NO. 20-6336

IN THE
SUPREME COURT OF THE UNITED STATES

ERIC TROY SNELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Fourth Circuit

REPLY OF PETITIONER

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RULE 14.1(b)(iii) STATEMENT

United States v. Eric Troy Snell, 2020 WL 4053823 (D. Md. July 20, 2020) is the Memorandum denying Petitioner's motion for compassionate release in the case *sub judice*. It was not appealed.

REPLY ARGUMENT

1. The government's list of rejected certiorari petitions it maintains have raised "similar issues," BIO 9-10 (citing cases), argues in favor of granting the petition, not denying it. That appellate findings of harmless sentencing error – whether via the Fourth Circuit's unique "assumed harmless error inquiry," or some variant used by other circuits – result so consistently in petitions to this Court suggests the presence of an important question of federal law that has not been, but should be, settled by the Court. Rule 10(c).

2. Attempts to engraft Fed. R. Crim. P. 52(b) plain-error standards onto this sentencing error, BIO 10-13, do not address the affront to *Gall v. United States*, 552 U.S. 38 (2007) presented by "assumed error harmlessness" review. The government points to the district court's acknowledgment that acceptance of Snell's Guidelines position would have resulted in an offense level of 24, rather than 28, as proof that it complied with *Gall*'s directive to "remain cognizant of [the Guidelines] throughout the sentencing process." BIO 12-13. But that elides that neither the district court nor the Fourth Circuit ever explained how and why a 71-percent deviation from Snell's proffered Guidelines range, which the imposed sentence reflects, was substantively reasonable. The government instead would have that

task deemed fulfilled by the district court's comment that Snell's offense was "very serious," and the Fourth Circuit's crediting of that explanation as "thorough" and "compelling." BIO 13. That's a lot of work for four words to accomplish. Too much, in fact, to remain consistent with this Court's directive to remain cognizant of the Guidelines throughout sentencing, and ensure that they "are in a real sense the basis for the sentence." *Peugh v. United States*, 569 U.S. 530, 542 (2013) (citation omitted).

3. It is of course understandable for the government to defend "assume error harmlessness inquiry" as a time-saving device useful for avoiding "pointless" remands and "obviat[ing] questionable appeals." BIO 13-14, citing *United States v. Abbas*, 560 F.3d 660, 667 (7th Cir. 2009) and *United States v. Zabielski*, 711 F.3d 381, 389 (3d Cir. 2013). But as has been recognized by judges who have seen the process up close, the practice has devolved into an exercise in sentencing courts covering their mistakes "with a few magic words." *United States v. Gomez-Jimenez*, 750 F.3d 370, 391 (4th Cir. 2014) (Gregory, J., concurring in part and dissenting in part).

4. The government's attempt to distinguish Snell's cases from other circuits that diverge from Fourth Circuit practice, BIO 15-18, falls short. The court in *United States v. Langford*, 516 F.3d 205, 213 (3d Cir. 2008) required the district court to give its reasoning from start to finish, from correctly calculated Guidelines through the § 3553(a) factors – in essence, to show its work. The Fourth Circuit here did not do that; it simply accepted the district court's anodyne comment that it

would impose the same sentence regardless of any Guidelines error. In *United States v. Lanesky*, 494 F.3d 558 (6th Cir. 2007), the Sixth Circuit faithfully applied the requirement that a properly calculated Guidelines range was a prerequisite to determining "with certainty" whether there was any error. *Id.* at 561-562. "Assumed error harmlessness inquiry" does the opposite, completely bypassing the question of whether the actual sentence was substantively reasonable when measured against a correct Guidelines calculation.

And *United States v. Bah*, 439 F.3d 423 (8th Cir. 2006), is factually indistinguishable in all relevant respects from this case. The district court stated that "if [I] am wrong about the application of the guidelines...and the guidelines would advise a sentence that was higher or a sentence that was lower, this is still my sentence based on all the factors [of § 3553(a).]" *Id.* at 431 (cleaned up). The government repeatedly falls back to the district court's supposedly "thorough explanation" of its sentence. BIO 16, citing Pet. App. 3 – but as in *Bah*, and as noted above, here there simply was none.

4. The objection to this case as an improper vehicle, BIO 18-19, similarly is misplaced. Snell's briefs to the Fourth Circuit detailed extensively why the district court's imposition of both two-level enhancements was incorrect. The government failed to prove a temporal connection between any gun (two of which were his service weapons) and criminal conduct 12 months earlier, sufficient to justify the dangerous-weapon enhancement of USSG §2D1.1(b)(1). And the government's argument for the obstruction enhancement failed in multiple ways:

under the Application Notes to USSG §3.C1.1 there not only is no liability for "attempted" misleading of law enforcement through unsworn statements, but the misstatement must have "significantly obstructed or impeded" the investigation. *See* USSG §3C1.1, n.4(G). Snell's did not obstruct or impede it *in any way*, since by the time FBI agents picked him up, they already knew what his payments to Rayam were for – in fact, they told the Philadelphia federal court as much, in detailed sworn statements used to obtain warrants.

The petition thus presents an excellent vehicle for this Court's resolution of the question presented. Snell convincingly established with his Fourth Circuit briefing that the two enhancements were erroneously applied – and the Fourth Circuit simply skipped the analysis, to declare any error harmless.

5. In his separate opinion in *Gomez-Jimenez*, the now-Chief Judge of the Fourth Circuit identified the "most troubling" aspect of that Court's cursory treatment of alleged Guidelines error:

> …the practical effect of this conclusion is the creation of a mechanism whereby district courts may impose one-size-fits-all sentences that appellate courts would refrain from meaningfully reviewing. Courts could apply any number of enhancements to justify reaching the sentence they desire, then use this Court's harmless error jurisprudence to prompt us to uphold a sentence that otherwise lacks a sufficient justification. The notion of consistent sentences for similarly situated defendants disappears where errors regarding conduct and enhancements—errors which would make defendants dissimilar—are swept under the rug of harmlessness. [*Gomez-Jimenez*, 750 F.3d at 391-392 (Gregory, J., concurring in part and dissenting in part)].

Such a ham-handed mechanism simply is not conducive to individualized justice. As in *Gomez-Jimenez*, here too, "any procedural error [was] ignored simply because the

district court" asked the appellate court to do so. *Id.* at 391 (Gregory, J., concurring in part and dissenting in part).

6. Snell in no way forfeited his summary-disposition argument based on the harm he will suffer by the circuit court leaving unaddressed the erroneous dangerous-weapon enhancement. BIO 20. Snell extensively briefed the weapon-enhancement issue below, detailing why the district court's acceptance of it was erroneous. Opening brief, pp. 34-39; Reply, 12-13. He should hardly be penalized because the circuit court, rather than find the enhancement erroneous and then discuss whether or not that error was harmless, instead tacitly agreed with him but chose the shortcut of sidestepping the matter via "assumed error harmlessness inquiry." The government's forfeiture rule would penalize Snell for too convincingly briefing the district court's legal error.

The government's two forfeiture cases are inapposite. One involves a garden-variety forfeiture by the government itself, which failed to raise an alternate basis to affirm – that could have been raised at any time in the case – until its merits brief to this Court. *United States v. Jones*, 565 U.S. 400, 413 (2012). The other recites this Court's "traditional rule" precluding certiorari "only when 'the question presented was not pressed *or* passed upon below.'" *United States v. Williams*, 504 U.S. 36, 41 (1992) (emphasis added). Of course, Snell in his alternate request does not seek certiorari, but a summary disposition under Rule 16.1. Pet. 20-22. And below he certainly pressed the erroneous weapon enhancement; he could hardly have pressed the circuit court's ensuing failure to address it. The government offers

no authority requiring a certiorari petitioner to have anticipated and addressed in its circuit-court briefing an error first injected into the case in the very opinion of which certiorari review is sought.

Finally, having analogized "assumed error harmlessness inquiry" to plain-error review, BIO 11-12, the government can hardly deny that even if Snell had forfeited the issue, this Court still may review it. Requiring a model prisoner to languish a year longer behind bars because an appellate court chose not to address the merits of an argument he fully briefed certainly presents an error "so serious as to constitute a fundamental unfairness in the proceedings." *Wood v. Georgia*, 450 U.S. 261, 265 n.5 (1981).

CONCLUSION/RELIEF REQUESTED

Petitioner Snell urges this Court to grant certiorari to resolve this important question, or in the alternative, grant summary relief under Rule 16.1.

Respectfully submitted,

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