No. 20-5090

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

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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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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I. The circuits are divided.

The courts of appeals have divided on the proper treatment of Guideline disclaimers: statements by a district court that it would impose the same sentence under different Guidelines. The First, Fourth, and Fifth Circuits essentially take such Guideline disclaimers at face value, at least under some objectively defined circumstances. The First Circuit does not appear to evaluate the district court's explanation for such hypothetical sentences. *See United States v. Marsh*, 561 F.3d 81, 86 (1st Cir. 2009). Likewise, the Fourth Circuit accepts them so long as the sentence would be a substantively reasonable variance from the true range. *See United States v. Prater*, 801 F. App'x 127, 128 (4th Cir. 2020)(unpublished); *United States v. Mills*, 917 F.3d 324, 330 (4th Cir. 2019). And the Court below accepts such disclaimers so long as the district court has "considered" the true Guideline range. *See United States v. Rico*, 864 F.3d 381, 387 (5th Cir. 2017).

By contrast, the Second, Third, Ninth, and Tenth Circuits have a much more cautious view of this practice. These courts carefully scrutinize the basis for the court's hypothetical sentence before declaring a Guideline error harmless. *See United States v. Feldman*, 647 F.3d 450, 460 (2d Cir. 2011); *United States v. Smalley*, 517 F.3d 208, 213–16 (3d Cir. 2008); *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)(quoting *United States v. Acosta–Chavez*, 727 F.3d 903, 910 (9th Cir. 2013)(quoting *United States v. Munoz–Camarena*, 631 F.3d 1028, 1031 (9th

Cir.2011)); *United States v. Peña-Hermosillo*, 522 F.3d 1108, 1117 (10th Cir. 2008). Indeed, the Second Circuit affirmatively discourages the practice. *See Feldman*, 647 F.3d at 460.

The government all but concedes that "formal differences exist in the articulated requirements for harmless-error review when a district court has offered an alternative sentencing determination…" Brief in Opposition ("BIO"), at 13-14. Yet it maintains that "those differences in approach do not reflect any meaningful substantive disagreement." BIO, at 14. This understates the divisions below. Specifically, the government cannot show, in spite of its efforts, that all courts will accept Guideline disclaimers if the district court only considers the true range, which is the rule of the Fifth Circuit. Rather, at least four courts demand the same explanation for the hypothetical sentence that they would require of a Guideline variance.

Certainly, the view of the Second Circuit cannot be reconciled with the lax view of the First, Fourth and Fifth Circuits. This is demonstrated by its decision in *Feldman*, *supra*, which sternly discourages the practice of determining the sentence under a hypothetical Guideline range. *See Feldman*, 647 F.3d at 460. The government dismisses the significance of *Feldman* because the district court in that case sought to disclaim multiple Guideline objections. *See* BIO, at 14-15. As the government correctly notes, this resulted in some ambiguity in the district court's comments. *See* BIO, at 14-15.

But this was hardly the only ground for decision in *Feldman*. Rather, the *Feldman* court emphasized the critical important of the Guidelines to the sentencing process, and added that it would not "lightly assume that eliminating enhancements from the Guidelines calculation would not affect the sentence." *Id*. at 460. It warned district courts that they "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." *Id.* And it flatly held "that criminal sentences may or should" not "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.'" *Id.* This skeptical approach to Guideline disclaimers simply cannot be reconciled with the uncritical view of the court below, or of the First and Fourth Circuits.

Citing *United States v. Jass*, 569 F.3d 47 (2d Cir. 2009), the government seeks to confine *Feldman* to situations involving multiple Guideline objections and ambiguous disclaimers. *See* BIO at 15. *Jass* does not support that interpretation. The Second Circuit in *Jass* reviewed the district court's comments and found that they were credible. *See Jass*, 569 F.3d at 68. In particular, the district court welcomed appellate review of its doubtful Guideline ruling, and imposed an exceedingly severe 65-year sentence. *See id.* As such, the district court's remarks reflected no problematic intent to evade review – rather it welcomed such review. And the sentence it imposed was the kind of life-altering punishment for which the Guidelines might be a lesser consideration than the press of conscience.

The outcome in *Jass* certainly shows that the Second Circuit will sometimes disregard a Guideline error as harmless in light of a district court's sentencing comments. But it does not support the government's reading, which equates the Second Circuit's position to that of the Fifth.

Nor can the government reconcile the approach of the court below with that of the Third Circuit. The Third Circuit has repeatedly emphasized the importance of the district court's explanation of the sentence in deciding whether to credit a Guideline disclaimer. See *United States v. Zabielski*, 711 F.3d 381 (3d Cir.2013)("Though probative of harmless error, these statements 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…"); *see also id*. (citing *United States v. Smalley*, 517 F.3d 208, 214 (3d Cir.2008), and *United States v. Wright*, 642 F.3d 148, 154 n. 6 (3d Cir.2011) for the proposition "that if a departure or variance would be necessary to reach the actual sentence absent the Guidelines calculation error, the reasons for that departure or variance must be explained."). This is the opposite of the view of the court below, which requires the sentencing court to say nothing more than that it has considered the true range.

To like effect is the Tenth Circuit's holding in *United States v. Peña-Hermosillo*, 522 F.3d 1108 (10th Cir. 2008). That case rejected a Guideline disclaimer for want of adequate explanation of the hypothetical variance. *See Peña-Hermosillo,* 522 F.3d at 1117-1118. Indeed, the Tenth Circuit in *Peña-Hermosillo* did not even accept that

Guideline disclaimers could render a Guideline error harmless. *See id*. It certainly did not hold, as the Fifth Circuit does, that all such errors are harmless so long as the court considers the correct range.

Finally, the Ninth Circuit has twice reversed in spite of Guideline disclaimers, again for want of an adequate explanation for the hypothetical variance. *See United States v. Garcia-Jimenez*, 807 F.3d 1079, 1089 (9th Cir. 2015)(quoting *United States v. 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). This view contrasts with that of the First, Fourth, and Fifth Circuits, which do not require such explanations at all, provided the true range has been considered and the resulting sentence is substantively reasonable.

The clear contrast of these circuits' precedent with that of the court below is seen most starkly in *United States v. Richardson*, 676 F.3d 491 (5th Cir. 2012). In that case, the district court imposed a 65-month sentence in the heart of the range it believed applicable. *See Richardson*, 676 F.3d at 501. It then asserted that this 65 month sentence – a decidedly unround number that happened to coincide with the Guideline range it believed applicable – would have been unaffected by any of five Guideline objections. *See id.* Indeed, it asserted that *any permutation* of five Guideline rulings would have produced this remarkably specific sentence. *See id.*

To be sure, the Fifth Circuit noted that the sentence was supported by 18 U.S.C. §3553(a) factors, including some named by the district court at sentencing. *See id*. at 510. But it never questioned how these factors could have transmuted facts into

the specific number chosen – 65 – without the influence of the Guidelines. *See id.* at 510-512. Rather, it uncritically applied its straightforward test for evaluating harmless error: consideration of the defendant's asserted range (or ranges, as in this case) plus a Guideline disclaimer equals harmless error. *See id.* at 512.

To like effect is *United States v. Gallegos-Carmona*, 630 Fed. Appx. 267 (5th Cir. 2015)(unpublished). In that case, the district court calculated a Guideline range of 57-71 months imprisonment. *See Gallegos-Carmona*, 630 Fed. Appx at 268-269. It then imposed a sentence of 57 months, stating that it would have imposed this sentence even if it had miscalculated the Guidelines. *See id.* This is, Petitioner respectfully submits, an extraordinary claim: that the court would have selected a *57 month sentence out of all the possible sentences in the world* even if this were not the bottom of the range it believed applicable, indeed, even if 57 months did not fall within the correct range, which was by the defendant to be argued to be 24-30 months. *See id.* at 269-270. But the Fifth Circuit took it entirely at face value. *See id.* at 269-270.

Richardson and *Gallegoas-Carmona* show that the Fifth Circuit means what it says when it says, repeatedly, that "[a]n error in calculating a defendant's guidelines range will be harmless and not require reversal if the district court considered the correct guidelines range and indicated that it would impose the identical sentence if that range applied." *Rico*, 864 F.3d at 387; *accord United States v. Guzman-Rendon*, 864 F.3d 409, 411 (5th Cir. 2017); *United States v. Leontaritis*, 977 F.3d 447, 452 (5th Cir. 2020). This test does not require the district court to

explain how it might have reached the same sentence under different Guidelines; it certainly does not require it to do so plausibly. This not what other circuits say, nor what they do.

II. The present case is an appropriate vehicle to address the division of authority.

The government identifies two reasons to deny certiorari in spite of the division of authority, but neither are persuasive. First, the government argues that the result in this case would be the same in the Second, Third, Ninth and Tenth Circuits because the district court in this case adequately explained the sentence. BIO, at 14-17. Specifically, it maintains that the district court adequately grounded the sentence in factors other than the Guidelines, namely the defendant's criminal history. *See* BIO, at 10-11

But of course the court of appeals never undertook this analysis. Under its precedent, it is enough that the district court "consider" the true (or asserted) range, and that it say that the sentence would have been the same. *See Guzman-Rendon*, 864 F.3d at 411; *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)); *Rico*, 864 F.3d at 386; *Leontaritis*, 977 F.3d at 452; [Appendix B, at 2]. "Consideration" of the true range eliminates the need for explanation. It also eliminates any need to review the adequacy or plausibility of the district court's claims.

And in fact, the district court's explanation here does not withstand scrutiny. The sentencing court said that it was influenced by the defendant's criminal history, which is of course a valid consideration. But it could not explain how the defendant's criminal history would generate the particular number in the term of imprisonment -- 60 months – without the help of the Guidelines. Further, the court's stated rationale for the hypothetical variance -- underrepresentation of the defendant's criminal history by Category IV -- could just as well have given rise to a variance or departure from the range it believed applicable. Yet the court sentenced near the bottom of the range it believed applicable, assessing a 60 month sentence in a range of 57-71 months. If these problems with the sentencing court's explanation are not conclusive, they at least sufficient to prevent the government from discharging its burden of proof to show harmless error.

What the district court's comments plausibly explain is that a 60-month sentence would be substantively reasonable even if the Guidelines were lower. But that is not the question asked by a properly conducted harmless error inquiry. Harmless error does not ask whether the court could have imposed the same sentence, but whether the error in fact influenced the outcome. *See* 18 U.S.C. §3742(f).

Second, the government offers a cursory defense of the district court's Guideline calculation. *See* BIO, at 18-19. Notably, the court of appeals never embraced this reasoning -- it tellingly skipped directly to the consideration of harm. But the government is wrong in any case, as review of the Guideline's text and structure will show.

Guideline 2B3.1 provides for a two level adjustment in robbery cases "if a threat of death was made." USSG § 2B3.1(b)(2)(F). Significantly, this provision is framed as an enhancement to the base offense level for robberies – the Guideline accordingly does not presume that all robberies involve a threat of death. All robberies do, however, carry a threat of bodily injury, implicit or explicit. *See United States v. Brewer*, 848 F.3d 711, 715-716 (5th Cir. 2017).

The Guideline accordingly contemplates that at least some robbers will threaten injury without death. *See United States v. Hickman*, 151 F.3d 446, 460-61 (5th Cir. 1998), *unanimously approved of in relevant part on reh'g en banc*, 179 F.3d 230 (5th Cir. 1999)(holding that "merely brandishing a weapon at a victim cannot support an enhancement" for "physical restraint" under USSG §2B3.1, "because, '[w]ere it otherwise, enhancement would be warranted every time an armed robber entered a bank, for a threat not to move is implicit in the very nature of armed robbery.' ")(quoting *United States v. Doubet*, 969 F.2d 341, 346 (7th Cir. 1992), *abrogated on other grounds by United States v. Dunnigan*, 507 U.S. 87 (1993)); *accord United States v. Garcia*, 857 F.3d 708 (5th Cir. 2017). Under a contrary view, the two-word restrictive phrase "of death" would be superfluous, which is disfavored by basic interpretive canons. *See Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001).

Accepting the Guideline's premise that some threats of injury stop short of threatening death, it is difficult to imagine a better case of this than Petitioner's. Certainly, his threat that "things will get ugly" implied the possibility of violence. But

nothing about it adverted to death as opposed to injury, neither implicitly, nor explicitly.

The government relies on certain illustrations found in the Commentary to USSG §2B3.1, BIO, at 19, but they only show why the adjustment is not properly applied. The Commentary contains five examples of qualifying conduct, all of which point more specifically toward death than anything Petitioner said. Three of the examples reference (by word or gesture) death itself: "Give me the money or I will kill you", "Give me your money or else (where the defendant draws his hand across his throat in a slashing motion)", and "Give me the money or you are dead." USSG § 2B3.1, comment. (n. 6). The remaining two threaten an act from which death often results: "Give me the money or I will pull the pin on the grenade I have in my pocket", and "Give me the money or I will shoot you." *Id.* In none of the examples is the threat consistent with non-lethal force. The examples thus tend to exclude the adjustment on the current facts.

III. The rule of the court below poses a serious threat to the sound of administration of justice.

Finally, the government seeks to defend the view of the court below on the merits, but it in fact mounts a defense only of the unremarkable proposition that courts of appeals may engage in harmless error review. At stake in this case, however, is not the existence of harmless error review. Rather, this case presents the question of whether district courts may be empowered to judge their own Guideline errors harmless, without even offering a persuasive explanation for the decision to impose

the same sentence under a different hypothetical range. That extraordinary power defeats the purposes of the Sentencing Reform Act, encourages advisory opinions, and deprives many defendants of substantial justice.

The government cites *Molina-Martinez v. United States*, 136 S.Ct. 1338 (2016), to show that a district court's sentencing explanation may be considered in assessing substantial rights. *See* BIO, at 9-10. But the bare capacity of circuit courts to consider such comments does not imply that they must always be credited without scrutiny. *Molina-Martinez* certainly does not offer any support for the Fifth Circuit's view that courts of appeals must accept the district court's Guideline disclaimers, even if it does not provide a persuasive explanation for this hypothetical sentence. To the contrary, *Molina-Martinez* contemplates consideration of such statements only as part of "a detailed explanation of the reasons the selected sentence is appropriate." *Molina-Martinez*, 136 S.Ct. at 1347.

Indeed, the *Molina-Martinez* court imagined an organic relationship between the judge's explanation for the sentence imposed and the conclusion that the Guidelines were irrelevant to the sentence. *See Molina-Martinez*, 136 S.Ct. at 1346-1347. It observed that the sentencing court's explanation for the sentence imposed "could make it clear that the judge based the sentence he or she selected on factors independent of the Guidelines." *Id*. Thus a court might explain that it thought the §3553(a) factors supported a sentence, say, at the statutory maximum or minimum, that it must be the same as a codefendant's, or that it must not be less than the defendant received for a prior offense. Each of these explanations might plausibly

show that a factor other than the Guidelines produced a particular number of months imprisonment.

In other words, *Molina-Martinez* recognizes that a district court's explanation for the sentence *it actually imposes* might have value for determining the impact of a Guideline error, and even show harmlessness. *Molina-Martinez* does not say that district judges can or should go out of their way to decide the sentence that would apply under a hypothetical Guideline range, just to avoid reversal. It certainly does not say that courts of appeals must credit statements to that effect.

The government argues that "harmless-error review of guidelines-calculation errors" improves appellate review by "eliminating pointless appeals." (BIO, at 12)(quoting *Zabielski*, 711 F.3d at 389). But again, the existence of harmless error review is not at issue here. Rather, the question at issue here, and the one that has divided the courts of appeals, is whether district courts are empowered to avoid appellate review by declaring their own errors harmless. If this practice obviates questionable appeals, it is at the cost of a great many meritorious ones.

Perhaps as importantly for the purposes of the Sentencing Reform Act, giving district courts *carte blanche* to preclude review of their Guideline calculations reduces appellate guidance as to the meaning of the Guidelines. This frustrates Congress's chief goal in enacting the Sentencing Reform Act, which was to create sentencing uniformity. It also reduces the incentives for district courts to take care in calculating the Guidelines in each individual case. As a dissenting Judge observed in a circuit that accepts Guideline disclaimers at face value, "*Gall* is essentially an academic

exercise in this circuit now." *United States v. Gomez-Jimenez*, 750 F.3d 370, 390 (4th Cir. 2014) (Gregory, J., concurring and dissenting in part). If this Court wishes to protect its decisions in *Gall v. United States*, 552 U.S. 38 (2007), *United States v. Booker*, 543 U.S. 220 (2005), and *Rita v. United States*, 551 U.S. 338 (2007) – which seek to advance Congressional interests in the Guideline system -- it should intervene.

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 2nd day of December, 2020.

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