

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

SAVON HARDAWAY,
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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QUESTIONS PRESENTED

- I. Mr. Hardaway pleaded guilty to a felon in possession charge. The district court arraigned Mr. Hardaway after this Court's decision in *Rehaif v. United States*, 139 S. Ct. 2191 (2019), but Mr. Hardaway did not object to the district court's failure to advise him that the elements of the felon in possession offense included that he knew he had been convicted of a crime punishable by a term of imprisonment exceeding one year. Did Mr. Hardaway make a sufficient showing that if had been properly advised, there is a reasonable probability that he would not have pleaded guilty to the felon in possession charge?
- II. The district court sentenced Mr. Hardaway as a career offender. On appeal, the Government conceded that he is not a career offender. The Fourth Circuit nevertheless affirmed, holding that sentencing Mr. Hardaway as a career offender was harmless error. Can the district court's error in sentencing Mr. Hardaway be harmless when the district court relied on the same reasons to justify an erroneous career offender sentence of 151 months and what it called an "alternative variance" sentence 114 months more than the top of the correct Guidelines range?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner, who was the Defendant-Appellant below, is Savon Hardaway.

Respondent, who was the Plaintiff-Appellee below, is the United States of America.

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CITATION OF PRIOR OPINION

The United States Court of Appeals for the Fourth Circuit decided this case by unpublished opinion issued 4 April 2023, in which it affirmed the judgment of the district court. A copy of the Fourth Circuit's opinion is included in the Appendix to this petition.

JURISDICTIONAL STATEMENT

This petition seeks review of an opinion affirming Mr. Hardaway's conviction and sentence, following a guilty plea to two counts of knowingly and intentionally distributing a quantity of heroin, in violation of 21 U.S.C. § 841(a), and one count of possession of a firearm after having been convicted of a felony, in violation of 18 U.S.C. §§ 922(g)(1), 924. J.A. 92-99. The petition is being filed within the time permitted by the Rules of this Court. *See* S. Ct. R. 13. This Court has jurisdiction to review the Fourth Circuit's opinion pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Indictment

A federal grand jury returned a superseding indictment charging Mr. Hardaway and five co-defendants. J.A. 8-15. Mr. Hardaway was charged with one count of conspiracy to knowingly and intentionally distribute and possess with intent to distribute a quantity of heroin, in violation of 21 U.S.C. §§ 841(a)(1), 846 (Count 1); three counts of knowingly and intentionally distributing a quantity of heroin, in violation of 21 U.S.C. § 841(a), based on the three controlled buys (Counts 2, 3, and 4); and one count of possession of a firearm after having been convicted of

a felony, in violation of 18 U.S.C. §§ 922(g)(1), 924 (Count 11). J.A. 8-9, 11.

In Count 11, the grand jury charged:

On or about August 21, 2018, in the Eastern District of North Carolina, the defendant, SAVON HARDAWAY, also known as “Say,” having been convicted of a crime punishable by imprisonment for a term exceeding one (1) year, did knowingly and intentionally possess, in and affecting commerce, a firearm, in violation of Title 18, United States Code, Sections 922(g)(1) and 924.

J.A. 11.

Plea agreement and arraignment

Mr. Hardaway signed a written plea agreement, agreeing to plead guilty to Counts 2, 3, 4, and 11. J.A. 92-99. Paragraph 3 of the plea agreement addressed the counts in the superseding indictment to which Mr. Hardaway was pleading guilty. J.A. 94-97. Regarding Count 11, the plea agreement provided:

3. The Defendant understands, agrees, and admits:
 - a. That as to each Count of the Superseding Indictment to which the Defendant is pleading guilty, the charge, code section, elements, and applicable penalties are as follows:

* * *

Count Eleven

- (1) Possession of a Firearm by a Felon
- (2) Elements: On or about August 21, 2018 in the Eastern District of North Carolina, the Defendant

First: knowingly possessed a firearm;

Second: after having been convicted of a crime punishable by a term of imprisonment exceeding one

year;

Third: the defendant knowing that he had been convicted of a crime punishable by a term of imprisonment exceeding one year; and

Third: the possession of the firearm was in or affecting commerce.

- (4) Maximum term of imprisonment: 10 years
- (5) Minimum term of imprisonment: N/A
- (6) Maximum term of supervised release: 3 years
- (7) Maximum term of imprisonment upon revocation of supervised release: 2 years.
- (8) Maximum fine: \$250,000
- (9) Restitution pursuant to 18 U.S.C. § 3663 & 3663A, and as agreed to in Paragraph 2(b) above.
- (10) Special assessment: \$100

J.A. 94, 96-97.

Mr. Hardaway also agreed to an appeal waiver provision in the plea agreement that expressly preserved his right to appeal a determination by the district court that his prior conviction for attempted common law robbery or conspiracy to commit common law robbery was a crime of violence under the United States Sentencing Guidelines. J.A. 92-93.

Prior to Mr. Hardaway's arraignment, this Court held in *Rehaif v. United States*, 139 S. Ct. 2191, 2200 (2019), that in prosecuting a felon in possession charge

under 18 U.S.C. §§ 922(g) and 924(a)(2), “the Government must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm.”

The district court held Mr. Hardaway’s arraignment on 5 August 2019. J.A. 5, 16-47. Mr. Hardaway confirmed that he had reached a plea agreement with the Government. J.A. 31. The court read the charges in Counts 1, 2, 3, 4, and 11 in the superseding indictment and recited the potential penalties for those offenses. J.A. 31-34. As to Count 11, the district court stated:

Count Eleven charges on or about August 21st, 2018, in the Eastern District of North Carolina, the defendant, Savon Hardaway, also known as “Say,” having been convicted of a crime punishable by imprisonment for a term exceeding one year, did knowingly possess, in and affecting commerce, a firearm, in violation of Title 18, U.S. Code, Section 922(g)(1) and 924.

J.A. 33. After the court read all the charges against him and asked Mr. Hardaway if he understood the charges, Mr. Hardaway answered, “Yes, sir.” J.A. 33. The court then read each charge as to which Mr. Hardaway had agreed to plead guilty, and asked Mr. Hardaway how he pleaded to each count. J.A. 40-42. The court engaged Mr. Hardaway as to Count 11.

THE COURT:

As to Count Eleven, the charge is that on or about August 21st, 2018, in the Eastern District of North Carolina, the defendant, Savon Hardaway, also known as “Say,” having been convicted of a crime punishable by imprisonment for a term exceeding one year did knowingly possess, in and affecting commerce, a firearm, in violation of Title 18, U.S. Code, Section 911(g)(1) and 924.

How do you now plead to the charge in Count Eleven, sir, guilty or

not guilty?

THE DEFENDANT: Guilty.

THE COURT: Did you commit the crime charged in Count Eleven, sir?

THE DEFENDANT: Yes, sir.

THE COURT: So you are, in fact, guilty of Count Eleven, sir?

THE DEFENDANT: Yes, sir.

J.A. 42.

The court asked the Assistant United States Attorney to make a proffer of what the evidence would show if the case went to trial. J.A. 42-43. After summarizing what he thought the evidence would show as to the charge in Count 11, the Assistant United States Attorney noted that “the defendant has acknowledged in his plea agreement that he knew at the time he was a felon convicted or punished—convicted of a crime punishable by imprisonment of more than one year.” J.A. 43-44.

The court accepted Mr. Hardaway’s guilty plea as to Counts 2, 3, 4, and 11. J.A. 44.

Sentencing and judgment

The Probation Office prepared a presentence investigation report. J.A. 106-25. The Probation Office found that Mr. Hardaway had two scorable prior sentences imposed in North Carolina state court. J.A. 113-15. Mr. Hardaway was convicted in 2015 of attempted common law robbery, conspiracy to commit common

law robbery, and conspiracy to possess a firearm by a felon, and he was sentenced to 6 to 17 months' custody. J.A. 114. In 2016, Mr. Hardaway was convicted of selling or delivering a Schedule I controlled substance, and he was sentenced to 14 to 26 months' custody. J.A. 115. After assigning three points for each of the 2015 and 2016 sentences, and adding two points because Mr. Hardaway had committed the instant offenses while under a criminal justice sentence, the Probation Office found that Mr. Hardaway's criminal history score was 8, placing him in Criminal History Category IV. J.A. 116. However, the Probation Office found that Mr. Hardaway had two prior felony convictions of either a crime of violence or a controlled substance offense—specifically, the convictions for attempted common law robbery and selling or delivering a Schedule I controlled substance—and therefore determined that Mr. Hardaway's Criminal History Category was VI based on the Career Offender Guideline. J.A. 116, 120; *see* U.S.S.G. § 4B1.1(b).

In calculating Mr. Hardaway's offense level, the Probation Office first determined the combined adjusted offense level for the felon in possession and heroin distribution counts was 26, including a two-point enhancement for possession of a stolen firearm. J.A. 120; *see* U.S.S.G. § 2K2.1(b)(4)(A). Having concluded that the Career Offender Guideline applied, the Probation Office increased Mr. Hardaway's adjusted offense level to 32. J.A. 120; *see* U.S.S.G. § 4B1.1(b)(3). After deducting three levels based on Mr. Hardaway's acceptance of responsibility, the Probation Office determined his total offense level was 29. J.A. 121; *see* U.S.S.G. § 3E1.1.

Based on a total offense level of 29 and Criminal History Category VI, the Probation Office determined that Mr. Hardaway's Guidelines sentencing range was 151 to 188 months' imprisonment. J.A. 121. Mr. Hardaway objected that his conviction for attempted common law robbery was not a crime of violence under the Guidelines, and thus the total offense level and his criminal history category were incorrect because the Career Offender Guideline did not apply. J.A. 101, 102, 124-25.

At Mr. Hardaway's sentencing hearing, Mr. Hardaway's counsel conceded that the case law at that time supported the Probation Office's conclusion that the attempted common law robbery conviction was a crime of violence under the Guidelines, but he said he wanted to preserve the objection because of "some uncertainty" in the law regarding what offenses are properly considered crimes of violence. J.A. 57.

The district court overruled Mr. Hardaway's objections. J.A. 58, 63. The district court found that the Guidelines sentencing range was 151 to 188 months. J.A. 63.

Mr. Hardaway's counsel argued for a downward variance from the Guidelines range. J.A. 63-67. The district court noted it had considered Mr. Hardaway's counsel's argument "for a downward variance to essentially a place within the noncareer offender advisory Guideline," but ruled it would not vary downward. J.A. 76. Mr. Hardaway was a street level dealer, and the evidence connecting Mr. Hardaway to the conspiracy was weak. J.A. 64. The total drug weight for the three

controlled buys to which Mr. Hardaway pleaded guilty was only 1.12 grams of heroin. J.A. 64. Counsel argued that Mr. Hardaway was less culpable than other defendants charged in the same superseding indictment, one of whom had been sentenced to 33 months, and another of whom had been sentenced to 48 months. J.A. 64.

Mr. Hardaway was only eighteen years old at the time of the offense that led to his attempted common law robbery conviction. J.A. 65. His two co-defendants were much older. J.A. 65. But for that conviction, which made Mr. Hardaway a career offender, Mr. Hardaway's counsel argued that his Guidelines sentencing range would have been 70 to 87 months. J.A. 66.

The district court decided to not vary downward from the Guidelines sentencing range. J.A. 76. The court sentenced Mr. Hardaway to 151 months' imprisonment on each of Counts 2, 3, and 4, to be served concurrently, and a concurrent term of 120 months' imprisonment on Count 11. J.A. 77, 81-88.

After announcing the sentence, the court stated:

I do think I've properly calculated the advisory Guideline range, but to the extent I've miscalculated it, I would impose the same sentence as an alternative variant sentence. If the Guideline were in a noncareer offender calculation, I would impose the same sentence under the 3553(a) factors as an upward variance. I announce this alternative variant sentence pursuant to U.S. v. Gomez-Jimenez, 750 F.3d 370 (4th Cir. 2014), and U.S. v. Hargrove, 701 F.3d 156 (4th Cir. 2012).

J.A. 78.

Appeal

Mr. Hardaway filed a notice of appeal. Prior to Mr. Hardaway filing his

opening brief, the United States Court of Appeals for the Fourth Circuit held in *United States v. Gary*, 954 F.3d 194, 198 (4th Cir. 2020), that it was a structural error if the district court failed to advise a defendant pleading guilty to a felon in possession charge that the Government had to prove the defendant knew she has the relevant status precluding possession of a firearm. The Fourth Circuit also ruled that it would notice and correct as a plain error the district court's acceptance of the defendant's guilty plea. *Id.* at 208. Mr. Hardaway argued that under *Gary*, he was entitled to vacatur of his guilty plea to the felon in possession charge. Opening Br. 18-23 (Dkt. No. 18).

Mr. Hardaway also argued that the district court erred in sentencing him as a career offender. Specifically, Mr. Hardaway argued that his conviction in North Carolina of attempted common law robbery was not a crime of violence, and thus he did not have two predicate convictions as required to be deemed a career offender under the Guidelines. *Id.* 24-29.

Prior to the Government filing its response brief, this Court held in *Greer v. United States*, 141 S. Ct. 2090, 2099-2100 (2021), that it is not a structural error for the district court to fail to advise a defendant charged as a felon in possession of a firearm that the Government had to prove that the defendant knew she was a felon. Where the defendant did not object to the district court's advice of rights, the defendant must show plain error. *Id.* at 2096. The Court held that to make the plain error showing in a case where the defendant pleaded guilty, the defendant

must establish that her substantial rights were affected, and to do so the defendant has the burden of showing that if the district court had correctly advised her, there is a reasonable probability the defendant would not have pleaded guilty. *Id.* at 2097.

In its response brief, the Government argued that Mr. Hardaway had not made a sufficient showing that there was a reasonable probability that, had he been properly advised, he would not have pleaded guilty. Resp. Br. 12-14 (Dkt. No. 46). Responding to Mr. Hardaway's sentencing argument, conceded that Mr. Hardaway was not a career offender because his North Carolina attempted common law robbery conviction is not a career offender predicate. *Id.* 14, 15. The Government argued that the district court's error was harmless, because the court stated that if it had decided the Guidelines incorrectly, it nevertheless would have imposed the same sentence. *Id.* 15-20.

The Fourth Circuit affirmed. The Fourth Circuit held that Mr. Hardaway had not made a sufficient showing that he would have pleaded not guilty had he been properly advised by the district court. App. 3-4. The Fourth Circuit also held that the district court's ruling that Mr. Hardaway was a career offender and sentencing him as a career offender was harmless error. *Id.* 4. The Fourth Circuit reasoned that the district court had stated that it would have imposed the same sentence if it had decided the Guidelines issue the other way, and that the 151-month sentence was substantively reasonable. *Id.* 4-5.

CONSTITUTIONAL PROVISION AND FEDERAL RULE INVOLVED

1. The Fifth Amendment to the United States Constitution provides:

“No person shall . . . be deprived of life, liberty, or property, without due process of law[.]”

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.

MANNER IN WHICH THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

The questions presented were argued and reviewed below where Mr. Hardaway argued his guilty plea to the felon in possession charge was invalid under this Court’s decisions in *Rehaif* and *Greer*, and that the sentencing error was not harmless. App. 2. The Fourth Circuit rejected Mr. Hardaway’s arguments and affirmed. *Id.* 6.

REASONS FOR GRANTING THE WRIT

Mr. Hardaway respectfully contends that there are “compelling reasons” for granting his petition for writ of certiorari. *See* S. Ct. R. 10.

Prior to this Court’s *Rehaif* decision, federal courts did not recognize that the elements of the felon in possession of a firearm offense include that the defendant knew her status precluded her from legally possessing a firearm. Following this Court’s decision in *Greer*, courts must determine if a defendant who pleaded guilty but did not object to the district court’s advice of rights has established a plain error

basis for relief. This case presents a recurring fact pattern where there is evidence in the record to support the defendant's argument that she would not have pleaded guilty if properly advised of the elements of the felon in possession offense, but there was no reason to fully develop that argument based on the state of the law at that time. Granting certiorari in this case will assist the federal courts in the applying the *Rehaif* and *Greer* principles to this recurring fact pattern.

The question whether a district court's error in sentencing a defendant based on an incorrect Guidelines range is a harmless error if the court declares it would have imposed the same sentence if it had decided the Guidelines issue in favor of the defendant is also a recurring question. This Court's Guidelines decisions make it clear that district courts cannot use the facile invocation of variance language to avoid appellate review and correction of Guidelines errors.

DISCUSSION

I. MR. HARDAWAY'S GUILTY PLEA TO THE FELON IN POSSESSION CHARGE WAS CONSTITUTIONALLY INVALID, AND HE MADE A SUFFICIENT SHOWING THAT IF HE HAD BEEN PROPERLY ADVISED, THERE IS A REASONABLE PROBABILITY THAT HE WOULD NOT HAVE PLEADED GUILTY.

A guilty plea is constitutionally valid only to the extent it is "voluntary" and "intelligent." *See Brady v. United States*, 397 U.S. 742, 748 (1970). This Court has long held that a plea does not qualify as intelligent unless a criminal defendant first receives "real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process." *See Smith v. O'Grady*, 312 U.S. 329, 334 (1941). If neither the defendant, nor his counsel, nor the court "correctly

understood the essential elements of the crime with which he was charged,” a guilty plea to that charge would be constitutionally invalid. *See Bousley v. United States*, 523 U.S. 614, 618-19 (1998). Where the district court did not advise Mr. Hardaway at his arraignment that the Government was required to prove that he knew he was a felon, Mr. Hardaway’s guilty plea was not knowing and voluntary, and therefore was constitutionally invalid. *See id.*; *United States v. Gary*, 954 F.3d 194, 198 (4th Cir. 2020), *rev’d sub nom. Greer v. United States*, 141 S. Ct. 2090 (2021).

Mr. Hardaway did not object to the district court’s failure to properly advise him of the elements of the felon in possession of a firearm offense at his arraignment. J.A. 29-46. Mr. Hardaway had no reason to raise any question on the record whether he knew he was a felon because he had no reason to know that was an element of the felon in possession offense. At the time he filed his opening brief, *United States v. Gary* was the law in the Fourth Circuit, and Mr. Hardaway relied on the *Gary* court’s holding that a district court’s failure to advise a defendant of the elements of the felon in possession of a firearm offense was a structural error and that the court would notice this error. Opening Br. 18-23 (Dkt. No. 18).

Mr. Hardaway understands that under this Court’s decision in *Greer*, because he did not object below, he must show that the district court’s failure to advise him of the elements of the felon in possession of a firearm offense was plain error. *See Greer v. United States*, 141 S. Ct. at 2096. Mr. Hardaway further understands that under *Greer*, to establish that his substantial rights were affected as required for

plain error relief, he has the burden of showing that if the district court had correctly advised him of the elements of the felon in possession offense, there is a reasonable probability that he would not have pleaded guilty. *Id.* at 2097.

Mr. Hardaway respectfully contends that given the procedural posture of the case, he made “an adequate showing on appeal that he would have presented evidence in the district court that he did not in fact know he was a felon when he possessed the firearms.” *Id.*

At the sentencing hearing, Mr. Hardaway’s counsel questioned the facts underlying Mr. Hardaway’s convictions for attempted common law robbery and conspiracy, and he also noted Mr. Hardaway’s youth at the time. *See* J.A. 65-66. Where Mr. Hardaway was sentenced to 6 to 17 months on one charge, and given a suspended sentence on the other charges, there is a reasonable probability that Mr. Hardaway did not know that his convictions precluded him from possessing firearms. J.A. 114; *see United States v. Barronette*, 46 F.4th 177, 201 (4th Cir. 2022) (plain error relief warranted where state law predicates were misdemeanor convictions, noting that “while [the defendant] was sentenced to a term of imprisonment exceeding two years, the judge simultaneously suspended the vast majority of that sentence, raising a question as to whether he actually knew he had been convicted of a crime punishable by more than two years when he possessed a firearm several years later”).

Mr. Hardaway argued in his Fourth Circuit reply brief that this evidence in the record was sufficient to justify remand to the district court for further

consideration of his contention that if had been properly advised, he would not have pleaded guilty. Reply Br. 3-7 (Dkt. No. 51). In contrast, the defendant in *Gary* did not claim that he did not know he was a felon or suggest that he would not have pleaded guilty absent the *Rehaif* error. See *United States v. Greer*, 141 S. Ct. at 2100 n.1. Before the district court, Mr. Hardaway had no reason to try to more fully develop the facts that would show he did not know he was a felon. Before the Fourth Circuit, it was only at the time of his reply brief that Mr. Hardaway had reason to know that he had to show a reasonable probability that he would not have pleaded guilty if he had been properly advised at his arraignment, and he asked for the opportunity to more fully develop the record in the district court to support his contention that he did not know he was a felon. Mr. Hardaway respectfully contends that he has met his burden under *Greer* to make “a sufficient argument or representation on appeal that he would have presented evidence at trial that he did not in fact know he was a felon.” *Id.* at 2100. Mr. Hardaway did not knowingly give up his fundamental due process right to notice, see *Smith v. O’Grady*, 312 U.S. at 334, and contends that his guilty plea is constitutionally invalid, see *Bousley v. United States*, 523 U.S. at 618-19. Mr. Hardaway respectfully requests that the Court grant his petition and vacate his conviction of felon in possession of a firearm.

II. SENTENCING MR. HARDAWAY AS A CAREER OFFENDER WAS NOT HARMLESS ERROR.

Congress intended the Guidelines system to increase the uniformity of federal sentencing. See *United States v. Booker*, 543 U.S. 220, 246 (2005). “The

post-*Booker* federal sentencing scheme aims to achieve uniformity by ensuring that sentencing decisions are anchored by the Guidelines and that they remain a meaningful benchmark through the process of appellate review.” *Peugh v. United States*, 569 U.S. 530, 541 (2013); *see id.* at 549 (“Guidelines will anchor both the district court’s discretion and the appellate review process”). The district court “must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing.” *Gall v. United States*, 552 U.S. 38, 50 (2007). When a district court imposes a within-Guidelines sentence and an alternative variant sentence without explaining how and why the variance is justified beyond the reasoning the court used to justify the within-Guidelines sentence, the district court is effectively opting out of the Guidelines.

Mr. Hardaway respectfully contends that affirming the district court’s alternative variance sentence in this case is inconsistent with the mandate for a sentencing system anchored by the Guidelines.

“[D]istrict courts *must* begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process.” *Peugh v. United States*, 569 U.S. at 541 (quoting *Gall v. United States*, 552 U.S. at 50 n.6) (emphasis in *Gall*). Before imposing a non-Guidelines sentence, the district court “must consider the extent of the deviation and ensure the justification is sufficiently compelling to support the degree of variance.” *Gall v. United States*, 552 U.S. at 50. “Even 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. at 541 (quotation omitted). Therefore, “the Guidelines are not only the starting point for most federal sentencing proceedings but also the lodestar.” *Molina-Martinez v. United States*, 578 U.S. 189, 200 (2016).

“A district court that ‘improperly calculat[es]’ a defendant’s Guidelines range . . . has committed a ‘significant procedural error.’” *Id.* at 199 (quoting *Gall v. United States*, 552 U.S. at 51). “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.” *Id.* at 198.

The district court ruled that Mr. Hardaway was a career offender and sentenced him based on the career offender finding to 151 months’ imprisonment. J.A. 63. The district court further noted that while it believed it had properly calculated the Guidelines sentencing range, if the court had miscalculated the Guidelines range, the court would have imposed the same sentence as an alternative variant sentence. J.A. 78. The court did not discuss why or how the factors it considered relevant to support a within-Guidelines sentence using the career offender Guidelines range also supported a sentence substantially above a “noncareer offender” Guidelines range. *See* J.A. 78.

Moreover, the district court never clarified what “noncareer offender”

Guidelines range it was considering. Mr. Hardaway, through counsel, argued that but for the district court's erroneous ruling that Mr. Hardaway was a career offender, the correct Guidelines range was 70 to 87 months. J.A. 66. The Government argued that "[w]ithout career-offender status, Defendant's guidelines range would be 41-51 months." Resp. Br. 17 (Dkt. No. 46). The Probation Office advised that if the court had concurred with Mr. Hardaway's objections, the correct Guidelines range would be 41 to 51 months, but that calculation was based, in part, on Mr. Hardaway's objection to the enhancement for a stolen firearm that he withdrew at the sentencing hearing. *See* J.A. 57, 124, 125. "[A] major departure should be supported by a more significant justification than a minor one." *Gall v. United States*, 552 U.S. at 50. Where the district court did not determine the Guidelines range that would apply if Mr. Hardaway was not a career offender, the court violated this Court's directive that it must "consider the extent of the deviation and ensure the justification is sufficiently compelling to support the degree of variance." *See id.*

Where, as here, a district court says it would impose a sentence that is either at the bottom of the Guidelines range, or well above the top of the Guidelines range, the district court's sentence is not "anchored by the Guidelines." *See Peugh v. United States*, 569 U.S. at 541. Because the federal sentencing scheme does not contemplate that the same justification simultaneously may be "sufficiently compelling" to support both a low-Guidelines range sentence and an upward

variance from the Guidelines range, *see id.*, the district court's alternative sentence cannot be procedurally reasonable. To uphold Mr. Hardaway's sentence in this case would be to sanction two alternative sentences that are both affected by procedural error—one sentence based on an incorrectly calculated Guidelines range, and another sentence based on unexplained upward variance from the Guidelines range.

Mr. Hardaway contends that if he were to be sentenced today, he would not have any career offender predicates based on the Fourth Circuit's ruling in *United States v. Locklear*, No. 19-4443, 2022 WL 2764421 (4th Cir. July 15, 2022).

Mr. Hardaway's Guidelines range would be 30 to 37 months based on an offense level of 15 and criminal history category IV. *See* U.S.S.G. ch. 5, pt. A (Sentencing Table). Sentencing Mr. Hardaway to 151 months' imprisonment was not harmless error. *See Molina-Martinez v. United States*, 578 U.S. at 198.

CONCLUSION

For the foregoing reasons, Petitioner Savon Hardaway respectfully requests that the Court grant his petition for writ of certiorari, reverse the decision of the Fourth Circuit, and remand for further proceedings.

This the 3rd day of July, 2023.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Petition for Writ of Certiorari was served on the Respondent herein by depositing a copy thereof in the United States mail, postage prepaid, first class, addressed as follows:

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