No. _____

In the

Supreme Court of the United States

_____

John Gabriel Trevino,

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 non-compliance with Federal Rule of Criminal Procedure 32(i)(1)(A) may be excused where the defendant fails to show that he or she would have received a lesser sentence if the court had complied?

PARTIES TO THE PROCEEDING

Petitioner is John Gabriel Trevino, 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 Joh Gabriel Trevino seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The unpublished opinion of the court of appeals is reported at *United States v. Trevino*, No. 19-11202, 2022 WL 17691623 (5th Cir. December 14, 2022)(unpublished). It is reprinted in Appendix A to this Petition. The district court's judgement and sentence is attached as Appendix B, and its amended judgment is attached as Appendix C.

JURISDICTION

The panel opinion and judgment of the Fifth Circuit were entered on December 14, 2022. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

RELEVANT FEDERAL RULES

Federal Rule of Criminal Procedure 32 reads in relevant part:

> (i) Sentencing.
>
> (1) In General. At sentencing, the court:
>
> (A) must verify that the defendant and the defendant's attorney have read and discussed the presentence report and any addendum to the report…

Federal of Criminal Procedure 52 reads in relevant part:

> (b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

STATEMENT OF THE CASE

A. Facts and Proceedings in District Court

Petitioner John Trevino pleaded guilty to one count of violating 18 U.S.C. 2251(a). *See* (Record in the Court of Appeals, at 138-144). This plea stemmed from a plea agreement, which ultimately did not contain a waiver of appeal. *See* (Record in the Court of Appeals, at 127-134).

A Presentence Report (PSR) calculated a Guideline range of 235-292 months imprisonment, the result of an offense level 37 and a criminal history category of II. *See* (Record in the Court of Appeals, at 160). The offense level depended on, *inter alia*, a two level adjustment under USSG §2G2.1(b)(3). *See* (Record in the Court of Appeals, at 153-154). Petitioner objected to this adjustment, contending that the undisputed conduct did not trigger the Guideline adjustment. *See* (Record in the Court of Appeals, at 163-165). An Addendum rejected the objection, commenting at length on the defendant's conduct, and applying Probation's view of USSG §2G2.1(b)(3) to those findings. *See* (Record in the Court of Appeals, at 175-176).

At the outset of the hearing, the court asked whether the defendant had reviewed the PSR. *See* (Record in the Court of Appeals, at 102). But it neglected to ask whether he had reviewed the Addendum. *See* (Record in the Court of Appeals, at 102). After argument, it overruled the Guideline objection. *See* (Record in the Court of Appeals, at 112-116).

After this ruling, defense counsel requested a sentence at the low end of the Guideline, 235 months imprisonment. *See* (Record in the Court of Appeals, at 117).

Counsel noted that 235 months also represented the high end of the range that would have applied under Petitioner's view of the Guidelines. *See* (Record in the Court of Appeals, at 117). The court imposed that sentence, s*ee* (Record in the Court of Appeals, at 119), and said that the sentence would have been the same under Petitioner's view of the Guidelines, s*ee* (Record in the Court of Appeals, at 119).

In the Judgment, the court added a wide array of supervised release conditions, among them a group of conditions that had not been pronounced orally at sentencing. ***Compare*** (Record in the Court of Appeals, at 63) ***with*** (Record in the Court of Appeals, at 121-123). The judgment described these as "standard conditions," and they appear on its fourth page. *See* (Record in the Court of Appeals, at 63).

B. Appellate Proceedings

The Federal Defender filed an brief under *Anders v. California*, 386 U.S. 738 (1967), noting a possible objection to the Guideline calculation, but concluding that the objection would likely have been harmless in light of the court's remarks at sentencing. This Court, however, ordered the Defender to consider four additional arguments, namely:

> (1) whether the district court complied with Federal Rule of Criminal Procedure 32(i)(1) by verifying that Trevino and his trial counsel read and discussed the addendum to the presentence report; (2) the substantive reasonableness of the sentence, especially in light of counsel's indication that the district court's imposition of an enhancement under U.S.S.G. § 2G2.1(b)(3) was potentially erroneous but nevertheless harmless; (3) whether the district court erred by imposing standard conditions of supervised release in the written judgment that were not orally pronounced at sentencing nor required by 18 U.S.C. § 3583(d), *see United States v. Garcia*, 983 F.3d 820, 824 (5th Cir. 2020); *United States v. Diggles*, 957 F.3d 551, 556-59 (5th Cir.) (en banc), cert. denied, 141 S. Ct. 825 (2020); and (4) the propriety of

> the special conditions of supervised release imposed by the district court.

Fifth Circuit Order of July 1, 2021, p.2.

Petitioner filed a new Initial Brief raising the first and third of these issues. The court "vacated the judgment in part" ordering the district court to strike conditions of supervised release that it had not orally pronounced. *See United States v. Trevino*, No. 19-11202, 2022 WL 17691623, at *1 (5th Cir. Dec. 14, 2022)(unpublished); [Appx. A]. However, it affirmed the judgment "in all other respects." *Trevino*, No. 19-11202, 2022 WL 17691623, at *1. Rejecting Petitioner's claim that he should receive a new sentencing hearing because the court failed to verify that he had read and discussed the addendum with counsel, the court of appeals offered the following explanation:

> As Trevino concedes, we review for plain error because he did not raise this issue in district court. Based on the record, it is reasonable to infer that Trevino had read and discussed the addendum with his counsel. In any event, as Trevino concedes, he cannot succeed on plain error review because he cannot meet his burden of showing that the alleged error was prejudicial under binding precedent.

Id. (citing United States v. Esparza-Gonzalez, 268 F.3d 272, 274 (5th Cir. 2001)).

Since then, the district court has complied with the judgment of the court of appeals, striking the unpronounced conditions from an amended judgment. *See* [Appx. C].

REASONS FOR GRANTING THE PETITION

The courts of appeals are divided as to the proper remedy when the court fails to verify that the defendant and the defendant's attorney have read and discussed the presentence report and any addendum to the report.

A. The courts are divided as to an important issue.

Prior to 1984, federal criminal sentencing suffered from pervasive disparity. *See* S. Rep. No. 98-225, 38, 65 (1983). Defendants convicted of similar crimes with similar criminal records would receive vastly different punishment depending on accidents of geography and judicial assignment. *See id.* The result was a real and perceived unfairness, and an unpredictability to the sentencing process that undermined deterrence and proportional punishment. *See id.*

In order to combat these problems, Congress enacted the Sentencing Reform Act. It created a system of Sentencing Guidelines, now advisory, that try to impose comparable sentences for comparable conduct. *See* 28 U.S.C. §§991(b)(1)(B); 994(f). The centerpiece of this regime is Federal Rule of Criminal Procedure 32, which "provides for focused, adversarial development of the factual and legal issues relevant to determining the appropriate Guidelines sentence." *Burns v. United States*, 501 U.S. 129, 134 (1991). Under this more formalized process, Probation prepares an extensive Presentence Report, calculating the Guidelines, and advising the court of other critical factual matters that may affect sentencing. *See* Fed. R. Crim. P. 32(d). The parties have a deadline to object to any matters, factual or legal, which they wish to litigate, and can insist on a ruling from the court unless the court certifies that the

issue will not affect the outcome. *See* Fed. R. Crim. P. 32(d). Indeed, both parties may appeal unfavorable rulings, whether legal or factual. *See* 18 U.S.C. 3742.

This form of federal sentencing – now with us for more than 40 years -- may have succeeded in accomplishing its goal of reduced disparity and improved proportionality. But the formal and complicated processes it demands have costs, among them the risk that the defendant will become detached from the events that determine his or her fate. The constitution contemplates the defendant's active participation in the criminal process, both because it is essential to a truly adversarial process, *see Drope v. Missouri*, 420 U.S. 162, 172 (1975). and because he possesses profound dignitary interests in understanding it. As a policy matter, moreover, deterrence presumes a basic understanding of the reasons for the sentence.

Fortunately, Rule 32 includes at least two critical safeguards against the defendant's detachment and alienation from the sentencing process. First, it insists that the defendant be heard directly and personally before the imposition of sentence, through allocution. *See* Fed. R. Crim. P. 32(i)(4). Second, it says that the sentencing court "must verify that the defendant and the defendant's attorney have read and discussed the presentence report and any addendum to the report." Fed. R. Crim. P. 32(i)(1)(A).

This case involves the second of these guarantees, which ensures that the defendant will have a meaningful opportunity to participate in federal sentencing by ensuring that her or she understands the chief document in that process. Specifically, the question before the court is under what conditions a sentencing court that

overlooks this guarantee will have to redo the sentencing. The court below, *see United States v. Esparza-Gonzales*, 268 F.3d 272, 274 (5th Cir. 2002), in common with several others, *see United States v. Stevens*, 223 F.3d 239, 246 (3d. Cir.2000); *United States v. Lockhart*, 58 F.3d 86, 89 (4th Cir.1995); *United States v. Rodriguez–Luna*, 937 F.2d 1208, 1213 (7th Cir.1991); *United States v. Davila–Escovedo*, 36 F.3d 840, 844 (9th Cir.1994); *United States v. Romero*, 491 F.3d 1173, 1180 (10th Cir. 2007), requires the defendant to show that the outcome would have been different if the district court had inquired about their familiarity with the PSR.

It is not clear, however, precisely how the defendant would accomplish that showing. The Tenth Circuit declined to remand because the defendant could not offer evidence contrary to the PSR. *United States v. Rangel-Arreola*, 991 F.2d 1519, 1526 (10th Cir. 1993). But, of course, the absence of contrary record evidence may result from the defendant's lack of participation in the process – that's the reason for the Rule.

By contrast, the Sixth Circuit has flatly held that "[i]f the procedures [established by Rule 32(c)(3)(A)] are not followed, this court should remand for resentencing." *United States v. Schultz*, 855 F.2d 1217, 1224 (6th Cir.1988); *accord United States v. Mitchell*, 243 F.3d 953, 955 (6th Cir. 2001). In so doing, it expressly "disagree(d)" with the government's "argu[ment] that the district court's failure to comply with Rule 32(c)(3)(A) does not require a new sentencing hearing unless [the defendant] can show actual prejudice as a result of the error." *Mitchell*, 243 F.3d at 955. In doing so, it "recognized the significant role that Rule 32's requirements play

in ensuring a just adjudication at the sentencing hearing," including the important role they play in avoiding the use of misinformation in prison designation and prison programming. *Id.* The Sixth Circuit's 2001 case on this point – *Mitchell* -- remains good law, having been cited with approval as recently as 2016. *See United States v. Howard*, 645 F. App'x 459, 463 (6th Cir. 2016)(unpublished)(citing *Mitchell* for the proposition that "we require literal compliance with the rule," while adding "'[a] trial judge need not expressly ask the defendant if he and his counsel have read and discussed the report.'")(quoting *United States v. Osborne*, 291 F.3d 908, 910 (6th Cir.2002)).

The division between the Circuits is clear and direct: the Sixth Circuit remands when the district court fails to verify the defendant's review of the PSR and Addenda with counsel; the other circuits do not absent a showing, somehow, of a different outcome. Indeed, the conflict has been expressly acknowledged by the Tenth Circuit. *See Romero*, 491 F.3d at 1180 ("…some circuits permit remand for a Rule 32 error without requiring the defendant to demonstrate prejudice, as did the Sixth Circuit in … *Mitchell* … but we rejected this approach…").

The issue is important and recurring. The duty to verify review of the PSR attends very nearly every federal case. Lapses may occur in any case, and their frequency is not likely reflected in appellate caselaw, given the limited incentives defendants possess to raise them in most circuits.

Further, the absence of a meaningful remedy for such lapses strikes at the heart of the adversarial system the Sentencing Reform Act sought to create. In the

event that the defendant has not read the PSR, or trial counsel has not explained its content and significance, there is a high probability that neither the defendant nor defense counsel will call that issue to the judge's attention. This is because the defendant may not know to bring the issue up, and trial counsel may have overlooked the duty to consult regarding the PSR, or may not wish to inform the judge of the professional lapse. As such, the adversarial system, involving the defendant's meaningful participation at sentencing, depends on the affirmative conduct of the trial court to verify in some way that the consultation has occurred. Yet the position of the court below and like-minded circuits has essentially rendered int optional.

B. This case is an appropriate vehicle to address the conflict.

This case well presents the issue that has divided the courts of appeals. The plain language of the Rule requires the court to verify that the defendant has read and discussed with counsel both the Presentence Report and any Addendum. The court simply did not do so with respect to the Addendum, which addressed an extant Guideline objection.

The court below suggested that 'it is reasonable to infer that Trevino had read and discussed the addendum with his counsel." *Trevino*, 2022 WL 17691623, at *1. The government argued as much, relying on the fact that trial counsel had reviewed the Addendum, and the defendant never affirmatively stated that he had not reviewed the Addendum. *See* Appellee's Brief in *United States v. Trevino*, No. 19-11202, 2021 WL 5506895, at **6-8 (5th Cir. Filed November 22, 2021).

These facts, however, do not reliably establish that Petitioner read and discussed the Addendum with counsel. Indeed, the Sixth Circuit has found that a trial counsel's reference to the critical document cannot be imputed to the defendant. *See Mitchell*, 243 F.3d 953, 955 ("Mitchell's counsel's arguments at the sentencing hearing indicated both that he had read the presentence report and that he and Mitchell had discussed Mitchell's background. The hearing transcript does not, however, demonstrate that Mitchell and his counsel 'read and discussed' the report itself. Accordingly, the district court could not have made such a determination as required by Rule 32(c)(3)(A).") So at least one circuit would reach a different outcome on the facts presented here.

Finally, it is no moment that the court remanded on a different issue. The court of appeals carefully limited its relief to the conditions of release, and did not provide room to relitigate any other portion of the judgment in district court. The remand therefore cannot rectify the Rule 32 error infecting any other portion of the judgment. It would be wasteful to compel another round of appeals to address an issue that is not properly before the district court on remand.

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 14th day of March 2023.

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