

No. 18-

IN THE
SUPREME COURT OF THE UNITED STATES

DAMON HALL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is the Fifth Circuit correctly conducting its harmless inquiry when reviewing preserved Guidelines-calculation errors arising under Rule 52(a) of the Federal Rules of Criminal Procedure, particularly in light of this Court's decision in *Molina-Martinez v. United States*, 136 S. Ct. 1338 (2016)?

PARTIES

Petitioner: Damon Hall

Respondent: United States of America

TABLE OF CONTENTS

	PAGE
Question Presented	ii
Parties.....	iii
Table of Contents	iv
Index to Appendices	v
Table of Authorities	vi
Opinion Below	1
Jurisdictional Statement	1
Statutory Provision Involved.....	2
Statement of the Case	2
Reasons for Granting the Petition.....	5
I. The Fifth Circuit has set too low a bar for the government to demonstrate a preserved Sentencing Guidelines error is harmless.	5
Conclusion	9

INDEX TO APPENDICES

- Appendix A: Judgments and Opinion of the United States Court of Appeals for the Fifth Circuit
- Appendix B: Judgment and Sentence of the United States District Court for the Northern D

TABLE OF AUTHORITIES

PAGE

FEDERAL CASES

<i>Gall v. United States</i> , 552 U.S. 38 (2007)	5
<i>Molina-Martinez v. United States</i> , 136 S. Ct. 1338 (2016)	<i>Passim</i>
<i>Peugh v. United States</i> , 133 S. Ct. 2072 (2013)	6, 7
<i>United States v. Bazemore</i> , 839 F.3d 379 (5th Cir. 2016)	8, 9
<i>United States v. Guzman-Rendon</i> , 864 F.3d 409 (5th Cir. 2017)	4
<i>United States v. Damon Hall</i> , No. 16-11418, 698 Fed. Appx. 217 (October 4, 2017)(unpublished)	<i>Passim</i>
<i>United States v. Olano</i> , 507 U.S. 724 (1993)	5, 6
<i>United States v. Tanksley</i> , 848 F.3d 347 (5th Cir. 2017)	3
<i>United States v. Vonn</i> , 535 U.S. 55 (2002)	6
<i>Williams v. United States</i> , 503 U.S. 193 (1992)	7, 9

STATUTES

18 U.S.C. §3553	3
28 U.S.C. § 1254(1)	2
Sup. Ct. R. 13.1.	2

RULES

Federal Rules of Criminal Procedure, Rule 52(a)	<i>Passim</i>
Federal Rules of Criminal Procedure, Rule 52(b)	5

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Damon Hall, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The unpublished opinion fo the United States Court of Appeals for the Fifth Circuit is captioned as *United States of America v. Damon Hall*, No. 16-11418, 698 Fed. Appx. 217 (October 4, 2017) (unpublished). *See* Appendix A.

JURISDICTIONAL STATEMENT

The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). This petition has been filed within 90 days of the opinion of the court of appeals and is therefore timely. *See* Sup. Ct. R. 13.1.

FEDERAL RULE OF CRIMINAL PROCEDURE INVOLVED

The question presented involves Federal Rule of Criminal Procedure 52(a), which provides: "[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded."

STATEMENT OF THE CASE

The district court had erroneously concluded that Petitioner qualified as a Career Offender under the Federal Sentencing Guidelines. (ROA. 100, 125, 137.) Due to the error, the district court sentenced Petitioner under the belief that the applicable sentencing range under the Guidelines was 188-235 months; the correct range was actually 168-210 months. (ROA. 58, 112.) The court ultimately sentenced Petitioner to 175 months, a downward variance from the erroneous range but one that happens to have fallen within the correct range. The error which led to the erroneous Career Offender designation was fully preserved and litigated in the district court. (ROA. 85-100, 150-153, 158-173.)

In pronouncing the sentence, the court held that it would have imposed this sentence “[e]ven if my rulings on the objection to the calculation of the guidelines were to be determined to be incorrect.” (ROA. 111-112.) In the statement of reasons, the court similarly noted that “[e]ven if the guideline calculations are not correct, this is the sentence the Court would otherwise impose under 18 U.S.C. § 3553.” (ROA. 184.) In its explanation, the court noted as aggravating the location of Petitioner’s drug dealing and the under-representation of his criminal history, and as mitigating Petitioner’s “contrition and family support.” *Hall*, 698 Fed. Appx. at 218.

Petitioner appealed. While the case was pending, the court of appeals ruled in Petitioner’s favor on the same Guidelines issue litigated below. *See United States v. Tanksley*, 848 F.3d 347, 352 (5th Cir. 2017). The government conceded error, but

argued the error was harmless. Among other things, it noted that Petitioner's counsel had identified the correct range in his sentencing argument to the court. *See Hall*, 698 Fed. Appx. at 218; (Govt. Br. at 6-9.) Because the district court imposed a sentence below the erroneous Guidelines range, 188-235 months, and within the correct Guidelines range, 168-210 months, the government argued the error was harmless in light of court's remarks that it would have imposed the same sentence regardless of the Guidelines objection. (Govt. Br. at 9.)

In a brief opinion, the Fifth Circuit agreed with the government. *See Hall*, 698 Fed. Appx. at 218. The totality of its reasoning was as follows:

The Government points to part of the sentencing transcript in which Hall identified the correct range and in which the district court explained that it would give the same sentence regardless of whether the career offender enhancement applied. *See United States v. Guzman-Rendon*, 864 F.3d 409, 411 (5th Cir. 2017). Moreover, the Government convincingly demonstrates (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. *See id.* When the district court explained that it would have imposed the same sentence either way, it pointed to the serious nature of the offense, including the danger posed by Hall dealing drugs (in this case and previously) in an apartment area; the under-representation of Hall's criminal history; and, as mitigating factors, Hall's contrition and his family support.

Id.

This petition follows.

REASONS FOR GRANTING THE PETITION

I. The Fifth Circuit has set too low a bar for the government to demonstrate a preserved Sentencing Guidelines error is harmless.

Petitioner respectfully submits that the Fifth Circuit continues underestimate the influence of the Guidelines when reviewing Guidelines errors for harm under Rule 52(a) of the Federal Rules of Criminal Procedure. In *Molina-Martinez*, this Court held that when reviewing unpreserved errors arising under Rule 52(b), a defendant can “in most cases” show a reasonable probability of harm where a Guidelines error causes a defendant to be sentenced under an incorrect Guidelines range. See *Molina-Martinez*, 136 S. Ct. 1338, 1347 (2017). The Court rejected the Fifth Circuit’s overly “rigid” standard of review it had used for unpreserved Guidelines errors. *Molina-Martinez*, 136 S.Ct. at 1341. Because the Guidelines “are not only the starting point for most federal sentencing proceedings, but also the lodestar,” *Id.* at 1346, the Court concluded that “in most cases the Guidelines range will affect the sentence.” *Id.* at 1349.

Critically, *Molina-Martinez* considered review of the harmless error standard under Rule 52(b), which applies to unpreserved error—where the *defendant* bears the burden to show a reasonable probability of a different outcome. See *Molina-Martinez*, 136 S. Ct. at 1349; *United States v. Olano*, 507 U.S. 724, 734 (1993). Nevertheless, a defendant can typically satisfy this burden merely by showing that the district court’s “starting point and initial benchmark” was the wrong Guidelines range. *Gall v. United States*, 552 U.S. 38, 49 (2007); see *Molina-Martinez*, 136 S.Ct. at 1346 (“The Guidelines

inform and instruct the district court's determination of an appropriate sentence. [I]n the usual case, then, the systematic function of the selected Guidelines range will effect the sentence."). And this will remain true even where a judge may have varied from the erroneous range. *See Molina-Martinez*, 136 S.Ct. at 1345 ("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.*") (emphasis in original) (quoting *Peugh v. United States*, 133 S.Ct. 2072, 2083 (2013)).

The reasoning of *Molina-Martinez* compels the conclusion that *preserved* Guidelines errors arising under Rule 52(a) should rarely, if ever, be found to be harmless. For preserved claims arising under Rule 52(a), the *government* instead of the defendant bears the burden of showing a Guidelines error was harmless. *See United States v. Vonn*, 535 U.S. 55, 62 (2002) (for errors arising under Rule 52(a), government "carr[ies] the burden of showing that any error was harmless, as having no effect on the defendant's substantial rights"); *Olano*, 507 U.S. at 734. This Court held in *Molina-Martinez* that a defendant can affirmatively establish a reasonable probability of harm in most cases *solely* with proof that an error led him to be sentenced under the wrong Guidelines range. *Molina-Martinez*, 136 S. Ct. at 1346-1349. But if this is true, then the government rarely if ever would be able to affirmatively demonstrate that the district court's consideration of the wrong Guidelines range "did not affect the district court's selection of the sentence imposed."

Williams v. United States, 503 U.S. 193, 203 (1992) (discussing Rule 52(a)).

But that is not the state of affairs in the Fifth Circuit. Even after *Molina-Martinez*, the Fifth Circuit continues to underestimate the “real and pervasive effect the Guidelines have on sentencing.” *Molina-Martinez*, 136 S. Ct. at 1346. It sets far too low a bar for the government to establish harmlessness for preserved claims of Guidelines error.

In this case, the district court sentenced Petitioner under the erroneous belief that the applicable Guidelines range was 188-235 months; the correct range was 168-210 months. (ROA. 100, 181.) The government can point to nothing to conclusively demonstrate that if the court had used the correct 168-210 month range as its starting point, the district court still would have arrived at a numerical sentence of 175 months. See *Molina-Martinez*, 136 S.Ct. at 1345 (“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.*”) (emphasis in original) (quoting *Peugh v. United States*, 133 S.Ct. 2072, 2083 (2013)). The 175-month sentence imposed was a downward variance from the erroneous range. (ROA. 58, 112.) But this sentence would not be a downward variance from the correctly calculated range of 168-210 months; on the contrary, the sentence is seven months above even the low-end of the correct range.

The Fifth Circuit was satisfied the error had no impact on the sentence because:

1) Petitioner’s counsel had pointed out the correct range in his sentencing remarks; and

2) the district court indicated it would have imposed the same sentence, “even if my rulings on the objection to the calculation of the guidelines were to be determined to be incorrect.” See *Hall*, 698 Fed. Appx. at 218; (ROA.. 111-112.) But in light of *Molina-Martinez*, this is far too tenuous a basis upon which to conclude that the erroneous Guidelines range had no effect on the sentence. Even though Petitioner’s Counsel mentioned the correctly applicable Guidelines range, the district court never even acknowledged this range on the record, much less discussed it. Nor did the court explain why it was willing to downwardly vary from a 188-235 month sentencing range based on Petitioner’s contrition and family circumstances, but unwilling to downwardly vary if the applicable range had been 168-210 months. *Hall*, 698 Fed. Appx. at 218; (ROA. 111-113.) Nor did the court state explicitly that it would select a sentence of 175 months in length regardless of whether the range was 168-210 months or 188-235 months.

The court of appeals should have been particularly reluctant to find harmlessness in light of the fact that this very same district judge has imposed a lower sentence on remand notwithstanding earlier remarks that it would have imposed the same sentence. For example, in *Bazemore*, a Guidelines error reduced the defendant’s sentencing range from 292-365 months to 151-188 months. *United States v. Bazemore*, 839 F.3d 379, 383-85 (5th Cir. 2016). And even though the same district court had said during the first sentencing that it would have imposed the same sentence had it been wrong about the Guidelines, it did in fact significantly reduce the sentence on

remand—from 292 months to 188 months. *Id.* at 385; see *United States v. Bazemore*, 608 Fed. Appx. 207, 216 (5th Cir. 2015). Thus, the district court reduced the sentence by nearly nine years on remand in spite of what it had said during the first sentencing.

This Court must clarify to the Fifth Circuit that it needs far more evidence in the record before it can find that the government has sustained its burden of proving that an incorrect Guidelines range had zero effect “on the district court’s selection of the sentence imposed.” *Williams*, 503 U.S. at 203. The Court should grant this petition.

CONCLUSION

Petitioner respectfully requests that this Court grant his petition for a writ of certiorari.

DATE: January 2, 2018

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'W. Biggs', followed by a horizontal line.

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