and citizens of another state;--between citizens of different states;--between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

STATEMENT OF THE CASE

A. Introduction

The district court here made a questionable Guideline ruling that the court below declined to review. *See* [Appendix B, at 1]; *United States v. Thomas*, 793 Fed. Appx. 346, 346 (5th Cir. Feb. 13, 2020)(unpublished). Following its precedent, the Fifth Circuit held any error harmless for the sole reason that the district court disclaimed any influence of the Guidelines on the sentence. *See* [Appendix B, at 2]; *Thomas*, 793 Fed. Appx. at 346-347; *Guzman-Rendon*, 864 F.3d at 411.

Closer scrutiny of the court's Guideline disclaimer, however, raises questions about whether the contested Guideline enhancement was genuinely irrelevant to the sentence imposed. The sentencing court, which imposed sentence within the range it thought applicable, explained that it thought the defendant's criminal history more resembled that of a Criminal History Category VI offender – he in fact fell into Category IV. *See* (ROA.115-116). But this does not explain the decision to impose the sentence selected by the district court. The 60 month does not appear in the range defined by the intersection of Category VI and the Offense Level that would have applied but for the enhancement. Further, the reader is left to wonder why the court did not upwardly depart or vary from the range it believed applicable.

In at least four other circuits, the district court's disclaimer probably would not be taken at face value. *See United States v. Feldman*, 647 F.3d 450, 460 (2d Cir. 2011); *United States v. Zabielski*, 711 F.3d 381, 389 (3d Cir.2013); *United States v. Garcia-Jimenez*, 807 F.3d 1079, 1089 (9th Cir. 2015); *United States v. Peña-Hermosillo*, 522

F.3d 1108, 1117 (10th Cir. 2008). The attitude of the Fifth Circuit toward such Guideline disclaimers seriously jeopardizes the critical role of the Guidelines in standardizing federal sentencing. See *United States v. Gomez-Jimenez*, 750 F.3d 370, 390 (4th Cir. 2014)(Gregory, J., concurring and dissenting). It also reduces the incentive to make objections, and encourages advisory opinions of dubious constitutional validity. This Court should grant certiorari.

B. Facts and Proceedings in the Trial Court

On August 21, 2018, Petitioner Ronald Lynn Thomas walked into a bank in North Richland Hills, Texas and presented the teller with a note that said "give me all the money or things will get ugly." (Record in the Court of Appeals, at 29, 125). The teller would later say said that she feared for her life, *see* (Record in the Court of Appeals, at 125), though other bank employees were not afraid, *see* (Record in the Court of Appeals, at 160-167). There is no allegation that Mr. Thomas displayed, referenced, or even possessed a gun. *See* (Record in the Court of Appeals, at 123-125).

After Mr. Thomas pleaded guilty to this bank robbery, the Presentence Report (PSR) calculated an offense level of 57-71 months. *See* (Record in the Court of Appeals, at 144). This calculation stemmed in part from the PSR's application of a two level adjustment for a "threat of death," under USSG §2B3.1(b)(2)(F). *See* (Record in the Court of Appeals, at 126). The defense filed detailed objections to that adjustment, citing 99 cases addressing the enhancement. *See* (Record in the Court of Appeals, at 147-150, 157-180). In these 99 cases, no court had upheld the adjustment in the

absence of either a reference to a gun, an explicit reference to death, or a threat to return. *See* (Record in the Court of Appeals, at 157-180).

The government and Probation supported the adjustment. The government emphasized that the defendant appeared unkempt. *See* (Record in the Court of Appeals, at 152). And Probation relied heavily on the victim's interpretation of the note as a threat of death. *See* (Record in the Court of Appeals, at 155).

The district court sided with the government and Probation. It compared Mr. Thomas's statement to certain examples of qualifying threats noted in the Commentary to §2B3.1. And it then imposed a 60 month sentence, which it said would have been the same even if it had sustained the defense objection. *See* (Record in the Court of Appeals, at 114-115). In support of that assertion, it discussed the defendant's criminal history, and the number of prior convictions that did not receive criminal history points under the Guidelines. *See* (Record in the Court of Appeals, at 115-116). Specifically, the court expressed surprise that the defendant hadn't appeared in Criminal History Category VI in the Guideline Sentencing Table. *See* (Record in the Court of Appeals, at 115-116).

The defense objected to the court's "alternative sentence." *See* (Record in the Court of Appeals, at 116-117). It argued, *inter alia*, that such a sentence would be contrary to 18 U.S.C. §3553(a)(4), that it was inadequately explained, and that it would be unreasonable. *See* (Record in the Court of Appeals, at 116-117). The court overruled those objections. *See* (Record in the Court of Appeals, at 117).

C. Appellate Proceedings

On appeal, Petitioner maintained that the statement "things will get ugly" does not amount to a "threat of death," under USSG §2B3.1(b)(2). *See* Initial Brief in *United States v. Thomas*, 19-10262, 2019 WL 3072020, at *4-5 (Filed 5th Cir. July 10, 2019)("Appellant's Brief"). Rather, he contended that the statement constituted a more general threat to use force. *See* Appellant's Brief, at *4-5. And because all robberies involve the use or threatened use of force, he contended that to describe a general threat of injury as a "threat of death" would effectively apply the enhancement to all robberies. *See* Appellant's Brief, at *4-5. *United States v. Brewer*, 848 F.3d 711, 715-716 (5th Cir. 2017).

Petitioner acknowledged that the district court said the sentence would be the same under different Guidelines. *See* Appellant's Brief, at *5-6, 11-16. But he argued that harmless error did not compel affirmance merely because the district court said that the sentence would have been the same, at least where a changed Guideline range would significantly change the rationale for the sentence. *See Appellant's Brief*, at *5; *United States v. Ibarra-Luna*, 628 F.3d 712, 717 (5th Cir. 2010). Indeed, he contended that the nature of the adjustment at issue – whether the defendant made a threat of death – plainly bore on Petitioner's culpability and dangerousness. *See* Appellant's Brief, at *15-16.

The government defended the enhancement on the merits, but also sought affirmance based on harmless error. In support of its harmless error argument, it noted that Fifth Circuit distinguished between cases where the district court

"considered" the range vindicated on appeal, and those in which it did not. *See* Appellee's Brief in *United States v. Thomas*, No. 19-10262, 2019 WL 4013731 at **16-17 (5th Cir. Filed August 22, 2019)("Appellee's Brief"); *United States v. Duhon*, 541 F.3d 391, 396 (5th Cir.2008); *United States v. Richardson*, 676 F.3d 491, 511 (5th Cir. 2012). In the former case, noted the government, the Fifth Circuit requires only that the district court explicitly disclaim any effect of the Guidelines on the sentence. *See* Appellee's Brief at **16-17; *Duhon*, 541 F.3d at 396; *Richardson*, 676 F.3d at 511.

The court of appeals expressly declined to decide whether the Guidelines had been correctly determined. *See* [Appendix B, at 1]; *United States v. Thomas*, 793 Fed. Appx. 346, 346 (5th Cir. Feb. 13, 2020)(unpublished). Instead, it affirmed on harmless error grounds, citing *United States v. Guzman-Rendon*, 864 F.3d 409, 411 (5th Cir. 2017), for the proposition that an error is harmless if "the district court considered both ranges (the one now found incorrect and the one now deemed correct) and explained that it would give the same sentence either way." [Appendix B, at 2-3]; *Thomas*, 793 Fed. Appx. at 347. It found both conditions – consideration of the range asserted to be correct on appeal, and a statement that the sentence would be the same -- met in the instant case. *See* [Appendix B, at 2]; *Thomas*, 793 Fed. Appx. at 347. In the view of the court below, the sentencing court had "considered" the range that would apply without the enhancement because the range had been mentioned by the PSR Addendum and the defense at sentencing. *See* [Appendix B, at 2]; *Thomas*, 793 Fed. Appx. at 347. That was enough. *See* [Appendix B, at 2]; *Thomas*, 793 Fed. Appx. at 347.

REASONS FOR GRANTING THE PETITION

The courts are divided as to the standards for evaluating harmlessness when the district court says that it would have imposed the same sentence irrespective of the Guidelines. The rule applied below undermines the function of the Guidelines in federal sentencing, undermines the incentive to object to Guideline error, and raises serious constitutional issues under Article III.

Although advisory only, *see United States v. Booker*, 543 U.S. 220 (2005), the Guidelines play a central role in federal sentencing. The district court must begin each sentencing determination by correctly calculating them, and mistakes in their application constitute reversible error. *See Gall v. United States*, 552 U.S. 38, 49, 50 (2007). Indeed, this Court presumes that Guideline error affects the sentence imposed. *See Molina-Martinez v. United States*, __U.S.__, 136 S.Ct. 1338 (2016).

The Guidelines thus function as a "framework," *Molina-Martinez*, 136 S.Ct. at 1345, an "anchor," *id*. at 1349, a "lodestar, " *id*. at 1346, and a "benchmark and starting point," *Gall*, 552 U.S. at 49, in federal sentencing. That characterization is both doctrinal and empirical. From an empirical standpoint, most sentences fall within the Guidelines, and Guideline errors tend actually to affect the sentence imposed. *See Molina-Martinez*, 136 S.Ct. at 1346. Doctrinally, the central role of the Guidelines manifests in a presumption of reasonableness for within-Guideline sentences, *see Rita v. United States*, 551 U.S. 338, 341 (2007), in the defendant's *ex post facto* rights in the Guideline Manual, *see Peugh v. United States*, 569 U.S. 530 (2013), and in the sentencing court's duty to explain out-of-range sentences, *see Rita*, 551 U.S. at 357. The rule below for evaluating the harmlessness of preserved

Guideline error undermines their special role in federal sentencing. Moreover, it conflicts with the rule of several other courts of appeals.

A. The circuits are divided.

In the court below, Guideline error is necessarily harmless when:

1) the district court considered both ranges (the one now found incorrect and the one vindicated on appeal) and, 2) the court explained that it would give the same sentence under either range. *See United States v. Guzman-Rendon*, 864 F.3d 409, 411 (5th Cir. 2017); *accord United States v. Richardson*, 676 F.3d 491, 511 (5th Cir. 2012)(citing *United States v. Duhon*, 541 F.3d 391, 396 (5th Cir.2008); *United States v. Bonilla*, 524 F.3d 647, 656 (5th Cir.2008)); *United States v. Rico*, 864 F.3d 381, 386 (5th Cir. 2017); [Appendix B, at 2]; *Thomas*, 793 Fed. Appx. at 346-347. Although the Fifth Circuit employs a more exacting standard when the district court has not "considered" the true range, *see Rico*, 864 F.3d at 386, n.4 (citing *United States v. Ibarra-Luna*, 628 F.3d 712, 714 (5th Cir. 2010)), the duty to "consider" the true range in spite of Guideline error is easily discharged.

In the Fifth Circuit, a district court is held to "consider" the true range if that range is mentioned by the parties or Probation in connection with an objection. *See* [Appendix B, at 2]; *Thomas*, 793 Fed. Appx. at 347. Or, the necessary "consideration" may be evidenced by perfunctory and confusing statements like the one made in *Richardson*, where the court said simply that it considered every possible range that might have otherwise applied:

> "…even if the Court began with the base offense level that we have here now and considered, you know, either no enhancements whatsoever, or

> enhancement-by-enhancement, the Court believes that each one of those resulting Guideline ranges would be insufficient in this case."

Richardson, 676 F.3d at 511.

Significantly, the Fifth Circuit standard does not require any special explanation for an hypothetical variance. Rather, the rule simply requires "consideration" of the vindicated range and a statement that the sentence would have been the same. *See Guzman-Rendon*, 864 F.3d at 411; *Richardson*, 676 F.3d at 511; *Rico*, 864 F.3d at 386; [Appendix B, at 2]; *Thomas*, 793 Fed. Appx. at 346-347.

To be sure, all other circuits evaluating harm will consider a district court's statements regarding the likely sentence under other Guideline ranges. *See United States v. Marsh*, 561 F.3d 81, 86 (1st Cir. 2009); *United States v. Jass*, 569 F.3d 47 (2d Cir.2009); *United States v. Zabielski*, 711 F.3d 381, 389 (3d Cir.2013); *United States v. Hargrove*, 701 F.3d 156, 161–63 (4th Cir. 2012); *United States v. Abbas*, 560 F.3d 660, 667 (7th Cir.2009); *United States v. Waller*, 689 F.3d 947, 958 (8th Cir.2012); *United States v. Keene,* 470 F.3d 1347, 1349 (11th Cir.2006).

And at least two other courts follow forgiving rules akin to the Fifth Circuit's. The Fourth Circuit will deem Guideline error harmless if the district court says it would have imposed the same sentence, provided the variance is substantively reasonable. *See United States v. Prater*, 801 F. App'x 127, 128 (4th Cir. 2020)(unpublished); *United States v. Mills*, 917 F.3d 324, 330 (4th Cir. 2019); *United States v. Gomez-Jimenez*, 750 F.3d 370, 382-83 (4th Cir. 2014); *United States v. Hargrove*, 701 F.3d 156, 161–63 (4th Cir. 2012). Similarly, the First Circuit will affirm

erroneous sentences under an alternative rationale even if the justification is cursory. *See United States v. Marsh*, 561 F.3d 81, 86 (1st Cir. 2009).

But not all circuits will take such statements at face value, provided only that the true range is somehow presented to the district court. Rather, the Third Circuit has repeatedly explained that hypothetical sentences should not be mere "afterthoughts" designed to protect the sentence from appellate review. *See United States v. Smalley*, 517 F.3d 208, 213–16 (3d Cir. 2008); *Zabielski*, 711 F.3d at 389. It has explained:

> [t]hough probative of harmless error, [a statement that the court would have imposed the same sentence] will not always suffice to show that an error in calculating the Guidelines range is harmless; indeed, a district court still must explain its reasons for imposing the sentence under either Guidelines range.

Zabielski, 711 F.3d at 389. This follows from the Circuit's recognition that harmless Guideline error is "the rare case." *Id.* at 387 (citing *United States v. Langford,* 516 F.3d 205, 218 (3rd Cir. 2008)(citing *United States v. Flores,* 454 F.3d 149, 162 (3rd Cir. 2006))). It also recognizes that affirmance of a perfunctory Guideline disclaimer may deprive the defendant of "any meaningful review of the reasonableness of the sentence." *Smalley*, 517 F.3d at 215.

For these reasons, the Third Circuit has vacated and remanded in spite of a district court's Guideline disclaimer where "the alternative sentence is a bare statement devoid of a justification for deviating" above the range. *Smalley*, 517 F.3d at 215. Indeed, it has done so in a case comparable to the one at bar: erroneous application of USSG §2B3.1(b)(2). *See id.*

Likewise, the Tenth Circuit, requires a "cogent explanation" for any claim that very different Guidelines will produce the same sentence, explaining:

> …it is hard for us to imagine a case where it would be procedurally reasonable for a district court to announce that the same sentence would apply even if correct guidelines calculations are so substantially different, without cogent explanation.

United States v. Peña-Hermosillo, 522 F.3d 1108, 1117 (10th Cir. 2008). In the absence of a thorough explanation for a Guideline disclaimer, that court is "inclined to suspect that the district court did not genuinely consider the correct guidelines calculation in reacting the alternative rationale." *Peña-Hermosillo*, 522 F.3d at 1117. Thus, the Tenth Circuit reversed a Guideline error in spite of a district court's Guideline disclaimer where its "cursory" reasoning made only "vague" reference to the 18 U.S.C. §3553(a) factors. *Id.*

The Second Circuit has affirmatively discouraged district courts from trying to determine the sentence that would have been imposed under hypothetical Guideline ranges. It 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 this Court found particular enhancements erroneous.

United States v. Feldman, 647 F.3d 450, 460 (2d Cir. 2011)(emphasis added). That court expressed concern that the purposes of appellate review would be defeated if all criminal sentences could "be exempted from procedural review with the use of a simple incantation: 'I would impose the same sentence regardless of any errors calculating the applicable Guidelines range.'" *Feldman*, 647 F.3d at 460.

The Ninth Circuit has repeatedly issued similar warnings about Guideline disclaimers, namely that a "district judge'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. Garcia-Jimenez*, 807 F.3d 1079, 1089 (9th Cir. 2015)(quoting *Acosta–Chavez*, 727 F.3d 903, 910 (9th Cir. 2013)(quoting *United States v. Munoz–Camarena*, 631 F.3d 1028, 1031 (9th Cir.2011))(internal quotations omitted). It has thus twice remanded Guideline errors in spite of such alternative rationale. *See Garcia-Jimenez*, 807 F.3d at 1089–90; *Acosta–Chavez*, 727 F.3d at 910.

Finally, the Seventh and Eighth Circuits have both suggested that not all Guideline disclaimers can be accepted at face value. *See United States v. Abbas*, 560 F.3d 660, 667 (7th Cir. 2009)(affirming after noting that the district court gave "a detailed explanation of the basis for the parallel result; this was not just a conclusory comment tossed in for good measure."); *United States v. Ortiz*, 636 F.3d 389, 395 (8th Cir. 2011)(affirming and noting that the district court had not merely "pronounced a blanket identical alternative sentence to cover any potential guidelines calculation error asserted on appeal without also basing that sentence on an alternative guidelines calculation.").

Accordingly, the Fifth Circuit's standards for assessing harm in cases of Guideline error cannot be reconciled with those of several other courts of appeals. To accept a Guideline disclaimer, the Fifth Circuit simply requires some evidence that the true range was "considered." But other courts either actively discourage such

hypothetical sentences, *Feldman*, 647 F.3d at 460, or closely scrutinize their rationale, *see Zabielski*, 711 F.3d at 389; *Peña-Hermosillo*, 522 F.3d at 1117; *Garcia-Jimenez*, 807 F.3d at 1089.

B. The rule applied below presents a serious danger to the sound administration of justice.

As between the approaches discussed above, the more exacting standards of the Second, Third, Ninth, and Tenth Circuits better comport with the purposes of the Sentencing Reform Act, the Guidelines, Federal Rule of Criminal Procedure 52, and the precedent of this Court. The Guidelines seek to promote proportionality uniformity of sentence among similarly situated offenders. *See Rita*, 551 U.S. at 349; *Molina-Martinez*, 136 S.Ct. at 1342. And appellate review of Guideline questions is important to that goal. Review provides public information about the meaning of Guidelines, resolving ambiguities that might afflict all litigants in the Circuit. *See* S. Rep. No. 225, 98th Cong., 2d Sess. 151 (1984), reprinted in 1984 U.S.C.C.A.N. 3182, 3334 (describing the right to appellate review "essential to assure that the guidelines are applied properly and to provide case law development of the appropriate reasons for sentencing outside the guidelines."). This process also alerts the Sentencing Commission that an Amendment might be necessary. *See Rita*, 551 U.S. at 350; *Braxton v. United States*, 500 U.S. 344, 348 (1991).

The approach of the First, Fourth and Fifth Circuits jeopardizes this important function for appellate review, because it provides district courts a way to avoid meaningful scrutiny of Guideline application questions. Many judges, after all,

regard the Guidelines as complicated and cumbersome. *See United States v. Williams*, 431 F.3d 767, 773 (11th Cir. 2005)(Carnes, J., concurring) ("The *Booker* decision did not free us from the task of applying the Sentencing Guidelines, some provisions of which are mind-numbingly complex and others of which are just mind-numbing."); *Molina-Martinez*, 136 S.Ct at 1342 ("The Guidelines are complex…"). District courts that do not wish to trouble with them, or that do not wish to trouble with them more than once, may be tempted to insulate all sentences from review by issuing a simple Guideline disclaimer. Indeed, distinguished circuit judges have encouraged such disclaimers precisely to avoid the need to avoid frustrating and difficult Guideline adjudications. *See Williams*, 431 F.3d at 773 (Carnes, J., concurring).

Widespread acceptance of Guideline disclaimers also diminish the anchoring force of the Guidelines in federal sentencing. Indeed, a concurring and dissenting opinion of the Fourth Circuit has argued that this is already the condition of federal sentencing:

> The evolution of our harmless error jurisprudence has reached the point where **any procedural error may be ignored simply because the district court has asked us to ignore it**. In other words, so long as the court announces, without any explanation as to why, that it would impose the same sentence, the court may err with respect to any number of enhancements or calculations. More to the point, a defendant may be forced to suffer the court's errors without a chance at meaningful review**. *Gall* is essentially an academic exercise in this circuit now**, never to be put to practical use if district courts follow our encouragement to announce alternative, variant sentences. If the majority wishes to abdicate its responsibility to meaningfully review sentences for procedural error, the least it can do is acknowledge that **it has placed *Gall* in mothballs, available only to review those sentences where a district court fails to cover its mistakes with a few magic words**.

Gomez-Jimenez, 750 F.3d at 390 (Gregory, J., concurring and dissenting in part)(emphasis added).

Further, the rule applied by the Fifth Circuit tends to discourage objections, undermining the policy of Federal of Criminal Procedure 52. In order to encourage objections, Rule 52 shifts the burden of persuasion on the question of prejudice when an appealing party fails to object to error. *See United States v. Olano*, 507 U.S. 725, 734 (1993). Thus, a sentence's proponent must show that a Guideline error had no effect on the sentence when its opponent has objected. *See Olano*, 507 U.S. at 734. But absent an objection, the appellant must show that a reasonable probability that Guideline error affected the sentence. *See id.* This burden-shifting regime, like the rest of the plain error doctrine, tries to make it more difficult to obtain relief in the absence of objection. *See Puckett v. United States*, 556 U.S. 129, 135 (2009).

Recognizing that "sentencing judges often say little about the degree to which the Guidelines influenced their determination," however, this Court has permitted defendants appealing on plain error to rely on a presumption of prejudice from Guideline error. *See Molina-Martinez*, 136 S.Ct. at 1347. And a judge that makes no contested Guideline rulings is less likely to protect the sentence from appellate review with Guideline disclaimer than one who hears an objection. A defendant who expects the judge to insulate a dubious Guideline ruling with an alternative sentence may therefore well conclude that appellate relief is more likely if he or she remains silent. That is particularly the case in the Fifth Circuit, where the mere presentation of an

objection constitutes evidence that alternative ranges were "considered" by the district court. *See* [Appendix B, at 2]; *Thomas*, 793 Fed. Appx. at 346-347.

Finally, the practice of pronouncing judgment as to hypothetical circumstances raises serious concerns under Article III. "It is quite clear that 'the oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions.'" *Flast v. Cohen*, 392 U.S. 83, 96 (1968)(quoting C. Wright, Federal Courts 34 (1963)). The prohibition on advisory opinions stems from separation of powers concerns and the duty of judicial restraint. *Flast*, 392 U.S. at 96-87. But it also stems from practical concerns:

> recogniz[ing] that such suits often "are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaced situation embracing conflicting and demanding interests."

Id. (quoting *United States v. Fruehauf*, 365 U.S. 146, 157 (1961)).

The hypothetical decisions encouraged by the court below squarely implicate these concerns. After the district court has resolved the Guidelines, the parties are likely to frame their arguments about the appropriate sentence using the range stated by the court as a framework, benchmark, or lodestar. Thus, a defendant who believes himself or herself subject to an unacceptably high range may seek to *distinguish* himself or herself from the typical offender in this range. But a defendant who obtains a more favorable Guideline range – the one, by hypothesis, ultimately vindicated on appeal – may instead emphasize the *typicality* of the offense, and the advantages of Guideline sentencing generally.

A district court that issues a "hypothetical sentence" thus does so without the benefit of advocacy from parties who know what the range will actually be, to say nothing of the correct advice of the Sentencing Commission. If this does not implicate the Article III prohibition on advisory opinions, it at least reduces the level of confidence appropriate to hypothetical alternative sentences.

The approach of the First, Fourth, and Fifth Circuits seriously undermines the administration of justice, and ought to be reviewed.

C. The Court should grant certiorari in the present case.

The present case is an appropriate vehicle to address the conflict. Notably, the defendant has challenged the district court's Guideline disclaimer in every forum. *See* (Record in the Court of Appeals, at 116-117); *see* Appellant's Brief, at **5-6, 11-16. This includes Petitioner's district court objection that such disclaimers effectively nullify 18 U.S.C. §3553(a)(4), which requires correct calculation of the Guideline range, *see* (Record in the Court of Appeals, at 116-117). Because a contemporaneous objection to an alternative sentence appears to be unusual, the present case is an unusually strong vehicle.

Further, the court below gave no suggestion that the Guidelines were correctly calculated. Rather it declined to reach the question, well illustrating the tendency of the Fifth Circuit's position to reduce appellate guidance about the meaning of the Guidelines. *See* [Appendix B, at 1]; *Thomas*, 793 Fed. Appx. at 346. More importantly, this means the sole basis for the decision below is the matter that has divided the courts of appeals.

Finally, the opinion gives no indication that an alternative above-range sentence would have been adequately justified by the comments of the district court. *See* [Appendix B, at 1-3]; *Thomas*, 793 Fed. Appx. at 346-347. The district court's comments do not explain the particular basis for a 60-month sentence. See (Record in the Court of Appeals, at 115-116). Five years appears to be little more than a round number inside the erroneously calculated range. *See* USSG Ch. 5A.

In fact, when the sentencing court issued its Guideline disclaimer, it noted that Petitioner's criminal history was more like that of a person in Criminal History Category VI. It said:

> After considering all of the facts and circumstances in this case, even if I am wrong as to any ruling on the objections, this is the sentence I otherwise would impose. Primarily, I believe that this sentence is needed to protect the public from further crimes of the Defendant. The Defendant's criminal history runs from paragraph 33 to paragraph 53 of the Presentence Investigation Report and as you read through those prior convictions and the information provided in the Presentence Report, you learn that at least 18 of the prior convictions received zero criminal history points. I was surprised his Criminal History Category was only a level IV, given the significant length of his criminal history.
>
> Therefore, as I have considered the facts and circumstances of this case, as I've considered the 3553(a) factors and have in particularly taken into account this lengthy criminal history which a significant number of prior convictions received zero criminal history points, this is the sentence I otherwise would impose even if I am wrong as to my ruling on these objections, but I believe a sentence of 60 months is appropriately in this case and is sufficient, but not greater than necessary, to comply with the statutory purposes of sentencing.

(Record in the Court of Appeals, at 115-116).

But a defendant at Offense Level 19 (where Petitioner would have been but for the erroneous enhancement) and Criminal Category VI would be in the range of 63-78 months. Thus, the court's observations regarding underrepresentation of

criminal history provide no link to a 60 month sentence in particular. And if the sentencing court really did believe Petitioner's Criminal History Category inadequate, it could have varied upwardly from the range it believed applicable. Instead, it imposed a within-range sentence. Similar issues led the Ninth Circuit, which undertakes greater scrutiny of hypothetical sentences, to remand in spite of an alternative sentence. *See Garcia-Jimenez*, 807 F.3d at 1089–90. In short, there is a good reason to believe that the case would have been remanded in courts applying differing standards.

CONCLUSION

Petitioner respectfully submits that this Court should grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted this 13th day of July, 2020.

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