No. _____

In the

Supreme Court of the United States

_____

Michael Don Billups,

Petitioner,

v.

United States of America,

Respondent.

_____

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

_____

PETITION FOR A WRIT OF CERTIORARI

_____

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QUESTION PRESENTED

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 Don Billups, 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 Don Billups 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The district court's judgement and sentence is attached as Appendix A. The unpublished opinion of the Court of Appeals is reported at *United States v. Billups*, No. 20-11263, 2022 WL 287552 (5th Cir. January 31, 2022)(unpublished).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 31, 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 1]; *United States v. Billups*, No. 20-11263, 2022 WL 287552, at *1 (5th Cir. January 31, 2022)(unpublished). If the district court did make this error, it mistook a case in which the Guidelines recommended 188-235 months imprisonment for one in which it flatly recommended a life sentence. But because the sentencing judge made "unequivocal" statements that he would have imposed the same sentence under any Guideline range at all, the Fifth Circuit found no prejudice. *Billups*, No. 20-11263, 2022 WL 287552, at *1.

This comports with the recent precedent of the Fifth Circuit, 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 United States v. Garcia Miguel*, 829 F. App'x 36, 39–40 (5th Cir. 2020)(unpublished)(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)).

In other circuits, however, the court of appeals would not take this kind of disclaimer 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). An objective analysis – one which looks beyond the mere tone of the district court's words, which might, after all, constitute little more than a proxy for its desire to avoid Guideline review – might give reason to think this particular Guideline error mattered. For one, it was enormous, transforming a term of years into the qualitatively different

recommendation of life in prison. For another, this particular district court appears to disclaim the Guidelines in boilerplate.[1]

[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 – 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

As such, the difference between the standard of the Fifth Circuit, which focuses on the clarity of the district court's words, and more skeptical, objective tests, might well be outcome determinative here. And given a choice between those standards, this Court should reject the Fifth Circuit's. 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. District Court Proceedings

1. Plea

Petitioner Michael Don Billups pleaded guilty under 18 U.S.C. §2423(a) to one count of transporting a minor across state lines with the intent to engage in unlawful sexual activity. *See* (Record in the Court of Appeals, at 36-40). He admitted that he traveled to Alabama with a 14-year old child with the intent to violate Alabama laws against rape, sodomy, and sexual abuse. *See* (Record in the Court of Appeals, at 36-40). A plea agreement precluded other charges, but did not waive appeal. *See* (Record in the Court of Appeals, at 135-143).

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impact of the Guidelines on the sentence imposed, but did not disclaim the impact of the statutory range" when imposing a 57 month sentence). Counsel has become aware of one case in which this court did not disclaim the Guidelines: *United States v. Cox*, 6:20-CR-16 (N.D.TX June 17, 2021).

2. Presentence Report

A Presentence Report (PSR) detailed a string of sexually assaultive behavior toward the victim of the offense. *See* (Record in the Court of Appeals, at 149-150). This lasted from the time the victim was 10 years old until the offense of conviction, which occurred when the victim was 14. *See* (Record in the Court of Appeals, at 149-150). According to the PSR, the defendant committed these offenses mostly in New Mexico and Texas, where he and the victim lived. *See* (Record in the Court of Appeals, at 149-150). But the defendant also assaulted the victim three times in Alabama, during the offense of conviction. *See* (Record in the Court of Appeals, at 149-150). The PSR also accused the defendant of sexually assaulting other children. *See* (Record in the Court of Appeals, at 149-150).

Probation concluded that the Guidelines called for a life sentence, owing to a final offense level of 43 and a criminal history category of I. *See* (Record in the Court of Appeals, at 161). This stemmed in part from an eight-point offense level adjustment under USSG §2G1.3(b)(5), which applies when the victim is under 12 years of age. *See* (Record in the Court of Appeals, at 151-152). Although the victim had reached the age of 14 at the time of the offense, *see* (Record in the Court of Appeals, at 149), the defense did not object. In the absence of the adjustment, the final offense level would have been 36.[2] *See* (Record in the Court of Appeals, at 151-

[2] The final offense level was reduced from 44 to 43 because 43 is the maximum level in the Guideline sentencing table. *See* (Record in the Court of Appeals, at 152); USSG Ch. 5A. Withholding the eight-level adjustment for a victim under 12 would have brought the offense level under 43, eliminating the need to subtract an additional

152). Coupled with a criminal history category of I, this would have produced a Guideline range of 188-235 months imprisonment, not life imprisonment. *See* (Record in the Court of Appeals, at 151-152); USSG Ch. 5A.

3. The Sentencing Hearing

The district court adopted the PSR, thus concluding that the Guidelines recommended a life sentence. *See* (Record in the Court of Appeals, at 118-119). It imposed that sentence, commenting at length about the seriousness of the offense, and in particular that the abuse lasted four years. *See* (Record in the Court of Appeals, at 128) Further, the court stated with some emphasis that it would have imposed a life sentence even if the Guidelines were "one to three days imprisonment," explaining that it did not think any other sentence would be reasonable. *See* (Record in the Court of Appeals, at 130). It said:

> After considering all of the factors of sentencing, the Section 3553(a) factors, the parties' submissions, the arguments today, I have determined that a sentence of life is sufficient, but not greater than necessary. Given the facts of this case and the scope and intensity of the harm, I don't hesitate. And I do often hesitate in imposing sentence. Sentencing can be the hardest thing that a judge does. This sentence is not difficult to impose. The crime is just that serious.
>
> I inform the parties that although I believe the guideline calculations announced today were correct, I inform them 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.
>
> I am going to impose an alternative nonguideline sentence of life. So even if the guideline sentence were, you know, one to three days in prison, I would impose a life sentence, *because that's the only reasonable sentence available here* to me given the calculus that I've discussed previously.

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level. For that reason, withholding the eight-level adjustment would have reduced the final offense level only by seven levels.

(Record in the Court of Appeals, at 130)(emphasis added). The Statement of Reasons echoed this language. *See* (Record in the Court of Appeals, at 198).

C. Appellate Proceedings

On appeal, Petitioner argued the district court's Guideline calculations suffered from a massive error. Specifically, Petitioner challenged his eight-level adjustment for victimizing a child under 12. *See* (Record in the Court of Appeals, at 151-152); USSG §2G1.3(b)(5). The record was clear that the victim turned 14 before the offense. *See* (Record in the Court of Appeals, at 149). And while the Guidelines sometimes premise offense-level enhancements on conduct outside the offense of conviction, *see* USSG §1B1.3, Petitioner noted that this requires activity that meets the definition of "relevant conduct" found in USSG §1B1.3. Subsection (a)(2) of this Guideline captures activity that falls within the same "scheme" or "course of conduct" as the offense of conviction. *See* USSG §1B1.3(a)(2). But this theory of liability is available "solely with respect to offenses of a character for which §3D1.2(d) would require grouping of multiple counts." USSG §1B1.3(a)(2). And Petitioner's assaultive crimes against the victim – certainly his prior assaultive conduct toward the victim before his 12th birthday -- were plainly not "of a character for which §3D1.2(d) would require grouping of multiple counts." *See* USSG §2G1.3, comment. (n. 6); USSG §3D1.2(d); USSG §3D1.2, comment. (nn. 3, 4, 6); *United States v. Davis*, 453 F. App'x 452 (5th Cir. 2011)(unpublished); *United States v. Montijo-Maysonet*, 974 F.3d 34, 53 (1st Cir. 2020); *United States v. Weiner*, 518 F. App'x 358, 365 (6th Cir. 2013)(unpublished); *United States v. Davis*, 924 F.3d

899, 902-903 (6th Cir. 2019). There are other parts of the relevant conduct definition, but Petitioner showed that his crimes committed before the victim's 12th birthday did not arguably satisfy them. As such, Petitioner, argued, the court plainly erred in applying the eight-level adjustment.

Given the massive effect of this adjustment on the offense level, Petitioner contended that the court should find a reasonable probability of a different outcome, and remand for resentencing. Yet the Fifth Circuit declined to do so, and declined even to decide whether the Guidelines had been correctly calculated. It said:

> Given the unequivocal statements by the district court when imposing Billups's sentence, even if there was clear or obvious error as to the application of § 2G1.3(b)(5)'s enhancement, Billups is unable to sustain his burden of showing that any error affected his substantial rights. Therefore, we reject the contention that the district court plainly erred in applying § 2G1.3's adjustment.

Billups, 2022 WL 287552, at *1 (internal citations omitted)(citing *Puckett v. United States*, 556 U.S. 129, 135 (2009*), United States v. Molina-Martinez*, 136 S. Ct. 1338, 1345 (2016), and *United States v. Johnson*, 943 F.3d 735, 738 (5th Cir. 2019)).

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 below illustrates, the Fifth Circuit will permit a district court to avoid review of Guideline error if it merely states in an "unequivocal" way that it would have imposed the same sentence irrespective of the Guidelines. Thus, the court of appeals accepted the district court's claim that it would have imposed a life sentence, even if the Guidelines were but one to three days of imprisonment, because that statement was "unequivocal." *See* [Appendix B, at 1]; *United States v. Billups*, No. 20-11263, 2022 WL 287552, at *1 (5th Cir. January 31, 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 objective likelihood.

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 Circuit 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 they would have 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, inquiring into the district court's degree of emphasis. 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 and 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 to needed amendments. *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. *Billups*, 2022 WL 287552, at *1. 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, there is sufficient reason to think that the Guideline error might have been prejudicial. The difference between the range that should have applied is massive: it is the difference between life imprisonment and a range of just 188-235 months. A life sentence forecloses any hope of liberty, irrespective of good behavior, programming, or life-span. As such, it would be qualitatively different even from a very severe term of years. But in this case, the true range was far from the most severe term of

years suggested by the Guidelines. Rather, the top of the Guideline range would not even be 20 years, and the bottom of the range a little more than 15 years.

Further, as noted above, the district court's patterned statements disclaiming the influence of the Guidelines on the sentence call such statements into question, or at least raise questions about the extent to which it gives respectful consideration to the recommendations of the Sentencing Commission. That latter concern is especially acute here, where the court stated its intent to vary from a Guideline range of even a few days in jail. The district court's statement that it would have varied from two days to life imprisonment, coupled by its pattern of disclaiming the Guidelines, would have potentially exposed the sentence to a procedural reasonableness challenge had the district court been aware of the true range.

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 2d day of May, 2022.

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