NO. _____

# In The
# Supreme Court of the United States

CHRISTOPHER JASON HENRY,
*Petitioner,*
v.

UNITED STATES,
*Respondent.*

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

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

I. In the opinion below, a divided panel of the Eleventh Circuit held that the sentencing adjustment in U.S.S.G. § 5G1.3(b) is completely advisory, even when its requirements are met. Does this conclusion misunderstand which aspects of the Guidelines this Court rendered advisory in *United States v. Booker*, 543 U.S. 220 (2005)?

II. Can the sentencing court's statement—that it would impose the same sentence irrespective of any guideline error—absolve the appellate court of its responsibility to ensure that the district court committed no significant procedural error in its calculation of the Guidelines? Can the Eleventh Circuit's harmless error determination be reconciled with this Court's precedent in *Molina-Martinez v. United States*, 136 S. Ct. 1338 (2016), and *Rosales-Mireles v. United States*, 138 S. Ct. 1897 (2018)?

## LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

## RELATED CASES

- *United States v. Christopher Jason Henry,* No. 17-cr-508, U.S. District Court for the Middle District of Alabama. Judgment entered on December 10, 2018.
- *United States v. Christopher Jason Henry*, Appeal No. 18-15251, U.S. Court of Appeals for the Eleventh Circuit. Judgment initially entered on August 7, 2020. Rehearing granted and new opinion entered on Jun 21, 2021. Rehearing denied on August 17, 2021.

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## PETITION FOR A WRIT OF CERTIORARI

Mr. Christopher Jason Henry respectfully requests that this Court grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

## OPINIONS BELOW

The Eleventh Circuit issued an initial, published opinion on August 7, 2020. *United States v. Henry*, 968 F.3d 1276 (11th Cir. 2020), *vacated and superseded by* 1 F.4th 1315. The opinion is included in Petitioner's Appendix. Pet. App. 1a.

Subsequently, the Eleventh Circuit granted the government's motion for panel rehearing, vacated its prior decision, and issued a new, published opinion on June 21, 2021. *United States v. Henry*, 1 F.4th 1315 (11th Cir. 2021). The opinion is included in Petitioner's Appendix. Pet. App. 1b.

## JURISDICTION

The Eleventh Circuit issued its opinion on rehearing on June 21, 2021. *See* Pet. App. 1b. The Eleventh Circuit denied Mr. Henry's petition for panel rehearing and rehearing en banc on August 17, 2021, rendering the petition for writ of certiorari due on or before November 15, 2021. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## RELEVANT STATUTORY PROVISIONS

Federal Rule of Criminal Procedure 52 provides:

> **(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.

## STATEMENT OF THE CASE

The presentence investigation report ("PSI") described the offense conduct as follows: in November 2016, state law enforcement officers in Opp, Alabama received a report that a local shop had been burglarized, and numerous items stolen. (PSI ¶¶ 4-7). There were eight firearms among the missing items. Law enforcement officers interviewed Mr. Henry, and Mr. Henry forthrightly acknowledged his involvement in the shop burglary. One of the missing firearms was found in Mr. Henry's residence. (*Id.*). Mr. Henry pled guilty in state court to third degree burglary as a result of these actions. (*Id.* ¶¶ 7, 35). He received a 20-year sentence on February 17, 2017. (*Id.* ¶ 35).

The current federal prosecution commenced in November 2017, when a federal grand jury returned an indictment against Mr. Henry, charging him with a single count of possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1). (Doc. 1). Mr. Henry entered federal custody in January 2018, pursuant to a writ of habeas corpus ad prosequendum. (Docs. 5, 6). Shortly thereafter, in July 2018, he pled guilty to the indictment. (Docs. 23, 29).

Thus, the conduct underlying the instant federal case occurred more than five years ago, on November 14, 2016. (Doc. 1 at 1); (PSI ¶ 7). Mr. Henry was arrested by state authorities on that date, and then prosecuted in both

state and federal court for the same course of conduct. (PSI ¶ 35). The state court was first to initiate a prosecution and sustain a conviction, and it sentenced Mr. Henry to 20 years' imprisonment. (*Id.*). Thus, at the time of Mr. Henry's federal sentencing hearing, he was already serving the 20-year sentence for the related burglary.

In calculating the guideline range for the instant federal offense, the PSI calculated a base offense level of 20, as a result of § 2K2.1(a)(4) and Mr. Henry's prior conviction for a crime of violence. (*Id.* ¶¶ 13-14). The PSI then applied three enhancements—and ten offense levels—under §§ § 2K2.1(b)(1)(B), (b)(4)(A), and (b)(6)(B), because Mr. Henry stole eight firearms during the shop burglary. (PSI ¶¶ 15-17). The PSI credited Mr. Henry with a reduction for acceptance of responsibility under § 3E1.1, resulting in a total offense level of 27. (*Id.* ¶¶ 23-25). Mr. Henry received 14 criminal history points, corresponding to a criminal history category of VI. (*Id.* ¶ 38). Based on a total offense level of 27 and a criminal history category of VI, the resulting guideline range was 130-162 months. (*Id.* ¶ 70). However, the guideline range was reduced to 120 months by § 5G1.1(a) and the 10-year statutory maximum penalty applicable to Mr. Henry's § 922(g) offense.

Mr. Henry filed a sentencing memorandum, requesting a downward adjustment under U.S.S.G. § 5G1.3(b) to account for the 24 months he had already served in state custody for the same conduct underlying the instant offense. (Doc. 36 at 9-10). Mr. Henry pointed out that he had been in custody

for the instant offense and the related state court burglary since November 14, 2016. However, because he was initially arrested by state authorities, he was in the primary jurisdiction of the state, and borrowed to the federal government by writ for its prosecution of the instant § 922(g) offense. As a result, none of the time Mr. Henry had spent in custody since his arrest would be credited toward his federal sentence by the BOP. Because the 20-year sentence imposed by the state was still undischarged, § 5G1.3(b) *required* the district court to adjust Mr. Henry's federal sentence to account for the time served on relevant conduct. (*Id.*).

At Mr. Henry's sentencing hearing in November 2018, neither party articulated any objections to the PSI, so the district court adopted the factual findings and guideline calculations contained therein. (Doc. 39 at 2-3). As a result, the court noted that the 130-162 month guideline range was restricted to 120 months by the statutory maximum penalty. (*Id.* at 3).

Mr. Henry reiterated his request for a downward adjustment pursuant to § 5G1.3(b), and renewed his request for a downward variance based on the 18 U.S.C. § 3553(a) factors. (*Id.* at 5-10). The government agreed that Mr. Henry was entitled to downward adjustment under § 5G1.3(b); however, it argued that the court should ignore the statutory maximum penalty, and apply the 24-month reduction to the hypothetical 130-162 month range that would have resulted, had the guideline range not been restricted to 120 months by the statutory maximum. (*Id.* at 13).

The district court addressed the § 5G1.3(b) adjustment, but stated, with no accompanying explanation, that it would "give you a concurrent term because it is relevant conduct, but I can't go where your lawyer wants me to go because of all these burglaries." (*Id.* at 23).

The district court sentenced Mr. Henry to 108 months' imprisonment, to be served concurrently with the related state court burglary convictions. (*Id.* at 24-25). The court recited that it had considered the Guidelines, and deemed its 108-month sentence reasonable considering a nonexhaustive list of the 18 U.S.C. § 3553(a) factors. Notably, the district court explained to Mr. Henry that it had selected a sentence of 108 months, concurrent, because "*in other words, every day that you're serving and have served counts against your federal time*." (*Id.*) (emphasis added).

Mr. Henry asked the court to clarify whether its 108-month sentence incorporated the downward adjustment under § 5G1.3(b). The court stated that it had declined to apply the adjustment:

> No. I'm giving the sentence under all the circumstances. To the extent that I didn't give him credit for the relevant conduct from the 120 down, that would be an upward variance. But I am also giving him credit for a concurrent sentence, which I don't give many of. So 108 is my judgment of a fair sentence under all the circumstances in this case.

(*Id.* at 28). Mr. Henry objected to the sentence as procedurally and substantively unreasonable.

Mr. Henry appealed. Initially, an undivided, three-judge panel of the Eleventh Circuit agreed with Mr. Henry, vacated his sentence, and remanded

with instructions to apply the § 5G1.3(b) adjustment if in fact its requirements were met. *United States v. Henry*, 968 F.3d 1276, 1285 (11th Cir. 2020), *vacated by* 1 F. 4th 1315. The panel explained:

> [S]entence adjustments under section 5G1.3(b)(1) remain mandatory after *Booker*. An adjustment for time served reduces a defendant's sentence instead of enhancing it, so mandatory application of the guideline does not violate the Sixth Amendment. *See Booker*, 543 U.S. at 244, 125 S.Ct. 738. And because this guideline has no impact on the guideline range, mandatory application of the guideline does not violate the remedial holding of *Booker*. Even when this guideline applies, the district court, consistent with *Booker*, remains free to select a sentence above or below the applicable guideline range. But after the district court has selected the appropriate sentence—whether above, below, or within the guideline range—it must adjust that sentence for time served on an undischarged term of imprisonment if the requirements of section 5G1.3(b)(1) are satisfied.

*Id.* at 1286.

Subsequently, a divided panel of the Eleventh Circuit vacated its prior decision, and issued a new opinion affirming Mr. Henry's sentence. *United States v. Henry*, 1 F.4th 1315, 1328 (11th Cir. 2021). In this opinion, the majority explained that it did not matter "whether § 5G1.3(b) affects the kind of sentence or the guideline range; *Booker* told us that all guidelines are advisory." *Id.* at 1320. Moreover, according to the majority, any error committed by the district court was harmless, "because the district court considered the proposed applications of § 5G1.3(b)(1) urged by both the government and Henry and stated that it would have imposed the same sentence even if Henry's proposed approach applied." *Id.*

The Chief Judge of the Eleventh Circuit wrote separately, dissenting, and making clear that he would have held as follows: (1) the Eleventh Circuit's binding precedent already established that § 5G1.3(b) is mandatory; (2) even without that precedent, § 5G1.3(b) is mandatory under *Booker* because it dictates the kind of sentence available, rather than the calculation of the guideline range; and (3) the district court's error was not harmless, because the court's statement that it would have given Mr. Henry the same sentence merely underscored that it misunderstood how § 5G1.3(b) works. *Henry,* 1 F.4th at 1328-37 (W. Pryor, C.J., dissenting).

Mr. Henry filed a petition for rehearing en banc and rehearing en banc, which the Eleventh Circuit denied on August 17, 2021.

This petition for a writ of certiorari follows.

## REASONS FOR GRANTING THE WRIT

### I. The Eleventh Circuit's decision that U.S.S.G § 5G1.3(b) is completely advisory is either contrary to, or misapprehends a crucial aspect of, this Court's precedent in *United States v. Booker*, 543 U.S. 220 (2005).

As noted previously, the Eleventh Circuit determined in the opinion below that "whether § 5G1.3(b) affects the kind of sentence or the guideline range; *Booker* told us that all guidelines are advisory." *Henry*, 1 F.4th at 1320. This conclusion "misunderstands which aspects of the Guidelines *Booker* held advisory." *Henry*, 968 F.3d at 1281, *vacated by* 1 F.4th 1315.

In *Booker*, the respondent was convicted by a jury of an offense carrying a 10-year minimum and a statutory maximum of life. *Booker*, 543 U.S. at 227.

At sentencing, the district court made additional factual findings that, under the Sentencing Guidelines, increased the *mandatory sentencing range* to 360 months to life. *Id.* Accordingly, the question presented to this Court in *Booker* was "[w]hether the Sixth Amendment is violated by the imposition of an enhanced sentence under the United States Sentencing Guidelines based on the sentencing judge's determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant." *Id.* at 229 n.1. This Court answered this question affirmatively, and held that this practice violated the Sixth Amendment. *Id.* at 229, 237, 243-44.

However, rather than invalidating the entire Sentencing Reform Act, this Court elected to remedy the constitutional infirmity by severing and excising two specific statutory provisions: "the provision that requires sentencing courts to impose a sentence within the applicable Guidelines range (in the absence of circumstances that justify a departure), *see* 18 U.S.C. § 3553(b)(1), and the provision that sets forth standards of review on appeal, including *de novo* review of departures from the applicable Guidelines range, *see* § 3742(e)." *Id.* at 259. The Court emphasized that, with these two sections excised, the remainder of the Sentencing Reform Act satisfied constitutional requirements and was, by and large, "perfectly valid." *Id.* at 258-59.

As the dissenting Chief Judge of the Eleventh Circuit noted, the takeaway from *Booker* is clear: "provisions in the Guidelines that neither enhance a defendant's sentence based on judicial factfinding nor mandate the

imposition of a sentence within the guideline range are binding on sentencing courts, so long as they do not conflict with a federal statute or the Constitution." *Henry*, 1 F.4th at 1331. Put differently, the pre-*Booker* sentencing scheme remains intact with the exception of the two unconstitutional and now-excised provisions. Section 3553(b)(1)—which directed that "the court *shall* impose a sentence of the kind, and *within the range*, referred to in subsection (a)(4)"—did not survive Sixth Amendment scrutiny because it required courts to increase the defendant's mandatory sentencing range based on facts that were never presented to a jury. *Booker*, 543 U.S. at 232-37. Thus, if § 5G1.3(b) does not contribute *to the guideline range*, then it was not affected by *Booker* and it remains, by its terms, mandatory when its conditions are met.

Section 5G1.3(b)(1) is a mandatory adjustment governing the imposition of a sentence, not a provision that contributes to the defendant's guideline range. From a purely textual standpoint, the title of § 5G1.3 makes clear from the outset that the provision applies to the *imposition of a sentence*, not the calculation of the guideline rage. U.S.S.G. § 5G1.3 ("Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment"). Likewise, in contrast to the vast majority of other guideline provisions, the operative language in § 5G1.3(b)(1) instructs the district court to "adjust the sentence," not reduce or enhance any metric affecting the guideline calculation.

*Id.* § 5G1.3(b)(1). The commentary to § 5G1.3 leaves room for no alternative interpretation:

> The defendant is convicted of a federal offense charging the sale of 90 grams of cocaine. Under § 1B1.3, the defendant is held accountable for the sale of an additional 25 grams of cocaine, an offense for which the defendant has been convicted and sentenced in state court. The defendant received a nine-month sentence of imprisonment for the state offense and has served six months on that sentence at the time of sentencing on the instant federal offense. The guideline range applicable to the defendant is 12-18 months (Chapter Two offense level of level 16 for sale of 115 grams of cocaine; 3 level reduction for acceptance of responsibility; final offense level of level 13; Criminal History Category I). The court determines that a sentence of 13 months provides the appropriate total punishment. Because the defendant has already served six months on the related state charge as of the date of sentencing on the instant federal offense, a sentence of seven months, imposed to run concurrently with the three months remaining on the defendant's state sentence, achieves this result.

U.S.S.G. § 5G1.3(b), cmt. n.2(D); *see also United States v. Descally*, 254 F.3d 1328, 1333 (11th Cir. 2001). As the example illustrates, "a district court must first determine the total appropriate punishment—up to the statutory maximum—and then adjust the sentence it imposes to account for time already served on the other sentences." *Henry*, 968 F.3d at 1284.

From a structural perspective, it is significant that § 5G1.3(b) appears in Part G of Chapter 5. The application instructions to the Guidelines provide that the district court "shall determine the kinds of sentence and the guideline range" by proceeding sequentially through the Guidelines Manual, beginning with chapter one and concluding with Part G of Chapter 5. U.S.S.G. § 1B1.1(a)(8). Steps one through seven of this process—contained in

§ 1B1.1(a)(1)-(a)(7)—instruct the district court on how to calculate the *guideline range.* However, this process is complete at step seven, and step eight instructs the district court to "determine from Parts B through G of Chapter Five *the sentencing requirements* and options related to probation, imprisonment, supervision conditions, fines, and restitution." U.S.S.G. § 1B1.1(a)(8) (emphasis added). Thus, section 5G1.3(b) is one of the mandatory *sentencing requirements* that the court must address when it imposes its sentence, not when it calculates the guideline range.

Since § 5G1.3(b)(1) does not contribute *to the guideline range*, it was not affected by *Booker* and it remains mandatory when its conditions are met. Unlike the provisions at issue in *Booker*, § 5G1.3(b)(1) does not enhance a defendant's sentence based on judicial factfinding, nor does it require the imposition of a sentence within a mandatory sentencing range. On the contrary, § 5G1.3(b) operates as a significant safeguard built into the Sentencing Guidelines in order to *protect* defendants against having the length of their sentences multiplied by duplicative consideration of the same criminal conduct. *Witte v. United States*, 515 U.S. 389, 405 (1995). Although *Booker* invalidated 18 U.S.C. § 3553(b)(1) and § 3742(e), it left intact § 3742(f)(1), "which requires federal courts to correctly apply the Guidelines in all other respects." *Henry*, 1 F.4th at 1332.

Accordingly, the opinion below incorrectly interpreted and misapplied *Booker,* and created a direct conflict with this Court's precedent. This issue is

one of exceptional importance, as it implicates the foundational structure of all federal sentencing practice.[1]

## II. The Eleventh Circuit's conclusion is inconsistent with *Molina-Martinez v. United States*, 136 S. Ct. 1338 (2016), and harmless error review of the procedural reasonableness of a sentence.

The majority opinion also concluded that any error committed by the district court was harmless, "because the district court considered the proposed applications of § 5G1.3(b)(1) urged by both the government and Henry and stated that it would have imposed the same sentence even if Henry's proposed approach applied." *Henry*, 1 F.4th at 1320. This conclusion overlooks relevant facts and arrives at a conclusion that is either contrary to, or misapprehends a crucial aspect of, this Court's precedent addressing harmless error review of the procedural reasonableness of a sentence.

This Court has recently decided two cases dealing with the interpretation of Rule 52 and the scope of appellate review of an error in the calculation of the Guidelines. In the first of these cases, *Molina-Martinez*, the sentencing court miscalculated the Guidelines, and sentenced the defendant to the bottom of the erroneous guideline range. The defendant argued—for the first time on appeal—that by incorrectly calculating the Guidelines, the district

[1] Moreover, given the federal government's determination to federally prosecute those previously convicted in state court for the same acts, whether the protections provided by § 5G1.3(b) remain mandatory has implications for potentially hundreds of defendants per year. *See, e.g., Gamble v. United States*, 139 S. Ct. 1960, 1995 (2019) (Ginsburg, J., dissenting) (citing government's "estimate[] that it authorizes only 'about a hundred' *Petite* prosecutions per year," but that it could be a "'few hundred'" per year).

committed an error that was plain, that affected his substantial rights, and that impugned the fairness, integrity, and public reputation of the judicial proceedings. The Fifth Circuit disagreed, concluding that the error did not affect the defendant's substantial rights because his ultimate sentence was within the correctly calculated guideline range. The Fifth Circuit reasoned that, when a correct sentencing range overlaps with an incorrect range, the appellant cannot demonstrate a reasonable probability of a different result unless he can put forth additional evidence in the record showing that the Guidelines had an effect on the district court's selection of its sentence.

Reversing, this Court explained that, "[t]he Guidelines inform and instruct the district court's determination of an appropriate sentence." *Molina-Martinez*, 136 S.Ct. at 1346. Accordingly, in the usual case, "the systemic function of the selected Guidelines range will affect the sentence. This fact is essential to the application of Rule 52(b) to a Guidelines error. From the centrality of the Guidelines in the sentencing process it must follow that, when a defendant shows that the district court used an incorrect range, he should not be barred from relief on appeal simply because there is no other evidence that the sentencing outcome would have been different had the correct range been used." *Id.*

This Court emphasized that its decision was intended to preclude appellate courts reviewing sentencing errors from applying a categorical rule requiring additional evidence under similar circumstances. *Id.* at 1348.

Rejection of this categorical rule "means only that the defendant can rely on the application of an incorrect Guidelines range to show an effect on his substantial rights." *Id.* Notably, in distinguishing between harmless error under Rule 52(a) and plain error under Rule 52(b), the court was careful to note the following: "Although Rules 52(a) and (b) both require an inquiry into whether the complained-of error was prejudicial there is one important difference between the subparts—under (b), but not (a), it is the defendant rather than the government who bears the burden of persuasion with respect to prejudice." *Id.* at 1348 (internal quotations omitted).

In the second of the above-referenced cases, *Rosales-Mireles*, this Court once again reversed the Fifth Circuit for its erroneous interpretation of Rule 52 in the context of an unpreserved Guidelines error. Like in *Molina-Martinez*, the sentencing court incorrectly calculated the Guidelines, and then sentenced the defendant within the erroneously calculated guideline range. *Rosales-Mireles*, 138 S.Ct. at 1905. The defendant did not object in the district court, but argued on appeal that the district court committed plain error by miscalculating his guideline range. *Id.* The Fifth Circuit agreed that the sentencing court committed plain error affecting the defendant's substantial rights, but nevertheless declined to remand based on its determination that the error did not affect the fairness, integrity, or public reputation of the judicial proceedings. *Id.* Applying a heightened Rule 52(b) standard, the Fifth Circuit reasoned that neither the error nor the resulting sentence—which was

within the correctly calculated guideline range—was so egregious as to "shock the conscience of the common man." *Id.* at 1905-06.

Reversing, this Court explained that "an error resulting in a higher range than the Guidelines provide usually establishes a reasonable probability that a defendant will serve a prison sentence that is more than 'necessary' to fulfill the purposes of incarceration." *Id.* at 1907. Because the possibility of additional jail time has severe consequences for the incarcerated individual, it warrants serious consideration in the appellate court's decision to correct a forfeited error under Rule 52(b). *Id.* Therefore, in the ordinary case, "the failure to correct a plain Guidelines error that affects a defendant's substantial rights will seriously affect the fairness, integrity, and public reputation of judicial proceedings." *Id.* at 1911.

As in *Molina-Martinez,* this Court emphasized the inescapable impact of the Guidelines in federal sentencing: "even in an advisory capacity, the Guidelines serve as a meaningful benchmark in the initial determination of a sentence *and through the process of appellate review*." *Id.* at 1904 (emphasis added). Unlike cases where a particular trial strategy might lead to a harsher sentence, Guidelines miscalculations result directly from judicial error. *Id.* at 1908. Therefore, ensuring the accuracy of the Guidelines determinations serves to promote certainty and fairness in sentencing, and the appellate court may abuse its discretion by failing to correct such an error under Rule 52(b). *Id.*

Notably, in reaching this conclusion, this Court specifically rejected the government's argument that the defendant could not establish the fourth prong of plain error because his sentence was within the correctly calculated guideline range. *Id.* at 1910. "A substantive reasonableness determination, however, is an entirely separate inquiry from whether an error warrants correction under plain-error review." *Id.* Thus, "[*b]efore a court of appeals can consider the substantive reasonableness of a sentence, '[i]t must first ensure that the district court committed no significant procedural error*, such as failing to calculate (or improperly calculating) the Guidelines range.'" *Id.* (quoting *Gall*, 552 U.S., at 51) (emphasis added) (first brackets added).

Even assuming, *arguendo*, that the opinion below is correct—and the district court's failure to apply the § 5G1.3(b)(1) adjustment was simply an ordinary "Guidelines error"—that error cannot be deemed harmless. An error in the district court's calculation of the Guidelines requires reversal unless it is clear from the record as a whole that the error did not affect the court's selection of the appropriate sentence. *See Molina-Martinez*, 136 S. Ct. at 1345-47. Such a determination is not possible in this case.

At Mr. Henry's sentencing hearing, the district court explained to Mr. Henry that it had selected a sentence of 108 months, concurrent, because "in other words, every day that you're serving and have served counts against your federal time." (Doc. 39 at 25). Accordingly, when the court imposed a sentence of 108 months, it believed Mr. Henry would get credit from the BOP, and,

effectively, Mr. Henry would serve 108 months, *minus* the 24 spent in state custody (or 84 months from the date of the federal sentencing). However, the district court misunderstood Mr. Henry's predicament. Mr. Henry could not get concurrent time toward his federal sentence until *after* it had been imposed, and § 3585(b) prevented the BOP from granting that credit. *See* 18 U.S.C. § 3585(b) (providing that credit for prior custody is only available if the term of imprisonment "has not been credited against another sentence"). As a result of the district court's misapprehension, Mr. Henry's 108-month sentence started running on the date the federal sentence was imposed, in November 2018.

In other words, since the court did not consider the requirements of § 5G1.3(b)(1), it did not realize that Mr. Henry would not receive credit from the BOP for the 24 months he had already served in state custody. This error cannot be deemed harmless, because it is not clear from the record that the court would have imposed the same 108-month sentence had it properly considered the requirements of § 5G1.3(b)(1), or understood that Mr. Henry would not receive credit for any of the 24 months he spent in custody prior to his federal sentencing hearing.

In reaching a contrary conclusion, the Eleventh Circuit found that it was "not necessary" to resolve whether the district court committed a significant procedural error, because the sentencing court stated that it would impose the same sentence, irrespective of any error affecting the Guidelines. *Henry,* 1

F.4th at 1326; *see also United States v. Keene*, 470 F.3d 1347, 1348 (11th Cir. 2006) ("The reason it is unnecessary for us to decide the enhancement issue is that a decision either way will not affect the outcome of this case. We know it will not because the district court told us that the enhancement made no difference to the sentence it imposed.").

Effectively, the Eleventh Circuit will not even consider whether the district court incorrectly calculated the Guidelines if the sentencing court states as a matter of course that it would impose the same sentence regardless. This practice entirely pretermits meaningful appellate review with respect to the *procedural reasonableness* of the sentence. It is therefore in conflict with this Court's precedent, as *Rosales-Mireles* unequivocally provides that the appellate court must ensure *first* that the sentencing court committed no significant procedural error, and then, second—and assuming that the sentencing court's sentencing decision is procedurally sound—that the sentence is substantively reasonable.

Moreover, the Eleventh Circuit has effectively established a categorical rule that a sentence can never be procedurally unreasonable if the district court states as a matter of course that it would impose the same sentence irrespective of the Guidelines, and that sentence is otherwise substantively reasonable. This is exactly the type of categorical rule that this Court disclaimed in *Molina-Martinez,* in consideration of the fact that, no matter

what the ultimate sentence, the correct calculation of the Guidelines is the foundational starting point for the district court's selection of its sentence.

Therefore, Mr. Henry respectfully submits that certiorari is appropriate in this case.

## CONCLUSION

For the above reasons, this Court should grant this petition for writ of *certiorari*.

Respectfully submitted,

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