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

REPLY BRIEF FOR THE PETITIONER

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The government's brief in opposition is most remarkable for what it does not say. It does not deny that in the Eighth and Eleventh Circuits, a single, conclusory sentence suffices to foreclose review of any and all Guidelines errors. It scarcely could. After all, the Eighth Circuit squarely held, in a case the government never bothers to mention, that "'[w]hen the district court explicitly states that it would have imposed the same sentence of imprisonment regardless of the underlying Sentencing Guidelines range, *any error on the part of the district court is harmless*.'" Pet. 14 (quoting *United States* v. *Peterson*, 887 F.3d 343, 349 (2018) (emphasis added)).

The Eleventh Circuit was even more explicit in establishing a *per se* harmlessness rule: "'[B]ecause the district court stated on the record that it would have imposed the same sentence either way, *that is all we need to know to hold that any potential error was harmless*.'" Pet. 14-15 (quoting *United States* v. *Henry*, 1 F.4th 1315, 1327 (2021) (emphasis added)); accord Pet. 15 (quoting *United States* v. *Grady*, 18 F.4th 1275, 1291 (11th Cir. 2021)

("a guidelines error is harmless if the district court unambiguously expressed that it would have imposed the same sentence * * * regardless of how the guidelines objections had come out.")). The brief in opposition does not mention either case.

Nor does the government deny that most courts of appeals have squarely held that such conclusory statements fall far short of establishing harmlessness. See Pet. 9-13. To take just one example, the court of appeals for Kansas City, *Kansas* applies a rule diametrically opposed to that governing Kansas City, *Missouri*, where petitioner was sentenced: "'[i]t is not enough for the district court to say that its conclusion would be the same even if all the defendant's objections to the presentence report had been successful.'" Pet. 4 (quoting *United States* v. *Porter*, 928 F.3d 947, 963 (10th Cir. 2019)). The government doesn't mention that case, either.

Nor does the government deny that the question presented is important and recurring. Again, it scarcely could. The Seventh Circuit has decried "the frequency with which sentencing judges are relying on inoculating statements" to avoid appellate scrutiny. *United States* v. *Asbury*, 27 F.4th 576, 581 (2022). This issue arises so frequently that many of the decisions that render this conflict irreconcilable were decided in late 2021 and 2022, see Pet. 9-16, post-dating the government's string-cite of aging cert denials it recites to suggest that a now fully mature split does not warrant review. Opp. 8-9. Multiple petitions now pending raise the same issue. Opp. 9 n.2. And tellingly, the government does not dispute that this issue is "[]likely to be outcome-determinative" in petitioner's case, compare Br. in Opp. at 17, *Brooks* v. *United States*, No. 22-5788 (Dec. 7, 2022). That is a sensible concession, given that the Eighth Circuit's two-sentence analysis was limited to quoting the district court's conclusory statement and finding it dispositive.

And it failed even to conduct reasonableness review. Pet. App. 2a.

In thousands of words of briefing, the government never even acknowledges decisions representing half the split, which squarely hold that a single conclusory sentence can foreclose appellate review of Guidelines errors adding *years* to a defendant's sentence. Compare Pet. 13-16, with Opp. 13-17. Unable to acknowledge *any* of those cases, much less to reconcile them with conflicting decisions, the government changes the subject, attempting to reframe the dispute as whether sentencing errors are amenable to harmless error analysis. Of course they are. The only question is whether a district judge can "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." *Asbury*, 27 F.4th at 581.

This Court's review is warranted. The government's failure to defend the Eighth and Eleventh Circuit's *per se* rule represents a tacit admission that the rule is indefensible. Accordingly, summary reversal would be appropriate.

A. The Split Is Real

1. As the petition explained, the courts of appeals are divided about whether a district court can insulate Guidelines errors from appellate review through a conclusory assertion that it would have imposed the same sentence regardless of the correct Guidelines calculation.

Consistent with the requirements of Rule 52(a), most courts of appeals have rejected that position and required a detailed explanation of how Guidelines errors did not affect the defendant's sentence. Not so for the Eighth and Eleventh Circuits, which have adopted a *per se* rule allowing district courts to opt out of appellate review of Guidelines errors by asserting that they would have

imposed the same sentence regardless of the Guidelines. See Pet. 13-16.

Applying the Eighth Circuit's *per se* rule, the court below rejected petitioner's substantial (indeed, meritorious) challenge to the Guidelines calculation underlying his near-maximum *nine-year* prison sentence in just two sentences:

> At the sentencing hearing, the court explained that "notwithstanding any of these . . . calculations, if [Irons] had won every one of the [objections] advanced, [it] would [have] come out in the same place because of 18 U.S.C. [§] 3553(a)," meaning that Irons's sentence was based on the statutory sentencing factors rather than the allegedly erroneous criminal-history calculation. This is as clear a statement as any that Irons would have received the same sentence regardless of which criminal-history score applied.

Pet. App. 2a (cleaned up).[1]

The government assures this Court that the Eighth Circuit's decision here, and its many decisions in this line of cases, "do[] not conflict with any decision of * * * another court of appeals." Opp. 8. But the government cannot deny that the Eighth and Eleventh Circuits have published numerous decisions foreclosing appellate review of Guidelines errors based on a district court's conclusory assertion that it would have imposed the same sentence regardless of the correct Guidelines calculation. See Pet. 13-16.

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[1] The government suggests this case does not warrant review because the disposition is "unpublished," Opp. 7, 8. But petitioner's disposition was unpublished only because the Eighth Circuit's *per se* rule was already firmly established in precedential opinions. *E.g.*, *Peterson*, 887 F.3d at 349.

The government dismisses the yawning gulf between the two sides of the split as "some formal differences * * * in the articulated requirements for harmless-error review." Opp. 13-14. The government's assurances that these cases represent the ordinary application of harmless-error analysis would be more compelling if it discussed *even one* of the cases employing the rule. The only reasonable explanation for the government's complete silence about *Still*, *Peterson*, *Foston*, *Henry*, *Grady*, and *Ouellette*—literally *every decision* constituting half of the circuit split, see Pet. 13-16—is that those cases actually reflect a *per se* rule immunizing the Guidelines errors of judges who make conclusory recitations. If the government could muster any other explanation, it would have done so.

The government also fails to address that, as the First, Fourth, and Sixth Circuits have held, a correct Guidelines calculation is necessary to determine that the sentence imposed is *substantively reasonable*, an essential part of assuring that a Guidelines error was harmless. See *Rosales-Mireles* v. *United States*, 138 S. Ct. 1897, 1910 (2018); Pet. 13-15 & n.3. It is undisputed that the Eighth Circuit does not determine whether the sentence was substantively reasonable before concluding the error is harmless, and thus affirms even if the sentence was *unreasonable*. See Pet. 20. And the court never inquired whether petitioner's sentence was substantively reasonable.

These diametrically opposed rules have great practical importance. The government cannot dispute that the Eighth Circuit has rubber-stamped every single-sentence assertion that Guidelines error was harmless for *more than fifteen years*. See Pet. 14 n.2. By contrast, the Seventh Circuit has reversed similarly conclusory assertions of harmlessness *three times just this year*, all in cases involving serious aggravating factors. See

Asbury, 27 F.4th at 583 (reversing although defendant's criminal history score was 34, 2½ times higher than necessary for the highest criminal history category of VI); *United States* v. *Bravo*, 26 F.4th 387, 396-397 (2022) (reversing sentence of Latin Kings street gang member despite district court assertion that "I would have imposed the same sentence * * * regardless of [the] criminal history category"); *United States* v. *Loving*, 22 F.4th 630, 636 (2022) (reversing sentence of defendant who fled from drug arrest, "dragging [a state] trooper" behind his car, despite claim that "even if an appellate court thought that [defendant] shouldn't have gotten the one-point enhancement, just the 3553(a) factors * * * would warrant the 71 months sentence"). That stark difference reflects a "meaningful substantive disagreement" (Opp. 14) that cannot be concealed.

B. The Eighth Circuit's *Per Se* Rule Is Wrong

It is "inconsistent with a long line of Supreme Court decisions," and with 18 U.S.C. § 3553 itself, to allow the sentencing judge to foreclose appellate review "by way of a simple assertion that any latent errors in the guidelines calculation would make no difference to the choice of sentence." *Asbury*, 27 F.4th at 581.

"[D]istrict courts must begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process." *Gall* v. *United States*, 552 U.S. 38, 50 n.6 (2007). Even if a judge chooses to sentence under the Section 3553 factors, because Section 3553 *itself* requires consideration of the Guidelines, 18 U.S.C. § 3553(a)(4)-(5), and because the Guidelines represent "the product of careful study based on extensive empirical evidence derived from the review of thousands of individual sentencing decisions," *Gall*, 552 U.S. at 46, the final sentence must be reasonable in relation to the Guidelines, *id.* at 51.

This Court has instructed that at the outset of *every* sentencing appeal, "the appellate court * * * must first ensure that the district court committed no significant procedural error, such as * * * improperly calculating[] the Guidelines range * * * or failing to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range." *Gall*, 552 U.S. at 51. Thus, this Court has directed that the Guidelines must "remain a meaningful benchmark through the process of appellate review." *Peugh* v. *United States*, 569 U.S. 530, 541 (2013). And a "major departure [from the Guidelines] should be supported by a more significant justification than a minor one." *Gall*, 552 U.S. at 50. In addition, the Eighth Circuit's *per se* rule is inconsistent with Rule 52(a) in that it reverses the Rule's ordinary operation by placing on the defendant the burden of proving prejudice instead of requiring the government to prove harmlessness. Pet. 19.

The government does not even attempt to justify the Eighth Circuit's *per se* rule. Instead, it pretends that rule does not exist, conspicuously failing to cite *any* of the Eighth or Eleventh decisions applying their *per se* harmlessness rule, and never explaining how a single conclusory sentence can definitively establish harmlessness. The government's failure to defend the Eighth Circuit's actual ruling is compelling proof of its error.

Instead, the government pretends the Eighth Circuit did something it *did not* do: engage in conventional harmless error analysis. The government begins by quoting one of the Eighth Circuit's two conclusory sentences of analysis, but then immediately switches to a discussion not of what the court of appeals actually considered, but what the *district court* said. Opp. 11-12. It is undisputed that the Eighth Circuit considered *none* of those facts in its analysis. See Pet. App. 1a-2a. Essentially, the

government is not defending the court of appeals' *actual* decision, but saying that the Eighth Circuit could have reached the same conclusion if it had correctly applied conventional harmless error analysis. But that is not a defense of the Eighth Circuit's actual judgment. Harmless error analysis should be left for the court of appeals to conduct in the first instance on remand, *after* this Court corrects the court of appeal's legal error in holding that a district court's conclusory statement renders all errors categorically harmless. *Hicks* v. *United States*, 137 S. Ct. 2000, 2000 (Gorsuch, J., concurring) ("When this Court identifies a legal error, it routinely remands the case so the court of appeals may resolve whether the error was harmless * * * .").

In any event, the government is simply wrong that the district court's explanation here, which was *entirely* grounded in Section 3553, establishes that the error was harmless. "[S]imply citing the § 3553 factors does not insulate the sentence from procedural error." *Porter*, 928 F.3d at 963. After all, Section 3553 itself requires consideration of the applicable Guidelines range. 18 U.S.C. § 3553(a)(4)-(5). "Instead, the record must show that the corrected Guideline range would not have affected the sentence." *Porter*, 928 F.3d at 963. Thus, even a judge relying on Section 3553 factors "must give specific * * * attention to the contested guideline issue in her explanation," *Asbury*, 27 F.4th at 581. And the reasonableness of the sentence must be justified in relation to the *Guidelines*, not merely the Section 3553 factors. As the Seventh Circuit explained, where the judge asserts that the Guidelines application would not affect the sentence, "the judge *would need to give a reason for such a conclusion*, explaining why the difference between an advisory range of [46-57] months * * * and a range of [77-96] months * * * did not provide useful guidance for sentencing that particular defendant." *Asbury*, 27 F.4th at 582. In

other words, instead of confining itself to Section 3553 factors, the judge must "address[] and account[] for the *specific* possible [Guidelines] error" in explaining how it arrived at its sentence. *Ibid.*

The district court here did nothing of the sort. Although the government asserts that the "the court was aware of the advisory guidelines range that petitioner had proposed," Opp. 13, the court never even acknowledged the Guidelines range petitioner advocated (46-57 months), much less did it attempt to justify an extraordinary sentence that *almost doubled* the high end of the Guidelines range.

The anchoring effect of the Guidelines is not hypothetical, "even where the court asserted it was not moved by the Guidelines." *United States* v. *Seabrook*, 968 F.3d 224, 234 (7th Cir. 2020). In *Rosales-Mireles,* for example, the district court said it "would have not sentenced [petitioner] to anything less than the 78 months after his conduct in these cases and his conduct here today." Br. in Opp. at 16, *Rosales-Mireles*, *supra*. But after this Court reversed and remanded, the district court resentenced petitioner to 40 months' imprisonment, almost halving a sentence the judge previously described as the absolute minimum it would consider. Order, *United States* v. *Rosales-Mireles*, No. A-15-CR-297-SS, Dkt. 48 (Sept. 18, 2018).

C. The Issue Is Important

The government does not deny that the ability of district courts to insulate their sentences from review is an important and recurring issue. The issue is potentially implicated in thousands of cases every year. Pet. 21. The number of reported cases in just the last two years demonstrates that the issue recurs frequently. Appellate courts have "noticed the frequency with which sentencing

judges are relying on inoculating statements" in an effort to avoid review. *Asbury*, 27 F.3d at 581. And this Court's review is necessary to further Congress's "aim[] to achieve uniformity by ensuring that sentencing decisions are anchored to the Guidelines and that they remain a meaningful benchmark through the process of appellate review." *Peugh*, 569 U.S. at 541-542.

D. This Case Is An Excellent Vehicle

Finally, the government contends that "this case would be an unsuitable vehicle" because the district court correctly calculated petitioner's Guidelines range. Opp. 17. According to the government, "the Missouri armed criminal action offense necessarily includes all the elements of the underlying felony—in this instance, Missouri second-degree assault." Opp. 17. To begin with, the fact that petitioner might ultimately lose on remand does not render this case an unsuitable vehicle, as the government routinely notes when *it* is petitioning. As the Solicitor General has explained, "[t]he possibility that [petitioner] might ultimately be denied [relief] on another ground would not prevent the Court from addressing [the question presented]. Indeed, the Court frequently considers cases that have been decided on one ground by a court of appeals, leaving other issues to be decided on remand, if necessary." Cert. Reply at 11, *Astrue* v. *Capato*, 566 U.S. 541 (2012) (No. 11-159); accord Cert. Reply at 10-11, *Salazar* v. *Patchak*, 567 U.S. 209 (2012) (No. 11-247).

In any event, the government is wrong in asserting that petitioner would lose on remand. To begin, the government provides no authority for the proposition that the enhancement for "a conviction of a crime of violence," U.S.S.G. § 4A1.1(e), looks to the elements of the predicate offense underlying the conviction (here, second-degree assault), rather than the actual *offense of conviction* (armed career action). That argument is inconsistent with Eighth Circuit precedent, which has held that the

Missouri armed criminal action offense "sets forth a single set of elements," and is considered as a categorical matter. See *United States* v. *Long*, 906 F.3d 720, 726 (2018).[2] The government does not deny that in *United States* v. *Miranda-Zarco*, 836 F.3d 899 (2016), and *United States* v. *Brown*, No. 20-2874, 2021 WL 3732369 (Aug. 24, 2021) (per curiam), the Eighth Circuit determined that "Missouri armed criminal action convictions did not qualify as crimes of violence" under the Guidelines' elements clause. Opp. 18. The government attempts to distinguish *Miranda-Zarco* on the ground that first-degree robbery was not a crime of violence. Opp. 18. But Missouri first-degree robbery has always been a crime of violence, *e.g.*, *United States* v. *Shine*, 910 F.3d 1061, 1063 (8th Cir. 2018), and the Eighth Circuit did not suggest the contrary in *Miranda-Zarco*.

This Court need not resolve the issue, however. Such matters would ordinarily be addressed in the first instance on remand after this Court resolves the question whether a single conclusory sentence insulates all Guidelines errors from review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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[2] *Long* also concluded that "the armed criminal action in Missouri is a crime of violence under the [Guidelines] residual clause." 900 F.3d at 727. Because the residual clause was deleted in 2016, that conclusion is no longer valid. See *Brown*, *supra*.

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