No. _____

In the

Supreme Court of the United States

_____

Michael Wayne Cook,

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

_____

Kevin Joel Page
Assistant Federal Public Defender

Federal Public Defender's Office
Northern District of Texas
525 S. Griffin Street, Suite 629
Dallas, TX 75202
(214) 767-2746
Joel_page@fd.org

QUESTION PRESENTED

Whether courts of appeals evaluating the prejudicial effect of a Guideline error must accept a district court's claim that the Guidelines exerted no influence on the sentence?

PARTIES TO THE PROCEEDING

Petitioner is Michael Wayne Cook, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Michael Wayne Cook 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The district court's judgement and sentence is attached as Appendix A. The unpublished opinion of the Court of Appeals is reported at *United States v. Cook*, No. 21-10387, 2022 WL 175546 (5th Cir. January 18, 2022)(unpublished). It is reprinted in Appendix B to this Petition.

JURISDICTION

The panel opinion and judgment of the Fifth Circuit were entered on January 18, 2022. 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

The court below declined to review a substantial claim of Guideline error. *See* [Appendix B, at 2-4]; *United States v. Cook*, No. 21-10387, 2022 WL 175546, at *2-3 (5th Cir. January 18, 2022)(unpublished). Following its precedent, the Fifth Circuit accepted the district court's statement that the sentence would have been the same under different Guidelines because 18 U.S.C. §3553(a) supported the sentence. *See* [Appendix B, at 2-4]; *Cook*, 2022 WL 175546, at *2-3 (citing *United States v. Garcia Miguel*, 829 F. App'x 36, 39-40 (5th Cir. 2020) (unpublished); *United States v. Andrews*, 768 F. App'x 189, 193-94 (5th Cir. 2019) (unpublished)).

This follows Fifth Circuit precedent, under which the court of appeals will "take the district court at its clear and plain word" so long as it is "firm, plain, and clear in expressing the court's reasoning," and does "not 'beat around the bush' or equivocate" in disclaiming the Guidelines. *United States v. Castro-Alfonso*, 841 F.3d 292, 298-299 (5th Cir. 2016); *accord United States v. Reyna-Aragon*, 992 F.3d 381, 389 (5th Cir. 2021) ("the district court's "firm, plain, and clear" statement that a 60-month sentence was appropriate regardless of any ex post facto error closely resembles the statement upon which we based our harmlessness holding in *Castro-Alfonso*. Accordingly, we find that the district court was not influenced by the erroneous Guidelines calculation in imposing Reyna-Aragon's 60-month sentence.")(internal citations omitted)(citing *Castro-Alfonso*); *United States v. Hott*, 866 F.3d 618, 621 (5th Cir. 2017) ("'We take the district court at its clear and plain

word.'")(quoting *Castro-Alfonso*); *United States v. Rodriguez*, 707 Fed.Appx. 224, 229 (5th Cir. 2017)(unpublished)("we take the district court at its plain word—any error in applying the enhancement was harmless."); *United States v. Rodgers*, 855 Fed.Appx. 229, 230 (5th Cir. 2021)(unpublished)("'We take the district court at its clear and plain word.'")(quoting *Castro-Alfonso*); *see also Garcia Miguel*, 829 F. App'x at 39–40 (holding that "court's explicit reliance 'on facts independent of the Guidelines in determining that an upward variance was warranted,' demonstrated the sentence was not affected by the calculation under the Guidelines.")(quoting *United States v. Johnson*, 943 F.3d 735, 738–39 (5th Cir. 2019)).

But even very slight scrutiny of the district court's Guideline disclaimer raises enormous questions about whether the contested Guideline enhancement was genuinely irrelevant to the sentence imposed. The sentence imposed – 293 months -- is a remarkably unlikely result to achieve independent of the Guideline range. Yet it is the high end of the range the district court believed applicable: 235-293 months imprisonment. *See* (Record in the Court of Appeals, at 139).

No fact other than the Guideline plausibly explains this decidedly "unround" number: it is not the sentence of a co-defendant, chosen to avoid sentencing disparity; it is not a prior sentence of the defendant, chosen to avoid diminishing marginal deterrence or punishment for repeat offenses; it is neither a statutory minimum, nor maximum, chosen as a consequence of the court's limited sentencing authority. The explanation accepted by the court below – that it simply emerged by sheer coincide from the factors enumerated at 18 U.S.C. §3553(a), independent of

the Guidelines – is facially unlikely. We may assume with the court below that the district court's analysis of 18 U.S.C. §3553(a) shows that it would have imposed a very severe sentence under any Guidelines. We may further assume that the explanation shows that 293 months would have been a reasonable sentence, severe as it is. But it strains credulity to think that the district court simply chose this remarkably non-descript number independent of the Guideline calculations that the court believed to recommend it. Credulity breaks when one examines the sentencing practices of that particular district court,[1] which appears to offer such disclaimers as boilerplate.

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[1] *See* Initial Brief in *United States v. Wheeler*, No. 21-11182, at 20 (5th Cir. Filed March 8, 2022)(reflecting that the same district court said in case of within-Guideline sentence, "I believe the guideline calculations announced today were correct, but even if they were incorrectly calculated, I would have imposed the same sentence without regard to that range, and I would have done so for the same reasons, in light of the 3553(a) factors."); Appellee's Brief in *United States v. Gonzalez*, No. 21-10631, at 28-29 (5th Cir. Filed January 11, 2022)(government arguing as to 365 month high-end of the Guideline sentence that "proof of harmlessness is clear and unambiguous—the district court stated that, even if it was incorrect in its guidelines calculation, it 'would have imposed the same sentence without regard to that range, and [it] would have done so for the same reasons, in light of the 3553(a) factors.'"); Appellee's Brief in *United States v. Seabourne*, No. 21-11043, at 18 (arguing as to 125-month sentence at the high end of the range that the Guideline error was harmless because the district court said "'[even if the guidelines were incorrectly calculated, I would have imposed the same sentence without regard to that range, and I would have done so for the same reasons, in light of the [Section] 3553 factors. So even assuming I had sustained each of the defendant's objections . . . I would have upwardly varied to 125 months.'"); Initial Brief in *United States v. Gollihugh*, No. 21-11132, at 10 (5th Cir. Filed March 3, 2022)(quoting the same district court to say with regard to an upward variance that "I would have imposed the same sentence without regard to that range, and I would have done so for the same reasons."); Initial Brief *in United States v. Salas*, No. 21-11066 (5th Cir. Filed February 15, 2022)(stating in case involving 20-year within-Guideline sentence "[t]he court then stated that even if the guideline calculations it adopted were wrong, it would impose the same sentence based on the § 3553(a) factors and the court's determination that 'a sentence below 20 years is just

In at least four other circuits, the district court's disclaimer probably would not be taken at face value. *See United States v. Feldman*, 647 F.3d 450, 460 (2d Cir. 2011); *United States v. Zabielski*, 711 F.3d 381, 389 (3d Cir.2013); *United States v. Garcia-Jimenez*, 807 F.3d 1079, 1089 (9th Cir. 2015); *United States v. Peña-Hermosillo*, 522 F.3d 1108, 1117 (10th Cir. 2008). The attitude of the Fifth Circuit toward such Guideline disclaimers 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 encourages advisory opinions. This Court should grant certiorari.

B. Mr. Cook's life.

At the age of six, Petitioner Michael Wayne Cook gained a new stepfather. *See* (Record in the Court of Appeals, at 170). This man seems to have ruined his life, abusing Mr. Cook and everyone he loved. For six years, Mr. Cook underwent

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– would be insufficient and unreasonable.'"); Initial Brief in *United States v. Fyke*, No. 21-11284 (5th Cir. Filed April 11, 2022)(noting as to a statutory maximum sentence at the high end of the Guideline range that the same "district court explained that it 'would have imposed the same sentence' and 'would have done so for the same reasons, in light of the 3553(a) factors,' even if it had not considered the correct advisory range."); Appellee's Brief *in United States v. Santos*, 21-10381, at 29 (5th Cir. Cir. Filed October 29, 2021)(arguing that any Guideline error as to within-Guideline 192-month sentence imposed by same court would be harmless because the court said "I believe the guideline calculations announced today were correct, but to the extent they were incorrectly calculated, I inform the parties that I would have imposed the same sentence without regard to that range, and I would have done so for the same reasons, in light of the 3553(a) factors as I have explained them."); Initial Brief in *United States v. Rodriguez-Huitron*, No. 21-10082, 2021 WL 1933697, at *2 (5th Cir. Filed May 4, 2021)(noting that same district court had "disclaimed any impact of the Guidelines on the sentence imposed, but did not disclaim the impact of the statutory range" when imposing a 57 month sentence).

ongoing sexual, physical, and emotional abuse from this man, and witnessed similar abuse of his entire family. *See* (Record in the Court of Appeals, at 170). At 12, he was removed from the care of his mother, entering foster care and group homes, where he remained until he finally aged into the correctional system. *See* (Record in the Court of Appeals, at 170).

Mr. Cook doesn't seem to have recovered from any of this, yet. He sustained a juvenile adjudication for "aggravated sexual assault of a child" at 13, and two more adult convictions for the same offense at the ages of 17 and 18. *See* (Record in the Court of Appeals, at 168). Perhaps related to these experiences, and perhaps independently, Mr. Cook has suffered from serious mental illness. *See* (Record in the Court of Appeals, at 170). Between the ages of 12-18, he received treatment for bipolar disorder, and then received a schizophrenia diagnosis in adult prison. *See* (Record in the Court of Appeals, at 170).

C. The instant offense

In March of 2020, while Mr. Cook was 37 years old, he contacted a person he believed to be 15 years old on an adult dating site. *See* (Record in the Court of Appeals, at 165). He solicited the person for sex in a series of texts. *See* (Record in the Court of Appeals, at 165). When the minor turned out to be a sting operation's fictional persona, Mr. Cook was arrested. *See* (Record in the Court of Appeals, at 165). After subsequent polygraphs, he admitted sexual contact with another minor, and similar online contacts. *See* (Record in the Court of Appeals, at 165).

D. Proceedings before the sentencing hearing

Mr. Cook pleaded guilty to one count of attempting to entice a minor to engage in sexual activity, a violation of 18 U.S.C. §2242(b). *See* (Record in the Court of Appeals, at 150-157). His plea agreement did not waive appeal. *See* (Record in the Court of Appeals, at 150-157).

A Presentence Report (PSR) determined that his Guideline range should be 235-293 months imprisonment. *See* (Record in the Court of Appeals, at 175). It first determined that his offense level under Chapter 2 of the Guidelines should be 30, the sum of a base offense level of 28 under USSG §2G1.3 and a two level adjustment for the use of a computer. *See* (Record in the Court of Appeals, at 166-167).

The PSR then applied USSG §4B1.5(a), which raised his offense level to 37, owing to its conclusion that his prior adult sexual assault convictions constituted a "sex offense conviction" within the meaning of this Guideline. *See* (Record in the Court of Appeals, at 167); USSG §4B1.5(a). Probation did not attach any judicial records to substantiate the convictions, and the government introduced none at sentencing. The PSR applied a three-level reduction for acceptance of responsibility, which reduced the offense level to 34. *See* (Record in the Court of Appeals, at 167); USSG §3E1.1. It coupled that offense level with a criminal history category of V, which is the minimum permitted upon application of USSG §4B1.5(a). *See* (Record in the Court of Appeals, at 169); USSG §4B1.5(a). That produced a range of 235-293 months imprisonment. *See* (Record in the Court of Appeals, at 175); USSG Ch. 5A.

Petitioner might have been liable for a "pattern" of sexual abuse under USSG §4B1.5(b) in the absence of the enhancement he received under USSG §4B1.5(a), resulting in a five-level upward adjustment to 35, before acceptance of responsibility reduced it to 32. *See* (Record in the Court of Appeals, at 167). The criminal history category would have been IV in the absence of the §4B1.5(a) adjustment. *See* (Record in the Court of Appeals, at 169). As such, Petitioner's Guideline range without application of USSG §4B1.5(a) would have likely been 168-210 months imprisonment, the product of a final offense level of 32 and a criminal history category of IV. *See* USSG Ch. 5A. The enhancement, in other words, increased the Guideline range by 83 months, *nearly seven years*.

E. The sentencing hearing

At sentencing, the district court adopted the PSR's Guideline calculations. *See* (Record in the Court of Appeals, at 139). After hearing from both parties, it imposed a sentence at the high end of the range it believed to be applicable: 293 months imprisonment. *See* (Record in the Court of Appeals, at 146). It accepted that Petitioner had suffered extensive child abuse, but said that at some point "the law needs to step in a draw the line." *See* (Record in the Court of Appeals, at 145-146). It discussed the seriousness of the instant offense, and the defendant's other criminal history and conduct, before stating, both orally and in the Statement of Reasons, that the sentence would have been the same under Guidelines that were different in an unspecified way. *See* (Record in the Court of Appeals, at 143-146, 186). It did not say what led it to come up with the number of 293 months, other than the high end

of the range it believed applicable. *See* (Record in the Court of Appeals, at 143-146, 186). The defendant is also under a lifetime term of supervised release, including computer monitoring and a ban on unsupervised contact with children. *See* (Record in the Court of Appeals, at 109-110).

E. Appellate Proceedings

On appeal, Petitioner argued that binding precedent showed a plain Guideline error of nearly seven years at the high end. *See* Appellant's Brief in *United States v. Cook*, 21-10387, 2021 WL 3140323 (5th Cir. Filed July 21, 2021)("Appellant's Brief"). Specifically, he pointed to the Fifth Circuit's published decision in *United States v. Wikkerink*, 841 F.3d 327 (5th Cir. 2016), which makes clear that Petitioner's Texas convictions for "Aggravated Sexual Assault of a Child" could not trigger an enhancement under USSG §4B1.5(a). *See* Appellant's Brief, at **8-12. *Wikkerink* precludes the use of offenses as USSG §4B1.5(a) predicates, if they can be commutted by non-forcible contact with a victim older than 12, who is not more than 4 years younger than the defendant. *See Wikkerink*, 841 F.3d at 335. Texas Penal Code §22.021(a)(2)(B), which seems to have given rise to Petitioner's adult convictions, is such a statute.

Because the error was clear or obvious from binding precedent, and exerted a massive influence on the Guideline range, whose high end happened to match the sentence imposed, Petitioner argued that he had satisfied all four prongs of plain error review, meriting remand. *See* (Appellant's Brief, at **12-25); *United States v. Olano*, 507 U.S. 725, 732 (1993)(requiring appealing party to show: 1) error, 2) that

is clear or obvious, 3) that affects the party's substantial rights, and 4) that affects the fairness, integrity, or public reputation of judicial proceedings).

In response, the government filed a motion for summary affirmance, relying on the district court's Guideline disclaimer to show that the sentence would have been the same irrespective of the Guideline error. *See* United States' Motion for Summary Affirmance, or, Alternatively, for an Extension of Time in *United States v. Cook*, 21-10387 (5th Cir. Filed October 4, 2021)("Motion for Summary Affirmance"). In support of the remarkable claim that the district court would have imposed a sentence of exactly 293 months irrespective of a Guideline range bearing this number as its maximum, it simply pointed to the district court's statement to this effect, and to its analysis of 18 U.S.C. §3553(a). *See* Motion for Summary Affirmance at 7-12. It did not show anything in the record that tended to translate the §3553(a) factors named by the district court into 293 months particularly. *See id.*

Though ostensibly denying the government's motion for summary affirmance, the court of appeals affirmed without briefing. *See Cook*, 2022 WL 175546, at **1-2. In doing so, it did not decide whether the Guidelines had been correctly determined. *See id*. at *1. Instead, it affirmed on the ground that the district court's Guideline disclaimer precluded any showing of prejudice. *See id.* at **2-3. It said:

> Cook's challenge to his sentence is fatally flawed because he cannot show an effect on his substantial rights. Generally, where "the record is silent as to what the district court might have done had it considered the correct Guidelines range, the court's reliance on an incorrect range in most instances will suffice to show an effect on the defendant's substantial rights." However, in some cases, "the record ... may show, for example, that the district court thought the sentence it chose was appropriate irrespective of the Guidelines range."

> Here, the record is far from "silent as to what the district court might have done had it considered the correct Guidelines range." The district court offered "a detailed explanation of the reasons the [293-month] sentence was appropriate" under the § 3553(a) factors. The court stated that it would impose the same sentence irrespective of the guidelines range because the "level of dangerousness" and Cook's "repeat targeting of children is just incredibly dangerous and incredibly serious."
>
> The court noted that it had even considered an upward variance, specifically identifying aggravating factors such as the incredibly serious nature of the instant offense; Cook's history of sexual assaults against minors; his history of sex offense convictions, including aggravated sexual assault and failure to comply with sex offender requirements; the failure of more lenient prior sentences to deter his conduct; and Cook's admissions to having previously sought out and groomed minors for sexual activity online as justifications for his sentence. In short, the district court adequately explained in detail its determination that Cook's 293-month sentence was justified under the 18 U.S.C. § 3553(a) factors irrespective of any Guidelines error.

Id. (internal citations omitted)(quoting and citing *Molina-Martinez v. United States*, 578 U.S. 189, 200-01 (2016), and citing *United States v. Sanchez-Hernandez*, 931 F.3d 408, 411 (5th Cir. 2019)).

Notably, then, the court below simply accepted the district court's claim that the sentence would have been the same irrespective of the Guideline. It considered only the clarity of the district court's statement, and whether it plausibly decided that the sentence would be justified under 18 U.S.C. §3553(a). It did not consider the inherent unlikelihood of the district court choosing a sentence of 293 months absent the Guidelines, nor the extraordinary coincidence necessary for the court's disclaimer to be true.

REASONS FOR GRANTING THE PETITION

The courts are divided as to the standards for evaluating prejudice when the district court says that it would have imposed the same sentence irrespective of the Guidelines. The rule applied below undermines the function of the Guidelines in federal sentencing and encourages improper advisory opinions.

Although advisory only, *see United States v. Booker*, 543 U.S. 220 (2005), 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 presumes that Guideline error affects the sentence imposed. *See Molina-Martinez v. United States*, __U.S.__, 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," *Gall*, 552 U.S. at 49, in federal sentencing. 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 Guideline Manual, *see Peugh v. United States*, 569 U.S. 530 (2013), and in the sentencing court's duty to explain out-of-range sentences, *see Rita*, 551 U.S. at 357. The practice of the court below in evaluating the prejudicial

effect of Guideline error undermines their special role in federal sentencing. Moreover, it conflicts with the rule of several other courts of appeals.

A. The circuits are divided.

As the opinion illustrates, the court below will permit a district court to avoid review of Guideline error simply by offering a defensible explanation for the sentence under 18 U.S.C. 3553(a), even if the facts make the sentence chosen exceedingly unlikely but for the erroneous Guideline calculation. Thus, it accepted the district court's claim that it would have imposed a sentence of 293-months imprisonment even if this were not the top of the Guideline range, even though nothing else in the record suggested this otherwise puzzling number. *See* [Appendix B, at 2-4]; *United States v. Cook*, No. 21-10387, 2022 WL 175546, at *2-3 (5th Cir. January 18, 2022)(unpublished).

This attitude toward Guideline disclaimers is consistent with Fifth Circuit precedent. In recent years, that court has repeatedly stated its willingness to "take the district court at its clear and plain word" so long as it is "firm, plain, and clear " in stating that the sentence would have been the same under different Guidelines. *United States v. Castro-Alfonso*, 841 F.3d 292, 298-299 (5th Cir. 2016); *accord United States v. Reyna-Aragon*, 992 F.3d 381, 389 (5th Cir. 2021); *United States v. Hott*, 866 F.3d 618, 621 (5th Cir. 2017); *United States v. Rodriguez*, 707 Fed.Appx. 224, 229 (5th Cir. 2017)(unpublished); *United States v. Rodgers*, 855 Fed.Appx. 229, 230 (5th Cir. 2021)(unpublished. In the Fifth Circuit, in other words, it is the clarity of the district court's words that matter, not their plausibility.

To be sure, all other circuits evaluating harm will consider a district court's statements regarding the likely sentence under other Guideline ranges. *See United States v. Marsh*, 561 F.3d 81, 86 (1st Cir. 2009); *United States v. Jass*, 569 F.3d 47 (2d Cir.2009); *United States v. Zabielski*, 711 F.3d 381, 389 (3d Cir.2013); *United States v. Hargrove*, 701 F.3d 156, 161–63 (4th Cir. 2012); *United States v. Abbas*, 560 F.3d 660, 667 (7th Cir.2009); *United States v. Waller*, 689 F.3d 947, 958 (8th Cir.2012); *United States v. Keene,* 470 F.3d 1347, 1349 (11th Cir.2006).

And at least two other courts follow forgiving rules akin to the Fifth Circuit's. The Fourth Circuit will deem Guideline error harmless if the district court says it would have imposed the same sentence, provided the variance is substantively reasonable. *See United States v. Prater*, 801 Fed. Appx 127, 128 (4th Cir. 2020)(unpublished); *United States v. Mills*, 917 F.3d 324, 330 (4th Cir. 2019); *United States v. Gomez-Jimenez*, 750 F.3d 370, 382-83 (4th Cir. 2014); *United States v. Hargrove*, 701 F.3d 156, 161–63 (4th Cir. 2012). Similarly, the First Circuit will affirm erroneous sentences under an alternative rationale even if the justification is cursory. *See United States v. Marsh*, 561 F.3d 81, 86 (1st Cir. 2009).

But not all circuits will take such statements at face value. Rather, the Third Circuit has repeatedly explained that hypothetical sentences should not be mere "afterthoughts" designed to protect the sentence from appellate review. *See United States v. Smalley*, 517 F.3d 208, 213–16 (3d Cir. 2008); *Zabielski*, 711 F.3d at 389. It has explained:

> [t]hough probative of harmless error, [a statement that the court would have imposed the same sentence] will not always suffice to show that

> an error in calculating the Guidelines range is harmless; indeed, a district court still must explain its reasons for imposing the sentence under either Guidelines range.

Zabielski, 711 F.3d at 389. This follows from the Circuit's recognition that harmless Guideline error is "the rare case." *Id*. at 387 (citing *United States v. Langford,* 516 F.3d 205, 218 (3rd Cir. 2008)(citing *United States v. Flores,* 454 F.3d 149, 162 (3rd Cir. 2006))). It also recognizes that affirmance of a perfunctory Guideline disclaimer may deprive the defendant of "any meaningful review of the reasonableness of the sentence." *Smalley*, 517 F.3d at 215.

For these reasons, the Third Circuit has vacated and remanded in spite of a district court's Guideline disclaimer where "the alternative sentence is a bare statement devoid of a justification for deviating" above the range. *Smalley*, 517 F.3d at 215.

Likewise, the Tenth Circuit, requires a "cogent explanation" for any claim that very different Guidelines will produce the same sentence, explaining:

> …it is hard for us to imagine a case where it would be procedurally reasonable for a district court to announce that the same sentence would apply even if correct guidelines calculations are so substantially different, without cogent explanation.

United States v. Peña-Hermosillo, 522 F.3d 1108, 1117 (10th Cir. 2008). In the absence of a thorough explanation for a Guideline disclaimer, that court is "inclined to suspect that the district court did not genuinely consider the correct guidelines calculation in reacting the alternative rationale." *Peña-Hermosillo*, 522 F.3d at 1117. Thus, the Tenth Circuit reversed a Guideline error in spite of a district court's

Guideline disclaimer where its "cursory" reasoning made only "vague" reference to the 18 U.S.C. §3553(a) factors. *Id.*

The Second Circuit has affirmatively discouraged district courts from trying to determine the sentence that would have been imposed under hypothetical Guideline ranges. It warned that:

> a district court **generally should not try to answer the hypothetical question** of whether or not it definitely would impose the same sentence on remand if this Court found particular enhancements erroneous.

United States v. Feldman, 647 F.3d 450, 460 (2d Cir. 2011)(emphasis added). That court expressed concern that the purposes of appellate review would be defeated if all criminal sentences could "be exempted from procedural review with the use of a simple incantation: 'I would impose the same sentence regardless of any errors calculating the applicable Guidelines range.'" *Feldman*, 647 F.3d at 460.

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

Finally, the Seventh and Eighth Circuits have both suggested that not all Guideline 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 standards for assessing prejudice in cases of Guideline error cannot be reconciled with those of several other courts of appeals. The Fifth Circuit accepts Guideline disclaimers at face value, sometimes even when, as here, they are not especially plausible. 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.

B. 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 Second, Third, Ninth, and Tenth Circuits better comport with the purposes of the Sentencing Reform Act, the Guidelines, 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 Guideline 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 First, Fourth and Fifth Circuits jeopardizes this important function for appellate review, because it provides a way to avoid meaningful scrutiny of Guideline 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 Guideline 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 Guideline 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).

Finally, the practice of pronouncing judgment as to hypothetical circumstances raises serious concerns about advisory opinions. "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 Guideline 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 First, Fourth, and Fifth Circuits seriously undermines the administration of justice, and ought to be reviewed.

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

The present case is an appropriate vehicle to address the conflict. Notably, the court below gave no suggestion that the Guidelines were correctly calculated. *See Cook*, 2022 WL 175546, at *2-3. Rather it declined to reach the question, well illustrating the tendency of the Fifth Circuit's position to reduce appellate guidance about the meaning of the Guidelines. *See id*. More importantly, this means the sole basis for the decision below is the matter that has divided the courts of appeals.

The sole vehicle problem in the case is the absence of preservation, which shifts the burden to the opponent of the sentence to show that the outcome would have been different. *See Olano*, 507 U.S. at 734. Importantly, however, this is not an especially onerous burden. The opponent of the sentence need only show a reasonable probability of a different result, defined as a showing sufficient to "undermine confidence" in the outcome. *United States v. Dominguez Benitez*, 542 U.S. 74, 83 (2004). "The reasonable-probability standard is not the same as, and should not be confused with, a requirement that a defendant prove by a preponderance of the evidence that but for error things would have been different." *Dominguez Benitez*, 542 U.S. at 83, n.9. Ordinarily, it can be met by the mathematical difference between the true and erroneous Guideline ranges, coupled with the expectation that Guidelines affect the sentence. *See Molina-Martinez*, 136 S.Ct at 1346.

And here, when the district court's disclaimer is stripped of deference, it is easily overwhelmed by the circumstantial evidence that the Guidelines influenced

the sentence. The Guideline error changed the maximum of the range by nearly *seven years*. So this is certainly not a case where a minor error played only a minor role in the determination of the range, nor one where the sentence imposed could have been achieved without a variance.

Further, the district court had not been appraised of the possible Guideline error via objection, so to accept its disclaimer would require the Court to believe that the sentence would have been the same – 293 months – *under any Guideline range at all*. This is contrary to empirical evidence about how judges tend to sentence – the Guidelines tend to matter quite a lot – and to the command that district courts treat the Guidelines as a sentencing factor under 18 U.S.C. §3553(a)(4).

The practice of the district court, moreover, strongly suggests that the district court very frequently enters such disclaimers into the record, and has standard language for doing so. *See* Note 1, *supra*. Of course, boilerplate need not necessarily be treated with skepticism. Where a district court repeatedly tells the court of appeals that it is simply following the law – considering the §3553(a) factors, treating the Guidelines as advisory, or acknowledging its power to disagree with the Guidelines on policy grounds – we may accept the claim uncritically.

But the statement made here is of a different hue. The Guidelines are not usually irrelevant to the sentence and they are not supposed to be; district courts nonetheless have a vested interest in insulating their sentences from review, which

may lead to cumbersome resentencing proceedings. In that context, boilerplate Guideline disclaimers should carry little weight.

Finally, and most importantly, the numerical choice of the sentence and its relationship to the Guidelines provide extremely compelling evidence of the influence of the Guidelines on the sentence chosen. As noted, the number 293 has no other connection to the case, and is not a round number, divisible by ten, five, or twelve. Indeed, it is a *prime number*, precisely the kind of number to which the human mind does not ordinarily gravitate. If Fifth Circuit law did not encourage the panel to simply accept a Guideline disclaimer at face value, Petitioner likely could have shown an effect on his substantial rights.

CONCLUSION

Petitioner respectfully submits that this Court should grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted this 18th day of April, 2022.

JASON D. HAWKINS
Federal Public Defender
Northern District of Texas

/s/ Kevin Joel Page
Kevin Joel Page
Assistant Federal Public Defender
Federal Public Defender's Office
525 S. Griffin Street, Suite 629
Dallas, Texas 75202
Telephone: (214) 767-2746
E-mail: joel_page@fd.org

Attorney for Petitioner