

No. \_\_\_\_\_

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IN THE UNITED STATES SUPREME COURT

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STEVE FRENO,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA

Respondent-Appellee.

ON PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES  
COURT OF APPEALS FOR THE 8<sup>TH</sup> CIRCUIT

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PETITION FOR *CERTIORARI*

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## QUESTION PRESENTED FOR REVIEW

1. Whether, post-*Booker* and *Gall*, this Court should grant the Writ to provide clarity on an important, but unresolved area of law, to wit: whether appellate courts such as the Panel can completely dispense with analyzing the guidelines issue where the District Court indicates it would have reached the same result by varying under *Booker*, *Gall*, and by applying the 3553 (a) factors?

## **LIST OF PARTIES AND RELATED CASES**

1. Mr. Freno and United States appear in the caption.
2. There are no related cases.

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## **CITATIONS TO OFFICIAL AND UNOFFICIAL PROCEEDINGS BELOW**

### **8<sup>th</sup> Circuit Court of Appeals – *United States v. Steven Freno* – 23-3005**

- A – Order Denying En Banc Review (Aug. 16, 2024)
- B – Order Granting Extension for En Banc to July 26, 2024 (July 26, 2024)
- C – Order Granting Extension to July 25, 2024 (July 8, 2024)
- D – Judgment (June 27, 2024)
- E – Panel Opinion Affirming Judgment (June 27, 2024)
- F – Order Appointing Criminal Justice Act Counsel (Sept. 5, 2023)

### **District Court in the Northern District of Iowa – *United States v. Steven Freno*, No. 1:22-CR-67-CJW-MAR-1**

- G – Notice of Appeal (Sept. 4, 2023)
- H – Judgment (Aug. 31, 2023)

### **Relevant Statute and Guidelines**

- I – U.S.S.G. §4A1.3 and 18 U.S.C. § 3553 (a)

### **JURISDICTION**

This is an appeal from a combined federal criminal judgment arising in the Northern District of Iowa. On August 31, 2023, Mr. Freno received a 84 month sentence. Judgment, App. H. On September 20, 2023, Defendant filed a timely notice of appeal. Notice of Appeal, App. F. See Fed. R. App. Proc. 4 (b) (1) (A) (i) (appeals must be filed within 14 days of final judgment). Notice, App. G.

The District Court had jurisdiction pursuant to 18 U.S.C. § 3231.

The 8<sup>th</sup> Circuit has jurisdiction over all federal criminal judgments and sentences. See 28 U.S.C. § 1291.

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

## **TIMELINESS**

The 8<sup>th</sup> Circuit affirmed the conviction on June 27, 2024. Judgment and Panel Decision; Appx. D and E. On August 16, 2024, the 8<sup>th</sup> Circuit denied Mr. Freno's Petition for En Banc Review. Order, Appx. A. The En Banc Petition was timely filed on that date. Orders, Appx. B and C. This Petition is filed within 90 days of that date. See US Supreme Court Rule 13 (1) ("A petition for a writ of certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely when it is filed with the Clerk within 90 days after entry of the order denying discretionary review.").

The 90<sup>th</sup> day falls on November 14, 2024.

A document is considered timely filed if it is sent to the Clerk through the United States Postal Service by first-class mail (including express or priority mail), postage prepaid, and bears a postmark, other than a commercial postage meter label, showing that the document was mailed on or before the last day for filing, or if it is delivered on or before the last day for filing to a third-party commercial carrier for delivery to the Clerk within 3 calendar days." Supreme Court Rule 29.2. The original document was mailed via United

States Postal Service on November 12, 2024, and post marked for delivery on that date. Thus, it is timely filed since it was sent and postmarked on November 12, 2024. Following submission, the Supreme Court Clerk issue a letter requiring corrections within 60 days of the letter, which was dated November 21, 2024. This Petition will be mailed on January 18, 2025 and postmarked the same date. Thus, it will be timely filed.

## **GUIDELINE PROVISIONS INVOLVED**

### **Relevant Statute and Guidelines**

I – U.S.S.G. §4A1.3 and 18 U.S.C. § 3553 (a)

### **STATEMENT OF THE CASE**

#### **Relevant Course of Proceedings**

##### **- In the Northern District of Iowa**

On August 17, 2022, a federal grand jury indicted Mr. Freno on two counts: to wit: Count 1 – Possession of a Firearm by a Prohibited Person in 18 U.S.C. §§ 922 (g) (1), (g) (9), and 924 (a) (2), and Count 2 – Possession with Intent to Distribute a Controlled Substance, marijuana in violation of 21 U.S.C. §§ 841 (a) (1), 841 (b) (1) (D). R. Doc. 3. On January 30, 2023, Mr. Freno pleaded guilty to Counts 1 and 2 without a plea agreement. R. Doc. 29. On August 31, 2023, the District Court arrived at an advisory guidelines range of 57-71 and granted the Government's upward departure motion to a sentence of 84 months. Judgment,

Appx. H. On September 4, 2023, Mr. Freno filed a timely notice of appeal. Notice, R. Doc. 54. Appx. H.

**- 8<sup>TH</sup> Circuit Proceedings**

On June 27, 2024, a three judge panel denied Mr. Freno's Appeal, affirming the Judgment. Appx. D and E. On August 16, 2024, the 8<sup>th</sup> Circuit denied en banc review and rehearing. Appx. A.

**Facts**

Mr. Freno will present facts as relevant to granting the Writ.

**REASONS FOR GRANTING THE WRIT**

**I. POST-BOOKER AND GALL, THIS COURT SHOULD GRANT THE WRIT TO PROVIDE CLEARER DIRECTION ABOUT WHETHER THE 8<sup>TH</sup> CIRCUIT ERRED IN RELYING UPON A VARIANCE WITHOUT EVEN ANALYZING THE DISTRICT COURT'S UPWARD DEPARTURE BASED UPON AN UNDERREPRESENTED CRIMINAL HISTORY?**

**A. Rule 10 (c)**

The Writ should be granted to clarify an important, but unresolved area of federal law. See Supreme Court Rule 10 (c) (the Court may grant the Writ to resolve an important, but unresolved area of federal law).

**B. 8<sup>th</sup> Circuit's Resolution of the Guideline and Variance Issue.**

On appeal, Mr. Freno argued that the District Court erred in granting an upward departure and an upward variance. Mr. Freno In essence, the 8<sup>th</sup> Circuit

found that it did not have to consider the upward departure since it also affirmed the upward variance.

In other words, “the departure and the variance were alternative, rather than cumulative, bases” for Freno’s sentence. *United States v. Grandon*, 714 F.3d 1093, 1098 (8th Cir. 2013). Because we conclude below that the district court did not abuse its discretion in deciding to vary upward, “any error in alternatively imposing an upward departure would be harmless because the district court would have imposed the same sentence absent the error.” *Id.* (internal quotation marks omitted).

Appx. E at p. 2. The Court then continued to analyze the basis for the upward variance citing Mr. Freno’s extensive criminal history.

Especially important to the district court were Freno’s thirty-three adult criminal convictions. His criminal history includes three violent crimes and numerous convictions involving drugs or guns, indicating Freno’s tendency “to commit crime over and over again.” The district court also noted the presence of additional “aggravating factors,” including Freno’s continued criminal conduct while under the court’s supervision, his “violent[,] . . . intimidating[,] and traumatizing conduct” that led to this prosecution, as well as his “repeated” lying to the police.

Panel Opinion, Appx. at p. 3.

**C. Post-Booker and Gall, this Court Should Grant the Writ to Provide More Concrete Guidance About the Intersection Between the Guidelines and Section 3553 (a).**

In 2005, this Court struck down the mandatory guidelines as unconstitutional and rightly restored sentencing discretion to judges. *United States v. Booker*, 543 U.S. 220, 241, 125 S. Ct. 738, 754 (2005). In 2007, this Court reaffirmed its core holding in Booker, striking down any proportionality review to determine reasonable of any judge’s sentence and affirming discretion means discretion. *Gall*

v. *United States*, 552 U.S. 38, 49, 128 S. Ct. 586, 596 (2007) (affirming any rule applying exceptional circumstances or a mathematical formal is “inconsistent with the rule that the abuse-of-discretion standard of review applies to appellate review of all sentencing decisions—whether inside or outside the Guidelines range.”) But, this case poses a slightly different question, are the Courts or Circuits free to just flat out ignore the guidelines? Did *Gall* and *Booker* intend to abolish the Guidelines? The answer clearly appears to be no. This Court has not meaningly addressed the guidelines since 2007. It’s time to provide some guidance to lower courts to ensure that uniform sentencing and to avoid disparate sentencing outcomes based upon the happenstance of which individual judge is assigned to the case. Without such guidance, the guidelines, in essence, will become functionally useless.

This case demonstrates the need for review and clarification. In this case, Mr. Freno raised two arguments: (1) that the Court erred in imposing upward departure based upon underrepresentation of criminal history, and (2) that the Court erred varying upward after applying the 3553 (a) factors. The Panel, in effect, found that it did not need to address the guidelines because the sentencing judge varied upwards on the same basis and indicated he would have imposed the same sentence, regardless of the guidelines:

In other words, “the departure and the variance were alternative, rather than cumulative, bases” for Freno’s sentence. *United States v. Grandon*, 714 F.3d 1093, 1098 (8th Cir. 2013). Because we conclude below that the district court did not abuse its discretion in deciding to vary upward, “any error in alternatively imposing an upward departure would be harmless because the district court would have imposed the same sentence absent the error.” *Id.* (internal quotation marks omitted).

Panel Decision at p. 2. This approach effectively gives no weight whatsoever to any guideline error in imposing the ultimate sentence. What is the purpose of even analyzing the guidelines if the Court can just announce that it would have varied to achieve the same result? This approach results in an outcome that neither *Gall* or *Booker* intended. Rather than making the guidelines advisory, this *abolishes* the guidelines. There is no indication that either *Gall* or *Booker* intended such a result. As noted on his appeal, Mr. Freno had compelling arguments to remain within the guidelines: his non violent conduct, the age of the old convictions and his strong family network. But, due to the Panel’s overly broad view of the discretion of the sentencing judge and its failure to even consider the departure argument, those arguments were hardly even considered. This allowed the Panel to completely shortcut guidelines analysis in favor of the statutory 3553 (a) factors. Especially as it applies to upward or downward departures, the Guidelines are effectively useless. There is no indication that this Court intended such a far reaching result in either *Booker* or *Gall*.

Mr. Freno’s counsel was not able to identify any circuit split relating to the

application of the guidelines in situations such as these. Nevertheless, because of the importance of this issue, he moves this Court to grant certiorari review.

### **CONCLUSION AND REQUESTED RELIEF**

The Court should grant the Writ and order briefing.

RESPECTFULLY SUBMITTED,



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### **CERTIFICATE OF SERVICE**

I, Rockne Cole, counsel for Petitioner, hereby certify that, on January 18, 2025, I mailed an original and 10 copies to the Supreme Court via United States Postal Service 1<sup>st</sup> Class to:

United States Supreme Court  
Clerk's Office  
1 First Street, N.E.,  
Washington, D.C. 20543

and one copy to:

Kyndra Lindquist

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Rockne Cole

and one copy to:

Office of the Solicitor General  
Supreme Court Appeals  
950 Pennsylvania Ave., NW  
Washington, D.C. 20530-0001

Rockne Cole

**CERTIFICATE OF WORD COUNT**

I, Rockne Cole, certify that the above Petition includes 1853 words and was prepared in 14 Point New Times Roman, in Word and therefore, complies with US Supreme Court Rule 33.1, and it also complies with Rule 33.2 as it contains less than 40 pages.

Rockne Cole

Rockne Cole