

No. _____

IN THE
Supreme Court of the United States

JEREMY HOUGH,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, through “assumed error harmlessness review,” appellate courts may affirm a criminal sentence without addressing allegations of significant procedural error on appeal.

LIST OF ALL DIRECTLY RELATED PROCEEDINGS

United States Court of Appeals for the Fourth Circuit:

United States v. Hough, 833 F. App'x 985 (4th Cir. Case No. 19-4307).

United States District Court for the Eastern District of North Carolina:

United States v. Hough, No. 5:18-CR-365-D-1

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Petitioner Jeremy Hough respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The Fourth Circuit's unpublished opinion is reported at 833 F. App'x 985 and produced at Pet. App. 1a.

JURISDICTION

The district court had jurisdiction over the criminal prosecution under 18 U.S.C. §§ 922, 3231. Mr. Hough timely appealed the district court's final judgment. The Fourth Circuit had jurisdiction under 18 U.S.C. § 3742 over that timely appeal from a final order. The Fourth Circuit issued its opinion affirming Mr. Hough's sentence on November 3, 2020. This petition is being filed on June 4, 2021, along with a motion to

allow Mr. Hough to file it out of time. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The court, in determining the particular sentence to be imposed, shall consider . . .

(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[;] (5) any pertinent policy statement (A) issued by the Sentencing Commission pursuant to 994(a)(1) of title 28, United States Code[;] and (6) the need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct[.]

18 U.S.C. §§ 3553(a)(4)-(6).

Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

Fed R. Crim. P 52(a)

INTRODUCTION

Mr. Jeremy Hough possessed a gun. But the district court did not punish him for possessing the gun. Instead, Mr. Hough’s 78-month sentence was driven, in large part, by (1) a Sentencing Guidelines enhancement for possessing the firearm “in connection with” another felony offense, and (2) an upward departure based on Mr. Hough’s criminal history. The district court found that Mr. Hough was involved with a shooting that occurred weeks prior to the possession offense and he therefore should receive the “in connection with” enhancement; it also found that Mr. Hough’s criminal history score did not properly account for the extent of his criminal history. But Mr. Hough denied involvement in that shooting, which was weeks earlier and involved a completely different gun. And the Guidelines already properly accounted for his criminal history score.

Mr. Hough naturally appealed, arguing that the district court erred in finding a connection between his possession and the prior shooting and in upwardly departing from his initial Guidelines range. But the Fourth Circuit never reached these issues.

Instead, the Fourth Circuit applied its longstanding “assumed harmless error” review doctrine. Holding that the district court would have imposed the same sentence regardless of the procedural errors, it simply assumed that the Guidelines were computed incorrectly and proceeded directly to reviewing the substance of the sentence. Holding that the sentence was not substantively unreasonable, it affirmed.

The Fourth Circuit’s assumed harmless error approach runs counter to this Court’s guidance that district court’s must impose procedurally correct sentences. It also effectively removes the Sentencing Guidelines from the sentencing process, collapsing everything into a substantive Section 3553(a) review. And it diminishes public confidence in sentencing proceedings, allowing acknowledged procedural errors to stand and providing no incentive to district courts to actually try and get things right. This Court’s review is necessary to reaffirm the primary role of the Guidelines in federal sentencing proceedings.

STATEMENT OF THE CASE

In 2018, a grand jury sitting in the Eastern District of North Carolina indicted Mr. Hough on one count of possessing a firearm after having been previously convicted of a crime punishable by more than a year, in violation of 18 U.S.C. § 922(g)(1). Fewer than three months later, Mr. Hough accepted responsibility and pleaded guilty.

In preparation for sentencing, the United States Probation Office prepared a presentence report (“PSR”) that recommended enhancing Mr. Hough’s sentence for “possess[ing the] firearm . . . in connection with another felony offense.” U.S.S.G. § 2K2.1(b)(6)(B). Due to this enhancement, the PSR advised a Guidelines range of thirty to thirty-seven months of imprisonment. Had the PSR not added the “in connection with” enhancement, it would have advised a Guidelines range of twenty-one to twenty-seven months of imprisonment.

At sentencing, Mr. Hough objected to the enhancement. He argued that he possessed the gun for which he was being punished in May, 2018. But the

government was attempting, through the enhancement, to actually punish him for a shooting that occurred in April 2018 that he did not do and—even if he did—was totally unconnected to the gun he possessed in May. He argued against misusing the “in connection with” enhancement in order to “hav[e] a mini trial of a pending murder charge in state court in federal court, here, with no right to confrontation and under a preponderance of the evidence standard.” He explained that the state charges are factually unrelated to the federal section 922(g) offense and that the Government sought to punish him in federal court for state conduct.

The Government called Larry Bear, a detective with the Raleigh Police Department, who testified that, on April 23, 2018, Stanley Boyd was shot in Raleigh at an address on Green Road where a friend lived. Detective Bear testified that witnesses reported Mr. Boyd got in an argument with someone and that person shot Mr. Boyd multiple times. The suspect was driving a “dark-colored, black Lexus.” The shooter was described by witnesses as “a black male with light complexion or a Hispanic male with . . . shoulder-length [braided-style] hair, possibly wearing a black do-rag; one of the witnesses said the shooter had a small black handgun. Police later recovered six .380 shell casings in the roadway in front of the Green Road residence.

Police talked to Mr. Boyd three or four times while he was in the hospital. The first and second time, Mr. Boyd said he remembered nothing. The third time, Mr. Boyd described the shooter as “a male subject that he knew as Hood” with “shoulder-length, braided hair” who was “from New York . . . and . . . drove a black

or a dark-colored Lexus car.” He said that the shooter was about five feet, ten or eleven inches tall and skinny with unknown tattoos. Mr. Boyd later passed away.

Police believed that Mr. Hough was the shooter, even though he has no tattoos, does not have an alias of “Hood,” and is five foot six. Agent Bear testified that officers put together a photo lineup and Mr. Boyd identified Mr. Hough “with 100 percent certainty,” but Agent Bear was not present and had no information about how the lineup was conducted and whether it was unduly suggestive.

Of more than fifteen people at the scene, no one other than Mr. Boyd identified Mr. Hough as the shooter. And no physical evidence connected Mr. Hough to the crime. The firearm that was used in the shooting was not the firearm Mr. Hough possessed on the date of his arrest.

Detective Bear testified that Mr. Hough was driving a black Lexus when he was arrested. Officers retrieved Mr. Hough’s cell phone’s GPS coordinates for the time of the shooting, which Detective Bear had not seen but was told they showed the phone was at the address on Green Road at the time of the shooting.

The District Court found that the Government met its burden to apply the enhancement, reasoning that Mr. Hough illegally possessed two firearms within two weeks and allegedly used one of them to shoot Boyd. It found that the two offenses were part of the same course of conduct because, in its view, “the two instances of illegally possessing a firearm satisfies the regularity factor” and “the time period strongly suggests the two offenses constitute part of the same course of conduct.” The court found, by a preponderance of the evidence, that Mr.

Hough “did shoot Mr. Boyd on April 23, 2018,” and that “he was in possession of another gun because he was aware of what he had done on April 23, 2018.” The Court then calculated the advisory guideline range of thirty to thirty-seven months instead of the twenty-one to twenty-seven months that would have applied without the enhancement.

The Government then sought an upward departure under U.S.S.G. § 4A1.3 for underrepresented criminal history, arguing that Mr. Hough had unscored criminal conduct and “a record of institutional infractions” while incarcerated and parole violations. The Assistant United States Attorney argued that Mr. Hough’s criminal conduct was “on the upswing,” noting that he received, in the prosecutor’s view, a lenient sentence for conspiracy to commit Hobbs Act robbery and brandishing a firearm, and then violated supervision and was charged with this offense.

Counsel for Mr. Hough responded that none of the factors listed in Section 4A1.3 supported an upward departure in this case: He has only two sentences of more than one year, both of which are fully scored; no prior similar misconduct was established by civil adjudication; he was not pending trial or sentencing on another charge at the time of the instant offense; and there is no prior similar adult criminal conduct not resulting in a criminal conviction. She argued that the murder charge is not similar to the instant offense and is nonetheless accounted for in the court’s advisory guideline calculation. She reiterated that Mr. Hough is scheduled to go to trial on the murder charge in January or February of 2020 and the state

court will have the opportunity to address it. She noted that unscored misdemeanors were only unscored because the Guidelines explain precisely why they should not score, and none of those offenses are similar to the one before the court in this case.

The District Court upwardly departed under Section 4A1.3, finding that Mr. Hough's "criminal history category substantially underrepresents the seriousness of his criminal history or the likelihood that he will commit other serious crimes." The court reviewed Mr. Hough's criminal history and what it viewed as prior "lenient" sentences and parole and supervised release violations, offering its opinion that "the likelihood of him committing other crimes is a mere certainty." It departed to a criminal history category VI, found that inadequate, and thus moved to a total offense level of 19, calculating an advisory guideline range of sixty-three to seventy-eight months.

The District Court then noted the section 3553(a) factors it considered. With respect to nature and circumstances of the offense, the court noted that being a felon in possession of a firearm is a "serious offense." With respect to Mr. Hough's history and characteristics, the court noted he was thirty-five years old, has a GED, and had a troubled childhood. The court called Mr. Hough's criminal history "deeply troubling," noting his supervision violations, institutional adjustments, and "extraordinarily lenient" past sentences. The court stated that society "needs to be protected" from Mr. Hough.

The court cited a "great, great need for incapacitation in this case," calling

the need for just punishment “one of the most critical factors in connection with this.” It found for the record that, although Mr. Hough did not speak, the court viewed his attitude as “one of contumaciousness” and that it needed to impose a sentence that “promotes respect for the law.” The court imposed a sentence of seventy-eight months. It announced that if it improperly calculated the advisory guideline range, it would have imposed the same sentence as an upward variance.

Mr. Hough appealed to the 4th Circuit, arguing primarily that the district court erred in finding that he possessed a gun in May “in connection with” a shooting in April with a different gun that he denied doing and that his criminal history did not support an upward variance. Because these two enhancements improperly increased his Guidelines range from twenty-one to twenty-seven months to sixty-three to seventy-eight months, he argued that they constituted significant procedural error requiring vacation of the sentence.

But the 4th Circuit never reached the issue. Instead, it applied its “assumed harmless error” doctrine. It simply assumed that the district court erred. Then it held that the district court would have imposed the same sentence regardless of the error, and that that sentence was substantively reasonable. It thus affirmed the sentence without ever addressing the allegations of error.

This petition follows.

REASON FOR GRANTING THE PETITION

THIS COURT SHOULD GRANT REVIEW TO CLARIFY WHETHER A DEFERENTIAL HARMLESS ERROR STANDARD BASED SOLELY ON A SENTENCING COURT'S STATED INTENT TO IMPOSE THE SAME SENTENCE SHOULD APPLY WHEN A LEGALLY ERRONEOUS APPLICATION OF THE GUIDELINES DRASTICALLY INCREASES THE ADVISORY IMPRISONMENT RANGE.

The Fourth Circuit's conclusion that the trial court's legally and factually erroneous Guidelines applications were harmless based on the district court's stated intent that it would impose the same sentence regardless of such errors presents "an important question of federal law that has not been, but should be, settled by this Court[.]" S. Ct. R. 10(c). Specifically, this Court has not yet addressed whether the "assumed error harmlessness" standard the panel employed can excuse significant procedural errors which drastically increase the advisory imprisonment range without dismantling the integrated sentencing framework this Court constructed following *United States v. Booker*, 543 U.S. 220 (2005), and *Gall v. United States*, 552 U.S. 38 (2007).

While *Booker* rendered the Guidelines advisory, it preserved the role of the Sentencing Commission and the function of Guidelines which, together, would continue to "provide certainty and fairness in meeting the purposes of sentencing, while avoiding unwarranted sentencing disparities[.]" 543 U.S. at 264. Thus, while this Court could have discarded the Guidelines altogether, it determined that the Guidelines can and should continue to function in a meaningful way to maximize uniformity and fairness in federal sentencing.

“[A] district court should begin all sentencing proceedings by correctly calculating the applicable Guideline range.” *Gall*, 552 U.S. at 49. In keeping with this emphasis, the Court established a sequential, two-step process for appellate review of post-*Booker* sentences. *Id.* at 49-51. First, an appellate court must “ensure that the district court committed no significant procedural error such as failing to calculate (or improperly calculating) the Guidelines range[.]” *Id.* at 51. Only upon finding the sentence contained no “significant procedural errors” could the appellate court conduct step two, a review of the sentence for substantive reasonableness. *Id.* at 49-50; *see also United States v. Delgado-Martinez*, 564 F.3d 750, 752 (5th Cir. 2009) (noting “*Gall*’s directive to treat the two steps as sequential, dispositive inquiries”).

“As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark.” *Gall*, 552 U.S. at 49.

This “initial benchmark” continues to have an important function throughout the sentencing process and provides a standard by which to measure the reasonableness of the sentence ultimately imposed. If a sentencing court decides to impose a sentence which deviates from the established Guideline range, “he must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance.” *Id.* at 50 (“We find it uncontroversial that a major departure should be supported by a more significant justification than a minor one.”).

A proper Guidelines calculation also serves an important role in the appellate review of a sentence. *Rita v. United States*, 551 U.S. 338 (2007). In *Rita*, this Court condoned the use of a presumption of reasonableness by an appellate court when reviewing within-Guideline sentences. *Id.* at 348-49. However, this Court stressed that the validity of such a presumption depended upon a proper application of the Guidelines:

[T]his presumption reflects the fact that, by the time an appeals court is considering a within-Guidelines sentence on review, *both* the sentencing judge and the Sentencing Commission will have reached the *same* conclusion as to the proper sentence in the particular case. That double determination significantly increases the likelihood that the sentence is a reasonable one.

Id. at 347.

Given this important role a correct Guidelines application and calculation have as the “initial benchmark” in the post-*Booker* process, “an error at that step infects all that follows at the sentencing proceeding, including the ultimate sentence chosen by the district court.” *United States v. Lewis*, 606 F.3d 193, 201 (4th Cir. 2010) (internal quotations and citations omitted). Thus, while “[c]ourts are not bound by the Guidelines, . . . [they] serve as ‘a meaningful benchmark’ in the initial determination of a sentence and ‘through the process of appellate review.’” *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1904 (2018) (quoting *Peugh v. United States*, 569 U.S. 530, 541 (2013)).

The Guidelines are not, then, mere formalism. Instead, they “anchor the court’s discretion in selecting an appropriate sentence.” *Molina-Martinez v.*

United States, 136 S. Ct. 1338, 1349 (2016).

Despite the continued importance a proper Guidelines calculation has as the “initial benchmark” in the post-*Booker* sentencing framework, this Court has not yet clarified whether and how harmless error review should apply to an improper Guidelines calculation which, as this Court emphasized in *Gall*, constitutes a “significant procedural error.” As the Fifth Circuit noted, “*Gall* is silent on this point.” *Delgado-Martinez*, 564 F.3d at 752. Other appellate courts have long recognized the need for this Court to clarify the circumstances in which a significant procedural error based on a miscalculation of the guidelines can be deemed ‘harmless.’ *See United States v. Abbas*, 560 F.3d 660, 666 (7th Cir. 2009) (observing, “what *Gall* does not tell us is whether such an error can be harmless”); *United States v. Vickers*, 528 F.3d 1116, 1122 (8th Cir. 2008) (Shepard, J., concurring) (stating, “the Supreme Court did not provide [appellate courts] with one key piece of the sentencing puzzle: what to do with a significant procedural error?”).

In Petitioner’s case, the panel followed suit, and applied what it called “assumed error harmlessness inquiry.” It assumed that the Guidelines were incorrectly calculated, noted that the district court said it would have imposed the same sentence regardless of any errors, and affirmed the sentence as substantively reasonable. Pet. App. at 4a-5a. The Fourth Circuit did not address the substance of the alleged errors.

Petitioner recognizes that use of harmless review of sentencing errors may

not, at first glance, appear problematic. *See Williams v. United States*, 503 U.S. 193, 202-03 (1992) (condoning harmless error review of an upward departure in a pre-*Booker* case). Petitioner also acknowledges that this Court has used a similar standard that the panel employed here – whether “the district court would have imposed the same sentence” even without the error. *Id.*

However, while this standard of harmless error review may apply to some sentencing errors, it should not apply to all, and especially not to the kind of significant procedural errors in Petitioner’s case. Here both errors involved an alleged misapplication of the Guidelines calculation. Combined, these errors increased the advisory imprisonment range from twenty-one to twenty-seven months to sixty-three to seventy-eight months.

In light of this Court’s heightened emphasis on a correct Guidelines application to make the initial Guidelines calculation, an erroneous determination of this “benchmark” is not only “significant,” but likely the most significant of all procedural errors. It is an error that gets to the very “anchor” of “the court’s discretion in selecting an appropriate sentence.” *Molina-Martinez*, 136 S. Ct. at 1349.

A Guidelines misapplication and mistaken calculation differs in kind from other “significant procedural” errors in two ways. First, it is the only objective standard in the “regimented sentencing process,” *Lewis*, 606 F.3d at 199-200. A court’s calculation of the Guidelines is either right or wrong. By contrast, the subsequent steps in the sentencing process allow for a judge’s discretion to

determine the nature and degree of an upward departure or variance, and in selecting “a” reasonable sentence, not the “only” one. *United States v. Evans*, 526 F.3d 155, 166 (4th Cir. 2008) (explaining that the ultimate sentence imposed “may not be the only reasonable sentence, but it is a reasonable sentence, and the Supreme Court has directed that any reasonable sentence be upheld”).

Second, these subsequent steps necessarily depend upon a correct calculation of the Guidelines range because a significant departure or variance from this range requires commensurately more “compelling” reasons. *Gall*, 552 U.S. at 50. Since any miscalculation of the Guidelines “infects . . . the ultimate sentence chosen,” several errors that significantly increase the Guidelines range more severely “infect” the ultimate sentence. *United States v. Diaz-Ibarra*, 522 F.3d at 343, 347 (4th Cir. 2008). Just as a significant departure or variance requires more “compelling” justification, an appellate court should apply a more rigorous standard than a deferential “assumed error harmlessness” review to affirm a severely “infected” sentence.

Given this distinct role as the “benchmark” in the integrated post-*Booker* sentencing process, in those cases where a court’s legally erroneous Guidelines calculations drastically impact the advisory range – as in Petitioner’s case – it is difficult to see how a harmless-error standard based solely on the district court’s subjective intent can avoid rendering the Guidelines meaningless. Such a deferential standard permits an appellate court to employ a harmless error review in all cases involving a miscalculation of the Guidelines range, regardless

of the kind of significant procedural error or the severe impact of that error on the “initial benchmark.” This approach excuses even legally erroneous Guidelines applications, no matter how severe, as long as the district court announced an ‘alternate’ sentence and provided minimally sufficient justification for that sentence under § 3553(a) standing alone and without reference to the Guidelines. Such an approach would erode any incentive for district courts to meaningfully consider and accurately decide Guideline issues, and would grant them a degree of discretion almost exactly comparable to what they had in the pre-Guidelines system.

This “assumed error harmlessness” approach will also reduce the initiative of an appellate panel to address and resolve Guidelines issues. Indeed, if this standard of review must apply in cases involving initial Guidelines calculation issues, an appellate court would be compelled to bypass the Guidelines issue and affirm a sentence based solely on the stated intent of the district court and a deferential review of the sentence for substantive reasonableness. By merely “assuming” an error and resting affirmance on an alternate ground, these future panel decisions would merely constitute *dicta* regarding Guidelines issues. On a practical level, minimizing the importance of a proper Guidelines calculation in appellate review will not serve the interests of judicial efficiency. Absent clear interpretive guidance from the appellate courts, Guidelines issues and challenges on appeal and at the district court level will increase, not decrease.

Beyond its negative impact on judicial efficiency, a deferential harmless-

error review will diminish the integrity and uniformity of sentencing proceedings throughout the federal courts. In cases involving legally erroneous Guidelines applications, such as using enhancements that never apply to a particular Guideline, as in this case, the assumed error approach would permit contradictory Guidelines applications among the district courts. In cases involving novel Guidelines issues, or those which involve factual issues, it would foster inconsistent applications.

Moreover, this inconsistent application of the Guidelines among the circuits and the district courts defeats the continued purpose of the Guidelines to “secure national consistency,” *Gall*, 552 U.S. at 49, in post-*Booker* sentencing, to ensure that the Guidelines continue to “embody the § 3553(a) considerations, both in principle and in practice,” *Rita*, 551 U.S. at 350. This Court, in *Rita*, emphasized the crucial function that a correct Guidelines application continues to serve as the “wholesale” sentencing calculation with which the “retail” sentence in a particular case is compared for purposes of appellate review. 551 U.S. at 348. Using an “assumed error” approach that diminishes the importance of the correct “wholesale” price, and in fact, fosters disparate and skewed wholesale prices, will not ensure “national consistency.” Rather, it enshrines an appellate review system that fosters inconsistency.

By minimizing the importance of a correct Guidelines calculation at sentencing and on appellate review, indiscriminate application of harmless error review contravenes the important purpose which Congress intended for the

Sentencing Commission and the Guidelines. *Booker*, 543 U.S. at 263-64. An approach that permits both district and appellate courts to avoid addressing and correctly determining Guidelines applications will hinder the Commission from “modifying its Guidelines in light of what it learns” from studying “appellate court decision-making,” in order to encourage “better sentencing practices” and “promote uniformity in the sentencing process.” *Id.* at 263.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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