

No. _____

In the
Supreme Court of the United States

Aaron Sebastian Redmond,

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

The Fifth Circuit agreed with Mr. Redmond that the district court erred when it applied the U.S. Sentencing Guidelines, which resulted in a higher advisory sentencing range. Yet the Fifth Circuit affirmed the sentence because the district court stated that it would have imposed the same sentence irrespective of how it calculated the Guidelines. Is Guidelines error harmless simply because a district court makes a statement that it would have imposed the same sentencing regardless of the properly calculated Guidelines?

PARTIES TO THE PROCEEDING

Petitioner is Aaron Sebastian Redmond, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

RULE 14.1(b)(iii) STATEMENT

This case arises from the following proceedings in the United States District Court for the Northern District of Texas and the United States Court of Appeals for the Fifth Circuit:

- *United States v. Redmond*, 965 F.3d 416 (5th Cir. 2020)
- *United States v. Redmond*, No. 4:18-cr-00301-A-1 (N.D. Tex. May 3, 2019)

No other proceedings in state or federal trial or appellate courts, or in this Court, are directly related to this case.

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OF CERTIORARI

Petitioner Aaron Sebastian Redmond 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 published opinion of the Court of Appeals is reported at *United States v. Redmond*, 965 F.3d 416 (5th Cir. 2020). It is reprinted in Appendix B to this Petition.

JURISDICTION

The panel opinion and judgment of the Fifth Circuit were entered on July 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

This case concerns a district court's successful attempt to inoculate a sentence of imprisonment from appellate review by simply stating that the court would have imposed the same sentence irrespective of the Guidelines. What sets this case apart from others dealing with the inoculation issue is that the Fifth Circuit held that the district court improperly interpreted and applied the Guidelines and only affirmed because of the district court's inoculating statement. If not for the Fifth Circuit's rule permitting a district court to inoculate its sentences from reversal in this way, the district court's error would have required resentencing. *See United States v. Redmond*, 965 F.3d 416, 420 (5th Cir. 2020) ("While we agree with Redmond that the district court erred in applying the enhancement, no remand is required if the error was harmless."). The attitude of the Fifth Circuit toward sentencing inoculation 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 February 14, 2017, Aaron Redmond entered a bank, told the teller "no alarms, no phones, no nothing," and displayed the butt of a pistol in the pocket of his sweatshirt. He then told another teller to get on her knees. He demanded, and

received, money from the drawers operated by both tellers. He then told both tellers to walk to an adjacent room, close the door, and count to 100 before coming out. The tellers complied. On August 24, 2018, an agent and detective interviewed Mr. Redmond about the bank robbery while he was detained on an unrelated charge, eliciting incriminating responses.

The government indicted Mr. Redmond on one count of bank robbery, in violation of 18 U.S.C. § 2113(a). On January 18, 2019, Mr. Redmond pleaded guilty to the one-count indictment. When U.S. Probation prepared its presentence investigation report (PSR), it included a 4-level enhancement to Mr. Redmond's base offense level for an "abduction" during the robbery, under U.S. Sentencing Guidelines Manual § 2B3.1(b)(4)(A) (2018). Mr. Redmond filed a written objection to the abduction enhancement, arguing that he did not abduct the tellers under the Guidelines' definition of "abduction" because they did not "accompany" him to the adjacent room. The government responded with cases that purport to suggest a "flexible" interpretation of the Guidelines' definition. U.S. Probation followed suit, declining to accept Mr. Redmond's objection "due to the flexible standard set by the Fifth Circuit in the application of USSG § 2B3.1(b)(4)(A)."

At sentencing, the district court denied Mr. Redmond's objection to the abduction enhancement based on a novel theory of "constructive accompaniment." The district court then denied defense counsel's motion for a downward variance and imposed a 180-month sentence of imprisonment—a substantial *upward* variance—"without regard to what the advisory guideline range might be in this case."

C. Appellate Proceedings

On appeal, Mr. Redmond challenged the district court's interpretation of the Guidelines when applying the 4-level abduction enhancement and the substantive reasonableness of the court's disregard for the Guidelines when imposing a substantial, above-Guidelines sentence of imprisonment. The government argued that there was no error and that, even if there were error, it was harmless because the district court stated that it imposed the sentence "without regard to what the advisory guideline range might be in this case."

The Fifth Circuit, in a published opinion, agreed with Mr. Redmond that the district court's imposition of the 4-level "abduction" enhancement under the Guidelines was in error but nonetheless held that the error was harmless in light of the district court's statement inoculating the error. *Redmond*, 965 at 422 ("Because the government has 'convincingly demonstrate[d] both (1) that the district court would have imposed the same sentence had it not made the error, and (2) that it would have done so for the same reasons it gave at the prior sentencing,' *Ibarra-Luna*, 628 F.3d at 714, we conclude that the district court's Guidelines calculation error was harmless.").

REASONS FOR GRANTING THE PETITION

The Fifth Circuit's rule, applied below, ignores the role of the Guidelines in federal sentencing, conflicts with other circuits, undermines the incentive to object to guideline error, and raises serious constitutional issues.

A. The Fifth Circuit's rule ignores this Court's emphasis on the role of the Guidelines in federal sentencing.

In the Fifth Circuit, Guidelines error is harmless when: (1) “the district court would have imposed the same sentence had it not made the error”; and (2) it would have done so for the same reasons it gave at the prior sentencing.” *Redmond*, 965 F.3d at 420 (quoting *United States v. Ibarra-Luna*, 628 F.3d 712, 714 (5th Cir. 2010)). It is the government's burden to demonstrate that the sentencing court would have imposed the same sentence for the same reasons. *Id.* In doing so, as the Fifth Circuit implicitly held below, the more the district court refuses to consider the Guidelines the better—ignoring the Guidelines is strong evidence that Guidelines error, if corrected, would not change the sentence. *See id.* at 421 (“[H]ere, the evidence supports the district court's assertion, as it is clear that the court's 180-month sentence was uninfluenced the improperly calculated range of 78 to 97 months.”). Thus, district courts are incentivized to ignore the Guidelines when sentencing because doing so effectively ensures that their sentences will be inoculated from appellate review *even though* consideration of the Guidelines is supposed to be mandatory in federal sentencing. *See* 18 U.S.C. § 3553(a)(4). This incentive structure is contrary to the federal sentencing scheme and the uniform administration of justice.

Although advisory only, 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 ordinarily presumes that Guidelines error affects the sentence imposed. *See Molina-Martinez v. United States*, 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,” in federal sentencing. *Gall*, 552 U.S. at 49. 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 Guidelines Manual, *see Peugh v. United States*, 569 U.S. 530 (2013), and in a sentencing court’s duty to explain out-of-range sentences. *See Rita*, 551 U.S. at 357. The Fifth Circuit’s rule for evaluating the harmlessness of preserved Guidelines error undermines the Guidelines’ special role in federal sentencing and directly conflicts with this Court’s prior guidance.

B. Circuits are split on how to treat a district court's statement inoculating its sentence from Guidelines error.

The clearest contrast in how circuits consider sentencing inoculation is seen between the Fifth and Tenth Circuits. Although the Tenth Circuit accepts this Court's statement in *Molina-Martinez* that "[t]here may be instances when, despite application of an erroneous Guidelines range, a reasonable probability of prejudice does not exist," the Tenth Circuit treats it as a "rare case" that requires "a highly detailed explanation" by the district court. *United States v. Gleswein*, 887 F.3d 1054, 1061 (10th Cir. 2018). To bring the contrast into focus, compare the weight the Tenth Circuit gives a district court's statements to that of the Fifth Circuit:

We give little weight to the district court's statement that its conclusion would be the same "even if all of the defendant's objections to the presentence report had been successful." Our court has rejected the notion that district courts can insulate sentencing decisions from review by making such statements.

Gleswein, 997 F.3d at 1062-63.

Moreover, the district court explicitly stated that "the sentence would be the same as I've imposed, without regard to what ruling I might have made or should have made on the subject of [the] abduction [enhancement]" and that it was selecting the sentence "without regard to what the advisory [G]uideline range might be in this case." While "it is not enough for the district court to say the same sentence would have been imposed but for the error," *United States v. Tanksley*, 848 F.3d 347, 353 (5th Cir. 2017), here, the evidence supports the district court's assertion, as it is clear that the court's 180-month sentence was uninfluenced the improperly calculated range of 78 to 97 months.

Redmond, 965 F.3d at 420-21.

The Ninth Circuit has repeatedly issued warnings about Guidelines 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 quotation marks omitted). It has thus twice remanded Guidelines errors in spite of such alternative rationale. See *Garcia-Jimenez*, 807 F.3d at 1089–90; *Acosta-Chavez*, 727 F.3d at 910.

Further, the Seventh and Eighth Circuits have both suggested that not all Guidelines 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 standard for assessing harm in cases of Guidelines error cannot be reconciled with those of several other courts of appeals. To accept a Guidelines 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.

C. 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 Seventh, Eighth, 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 Guidelines 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 Fifth Circuit jeopardizes this important function for appellate review, because it provides district courts a way to avoid meaningful scrutiny of Guidelines 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 Guidelines 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 Guidelines 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 Guidelines 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.

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 Guidelines 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 Fifth Circuit seriously undermines the administration of justice and merits review.

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

The present case is perhaps unique as an appropriate vehicle to address the conflict because the court below held that the Guidelines were incorrectly calculated, yet still affirmed. This means the sole basis for the decision below is the matter that has divided the courts of appeals. The case would have been remanded in courts applying differing standards.

CONCLUSION

Petitioner requests that this Court grant his Petition for Writ of Certiorari and allow him to proceed with briefing on the merits and oral argument.

Respectfully submitted,

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