24-7208 ORIGINAL

No. _____

Supreme Court, U.S.
FILED
SEP 24 2024
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

CORNELL SLATER — PETITIONER
(Your Name)

vs.

UNTIED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Cornell Slater
(Your Name)

F.C.I. Leavenworth, P.O. Box 1000
(Address)

Leavenworth, KS 66048
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

1. Whether the Court of Appeals opinion is in direct contravention of this Court's holdings in Peugh v. United States, 569 U.S. 530, 541 (2013); and Rosales-Mireles v. United States, 138 S. Ct. 1897 (2018), when it allowed the district court to nullify the guidelines by way of a simple assertion that any latent errors in the guidelines calculation would make no difference to the choice of sentence? Such inoculating statements cannot override Section 3553(a)(4)(A), or this Court's holdings in Rita v. United States, 551 U.S. 338 (2007); Gall v. United States, 552 U.S. 38 (2007); Peugh v. United States, 569 U.S. 530 (2013); and Rosales-Mireles v. United States, 138 S. Ct. 1897 (2018)

2. Whether, should this Court find that district court's can use inoculating statements, such as "if there are any errors in the guidelines calculations it would make no difference to the choice of the sentence," to nullify the use of the guidelines, is there a criteria to ensure the court is midful of the guidelines in imposing it's sentence?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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TABLE OF AUTHORITIES CITED

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

[ ] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[ ] For cases from **federal courts:**

- The date on which the United States Court of Appeals decided my case was July 30, 2024.

[x] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

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

[ ] For cases from **state courts:**

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment to the U.S. Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Title 18 U.S.C. §3553(a)(4)

(a) Factors to be considered in imposing a sentence. The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider-

(4) the kinds of sentence and the sentencing range established for-

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines-

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g) [18 USCS § 3742(g)], are in effect on the date the defendant is sentenced;

STATEMENT OF THE CASE

On or about April 23, 2019, Cornell Slater ("Slater"), was indicted in the U.S. District Court for the District of Maryland, in a six count indictment, charging: (1) Prohibited Person (felon) in the possession of a firearm, in violation of Title 18 U.S.C. §922(g)(1); (2) Conspiracy to Hobbs Act Robbery, in violation of Title 18 U.S.C. §1951(a); (3) Attempted Hobbs Act roberry, in violation of 18 U.S.C. §1951(a); (4) Using, Carrying, and Discharging a firearm during and in relation to a crime of violence, in violation of Title 18 U.S.C. §924(c); (5) Prohibited Person (felon) in possession of a firearm, in violation of Title 18 U.S.C. §922(g)(1); (6) Prohibited Person (felon) in possession of ammunition, in violation of Title 18 U.S.C. §922(g)(1).

On or about January 3, 2020, Slater entered a plea of guilty to Counts One, Three, and Four of the indictment, as part of a plea agreement.

The District Court sentenced Slater to a total of 360 months imprisonment on all counts.

On the Government's motion, the Fourth Circuit Court of Appeals vacated Slater's conviction and sentence on Count Four, and remanded the case back to the District Court for full resentencing as to the remaining counts.

On re-sentencing the District Court resentenced Slater to 288 months imprisonment.

It reached this sentence by applying a four-level

enhancement under U.S. Sentencing Guidelines § 2A2.1(b)(1)(A) based on the court's finding that the victim sustained a permanent or life threatening bodily injury, This enhancement was not applied at his original sentencing.

Slater appealed this enhancement to the U.S. Court of Appeals for the Fourth Circuit.

The Fourth Circuit, without reaching the merits of the argument, affirmed the District Court's findings, under an assumed harmless error inquiry.

This petition follows:

REASONS FOR GRANTING THE PETITION

Facts

The district court, on resentencing Slater, after remand from the Fourth Circuit, based on the U.S. Supreme Court's holding in United States v. Taylor, 142 S. Ct. 2015 (2022), that attempted Hobbs Act robbery is not a crime of violence, found that U.S.S.G. § 2A2.1(b)(1)(A)'s four-level enhancement, applied. Slater, argued that there was no evidence submitted at sentencing, or in the plea agreement that "the victim sustained permanent or life-threatening bodily injury" as is required to apply §2A2.1(b)(1)(A).

The U.S. District Court overruled his objection to the four-level enhancement.

The district court did not consider the lower, correct, guideline range, instead it just sentenced him to 288 months imprisonment, based on a guideline range of 262 to 327 months.

Slater appealed to the U.S. Court of Appeals for the Fourth Circuit.

The Fourth Circuit, applying the "assumed harmless error inquiry," because the district court made the inoculating statement that even if the four-level enhancement did not apply, he would sentence Slater to the same 288 month sentence.

Though the district court did state this, it gave no explanation as to why it would do so.

The Court of Appeals then, itself, determined that absent the four-level enhancement, Slater's guideline range would have been 188-235 months' imprisonment, and therefore, there was only a 53 month upward variance, which in the Court of Appeals held would have been substantially reasonable.

Argument

I. In order to apply the four-level enhancement under U.S.S.G. §2A2.1(b)(1)(A), the evidence must show that "the victim sustained permanent or life-threatening bodily injury..." §2A2.1(b)(1)(A). The first Application Note to Section 2A2.1 incorporates the definition of "permanent of life-threatening bodily injury" from the Application Notes of Section 1B1.1. U.S.S.G. §2A2.1 n.1. Application Note one of the Commentary Section 1B1.1 defines permanent or life-threatening injury as an "injury involving a substantial risk of death; loss or substantial impairment of the function of a bodily member, organ, or mental faculty that is likely to be permanent; or an obvious disfigurement that is likely to be permanent." U.S.S.G. §1B1.1 n.1(J)

Here Slater argued there was insufficient factual basis to impose the §2A2.1(b)(1)(A) enhancement. Slater argued the enhancement was inapplicable because there was no description or evidence of the victim's injuries. The government did not present any evidence to supplement the single sentence in the PSR's Offense Conduct section, claiming "[M]r. Slater then pulled out a semi-automatic

pistol and fired two rounds, shooting [the victim] in her side." The report did not mention anything about the victim's injuries or treatment. The PSR justified the four-level enhancement, by claiming "The victim was shot on the side of her body, thereby sustaining life-threatening bodily injury."

The Court overruled Slater's objection based on the same statement.

Indeed, being shot in one's side could encompass an "injury involving a substantial risk of death; loss or substantial impairment of the function of a bodily member, organ, or mental faculty that is likely to be permanent." But, being shot in the side could also comprise a graze wound that does not permanently injure, as Slater pointed out to the Court of Appeals.

However, the Court of Appeals did not reach the merits of the case, instead it held the error was harmless because the Court stated it would give the same sentence even if it's guideline calculations were incorrect.

Sentencing proceedings in federal district courts proceed in two steps: first, the judge must calculate the correct advisory sentencing range under the Sentencing Guidelines; and second, the judge must consider the factors set out in Section 3553(a). Both of these steps are important-indeed, both are compelled by statute. The requirement of beginning with the guidelines appears in 18 U.S.C. §3553(a)(4)-a part of the Sentencing Reform Act that

was left undisturbed by United States v. Booker, 543 U.S. 220 (2005). It says that "[t]he court, in determining the particular sentence to be imposed, shall consider...the kinds of sentence and the sentencing range establ;ished for-(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines-(i) issued by the Sentencing Commission..." (emphasis added). The requirement to take a broader look at the appropriate sentence is found in 18 U.S.C. §3553(a), which also uses mandatory language in directing the court to take the listed factors into account.

Under this system, the court must start with the guidelines, but it must weigh the factors set out in Section 3553(a).

The statute does not give the judge the option to bypass the guidelines, and this Court has underscored this fact. In Rosales-Mireles v. United States, 138 S. Ct. 1897 (2018), it stated that "district courts must begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing proceedings. Id. at 1904, quoting Peugh v. United States, 569 U.S. 530, 541 (2013), in turn quoting Gall v. United States, 552 U.S. 38, 50 n. 6 (2007).

Nor does the statute permit the judge to nullify the guidelines by way of a single assertion that any latent errors in the guidelines calculation would make no difference to the choice of sentence.

To allow this practice to continue is the beginning of

a "slippery slope." If judges are allowed to disregard the guidelines, or any objection to the guidelines, by a simple inoculating statement that even if the court's guideline calculation is incorrect, it would still sentence the defendant to the same sentence, then the courts can start disregarding any objections to the guidelines at sentencing by making such an inoculating statement. The U.S. Courts of Appeals, using the "assumed harmless error inquiry" would simply rubber stamp the district court's complete disregard of the guidelines.

This would effectively eviscerate this Court's holdings in United States v. Rita, 551 U.S. 338, 371-75 (2007); Peugh v. United States, 569 U.S. 530, 541 (2013); Gall v. United States, 552 U.S. 38, 41 (2007); and Rosales-Mireles v. United States, 138 S. Ct. 1897 (2018).

Therefore, this Court should grant Certiorari on this issue.

II. The Fourth Circuit Court of Appeals has adopted an "assumed harmless error test" to challenges to incorrect calculation of the U.S. Sentencing Guidelines. This test only asks if the district court uttered the inoculating statement "even if the guideline calculation is found to be incorrect, I would still impose the same sentence." Other Circuits have adopted similar harmless error tests, however, they all hold that first the district court must look at both guideline ranges (both with and without the contested guideline enhancement), then explain why it would depart

upward to the same sentence.

For instance, the U.S. Court of Appeals for the Seventh Circuit in United States v. Abbas, 560 F. 3d 660,667 (7th Cir.2009) held that a district court's statement purporting to inoculate its chosen sentence against errors identified on appeal will be effective only if two conditions are satisfied. First, the inoculating statement must be "detailed." Abbas, 560 F. 3d at 667. By that they meant that the judge must give specific attention to the contested guideline issue in his/her explanation. A generic disclaimer of all possible errors will not do. Second, the inoculating statement must explain the "parallel result." Id. By that, they meant that it must be "tied to the decisions the court made" and account for why the potential error would not "affect the ultimate outcome." United States v. Bravo, 26 F. 4th 387 (7th Cir. 2022). In Abbas the Seventh Circuit emphasized "a conclusory comment tossed in for good measure" is not enough to make a guidelines error harmless.

The Fifth Circuit Court of Appeals has two ways to show harmless error. The first is show the district court considered both ranges (the one found correct and the incorrect one) and explained that it would give the same sentence either way. See United States v. Guzman-Rendon, 864 F. 3d 409, 411 (5th Cir. 2017) The second "applies even if the correct guideline range was not considered." Id. Under this method, the government must "convincingly demonstrate both (1) that the district court would have imposed the same

sentence had it not made the error, and (2) that it would have done so for the same reasons it gave at the prior sentencing." Id. (cleaned up) (quoting United States v. Ibarra-Luna, 628 F. 3d 712, 714 (5th Cir. 2010))

The First, Eighth, and Eleventh Circuits all hold as the Fourth Circuit, that an inoculating statement is sufficient to show harmless error. See United States v. Espinoza-Roque, 26 F. 4th 32 (1st Cir. 2022); United States v. Schuler, 598 F. 3d 444 (8th Cir. 2010); United States v. Gonzales, 71 F. 4th 881 (11th Cir. 2023).

The Third, Sixth, Ninth, and Tenth Circuits all hold as Fifth Circuit, the district court must show that it considered the correct range, and uttered the same sentence language. See United States v. Carter, 730 F. 3d 187 (3rd Cir. 2013); United States v. Alvarado, 95 F. 4th 1047 (6th Cir. 2024); United States v. Halamek, 5 F 4th 1081 (9th Cir. 2021); and United States v. Eddington, 65 F. 4th 1231 (10th Cir. 2023).

The Second Circuit holds the government must show that the guidelines had no anchoring effect on the Court's incorrect sentence. See United States v. Seabrook, 968 F. 3d 224 (2nd Cir. 2020).

As clearly shown there is a Circuit split as to what is necessary to show that a district court's incorrect calculation of the U.S. Sentencing Guidelines is harmless.

Therefore, this Court should grant Certiorari to resolve this issue. After all, the Guidelines, though

advisory, are not a body of casual advice, to be consulted or overlooked at the whim of a sentencing judge.

This is especially important for Slater because at his resentencing, the Court did not initially state that it would impose the sentence, if it's calculation of the guidelines was incorrect. Instead, it was the government (AUSA Moore), who stated;

> "And then by my rough calculation, your sentence of 288 months would probably be about four years higher than the guidelines as calculated, given the objection that Mr. Harris raised." (Sent. Tr. at P. 63, L. 17-20)

The AUSA then asked;

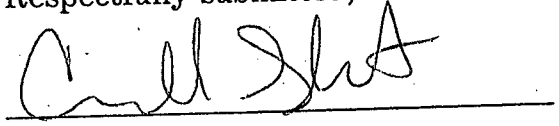
> "Would you say that the sentence you imposed be the same even if you had calculated the guidelines differently?" (Sent. Tr. P. 63, L. 21-22.)

To which the Court responded, "Yeah." So it was not even the Court who said it would impose the same sentence, if it miscalculated the guidelines, it was the government who brought it up, to encourage the Court to issue an inoculating statement for the Fourth Circuit.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: September 24, 2024