NO. _____

In the Supreme Court of the United States

LEOPOLDO VILLAREAL,

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

Some sentencing judges routinely assert that they would have selected the exact same sentence regardless of any error in applying the Sentencing Guidelines. Should an appellate court rely on those routine assertions when deciding whether an error is harmless?

DIRECTLY RELATED PROCEEDINGS

United States v. Leopoldo Villareal, No. 5:23-CR-75 (N.D. Tex. Jan. 18, 2024)

United States v. Leopoldo Villareal, No. 24-10074 (5th Cir. Oct. 17, 2024)

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PETITION FOR A WRIT OF CERTIORARI

Leopoldo Villareal respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion below was not selected for publication. It is reprinted on pages 1a–3a of the Appendix. The district court did not issue any written opinions.

JURISDICTION

The Fifth Circuit entered judgment on November 25, 2024. This petition is timely under S. Ct. R. 13.1 & 13.3. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

Federal Rule of Criminal Procedure 52(a) provides:

> (a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

STATEMENT

A. Facts

On December 1, 2022, Petitioner Leopoldo Villareal was a passenger in a car being driven by an acquaintance named Leroy Martinez. When a police officer attempted to stop the car for a traffic infraction, Martinez sped away. As more police officers and sheriffs deputies joined the case, the car reached speeds of 130 to 135 miles per hour. Pet. App. 32a.

During the chase, and Petitioner fired six to eight shots from a pistol "to frighten or intimidate law enforcement officers into terminating the pursuit." 5th Cir. Sealed ROA 158. The shots did not hit anyone, and there were no reports of vehicle damage. After Martinez's car ran off the road, Petitioner was arrested. Pet. App. 32a.

B. District Court Proceedings

Petitioner pleaded guilty to possessing a firearm after felony conviction in violation of 18 U.S.C. § 922(g)(1). Pet. App. 1a.

At sentencing, the major dispute was whether the district court should apply the sentencing guideline for attempted murder. Normally, when a defendant is convicted under § 922(g)(1), the court would apply the

guideline tailored to that offense, U.S.S.G. § 2K2.1. But when the defendant uses the firearm in connection with another crime, and the Chapter 2 guideline for that other offense would lead to a higher offense level, § 2K2.1(c) allows a court to apply the other guideline.

Here, the district court applied U.S.S.G. § 2A2.1—"Assault with Intent to Commit Murder; Attempted Murder." After all other guideline adjustments were applied, that meant Petitioner's offense level was 32 and his guideline range was 188–235 months, which became the statutory maximum, 180 months. *See* 18 U.S.C. § 924(a)(8). Petitioner objected to the cross-reference, arguing both that he did not point the gun *at* the deputies when he fired, and that "his intent was not to kill or harm deputies." App. 21a. If the district court had applied guideline 2K2.1 with no cross-references, the offense level would have been 23 and the guideline range would have been 84–105 months. *See* Villareal C.A. Br. 5.

The district court overruled Petitioner's objection to the attempted murder guideline. The court found that Petitioner either fired at or "in the general direction of" the deputies who were pursuing him. Pet. App. 13a. And the court also held that this was enough for attempted murder, even without finding that Petitioner harbored an intent to kill:

> That you would be willing, whether under the influence or not, to fire a gun multiple times at law enforcement officers is hard to fathom, the complete disregard for the safety of those around you. And you're just, at the very least, *incredibly dangerous*, and reckless disregard

> for the community, speeding at that rate through a community, firing a gun at and in the general direction of law enforcement officers, *even if it's just to scare them*. You're firing a gun at that rate of speed, and *who cares who is on the other end of that bullet.* That is incredibly concerning conduct, and I can't ignore it.

Pet. App. 13a (emphases added).

Despite extensive litigation over the cross-reference, the court then asserted that it would have chosen the same sentence even without the cross-reference:

> I inform both sides that, although I believe the guideline calculations announced today were correct, to the extent they were incorrectly calculated, I would have imposed the same sentence without regard to that range, and I would have done so for the same reasons, in light of the 3553(a) factors.

Pet. App. 27a.

C. Appeal

On appeal, Petitioner renewed his challenge to the attempted murder sentence. Relying on this Court's decision in *Braxton v. United States*, 500 U.S. 344 (1991), he argued that the attempted murder guideline required proof an intent to kill. Pet. App. 2a. Petitioner also pointed to an *alternative* cross-reference that would not require proof of intent to kill: aggravated assault, U.S.S.G. § 2A2.2. Leave all other

adjustments in place, that would have led to a guideline range of 92–115 months.

The Fifth Circuit did not even address this argument. Because the "district court stated it would have imposed the same sentence regardless of any Guidelines error," the court affirmed. Pet. App. 3a.

REASONS FOR GRANTING THE PETITION

The Fifth Circuit reached its "harmless" holding based on a line of precedent allowing a sentencing judge to opt out of appellate review by asserting that he would have imposed the same sentence, regardless of any guideline error. Pet. App. 3a (citing *United States v. Reyna-Aragon*, 992 F.3d 381, 388 (5th Cir. 2021), and *United States v. Rebulloza*, 16 F.4th 480, 484 (5th Cir. 2021). The decision below thus followed the wrong side of an entrenched circuit split.

A. The lower courts are divided.

1. In the Eighth and Eleventh Circuits, a sentencing decision is automatically insulated from appellate review if "the district court explicitly states that it would have imposed the same sentence of imprisonment regardless of the underlying Sentencing Guideline range." *United States v. Peterson*, 887 F.3d 343, 349 (8th Cir. 2018) (quoting *United States v. Davis*, 583 F.3d 1081, 1094–95 (8th Cir. 2009)). The decision below is very similar to *United States v. Still*, 6 F.4th 812, 818 (8th Cir. 2021): "Even if applying the voluntary manslaughter cross-reference was procedural error, we conclude that such error was harmless because the district court stated that it would have varied upward had it not applied the cross-reference."

Like the Eighth Circuit, the Eleventh Circuit allows sentencing judges to disclaim any reliance on the sentencing guideline range, even after extensive litigation about the guidelines. In the court's own words, a routine disclaimer is "'all we need to know' to hold that any potential error was harmless." *United States v. Henry*, 1 F.4th 1315, 1327 (11th Cir. 2021) (quoting *United States v. Keene*, 470 F.3d 1347, 1349 (11th Cir. 2006)); accord *United States v. Grady*, 18 F.4th 1275, 1291 (11th Cir. 2021) (citing *Keene*, 470 F.3d at 1348–49) ("[A] guidelines error is harmless if the district court unambiguously expressed that it would have imposed the same sentence, regardless of the guidelines calculation.").

2. The Second, Third, Ninth, and Tenth Circuits have all rejected routine disclaimers like the one below. The Second Circuit has warned every sentencing court that it should "not try to answer the hypothetical question of whether or not it definitely would impose the same sentence on remand if [the court of appeals] found particular enhancements erroneous." *United States v. Feldman*, 647 F.3d 450, 460 (2d Cir. 2011). "Nor do we believe that criminal sentences may or should be exempted from procedural review with the use of a simple incantation: 'I would impose the same sentence regardless of any errors calculating the applicable Guidelines range.'" *Id.*; *see also United States v. Seabrook*, 968 F.3d 224, 233–34 (2d Cir. 2020) ("[T]he district court cannot insulate its sentence from our review by commenting that the Guidelines range made no difference to its determination when the record indicates that it did.").

In the Third Circuit, a disclaimer statement doesn't render a guideline error harmless. The sentencing court would have to conduct a full, three-step sentencing process before selecting a valid alternative sentence: (1) calculate the correct guideline range as a starting point; (2) decide whether to depart under the guidelines; and then (3) weigh the 18 U.S.C. § 3553(a) factors to determine whether a variance is appropriate. *United States v. Wright*, 642 F.3d 148, 155–54 & n.6 (3d Cir. 2011).

The Ninth Circuit agrees: a guideline error is harmless only if the district court "performs its sentencing analysis twice." *United States v. Williams*, 5 F.4th 973, 978 (9th Cir. 2021) (quoting *United States v. Munoz-Camarena*, 631 F.3d 1028, 1030 n.5 (9th Cir. 2011)) (cleaned up). A "mere statement" that the court would impose the same sentence "'no matter what the correct calculation cannot, without more, insulate the sentence from remand' if "the court's analysis did not flow from an initial determination of the correct Guidelines range.'" *Id.* (quoting *Munoz-Camarena*, 631 F.4d at 1031).

Unlike the court below, the Tenth Circuit would give "little weight to the district court's statement that its conclusion would be the same 'even if all of the defendant's objections to the presentence report had been successful.'" *United States v. Gieswein*, 887 F.3d 1054, 1062–63 (10th Cir. 2018). The Tenth Circuit "has rejected the notion that district courts can insulate sentencing decisions from review by making such statements." *Id.* (citing *United States v. Pena-Hermosillo*, 522 F.3d 1108, 1109 (10th Cir. 2008)).

3. The Fifth Circuit cannot easily be sorted into one camp or the other. Some panels agree with the Second, Third, Ninth, and Tenth Circuits. *See*, e.g., *United States v. Ritchey*, 117 F.4th 762, 767 (5th Cir. 2024) ("This statement is relevant to the harmless error inquiry, but it is not decisive."); *United States v. Tanksley*, 848 F.3d 347, 353 (5th Cir. 2017) ("Nonetheless, it is not enough for the district court to say the same sentence would have been imposed but for the error."); *United States v. Martinez-Romero*, 817 F.3d 917, 925–26 (5th Cir. 2016) ("The court stated three times that even if the 16–level enhancement for the attempted kidnapping was incorrect, it would nonetheless impose the same 46–month sentence." Even so, the "sentencing error [was] not harmless.").

The decision below—like most published Fifth Circuit decisions—follow the Eighth and Eleventh Circuits' approach: a district court's guideline disclaimer is enough to make the error harmless. *See*, e.g., *Reyna-Aragon*, 992 F.3d at 387–89; *United States v. Medel-Guadalupe*, 987 F.3d 424, 429 (5th Cir. 2021); *United States v. Redmond*, 965 F.3d 416, 420–21 (5th Cir. 2020); *United States v. Vega-Garcia*, 893 F.3d 326, 328 (5th Cir. 2018); *United States v. Guzman-Rendon*, 864 F.3d 409, 411–12 (5th Cir. 2017).

In *United States v. Richardson*, 676 F.3d 491, 512 (5th Cir. 2012), the court suggested that the district court must first have "considered all of the possible guidelines ranges that could have resulted if it had erred" in calculating the guidelines. But, as this case shows, that requirement is not universally applied. Pet. App. 3a. The district court here *never* considered how the guidelines would be calculated after a cross-

reference to aggravated assault, rather than attempted murder. It thus never considered the guideline range of 92–115 months.

B. Experience and data suggest that most guideline disclaimers are wrong.

"[W]hen a Guidelines range moves up or down, offenders' sentences tend to move with it." *Molina-Martinez v. United States*, 578 U.S. 189, 199 (2016) (quoting *Peugh v. United States*, 569 U.S. 530, 544 (2013)) (cleaned up). This Court has recognized that, "in most cases" where the "court mistakenly deemed applicable an incorrect, higher Guidelines range," that error will affect a defendant's substantial rights. *Id.* at 200.

In an "ordinary case," the Sentencing Guidelines "serve as the starting point for the district court's decision and anchor the court's discretion in selecting an appropriate sentence." *Molina-Martinez*, 578 U.S. at 204. Until the very end of the sentencing hearing, this case followed the ordinary path. The district court carefully considered the parties' arguments about the attempted murder cross-reference and other guideline issues, then rendered a detailed oral ruling. Pet. App. 7a–19a.

As this Court has observed, Sentencing Commission "statistics demonstrate the real and pervasive effect the Guidelines have on sentencing." *Molina-Martinez*, 578 U.S. at 199. That strongly suggests that judges who routinely make guideline disclaimers almost certainly understate the guidelines' effect on their ultimate selection of sentence and overestimate the probability of an above-

range departure in the absence of a guideline error. And a review of several sentencing transcripts from the same courtroom suggests that guideline disclaimers are routine. *See* Pet. App. 36a–40a. Far from identifying "unusual circumstances," these statements suggest a hostility to the important process of appellate review.

C. This case is an ideal vehicle for the Court to address routine guideline disclaimers.

1. In previous cases where the Court has denied certiorari, there was some doubt about whether the district court actually erred. Not so here: "Although a murder may be committed without an intent to kill, an attempt to commit murder requires a specific intent to kill." *Braxton*, 500 U.S. at 351 n.* (quoting 4 C. Torcia, *Wharton's* Criminal *Law* § 743, p. 572 (14th ed. 1981)). The district court mistakenly believed that it could apply the attempted murder guideline in the absence of an intent to kill. *Braxton* forecloses that possibility.

2. Respondent has also argued that harmlessness is an inherently fact-bound inquiry, and for that reason the Court should not grant plenary review. But the Fifth Circuit relied on disclaimer language that appears in all (or nearly all) sentencing transcripts involving the same presiding judge. The *routine* nature of the disclaimer brings the circuit conflict into sharper relief.

This Court should grant the petition for certiorari to decide whether a routine disclaimer is enough to insulate an erroneous sentence from appellate review.

CONCLUSION

This Court should grant the petition and set this case for a decision on the merits.

Respectfully submitted,

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