No. 22-242

In the Supreme Court of the United States

CYRANO R. IRONS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly determined that an asserted error in the calculation of petitioner's advisory sentencing guidelines range was harmless, where the district court expressly stated that the sentencing factors set forth in 18 U.S.C. 3553(a) would result in the same sentence irrespective of that assertion.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is not published in the Federal Reporter but is available at 2022 WL 852853.

JURISDICTION

The judgment of the court of appeals was entered on March 23, 2022. A petition for rehearing was denied on April 26, 2022 (Pet. App. 3a). On June 21, 2022, Justice Kavanaugh extended the time within which to file a petition for a writ of certiorari to and including September 13, 2022. The petition for a writ of certiorari was filed on September 12, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Western District of Missouri, petitioner

was convicted of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2) (2018). Judgment 1. The district court sentenced him to 108 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 2a.

1. In August 2019, while petitioner was on supervised release for a prior federal conviction for possessing a firearm following a felony conviction, federal probation officers conducted a home visit at petitioner's residence. Presentence Investigation Report (PSR) ¶ 4. During the visit, officers discovered a loaded pistol in plain view on the kitchen table. *Ibid.* The pistol had an extended magazine capable of holding 22 rounds of ammunition and was loaded with 16 rounds of ammunition. PSR ¶ 5. Petitioner was arrested for again unlawfully possessing a firearm following a felony conviction and pleaded guilty to that offense. PSR ¶¶ 1, 7.

2. Applying the 2018 version of the advisory Sentencing Guidelines, the Probation Office's presentence report calculated a total offense level of 22 and a criminal history category of V, which produced an advisory range of 77 to 96 months of imprisonment. PSR ¶¶ 13-14, 30-32, 57. At the time, the statutory maximum sentence under Sections 922(g)(1) and 924(a)(2) was ten years of imprisonment. PSR ¶ 56.

a. The Probation Office applied Sentencing Guidelines § 2K2.1(a)(3),[1] which provides for a base offense level of 22 when the offense involved a semiautomatic firearm capable of accepting a large-capacity magazine and the defendant has a prior conviction for a crime of violence. PSR ¶ 14.

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[1] All references are to the 2018 Sentencing Guidelines.

The Probation Office also recommended that petitioner receive no credit for acceptance of responsibility under Sentencing Guidelines § 3E1.1, because although he had pleaded guilty to the charged offense, he had failed to withdraw from criminal conduct. PSR ¶ 12. The Probation Office explained that while petitioner was in custody awaiting sentencing, he had been "involved in a fight" with other inmates in which he "brandish[ed] a weapon." PSR ¶¶ 3, 12. In later addenda to the presentence report, the Probation Office described two additional incidents that had taken place in custody after petitioner's plea. In December 2020, petitioner refused to submit to a cell search and had a physical altercation with correctional officers; the search revealed two cellphones and two handmade weapons. Second Addendum to PSR 1. And in June 2021, petitioner had been observed in another physical altercation with fellow inmates. Third Addendum to PSR 1.

b. In calculating a total criminal history score of 11, PSR ¶ 32, the Probation Office assessed six criminal history points for petitioner's multiple 2008 Missouri convictions, PSR ¶¶ 27-28. One pair of Missouri convictions arose from a July 2008 incident. PSR ¶ 27. In the first count, petitioner was convicted of second-degree assault, in violation of Mo. Rev. Stat. § 565.060.1(2) (Supp. 2008), for "knowingly caus[ing] physical injury" to his victim "by means of a deadly weapon," PSR ¶ 27; in the second count, he was convicted of armed criminal action, in violation of Mo. Rev. Stat. § 571.015.1 (2000), for committing "the offense listed in Count 1 by, with and through, the knowing use, assistance and aid of a deadly weapon," PSR ¶ 27. Applying Sentencing Guidelines § 4A1.1, the Probation Office assessed three criminal history points for the assault count and one point for the

armed criminal action count, classifying the latter as a crime of violence. PSR ¶ 27; see Sentencing Guidelines § 4A1.1(a) and (e).

Petitioner also had a second pair of second-degree assault and armed criminal action convictions from a similar incident in August 2008; for those, the Probation Office assessed one point for the assault count and one point for the armed criminal action count, on the ground that both constituted crimes of violence. PSR ¶ 28; see Sentencing Guidelines § 4A1.1(e).

In addition, the Probation Office assessed three points for petitioner's prior federal conviction for possessing a firearm following a felony conviction, PSR ¶ 29; see Sentencing Guidelines § 4A1.1(a), and added two points under Section 4A1.1(d) because petitioner had been on supervised release at the time he committed the offense for which he was being sentenced, PSR ¶ 31.

c. Petitioner objected to the Probation Office's calculation of both his offense level and his criminal history score. In his view, his advisory guidelines range should be 46 to 57 months. Pet. Sent. Mem. 1. With respect to the offense level, petitioner argued that he should have received the three-point reduction for acceptance of responsibility. *Id.* at 2.

With respect to his criminal history score, petitioner objected on two grounds, either of which would have lowered his criminal history category to IV. Pet. Sent. Mem. 1-2; see PSR ¶¶ 27, 28, 32; see also Sentencing Guidelines Ch. 5, Pt. A (2018) (Tbl.). First, petitioner argued that two points should not have been assessed for the set of Missouri convictions stemming from the August 2008 incident, because no points had been assessed for those convictions in the presentence report

for petitioner's previous federal conviction. Pet. Sent. Mem. 1; see Pet. Resp. to Gov't Sent. Mem. Addendum 1. Second (and to some extent, alternatively), he argued that a point should not have been assessed for either of the Missouri convictions for armed criminal action, on the theory that armed criminal action is not a crime of violence. Pet. Sent. Mem. 1-2.

d. In response to petitioner's challenges to his criminal history score, the Probation Office and the government explained that, regardless of how the presentence report for petitioner's earlier felon-in-possession conviction had treated the August 2008 convictions, counting those convictions was proper under the Guidelines. Addendum to PSR 1; see Gov't Sent. Mem. 5. And they further explained that petitioner's convictions for armed criminal action were crimes of violence, because the underlying second-degree assault offenses were crimes of violence, and the statutory definition of the Missouri armed criminal action offense—which prohibits the commission of "any felony * * * by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon," Mo. Rev. Stat. § 571.015.1 (2000)—incorporates the elements of the underlying felony. Addendum to PSR 2; see Gov't Sent. Mem. 7.

3. At the sentencing hearing, the district court rejected petitioner's objections and expressly adopted the Probation Office's calculations in the presentence report and addenda. Pet. App. 11a-12a. With respect to the acceptance of responsibility reduction, the court explained that petitioner's behavior after his guilty plea "was inconsistent with someone [who has] tried to withdraw from criminal conduct or associations." *Id.* at 11a. And with respect to petitioner's criminal history score, the court agreed with "the reasoning set forth by the

probation officer in the first addendum [to the PSR] and also based upon the reasoning that the government has advanced in their sentencing memorandum." *Id.* at 12a.

The district court accordingly determined that the statutory range was not more than ten years of imprisonment, the advisory guidelines range was 77 to 96 months, and the supervised release range was one to three years. Pet. App. 12a. The government sought an above-guidelines sentence of 108 months, *id.* at 13a, while petitioner asked the court "to consider a guideline sentence," *id.* at 14a. After hearing argument from both sides, the court imposed an above-guidelines sentence of 108 months. *Id.* at 18a.

The district court emphasized that its "main analysis" was under 18 U.S.C. 3553(a) and that its choice of sentence was "more dependent on [those] factors." Pet. App. 16a-17a. The court made clear that, "notwithstanding any of these guideline calculations," if petitioner had succeeded on "every one" of his objections, the court still "would come out in the same place because of 18 U.S.C. 3553(a)." *Id.* at 17a. And it explained that the "drivers of a large sentence in this case" were "the circumstances of this crime, the need to protect the public," and petitioner's lack of "respect for the law." *Id.* at 18a; see *id.* at 17a-18a (again naming "the big drivers" of the sentence imposed).

With respect to "[t]he nature of this crime," the district court found it "obviously important" that petitioner was "on supervision for being a felon in possession of a firearm" when he was found with "another firearm." Pet. App. 18a. As for "respect for the law," the court pointed to petitioner's "behavior while incarcerated while awaiting sentencing," which it called "concerning." *Ibid.*

As for "the need to protect the public," the district court emphasized petitioner's "criminal history." Pet. App. 17a-18a. The court found it "very alarming" that "any time there's been a felony involvement with [petitioner] in the criminal justice system someone is getting shot." *Id.* at 17a. The court observed that petitioner's first pair of Missouri assault-related convictions stemmed from an incident "where someone was shot four or five times"; his second pair stemmed from an incident "where another person was shot six or seven times"; and "someone had been shot" in connection with petitioner's prior federal felon-in-possession conviction as well. *Ibid.*

The district court further explained that "one of the things you did I think that saves you * * * from a maximum sentence under the law"—*i.e.*, ten years—"is the fact you were honest in accepting and pleading guilty." Pet. App. 17a. And the court concluded by stating once again that, "after consideration of all those factors, and notwithstanding the guideline calculations, my sentence is—is based clearly and—clearly on 18 U.S.C. 3553(a) factors." *Id.* at 18a.

4. The court of appeals affirmed in an unpublished, nonprecedential decision. Pet. App. 1a-2a. On appeal, petitioner had abandoned two of his guidelines objections and argued only that the district court erred in assessing two criminal history points for the two Missouri armed criminal action convictions. See *ibid.* The court of appeals did not address the merits of that contention, however, because it determined that "[e]ven if * * * the district court made a mistake" in treating those convictions as crimes of violence, "any error was harmless." *Id.* at 2a. The court of appeals quoted the district court's statement that it would have "'come out in the

same place'" because of the statutory sentencing factors, *ibid.*, deeming it "as clear a statement as any that" petitioner "would have received the same sentence 'regardless of which [criminal history score] applied,'" *ibid.* (quoting *United States* v. *Staples*, 410 F.3d 484, 492 (8th Cir. 2005)) (brackets in original).

ARGUMENT

Petitioner contends (Pet. 9-20) that the court of appeals erred in affirming on harmless-error grounds based on its determination that the asserted error in the calculation of his advisory guidelines range did not affect the sentence imposed. That contention lacks merit, the court's unpublished per curiam decision does not conflict with any decision of this Court or another court of appeals, and this case would be a poor vehicle for addressing the question presented. This Court has repeatedly denied petitions for writs of certiorari that have raised similar issues. See *Brown* v. *United States*, 141 S. Ct. 2571 (2021) (No. 20-6374); *Rangel* v. *United States*, 141 S. Ct. 1743 (2021) (No. 20-6409); *Snell* v. *United States*, 141 S. Ct. 1694 (2021) (No. 20-6336); *Thomas* v. *United States*, 141 S. Ct. 1080 (2021) (No. 20-5090); *Torres* v. *United States*, 140 S. Ct. 1133 (2020) (No. 19-6086); *Elijah* v. *United States*, 139 S. Ct. 785 (2019) (No. 18-16); *Monroy* v. *United States*, 138 S. Ct. 1986 (2018) (No. 17-7024); *Shrader* v. *United States*, 568 U.S. 1049 (2012) (No. 12-5614); *Savillon-Matute* v. *United States*, 565 U.S. 964 (2011) (No. 11-5393); *Effron* v. *United States*, 565 U.S. 835 (2011) (No. 10-10397); *Rea-Herrera* v. *United States*, 557 U.S. 938 (2009) (No. 08-9181); *Mendez-Garcia* v. *United States*, 556 U.S. 1131 (2009) (No. 08-7726); *Bonilla* v. *United States*, 555

U.S. 1105 (2009) (No. 08-6668). The same result is warranted here.[2]

1. The court of appeals correctly applied the principles of harmless-error review in determining that the asserted error in the district court's calculation of petitioner's advisory guidelines range was harmless. Pet. App. 1a-2a.

a. In *Gall* v. *United States*, 552 U.S. 38 (2007), this Court stated that under the advisory Sentencing Guidelines, an appellate court reviewing a sentence, within or outside the guidelines range, must ensure that the sentencing court made no significant procedural error, such as by failing to calculate or incorrectly calculating the guidelines range, treating the Guidelines as mandatory, failing to consider the sentencing factors set forth in 18 U.S.C. 3553(a), making clearly erroneous factual findings, or failing to explain the sentence. 552 U.S. at 51. The courts of appeals have consistently recognized that errors of the sort described in *Gall* do not automatically require a remand for resentencing, and that ordinary appellate principles of harmless-error review apply. As the Seventh Circuit has explained:

> [a] finding of harmless error is only appropriate when the government has proved that the district court's sentencing error did not affect the defendant's substantial rights (here—liberty). To prove harmless error, the government must be able to show that the Guidelines error "did not affect the district court's selection of the sentence imposed." [*United States* v. *Anderson*, 517 F.3d 953, 965 (7th Cir. 2008)] (quoting *Williams v. United States*, 503

[2] The pending petition for a writ of certiorari in *Brooks* v. *United States*, No. 22-5788 (filed Oct. 5, 2022), also raises a similar issue.

U.S. 193, [203] (1992) (applying harmless error pre-*Gall*)).

United States v. *Abbas*, 560 F.3d 660, 667 (7th Cir. 2009); see Fed. R. Crim. P. 52(a) ("Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.").

A sentencing court may confront a dispute over the application of the Sentencing Guidelines. When the court resolves that issue and imposes a sentence outside the resulting advisory guidelines range, it may also explain that, had it resolved the disputed issue differently and arrived at a different advisory guidelines range, it would nonetheless have imposed the same sentence in light of the factors enumerated in Section 3553(a). Under proper circumstances, that permits the reviewing court to affirm the sentence under harmless-error principles even if it disagrees with the sentencing court's resolution of the disputed guidelines issue.

This Court in *Molina-Martinez* v. *United States*, 578 U.S. 189 (2016), analogously recognized that when the "record" in a case shows that "the district court thought the sentence it chose was appropriate irrespective of the Guidelines range," the reviewing court may determine that "a reasonable probability of prejudice does not exist" for purposes of plain-error review, "despite application of an erroneous Guidelines range." *Id.* at 200; see *id.* at 204 (indicating that a "full remand" for resentencing may be unnecessary when a reviewing court is able to determine that the sentencing court would have imposed the same sentence "absent the error"). Although *Molina-Martinez* concerned the requirements of plain-error review under Federal Rule of Criminal Procedure 52(b), the principle it recognized

applies with equal force in the context of harmless-error review under Rule 52(a).

b. Applying ordinary principles of harmless-error review to the circumstances of this case, the court of appeals correctly determined that any error in the district court's calculation of petitioner's advisory guidelines range was harmless because it did not affect the district court's determination of the appropriate sentence. Pet. App. 1a-2a.

As the court of appeals recognized, petitioner's "sentence was based on the statutory sentencing factors rather than the allegedly erroneous criminal-history calculation." Pet. App. 2a. The district court began its analysis by noting that even though it had "calculate[d] the guidelines," its "main analysis" was under the Section 3553(a) factors, and the sentence it ordered was "more dependent on [those] factors." *Id.* at 16a-17a. The court then explained at length that "the circumstances of this crime, the need to protect the public," and petitioner's lack of "respect for the law" were "really the drivers of a large sentence in this case." *Id.* at 18a; see *id.* at 17a-18a. And the sentence the court imposed—108 months—was accordingly well above any guidelines range under debate.

The district court additionally suggested that it considered "a maximum sentence under the law" (ten years of imprisonment), rather than the advisory guidelines range, to be the most appropriate frame of reference under the circumstances. Pet. App. 17a. And the Section 3553(a) factors that the court highlighted were not dependent on the singular guidelines objection that petitioner raised on appeal regarding the two criminal history points for his armed criminal action convictions based on their formal classification as crimes of violence.

With respect to petitioner's criminal history and the need to protect the public, the court emphasized the (undisputed) actual conduct in those crimes, each of which had involved a shooting. *Ibid.* And the court's emphasis on petitioner's commission of his crime while on supervised release for a prior federal conviction—which also involved a shooting—was likewise independent of the guidelines error that petitioner asserted. *Id.* at 17a-18a.

The district court accordingly emphasized that its choice of sentence would be the same regardless of the correct guidelines range. See Pet. App. 17a ("And notwithstanding any of these guideline calculations, if [petitioner] had won every one of the ones that [counsel for petitioner] had advanced, I would come out in the same place because of 18 U.S.C. 3553(a)."); *id.* at 18a ("So after consideration of all those factors, and notwithstanding the guideline calculations, my sentence is—is based clearly and—clearly on 18 U.S.C. 3553(a) factors."). And the court of appeals thus appropriately found it "clear" that petitioner "would have received the same sentence 'regardless of which [criminal history score] applied.'" *Id.* at 2a (quoting *United States* v. *Staples*, 410 F.3d 484, 492 (8th Cir. 2005)) (brackets in original).

To the extent that harmless-error review entails asking whether the district court was aware of the alternative range that would have applied had it not erred in calculating the guidelines range, see pp. 15-16, *infra*, the record here satisfies that inquiry. In his sentencing memorandum, petitioner had urged the court to adopt a guidelines range of 46 to 57 months—even *lower* than the range of 63 to 78 months that petitioner proffered in his appeal—based on his objections to the presentence report's calculation of his offense level and

criminal history score. Pet. Sent. Mem. 1; see Pet. 7. At sentencing, the court noted that it had reviewed petitioner's memorandum and found it to be "very helpful." Pet. App. 5a-6a; see *id.* at 9a (again referring to petitioner's memorandum). The record thus demonstrates that the court was aware of the advisory guidelines range that petitioner had proposed.

c. Petitioner contends (Pet. 16-18) that permitting harmless-error review of guidelines-calculation errors diminishes "the 'anchoring' effect of the Guidelines," and jeopardizes appellate review of guidelines questions. But harmless-error review does not alter the principle that "the Guidelines should be the starting point" for a district court's determination of the appropriate sentence. *Gall*, 552 U.S. at 49; see Pet. App. 12a (district court noting that the guidelines range "is our starting point"). Such review simply identifies cases, like this one, where the sentencing court found that factor to be overwhelmed by others.

Harmless-error review in cases like this therefore "merely removes the pointless step of returning to the district court when [the court of appeals is] convinced that the sentence the judge imposes will be identical" regardless of the correct range. *Abbas*, 560 F.3d at 667. And far from undermining appellate review, "[a]n explicit statement that the district court would have imposed the same sentence under two different ranges can help to improve the clarity of the record, promote efficient sentencing, and obviate questionable appeals." *United States* v. *Zabielski*, 711 F.3d 381, 389 (3d Cir. 2013).

2. The court of appeals' decision does not conflict with any decision of another court of appeals. To the extent that some formal differences exist in the

articulated requirements for harmless-error review when a district court has offered an alternative sentencing determination, those differences do not reflect any meaningful substantive disagreement about when an alternative sentence can render a guidelines-calculation error harmless. And petitioner has failed to identify any court that would have reached a different result in the circumstances of his case.

Petitioner errs in contending (Pet. 9-10) that the court of appeals' resolution of his appeal conflicts with the Seventh Circuit's decisions in *United States* v. *Asbury*, 27 F.4th 576 (2022), and *United States* v. *Loving*, 22 F.4th 630 (2022). In *Loving*, the district court had not even made a statement that the sentence would have been the same notwithstanding a guidelines error; to the contrary, "the district court said three times that Loving deserved a sentence *within the guideline range*." 22 F.4th at 636. And in *Asbury*, the Seventh Circuit merely rejected the proposition that a district court could "nullify the guidelines by way of a simple assertion that any latent errors in the guidelines calculation would make no difference to the choice of sentence"; the district court's disclaimers in that case had not specified which potential guidelines errors it had in mind, and the court failed to connect its alternative sentence to specific Section 3553(a) factors. 27 F.4th at 579-583. Here, the district court specifically tied its statement that it would have "come out in the same place" to the objections that "[petitioner's counsel] had advanced," Pet. App. 17a, which the court had already identified and rejected, see *id.* at 11a-12a. And the court thoroughly explained that the "drivers" of its chosen 108-month sentence were "the circumstances of this crime," "the need to protect the public," and "respect

for the law." *Id.* at 18a; see *id.* at 17a-18a (similar); *id.* at 17a (also identifying petitioner's "criminal history" as a significant factor).

Petitioner similarly errs in asserting (Pet. 11) that the decision below conflicts with the Second Circuit's analysis in *United States* v. *Seabrook*, 968 F.3d 224 (2020), and *United States* v. *Bennett*, 839 F.3d 153 (2016). In both cases, the court of appeals was unconvinced—based on the record before it—that the district court's choice of sentence was independent of the asserted errors in calculating the guidelines range. See *Seabrook*, 968 F.3d at 233-234 (observing that, "[t]ellingly," the district court "'returned multiple times'" to the Guidelines in "framing its choice of the appropriate sentence," and had also declined the government's suggestion to take a guidelines factor into account under Section 3553(a)) (citation omitted); see also *Bennett*, 839 F.3d at 163 (observing that the district court "returned multiple times" to the guidelines range). The same is true of the Fifth Circuit's decision in *United States* v. *Tanksley*, 848 F.3d 347 (2017), supp. op., 854 F.3d 284 (5th Cir. 2017), on which petitioner also relies. Pet. 12; see 848 F.3d at 353. Moreover, the Second and Fifth Circuits have been clear that they will credit the kind of "unequivocal[]" statements at issue in this case under appropriate circumstances. *United States* v. *Jass*, 569 F.3d 47, 68 (2d Cir. 2009), cert. denied, 558 U.S. 1159, and 559 U.S. 1087 (2010); see *United States* v. *Guzman-Rendon*, 864 F.3d 409, 411 (5th Cir.), cert. denied, 138 S. Ct. 524 (2017); *United States* v. *Thomas*, 793 Fed. Appx. 346, 346-347 (5th Cir. 2020) (per curiam), cert. denied, 141 S. Ct. 1080 (2021).

Petitioner's reliance on Third Circuit decisions (Pet. 12) is likewise misplaced. In *United States* v. *Smalley*,

517 F.3d 208 (3d Cir. 2008), the court of appeals declined to find a guidelines-calculation error harmless where the district court "did not explicitly set forth an alternative Guidelines range," *id.* at 214, and where its "alternative sentence" was accompanied by a "bare statement" that was "at best an afterthought, rather than an amplification of the Court's sentencing rationale," *id.* at 215; see *United States* v. *Wright*, 642 F.3d 148, 154 n.6 (3d Cir. 2011) (concluding that *Smalley* required a remand for resentencing). Petitioner does not, however, identify any Third Circuit decision that has required resentencing where, as here, the record demonstrates that the district court was aware of petitioner's alternative sentencing range, see pp. 12-13, *supra*; the court expressly stated multiple times that it would have imposed the same sentence regardless of the asserted guidelines errors, Pet. App. 17a-18a; and the court explained at length why its above-guidelines sentence was "drive[n]" by multiple Section 3553(a) factors, see *ibid.*

Petitioner also fails to adequately support his suggestion (Pet. 12) that his appeal necessarily would have proceeded differently in the Ninth and Tenth Circuits. Unlike the district court in this case, the district court in *United States* v. *Williams*, 5 F.4th 973 (9th Cir. 2021), had selected a within-guidelines sentence and provided "no explanation of why an above-Guidelines sentence would be appropriate." *Id.* at 978. And in *United States* v. *Gieswein*, 887 F.3d 1054, cert. denied, 139 S. Ct. 279 (2018), the Tenth Circuit *accepted* the kind of "highly detailed explanation for the sentence imposed" that the district court provided here. See *id.* at 1058, 1061-1063; cf. *United States* v. *Peña-Hermosillo*, 522 F.3d 1108, 1117 (10th Cir. 2008) (declining to find harmlessness

based on the district court's "cursory explanation for its alternative rationale" under Section 3553(a)).

Finally, petitioner notes (Pet. 13) that the decision below may be in tension with the approaches of the Fourth and Sixth Circuits. But both circuits have found harmlessness based on district court statements akin to the ones in this case. See *United States* v. *Gomez-Jimenez*, 750 F.3d 370, 382-383 (4th Cir.), cert. denied, 574 U.S. 917, and 574 U.S. 944 (2014); see also *United States* v. *Collins*, 800 Fed. Appx. 361, 362 (6th Cir. 2020) (citing cases). Petitioner cites no decision from either circuit declining to find harmlessness in circumstances like those here.

3. In addition, this case would be an unsuitable vehicle for resolving the question presented because the district court did not err in calculating petitioner's advisory guidelines range.

On appeal, petitioner argued only that the district court erred in assessing two criminal history points for his two Missouri armed criminal action convictions, on the ground that they were not crimes of violence. See p. 7, *supra*; see also Sentencing Guidelines § 4A1.1(e); Sentencing Guidelines § 4B1.2(a) (defining "crime of violence" as, *inter alia*, any offense punishable by more than one year of imprisonment and that "has as an element the use, attempted use, or threatened use of physical force against the person of another"). But as the district court recognized in its adoption of the Probation Office's and the government's explanation of the criminal history calculation, the Missouri armed criminal action offense necessarily includes all of the elements of the underlying felony—in this instance, Missouri second-degree assault. See Mo. Rev. Stat. § 571.015.1 (2000) (prohibiting "any felony under the laws of this

state by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon"). And the Eighth Circuit has held that second-degree assault under Mo. Rev. Stat. § 565.060.1(2) (Supp. 2008) is a crime of violence under the force clause of Section 4B1.2(a). See *United States* v. *Vinton*, 631 F.3d 476, 484-486 (8th Cir.), cert. denied, 565 U.S. 866 (2011). Thus, because petitioner's convictions for armed criminal action incorporate the elements of his assault offenses, his convictions for the former likewise qualify as crimes of violence.

Petitioner does not address the merits of the district court's application of Section 4A1.1(e) other than to state that his case presents a "substantial claim[] of error." Pet. 23. Instead, petitioner points to two Eighth Circuit decisions, *United States* v. *Miranda-Zarco*, 836 F.3d 899 (2016), and *United States* v. *Brown*, No. 20-2847, 2021 WL 3732369 (Aug. 24, 2021) (per curiam), where the court of appeals determined that other defendants' Missouri armed criminal action convictions did not qualify as crimes of violence. Pet. 23. But neither of those decisions involved a conviction for armed criminal action where the underlying felony was undisputedly a crime of violence. In *Miranda-Zarco*, the Eighth Circuit remanded for a determination whether petitioner's armed criminal action offense, based on the underlying felony of Missouri first-degree robbery, categorically involves force as required by Section 4B1.2(a)(1). See 836 F.3d at 902-903; see also *id.* at 900. And in *Brown*, the government conceded that the underlying felony of involuntary manslaughter not a crime of violence. See 2021 WL 3732369, at *1; see also Gov't C.A. Br. at 3, 15, *Brown*, *supra* (No. 20-2847).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2022