

IN THE SUPREME COURT OF THE UNITED STATES

DEWAYNE JOSEPH, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner was entitled to appellate relief on his claim that the district court erred by failing to definitively calculate an advisory Sentencing Guidelines range before denying his motion for a sentence reduction under Section 404 of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5222.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (S.D. Fla.):

United States v. Joseph, No. 10-cr-20511 (Feb. 28, 2011)

United States v. Joseph, No. 10-cr-20511 (July 26, 2019)

United States v. Joseph, No. 10-cr-20511 (June 17, 2021)

United States Court of Appeals (11th Cir.):

United States v. Joseph, No. 11-11097 (Oct. 28, 2011)

United States v. Joseph, No. 19-13030 (Jan. 22, 2021)

United States v. Joseph, No. 21-12222 (Apr. 4, 2022)

United States v. Joseph, No. 21-12222 (July 11, 2023)

Supreme Court of the United States:

Joseph v. United States, No. 22-5061 (Oct. 17, 2022)

IN THE SUPREME COURT OF THE UNITED STATES

No. 23-5755

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1, at 1-5) is not published in the Federal Reporter but is available at 2023 WL 4446356. Prior opinions of the court of appeals (Pet. App. A3, at 1-4, and Pet. App. A4, at 1-6) are not published in the Federal Reporter but are available or reprinted at 2022 WL 1008838 and 842 Fed. Appx. 471, respectively. The relevant order of the district court (Pet. App. A5, at 1-17) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 11, 2023. The petition for a writ of certiorari was filed on October

6, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g); possessing with intent to distribute five grams or more of cocaine base (crack cocaine), in violation of 21 U.S.C. 841(a)(1) and 21 U.S.C. 841(b)(1)(B)(iii) (2006); and using or carrying a firearm during and in relation to a drug-trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A). Judgment 1. Petitioner was sentenced to 352 months of imprisonment, to be followed by eight years of supervised release. Judgment 2-3. The court of appeals affirmed. 445 Fed. Appx. 301.

In 2019, after the enactment of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, petitioner moved to reduce his sentence under Section 404 of that Act. The district court denied the motion, D. Ct. Doc. 119 (July 26, 2019), and the court of appeals reversed, Pet. App. A4, at 1-6. On remand, the district court again denied petitioner's motion, Pet. App. A5, at 1-17, and the court of appeals affirmed, Pet. App. A3, at 1-4. This Court granted a petition for a writ of certiorari, vacated the court of appeals' judgment, and remanded for further consideration in light of Concepcion v. United States, 597 U.S. 481 (2022). 143 S. Ct.

360. On remand, the court of appeals again affirmed. Pet. App. A1, at 1-5.

1. In 2010, petitioner was arrested in Miami, Florida, after fleeing from police officers seeking to stop and question him. Presentence Investigation Report (PSR) ¶ 3. During the chase, officers saw petitioner discard a black object, which petitioner withdrew from his waistband, and a "small ziploc bag." Ibid. After the arrest, officers located both the black object and the plastic bag in the yard where petitioner had discarded them. Ibid. The black object proved to be a stolen handgun loaded with 11 rounds of ammunition, ibid., and the plastic bag contained crack cocaine, PSR ¶ 5. Petitioner was wearing a gun holster in his waistband when he was arrested. PSR ¶ 3.

In July 2010, a federal grand jury in the Southern District of Florida returned an indictment charging petitioner with one count of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1); one count of possessing with intent to distribute five grams or more of crack cocaine, in violation of 21 U.S.C. 841(a)(1) and 21 U.S.C. 841(b)(1)(B)(iii) (2006); and one count of using or carrying a firearm during and in relation to a drug-trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A). Indictment 1-2. At the time, Section 841(b)(1)(B) prescribed a default statutory penalty range of five to 40 years of imprisonment for possession with intent to distribute between five and 50 grams of crack cocaine. 21 U.S.C. 841(b)(1)(B)(iii)

(2006). For a violation committed "after a prior conviction for a felony drug offense has become final," the statute specified enhanced penalties of not "less than 10 years" of imprisonment and not more than "life." 21 U.S.C. 841(b)(1)(B) (2006).

Before trial, the government gave notice under 21 U.S.C. 851 of its intent to seek the enhanced penalties based on petitioner's prior convictions in state court for felony drug offenses. D. Ct. Doc. 44, at 1-2 (Nov. 3, 2010). The case proceeded to trial. The parties jointly stipulated that the plastic bag recovered by the police contained "30.3 grams * * * of a mixture and substance containing a detectable amount of cocaine base." 11/9/10 Trial Tr. 36 (capitalization omitted). The jury found petitioner guilty on all counts and found in a special verdict that the drug-trafficking offense involved "over 5 grams" of crack cocaine. Verdict Form 1; see Judgment 1.

2. In preparation for petitioner's sentencing, the Probation Office determined that petitioner qualified as a career offender under the advisory Sentencing Guidelines. PSR ¶ 20. Under the Guidelines, a career-offender's base offense level is either the base offense level for the underlying offense or a base offense level determined under the career-offender guideline based on the maximum statutory penalty for the offense -- whichever is higher. Sentencing Guidelines § 4B1.1 (2010). In accord with the statutory penalties in place at the time, the Probation Office relied on the statutory maximum penalty of life in applying the

career-offender guideline. See PSR ¶¶ 19-20. And using that offense level, the Probation Office calculated petitioner's Guidelines range to be 360 months to life, to be followed by a mandatory consecutive sentence of at least 60 months for petitioner's Section 924(c) violation. PSR ¶ 71.

At sentencing, the district court adopted the Probation Office's findings and calculations but applied an additional two-level reduction for petitioner's acceptance of responsibility, resulting in a Guidelines range of 292 to 365 months of imprisonment. Sent. Tr. 15-16. For the drug-trafficking offense, the court sentenced petitioner to 292 months of imprisonment. Id. at 17. The court also imposed a concurrent 120-month term of imprisonment for the felon-in-possession offense, and a consecutive 60-month term of imprisonment for the Section 924(c) offense, for a total sentence of 352 months of imprisonment, all to be followed by eight years of supervised release. Ibid.; see Judgment 2-3.

The court of appeals affirmed. 445 Fed. Appx. 301. Among other things, the court determined that petitioner's sentence was both procedurally and substantively reasonable. Id. at 306. The court noted that the district court had "imposed a sentence on the lower end of the applicable guidelines range," and explained that, in light of petitioner's "extensive criminal history," it could not "say the district court's sentencing decision was an abuse of discretion." Ibid.

3. In 2019, petitioner moved under Section 404 of the First Step Act to reduce his 292-month term of imprisonment for his drug-trafficking offense. See Pet. App. A5, at 7-8.

a. Section 404 permits a "court that imposed a sentence for a covered offense" to "impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 were in effect at the time the covered offense was committed." First Step Act § 404(b), 132 Stat. 5222 (citation omitted). Section 404 defines a "covered offense" as a "violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010, that was committed before August 3, 2010." § 404(a), 132 Stat. 5222 (citation omitted). "Nothing in [Section 404]," however, "shall be construed to require a court to reduce any sentence." § 404(c), 132 Stat. 5222.

Petitioner's motion relied on Section 2 of the Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372, which modified the statutory penalties for offenses punishable under Section 841(b)(1)(A)(iii) and (B)(iii) by raising the quantity of crack cocaine necessary to trigger the penalties prescribed in those provisions from 50 and 5 grams, respectively, to 280 and 28 grams. See Terry v. United States, 141 S. Ct. 1858, 1862-1863 (2021). Petitioner maintained that, if the Fair Sentencing Act had been in effect at the time of his underlying offense conduct, the penalties for his possession-with-intent-to-distribute offense would have been specified by Section 841(b)(1)(C) rather than Section

841(b)(1)(B) and that, as a result, the maximum term of imprisonment he could have received would have been 30 years of imprisonment. D. Ct. Doc. 113, at 4 (May 22, 2019); see D. Ct. Doc. 116, at 6 (June 11, 2019).

The district court denied petitioner's motion, on the ground that petitioner was ineligible for Section 404 relief, because his sentencing proceeding in 2011 had postdated the enactment of the Fair Sentencing Act. D. Ct. Doc. 119, at 4, 10-11, 16. The court of appeals, however, read the record as indicating that, notwithstanding the date of his sentencing, petitioner had not been sentenced under the Fair Sentencing Act. Pet. App. A4, at 5. It therefore vacated and remanded for additional Section 404 proceedings. Id. at 6.

b. On remand, petitioner filed an amended motion for a sentence reduction. D. Ct. Doc. 134 (May 17, 2021). Petitioner contended that if Section 2 of the Fair Sentencing Act had been in effect at the time of his drug-trafficking offense, the statutory penalty range for the offense would have been zero to 30 years of imprisonment, and that his Guidelines range (for which the statutory penalty range was one element) would have been lower: 210 to 262 months. See id. at 5. That contention was premised, however, on treating the relevant drug quantity as five grams of crack cocaine, ibid., rather than the amount to which he had stipulated at trial. And the government maintained that, pursuant to petitioner's stipulation of a 30-gram quantity, the statutory

penalties and Guidelines range for his drug-trafficking offense would not have been different under the Fair Sentencing Act. D. Ct. Doc. 136, at 5-8 (May 28, 2021). The government also urged the district court to decline to grant a sentence reduction as a matter of discretion, regardless of the applicable drug quantity. Id. at 8-10.

The district court again denied petitioner's motion. Pet. App. A5, at 1-17. The court noted the parties' dispute concerning the relevant drug quantity for purposes of calculating the statutory penalties and Guidelines range for petitioner's drug-trafficking offense if Section 2 of the Fair Sentencing Act had been in effect at the time of the offense. See id. at 10-13. The court explained, however, that "[r]egardless of whether the relevant quantity of crack cocaine is five grams or 30.3 grams," granting petitioner's request for a discretionary sentence reduction would be unwarranted in light of "the sentencing factors under 18 U.S.C. § 3553(a)." Id. at 13. Among other things, the court observed that the conduct in this case, involving a loaded firearm, was "very serious," ibid.; that petitioner had already accumulated a lengthy criminal record by the time of the instant offenses, see id. at 13-15; and that, "[w]hile incarcerated, [petitioner] has received no less than ten disciplinary infractions," id. at 15.

4. The court of appeals unanimously affirmed in an unpublished per curiam decision. Pet. App. A3, at 1-4. This Court

then granted a petition for a writ of certiorari, vacated the judgment, and remanded for further consideration in light of Concepcion v. United States, supra. On remand, the court of appeals again unanimously affirmed in an unpublished per curiam decision. Pet. App. A1, at 1-5.

a. In its initial decision, the court of appeals rejected petitioner's contention that the district court had erred by denying his Section 404 motion without first "definitively decid[ing] the drug-quantity" -- five grams or 30 grams -- to be used in calculating the statutory penalties and Guidelines range that would have applied to petitioner's drug-trafficking offense if the Fair Sentencing Act had been in effect at the time of his conduct. Pet. App. A3, at 4. The court of appeals explained that, "[r]ead in context, the district court's order shows that it proceeded by assuming that th[ose] issues would be decided in [petitioner]'s favor." Ibid. The court of appeals thus understood the district court to have determined that a sentence reduction under Section 404 would be unwarranted, as a matter of discretion, "even if the relevant drug quantity was only five grams of crack cocaine." Ibid.

After the court of appeals' initial decision, this Court granted a petition for a writ of certiorari in Concepcion to address "whether a district court adjudicating a motion under the First Step Act may consider other intervening changes of law (such as changes to the Sentencing Guidelines) or changes of fact (such

as behavior in prison) in adjudicating a First Step Act motion.” 597 U.S. at 486. The Court held in Concepcion that a court considering a Section 404 motion may take such changes into account. Ibid. The Court also stated that, in the Section 404 context, district courts “bear the standard obligation to explain their decisions and demonstrate that they considered the parties’ arguments.” Id. at 500-501.

Petitioner filed a petition for a writ of certiorari after Concepcion. This Court granted his petition, vacated the court of appeals’ judgment, and remanded for further consideration in light of Concepcion. 143 S. Ct. 360.

b. On remand, the court of appeals again affirmed. Pet. App. A1, at 1-5. The court observed that the district court’s order reflected “that it [had] considered the arguments” petitioner raised in support of his motion, “including his argument that the relevant drug quantity was five grams of crack cocaine.” Id. at 4. And the court of appeals perceived “nothing improper” in the district court “making simplifying assumptions” -- assuming that “the relevant drug quantity was only five grams of crack cocaine” and thus that petitioner would have “faced lower statutory penalty and guidelines ranges” taking into account the Fair Sentencing Act -- before determining that it “would not exercise its discretion to grant relief” even if those issues were decided in petitioner’s favor. Ibid. The court of appeals also found no abuse of discretion in that determination. Ibid.

The court of appeals stated in a footnote that a "circuit split" exists regarding "whether * * * a district court must calculate a defendant's revised guidelines range" before denying a Section 404 motion. Pet. App. A1, at 4 n.4. But the court explained that this case "does not implicate" any such split because here "the district court assumed that the relevant drug quantity was five grams of crack cocaine and correctly set forth the applicable statutory maximum penalty and guidelines range based on this drug quantity." Ibid.

ARGUMENT

Petitioner contends (Pet. 14-16) that the district court abused its discretion by denying his motion for a discretionary sentence reduction under Section 404 of the First Step Act without first determining the Guidelines range that would have applied to his drug-trafficking offense had the changes made by Section 2 of the Fair Sentencing Act been in effect when he committed that offense. Petitioner further contends (ibid.) that the court of appeals has departed from the approach taken by other circuits insofar as it permits district courts to deny Section 404 motions without first calculating such a Guidelines range.

Those contentions do not warrant further review in this case. Here, the court of appeals reasonably understood the district court to have assumed that petitioner's proffered Guidelines range was the correct one for these purposes and to have nonetheless declined to grant a sentence reduction as a matter of discretion. This

case therefore does not implicate any question about a district court's authority to adjudicate a Section 404 motion without first calculating the Guidelines range that would have applied at the offender's sentencing had the Fair Sentencing Act been in effect. And petitioner's disagreement (Pet. 17-22) with the court of appeals' understanding of the record in this particular case is highly fact-bound, does not implicate any conflict of authority, and does not otherwise warrant further review. This Court recently denied a petition for a writ of certiorari presenting the first question raised by petitioner, see Gonzalez v. United States, No. 23-226 (Jan. 8, 2024), and should follow the same course here.

1. The district court did not abuse its discretion in denying petitioner's motion for a discretionary sentence reduction under Section 404 when the court determined that such a reduction was unwarranted in light of the factors in 18 U.S.C. 3553(a), "[r]egardless of whether" petitioner was correct that the advisory Guidelines range that would have applied to his offense was 210 to 262 months had the changes made by the Fair Sentencing Act been taken into consideration. Pet. App. A5, at 13. As the court of appeals recognized, nothing in the First Step Act or this Court's decision in Concepcion v. United States, 597 U.S. 481 (2022), forbids a district court from making such "simplifying assumptions" in Section 404 proceedings -- assuming that various disputes would be resolved in the offender's favor but nonetheless denying relief. Pet. App. A1, at 4.

a. Section 404 creates a mechanism for certain crack-cocaine offenders who were sentenced before the effective date of the Fair Sentencing Act of 2010 to benefit from the changes that Sections 2 and 3 of that Act made to mandatory-minimum sentencing for crack-cocaine offenses. See Terry v. United States, 141 S. Ct. 1858, 1861-1863 (2021). If the offender has a qualifying "covered offense" as defined in Section 404(a), the court that previously imposed a sentence for that offense "may * * * impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act * * * were in effect at the time the covered offense was committed." First Step Act § 404(b), 132 Stat. 5222. Any such reduction is discretionary; "[n]othing" in Section 404 "require[s] a court to reduce any sentence." § 404(c), 132 Stat. 5222.

In Concepcion v. United States, this Court held that a district court adjudicating a Section 404 motion may "consider intervening changes of law or fact" as a matter of "discretion," even if those changes are unrelated to the Fair Sentencing Act. 597 U.S. at 500. The Court also observed, however, that Section 404 "requires district courts to apply the legal changes in the Fair Sentencing Act when calculating the Guidelines if they cho[o]se to modify a sentence." Id. at 498. The Court elaborated in a footnote that "[a] district court cannot, however, recalculate a movant's benchmark Guidelines range in any way other than to reflect the retroactive application of the Fair Sentencing Act. Rather, the First Step Act directs district courts to calculate

the Guidelines range as if the Fair Sentencing Act's amendments had been in place at the time of the offense." Id. at 498 n.6.

b. Here, petitioner argued that he was entitled to appellate relief on the theory that the district court denied his Section 404 motion without definitely resolving the crack-cocaine quantity relevant for determining the statutory penalties and Guidelines range that would have applied under the Fair Sentencing Act. The court of appeals did not err in rejecting that argument.

The district court expressly acknowledged, in accord with the law of the case, it should treat petitioner as eligible for a sentence reduction. Pet. App. A5, at 10. It then identified the statutory penalties and Guidelines range that would have been applicable assuming petitioner was correct about the relevant drug quantity. Id. at 11-13. And immediately after reciting the statutory penalties and Guidelines range that would have resulted from accepting petitioner's contention that five grams was the relevant drug quantity, the court determined that a sentence reduction was unwarranted "[r]egardless of whether the relevant quantity of crack cocaine is five grams or 30.3 grams," in light of the court's separate consideration of "the sentencing factors under 18 U.S.C. § 3553(a)." Id. at 13; see id. at 13-17 (discussing those factors).

The court of appeals reviewed the record and understood the district court to have "assumed that the relevant drug quantity was five grams" and to have nonetheless determined, as a

permissible exercise of discretion, that a sentence reduction is unwarranted. Pet. App. A1, at 4 n.4. That understanding of the record is not only reasonable, but is the plain import of the district court's statement that relief would be unwarranted "[r]egardless" of the parties' dispute about the relevant drug quantity. Pet. App. A5, at 13. And, as the court of appeals explained, there is "nothing improper about [a] district court * * * making simplifying assumptions" that favor the offender and then proceeding to deny relief even assuming that those matters would be resolved in the offender's favor. Pet. App. A1, at 4 (citing United States v. Tinker, 14 F.4th 1234, 1240 (11th Cir. 2021) (per curiam), for the proposition that "a district court may 'assume that a condition is satisfied' and then explain why a movant is not entitled to relief").

In any event, any procedural error in failing to calculate a Guidelines range in a Section 404 proceeding would be subject to harmless-error review. Federal Rule of Criminal Procedure 52(a) instructs that any error "that does not affect substantial rights must be disregarded." Fed. R. Crim. P. 52(a). Just as "procedural errors at sentencing" are "routinely subject to harmlessness review," Puckett v. United States, 556 U.S. 129, 141 (2009), so too would be any errors in the context of a motion to reduce a sentence under Section 404 of the First Step Act. See, e.g., United States v. Gonzalez, 71 F.4th 881, 887 (11th Cir. 2023) (applying Rule 52(a) to Section 404 proceedings), cert. denied,

No. 23-226 (Jan. 8, 2024); cf. Fed. R. Crim. P. 1(a) ("These rules govern the procedure in all criminal proceedings in the United States district courts[.]"). This Court has identified a case in which "the district court thought the sentence it chose was appropriate irrespective of the Guidelines range" as a circumstance in which an error may be nonprejudicial. Molina-Martinez v. United States, 578 U.S. 189, 200 (2016). And here, any failure by the district court to definitively state that it was applying petitioner's favored crack-cocaine quantity of five grams, when taking into account the correctly identified statutory penalties and Guidelines range that such a quantity would produce, had no effect on the court's determination that a sentence reduction was unwarranted. Petitioner's challenge accordingly provides no basis for appellate relief.

c. Petitioner identifies no sound basis for further review. Petitioner principally contends that the decision below conflicts with the decisions of other courts of appeals, which he describes as "requir[ing] a revised guidelines range to be calculated in [Section 404] proceedings." Pet. 15; see Pet. 14-16. As the court of appeals explained, however, that question is not presented in the circumstances of this case because the district court correctly identified the Guidelines range that would be applicable if petitioner were correct about the relevant drug quantity, and then determined that relief would be unwarranted even assuming that range applied. Pet. App. A1, at 4 n.4.

Moreover, even if this case did implicate the first question presented, certiorari on that issue would be unwarranted for the reasons explained in the government's brief in opposition in Gonzalez, in which this Court just denied a petition raising the issue. See Br. in Opp. at 14-18, Gonzalez, supra (No. 23-226) (Gonzalez Br. in Opp.).* The appellate panel in this case perceived a "circuit split" about whether a district court must invariably recalculate an offender's advisory Guidelines range, taking into account any changes resulting from applying Sections 2 and 3 of the Fair Sentencing Act, before adjudicating a Section 404 motion. Pet. App. A1, at 4 n.4. But any tension in the case law on that point is shallow and lacks practical significance. As the government has explained, the courts of appeals that have decided the question have all uniformly concluded that procedural errors in Section 404 proceedings, including with respect to the Guidelines, are subject to harmless-error principles. See Gonzalez Br. in Opp. at 15-16.

2. Petitioner alternatively contends (Pet. 17-22) that further review is warranted in this case to resolve a separate question regarding the circumstances in which a district court should in fact be understood to have assumed a Guidelines issue in the offender's favor in Section 404 proceedings. That contention is unsound.

* We have served petitioner with a copy of the government's brief in opposition in Gonzalez.

In its unpublished decision in this case, the Eleventh Circuit did not purport to adopt any general approach or rule of law for determining whether or when to conclude that a district court has made such a “simplifying assumption.” Pet. App. A1, at 4. The court of appeals simply reviewed the record in this case and determined, in the particular circumstances here, that the district court’s order is best understood as having “assumed that the relevant drug quantity was five grams,” and as having determined that a sentence reduction was unwarranted regardless of the statutory penalties and Guidelines range that result from that assumption (which the court correctly identified). Id. at 4 n.4. Petitioner’s highly fact-bound disagreement with the court of appeals’ understanding of the record here does not implicate any division of authority, lacks prospective significance for future cases, and does not otherwise warrant plenary review by this Court.

Petitioner also is mistaken in suggesting (Pet. 18-20) that the Seventh or Tenth Circuits would have necessarily understood the record in this case any differently. In United States v. Blake, 22 F.4th 637 (2022) (per curiam), a Seventh Circuit panel reversed the denial of a Section 404 motion where the district court had expressly declined to resolve a “difficult” question concerning the relevant drug quantity. Id. at 639-640. Because the district court failed to identify any drug quantity for purposes of determining the penalty ranges that would have been applicable taking into account the Fair Sentencing Act, the court

of appeals explained that it was not clear “the district court knew what [those ranges] were or considered them.” Id. at 642. In petitioner’s case, by contrast, the district court expressly acknowledged and considered the sentencing ranges that petitioner urged were applicable under the Fair Sentencing Act before exercising its discretion to nonetheless deny his motion. Pet. App. A5, at 11-12.

Similarly, in United States v. Burris, 29 F.4th 1232 (2022), the Tenth Circuit reversed a district court’s denial of a Section 404 motion where the district court declined to recalculate the Guidelines range at all. Id. at 1235. The Tenth Circuit made clear, however, that its decision in that case should not be understood to suggest that reversal would be warranted when a district court instead “implicitly accept[s] th[e] Guidelines range” offered by the defendant and “perform[s] its analysis based on the assumption” that the defendant’s preferred range is the correct benchmark. Id. at 1237 (quoting United States v. Warren, 22 F.4th 917, 929-930 (10th Cir. 2022)). In the decision below, the court of appeals reasonably viewed this as such a case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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