No. 22-____

IN THE
Supreme Court of the United States

MARTIN ELLIOTT BROOKS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether errors in calculating the Sentencing Guidelines are rendered harmless by the district court's assertion that the Guidelines would make no difference to the choice of sentence.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Martin Elliott Brooks respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINION BELOW

The Fourth Circuit's unpublished opinion is available at 2022 U.S. App. LEXIS 18665, 2022 WL 2526674 (4th Cir. July 7, 2022); *see also infra*, Pet. App. 1a.

LIST OF PRIOR PROCEEDINGS

(1) *United States v. Martin Elliott Brooks*, United States District Court, Eastern District of North Carolina, No. 7:19-CR-84-D-1 (final judgment entered March 9, 2021).

(2) *United States v. Martin Elliott Brooks*, United States Court of Appeals for the Fourth Circuit, No. 21-4116 (decision issued July 7, 2022).

JURISDICTION

The Fourth Circuit issued its opinion on July 7, 2022. Pet. App. 1a. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

1. Title 18, United States Code, Section 3553 provides, in relevant part:

> (a) **Factors to be considered in imposing a sentence.**
> . . . . The court, in determining the particular sentence to be imposed, shall consider—. . . .
> (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 . . . .
> (5) any pertinent policy statement—
> (A) issued by the Sentencing Commission . . . .

2. Federal Rule of Criminal Procedure 52 provides:

> (a) **Harmless error**. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.
>
> (b) **Plain error**. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

INTRODUCTION

Petitioner's case presents a recurring and critical issue in sentencing and appellate jurisprudence: whether a district court may immunize its Guideline miscalculations from appellate review by asserting that the Guidelines made no difference to the selection of its sentence. The courts of appeals are deeply divided over this question. The majority of circuits—the Second, Third, Fifth, Seventh, Ninth, and Tenth—hold that "it is not enough for the district court to say the same sentence would have been imposed but for the error." *United States v. Tanksley*,

848 F.3d 347, 353 (5th Cir. 2017). Instead, the district court must follow the dictates of *Gall v. United States* and "state its justification with enough specificity" to provide sufficient context for effective appellate review. *United States v. Seabrook*, 968 F.3d 224, 235 (2nd Cir. 2020) (citing *Gall v. United States*, 552 U.S. 38, 49-50 (2007)).

The minority view, by contrast, holds that when the sentencing court says "that it would have reached the same result" regardless of the advice of the Guidelines, any error in calculating the Guidelines is harmless. *United States v. Gomez-Jimenez*, 750 F.3d 370, 383 (4th Cir. 2014). The First, Fourth, Eighth, and Eleventh Circuits follow the minority approach. As one circuit judge has observed, these minority circuits have "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 391 (4th Cir. 2014) (Gregory, J. dissenting). The Fourth Circuit applied this approach to affirm Petitioner's sentence.

This Court's review is needed to resolve the split and restore uniformity to federal sentencing among the lower courts. This Court should conclude, like the majority of circuits to consider the issue, that a Guidelines error is not harmless simply because a district judge claimed the Guidelines made no difference to the sentence.

STATEMENT OF THE CASE

A. District Court Proceedings

Petitioner's case arose when several law enforcement officers attempted to serve an arrest warrant on Petitioner at his residence. After speaking with Petitioner's girlfriend inside the residence, officers began walking towards Petitioner's bedroom, where Petitioner was lying on his bed. As they did so, Petitioner used a handgun to fire several shots up into his bedroom ceiling. The officers retreated and called for back-up. Petitioner surrendered peacefully a few hours later. Pet. C.A. Opening Br. 5-6.

Petitioner pled guilty to being a felon in possession of a firearm and to possession of stolen firearms, in violation of 18 U.S.C. § 922(g)(1), § 922(j)(1), respectively. App. 1a. Before the sentencing hearing, Petitioner objected to the presentence report's calculation of his advisory Guidelines range, arguing that the probation officer had incorrectly applied a six-level assault enhancement under Section 3A1.2(c)(1) of the Sentencing Guidelines. Pet. C.A. Opening Br. 8. That enhancement applies only if the defendant assaults a law enforcement officer in a manner creating a substantial risk of serious bodily injury. U.S.S.G. § 3A1.2(c)(1). Petitioner asserted that the enhancement did not apply because he fired only into the ceiling of his own bedroom, with no intent to assault the officers, who were unharmed and never in danger. Pet. C.A. Opening Br. 8.

At sentencing on March 5, 2021, counsel for the United States agreed with Petitioner that the assault enhancement did not apply. The government thus

presented no evidence in support of the enhancement. Pet. C.A. Opening Br. 8. The district court nonetheless overruled Petitioner's objection and sentenced him to a total term of 288 months of imprisonment and five years of supervised release. App. 1a. As it does at every sentencing, the district court said it would impose the same sentence as an alternative variant sentence if it had miscalculated the guideline range. App. 1a 2-3.

B. Court of Appeals Proceedings

On appeal, the Fourth Circuit affirmed the district court without reaching the merits of the Guidelines issue raised by Petitioner. Instead, in an unpublished opinion, the Fourth Circuit concluded that any error in calculating the Guidelines range was harmless because the district court "announced that it would impose the same sentence as an alternative variant sentence even if it had miscalculated the Guidelines range." App. 1a 2-3. The Fourth Circuit found the district court's statement sufficient, despite evidence showing that the district court makes an identical announcement at every sentencing. Pet. C.A. Reply Br. 7-9. This petition followed.

REASONS FOR GRANTING THE PETITION

A. The Circuits Are Split Over Whether The Announcement Of An Alternate Sentence, Standing Alone, Is Sufficient To Satisfy Harmless Error Review.

In the majority of circuits, a district court cannot "insulate its sentence from [appellate] review by commenting that the Guidelines range made no difference to its determination when the record indicates that it did." *Seabrook*, 968 F.3d at 233-234. Instead, the Second, Third, Fifth, Seventh, Ninth, and Tenth Circuits require a

more detailed and thorough harmless error analysis before affirming a defendant's sentence. The Fourth, Sixth, Eighth, and Eleventh Circuits, on the other hand, require little more than a "few magic words" to affirm a sentence based on harmless error. *Gomez-Jimenez*, 750 F.3d at 391 (Gregory, J. dissenting). The courts of appeals' differing approaches to such a fundamental and recurring issue warrant this Court's review.

(1) The Majority Of Circuits Hold That The Sentencing Court Cannot Immunize Guideline Miscalculations From Appellate Review Simply By Announcing An Alternate Sentence.

The majority approach—adopted by the Second, Third, Fifth, Seventh, Ninth, and Tenth Circuits—provides that a Guidelines calculation error is not harmless merely because the district court stated it would have sentenced the defendant to the same sentence regardless of any Guidelines errors.

The Seventh Circuit's recent analysis of the issue exemplifies the majority rule's rationale for rejecting district judges' efforts to exempt their sentences from appellate scrutiny. In *United States v. Asbury*, the sentencing court rejected the defendant's objections to the presentence report, and added: "[I]f I made an error in the guideline calculation in terms of offense level, that would not affect my sentence. I'm basing my sentence on the Section 3553(a) factors and the exercise of my discretion after placing a lot of thought into this sentencing hearing." 27 F.4th 576, 579 (7th Cir. 2022). The Seventh Circuit rejected the conclusion that the sentencing court's statement rendered its sentencing errors harmless, holding that while sentencing courts have discretion to fashion sentences under 18 U.S.C. §

3553, this discretion does not "permit the judge to 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." *Id.* at 581. Reasoning that sentencing decisions at every level of the judiciary must be made by reference to the appropriate Guidelines calculation, "'a conclusory comment tossed in for good measure' is not enough to make a guidelines error harmless." *Id.*; *accord United States v. Loving*, 22 F.4th 630, 636 (7th Cir. 2022) ("[W]e cannot infer, based on the district court's terse comments about the sentencing factors under 18 U.S.C. § 3553(a) that the court believed a 71-month prison sentence would be appropriate regardless of the correct guideline range.").

As the Seventh Circuit explained, permitting such conclusory assertions to insulate sentencing errors from appellate review would circumvent the need for the judge in every case to correctly calculate a baseline Guidelines sentencing range and explain sentencing decisions departing from that range, and therefore is fundamentally inconsistent with Guidelines sentencing. "There are no 'magic words' in sentencing." *Asbury*, 27 F.4th at 581. "If there were, the judge would have no incentive to work through the guideline calculations: she could just recite at the outset that she does not find the [G]uidelines helpful and proceed to sentence based exclusively on her own preferences." *Id.*

Likewise, the Second Circuit has held "the district court cannot insulate its sentence from our review by commenting that the Guidelines range made no difference to its determination" because "the Guidelines, although advisory, are not

a body of casual advice, to be consulted or overlooked at the whim of a sentencing judge." *Seabrook*, 968 F.3d at 233–34. The Third, Fifth, Ninth, and Tenth Circuits have reached similar holdings. *See, e.g., United States v. Wright*, 642 F.3d 148, 154 n.6 (3d Cir. 2011) ("a statement by a sentencing court that it would have imposed the same sentence even absent some procedural error does not render the error harmless" because "it must still begin by determining the correct alternative Guidelines range and properly justify the chosen sentence" in relation to it); *United States v. Smalley*, 517 F.3d 208, 212 (3d Cir. 2008) (sentencing error was not harmless despite district court's statement that "it would have given the same sentence . . . if it had applied" the Guidelines as the defendant requested does not make the error harmless); *United States v. Williams*, 5 F.4th 973, 978 (9th Cir. 2021) (reversing because of district court's Guidelines miscalculation notwithstanding the district court's statements "that it would have imposed the same sentence" regardless of the Guidelines); *Tanksley*, 848 F.3d at 353 (remanding for new sentencing because "it is not enough for the district court to say the same sentence would have been imposed but for the error").

(2) The Minority of Circuits Hold That The District Court's Announcement Of An Alternate Sentence Renders Any Guidelines Miscalculation Harmless.

In contrast to the majority's more searching inquiry, a minority of circuits hold that the district court's pronouncement of an alternative sentence renders any Guidelines miscalculation harmless. The Fourth Circuit has specifically rejected any requirement that the district court properly calculate the alternative sentence Guidelines range, as an alternative sentence satisfies "the first element of the

assumed error harmless inquiry . . . because the district court has expressly stated in a separate and particular explanation that it would have reached the same result." *Gomez-Jimenez*, 750 F.3d at 383. The Eighth Circuit has likewise held that "a district court's incorrect application of the Guidelines is harmless error when the court specifies the resolution of a particular issue did not affect the ultimate determination of a sentence, such as when the district court indicates it would have alternatively imposed the same sentence even if a lower [G]uideline range applied." *United States v. Still*, 6 F.4th 812, 818 (8th Cir. 2021). The First and Eleventh Circuits follow the same approach. *See United States v. Ouellette*, 985 F.3d 107, 110–111 (1st Cir. 2021); *United States v. Henry*, 1 F.4th 1315, 1327 (11th Cir. 2021).

B. The Minority Approach Is Wrong.

(1) Sentencing Courts Must Properly Calculate The Sentencing Guidelines and Reviewing Courts Should Ordinarily Correct Guidelines Errors.

This Court has made clear that "a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range." *Gall*, 552 U.S. at 49. Appellate courts, in turn, "must first ensure" the district court did not "improperly calculate the Guidelines range." *Id.* at 49-51. Only after ensuring that the district court properly calculated the Guidelines range does the appellate court proceed to considering the substantive reasonableness of the sentence. *See Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1910 (2018) ("Before a court of appeals can consider the substantive reasonableness of a sentence, '[i]t must first ensure that the district court committed no significant procedural error, such as failing to

calculate (or improperly calculating) the Guidelines range.'" (quoting *Gall*, 552 U.S. at 51)).

Even when a sentencing court chooses not to impose a Guidelines sentence, it must explain its sentencing decision in relation to the properly-calculated Guidelines sentence because it is "uncontroversial" that a "major departure [from the Guidelines] should be supported by a more significant justification that a minor one," and sentencing courts "must adequately explain the chosen sentence . . . to promote the perception of fair sentencing." *Gall*, 552 U.S. at 50. Determining substantive reasonableness also requires knowing the correct Guidelines sentencing range because "[e]ven if the sentencing judge sees a reason to vary from the Guidelines, if the judge uses the sentencing range as the beginning point to explain the decision to deviate from it, *then the Guidelines are in a real sense the basis for the sentence*." *Peugh v. United States*, 569 U.S. 530, 542 (2013) (emphasis in original). In other words, although the district court has discretion to depart from the Guidelines, the court "must consult those Guidelines and take them into account when sentencing." *United States v. Booker*, 543 U.S. 220, 264 (2005).

Because properly calculating the Guidelines is central to sentencing, this Court has made plain that an error in calculating the Guidelines range will ordinarily entitle a defendant to a new sentencing hearing. *See Molina-Martinez v. United States*, 578 U.S. 189, 203 (2016) ("When a defendant is sentenced under an incorrect Guidelines range—whether or not the defendant's ultimate sentence falls within the correct range—the error itself can, and most often will, be sufficient to show a

reasonable probability of a different outcome absent the error."); *accord Rosales-Mireles*, 138 S. Ct. at 1903 (holding that a Guidelines error "in the ordinary case" warrants a remand for a new sentencing hearing because "it seriously affect[s] the fairness, integrity, or public reputation of the judicial proceedings.").

(2) Rule 52(a), Like Rule 52(b), Requires That Guideline Errors Should Ordinarily Be Corrected.

The correct Guidelines range is of such paramount importance to sentencing that Rule 52(b) ordinarily requires Guidelines miscalculations to be corrected even on plain error review when a defendant fails to object. *Rosales-Mireles*, 138 S. Ct. at 1907. The error also should ordinarily be corrected on harmless-error review because "ensuring the accuracy of Guidelines determinations also serves the purpose of providing certainty and fairness in sentencing on a greater scale," in light of the fact that "[w]hen sentences based on incorrect Guidelines ranges go uncorrected, the Commission's ability to make appropriate amendments is undermined." *Id.* at 1908. Finally, Guidelines errors should ordinarily be corrected because the anchoring effect of the guidelines means that "the risk of unnecessary deprivation of liberty particularly undermines the fairness, integrity or public reputation of judicial proceedings in the context of plain Guidelines error because the role the district court plays in calculating the range and the relative ease of correcting the error." *Id.*

These principles counsel reversal where, as here, the defendant has preserved the error and the claim is "governed by the more lenient harmless-error standard of Rule 52(a) rather than the more exacting plain-error standard of Rule 52(b)." *Greer*

v. United States, 141 S. Ct. 2090, 2093 (2021). "When Rule 52(a)'s 'harmless-error rule' governs, the prosecution bears the burden of showing harmlessness." *United States v. Davila*, 569 U.S. 597, 607 (2013) (quoting *United States v. Vonn*, 535 U.S. 55, 62 (2002)). But the minority approach taken by the Fourth Circuit effectively flips the burden under Rule 52(a), placing it on the defendant to prove prejudice when the district court has said it would have imposed the same sentence regardless of the Guideline range. This is a burden the defendant cannot overcome on appeal because the Fourth Circuit uncritically accepts even boilerplate assertions at face value, despite evidence that such assertions are mere rote pronouncements incorporated into every sentencing. Such harmless error review is tantamount to no review at all on appeal, because the Fourth Circuit always affirms if the sentencing court has made a boilerplate disavowal of the Guidelines' importance.

The minority's application of Rule 52(a) is also improper because it neglects that "the Court has consistently made clear that it is the duty of a reviewing court to consider the trial record *as a whole*" when conducting harmless error review. *United States v. Hasting*, 461 U.S. 499, 509 (1983) (citations omitted and emphasis added). This Court held of the mandatory Guidelines that "once the court of appeals has decided that the district court misapplied the Guidelines, a remand is appropriate unless the reviewing court concludes, *on the record as a whole*, that the error was harmless." *Williams v. United States*, 503 U.S. 193, 203 (1992) (emphasis added).

But in finding Guidelines calculation errors harmless, the minority approach looks only to the district court's harmless error statements, instead of the entire record.

C. The Question Presented Is Important and Recurring

Just this year, the Seventh Circuit "noticed the frequency with which sentencing judges are relying on inoculating statements" in an effort to immunize Guidelines miscalculations on appeal. *Asbury*, 27 F.4th at 581. District judges face incentives that encourage them to make blanket assertions about their sentencing conclusions to insulate their Guidelines calculations from appellate review. Indeed, the evidence before the Fourth Circuit showed that the district court here makes such blanket assertions at every sentencing. It is critical for this Court to resolve whether that practice is proper, and how appellate courts should assess such situations for harmlessness.[1]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[1] Notably, this Court recently called for a response in a petition raising the same issue. *See Cyrano R. Irons v. United States*, No. 22-242.

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