

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

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In the

**Supreme Court of the United States**

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STEVEN AARON PARUM,  
*Petitioner,*

v.

UNITED STATES OF AMERICA,  
*Respondent.*

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**On Petition for a Writ of Certiorari  
to the United States Court of Appeals  
for the Fifth Circuit**

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**PETITION FOR A WRIT OF CERTIORARI**

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## **QUESTION PRESENTED**

When a district court errs by failing to consider one of the factors under 18 U.S.C. § 3572(a) before imposing a fine, should an appellate court find plain error?

## **LIST OF PARTIES**

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

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## **PRAYER**

Petitioner Steven Aaron Parum respectfully prays that a writ of *certiorari* be granted to review the judgment of the United States Court of Appeals for the Fifth Circuit issued on April 5, 2018.

## **OPINIONS BELOW**

The Fifth Circuit's opinion in *United States v. Parum*, 717 Fed.Appx. 502 (5th Cir. Apr. 5, 2018), is reprinted at pages 1a–2a of the Appendix. The district court entered no written opinion, but the appendix contains an excerpt from the sentencing transcript in which the district court adopted the PSR and found that Mr. Parum did “have the ability to pay a fine.” Pet. App. 9a, 16a.

## **JURISDICTION**

On April 5, 2018, the United States Court of Appeals for the Fifth Circuit entered its judgment and opinion affirming the judgment in part, vacating the judgment relating to the establishment of a payment schedule, and ordering a limited remand “for the purpose of clarifying the ambiguity regarding establishment of and approval of a fine payment schedule.” Pet. App. 1a–2a. This petition is filed within 90 days of that date and therefore is timely. *See* Sup. Ct. R. 13.1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## RULE AND STATUTE INVOLVED

The question presented involves Federal Rule of Criminal Procedure 52(b), which provides: “A plain error that affects substantial rights may be considered even though it was not brought to the court’s attention.” Fed. R. Crim. P. 52(b).

This case also involves interpretation and application of 18 U.S.C. § 3572(a) which reads as follows:

**(a) Factors To Be Considered.**—In determining whether to impose a fine, and the amount, time for payment, and method of payment of a fine, the court shall consider, in addition to the factors set forth in section 3553(a)—

- (1) the defendant’s income, earning capacity, and financial resources;
- (2) the burden that the fine will impose upon the defendant, any person who is financially dependent on the defendant, or any other person (including a government) that would be responsible for the welfare of any person financially dependent on the defendant, relative to the burden that alternative punishments would impose;
- (3) any pecuniary loss inflicted upon others as a result of the offense;
- (4) whether restitution is ordered or made and the amount of such restitution;
- (5) the need to deprive the defendant of illegally obtained gains from the offense;
- (6) the expected costs to the government of any imprisonment, supervised release, or probation component of the sentence;
- (7) whether the defendant can pass on to consumers or other persons the expense of the fine; and
- (8) if the defendant is an organization, the size of the organization and any measure taken by the organization to discipline any officer, director,

employee, or agent of the organization responsible for the offense and to prevent a recurrence of such an offense.

18 U.S.C. § 3572(a).

## STATEMENT OF THE CASE

In the district court, Petitioner Steven Aaron Parum entered a plea of guilty to the offense of being a felon in possession of a firearm in violation of 18 USC § 922(g)(1). Pet. App. 3a. The presentence investigation report (“PSR”) prepared in Mr. Parum’s case found that Mr. Parum has three dependents, A.S.P. (age 13), K.P. (age 10), and A.P. (age 8) and noted that “Records from the Office of the Attorney General of Texas reflect the [Mr. Parum’s] child support account is in arrears in the amount of \$50,020.36.” In addition, the PSR provided the following background:

- “[Mr. Parum] completed the 10th grade at Permian High School in Odessa, Texas,”
- Mr. Parum “does not have a high school diploma or Graduate Equivalency Certificate,”
- Mr. Parum “has been diagnosed with attention deficit hyperactive disorder, bipolar disorder, depression, and anxiety,” and
- Mr. Parum “was living with his parents at the time of his arrest.”

In connection with Mr. Parum’s three dependents, the PSR recommended the following special conditions of supervision, among others:

86. The defendant shall comply with the child support order established by the Texas Attorney General's Office, Child Support Disbursement Unit, upon commencement of supervision for the support of the defendant's minor children, as follows:

| <u><b>Child</b></u>   | <u><b>Child's Age</b></u> | <u><b>Child's Mother</b></u> |
|-----------------------|---------------------------|------------------------------|
| [A.S.P.] <sup>1</sup> | 13 yrs. old               | Daniela Carrasco             |
| [A.P.]                | 8 yrs. old                | Daniela Carrasco             |

87. Within 60 days of his release from custody, the defendant shall establish an account with the Texas Attorney General's Office for the payment of child support for his minor children, as follows:

| <u><b>Child</b></u> | <u><b>Child's Age</b></u> | <u><b>Child's Mother</b></u> |
|---------------------|---------------------------|------------------------------|
| [K.P.]              | 10 yrs. old               | Angelina Walker              |

The PSR contained a section entitled “Fines” which read as follows:

90. **Statutory Provisions:** The maximum fine is \$250,000. 18 U.S.C. § 3571(b).
91. A special assessment of \$100 is mandatory. 18 U.S.C. § 3013.
92. Guideline Provisions: The fine range for this offense is from \$30,000 to \$250,000. USSG §5E1.2(c)(3).
93. Costs of prosecution shall be imposed on the defendant as required by statute. USSG § 5E1.5. In determining whether to impose a fine and the amount of such fine, the Court shall consider, among other factors, the expected costs to the government of any term of probation, or term of imprisonment and term of supervised release imposed. USSG § 5E1.2(d)(7) and 18 U.S.C. § 3572(a)(6). These costs may include drug and alcohol treatment, electronic monitoring, and/or contract confinement costs. The most recent advisory from the Administrative Office of the United States Courts, dated June 24, 2016, provides the following monthly cost data:

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<sup>1</sup> Pursuant to Sup. Ct. R. 34.6, 5th Cir. R. 25.2.13 and Fed. R.Crim. P. 49.1, Mr. Parum refers to the minors by their initials only.

|          | <u><b>Bureau of<br/>Prisons Facilities</b></u> | <u><b>Community<br/>Correction<br/>Centers</b></u> | <u><b>Supervision by<br/>Probation<br/>Officer</b></u> |
|----------|------------------------------------------------|----------------------------------------------------|--------------------------------------------------------|
| Daily    | \$88.00                                        | \$71.00                                            | \$11.00                                                |
| Monthly  | \$2,665.00                                     | \$2,174.00                                         | \$341.00                                               |
| Annually | \$31,976.00                                    | \$26,083.00                                        | \$4,097.00                                             |

The section entitled “Financial Condition: Ability to Pay” in the PSR read as follows:

**Financial Condition: Ability to Pay**

70. The defendant reported the following assets and liabilities:

**Assets**

None.

**Liabilities**

Child support - Arrearage Daniela Colunga \$50,020.36

**Total Liabilities** \$50,020.36

**Total Net Worth** (\$50,020.36)

**Total Monthly Cash Flow** \$0

71. A TransUnion Credit Report corroborated the defendant’s financial assessment. He has Court appointed counsel, his liabilities are not significant, and he is employable . . . .

Although the probation office reported that Mr. Parum had a negative net worth of \$50,020.36, the probation office concluded as follows: “It appears he has the ability to pay a fine.” At sentencing, the district court announced that he was not “departing from the recommended sentence.” Pet. App. 13a. Even though the district court

declared that it had considered the factors set forth in 18 U.S.C. § 3553(a) (factors to consider in imposing a sentence), the district court did not assert that it had considered the factor set forth in 18 U.S.C. § 3572(a)(2) (burden on defendant in imposing a fine). Pet. App. 13a. Instead, the district court simply found “the guideline range to be fair and reasonable.” Pet. App. 13a. In connection with a fine, the district court merely adopted the PSR and found that Mr. Parum did “have the ability to pay a fine.” Pet. App. 9a, 16a. Ultimately, the district court assessed “a fine at \$30,000 to be paid on a schedule approved by your probation officer upon your release from the Bureau of Prisons.” Pet. App. 16a. The district court did not make any finding of fact regarding the burden that a \$30,000 fine would impose upon Mr. Parum’s three dependents, relative to the burden that alternative punishments would impose.

On appeal, Mr. Parum argued that the district court erred by failing to consider the burden imposed on his dependents before imposing a \$30,000 fine. Pet. App. 1a. Specifically, Mr. Parum argued that although the probation office and the district court explicitly considered the sixth factor under 18 U.S.C. § 3572(a), the district failed to consider the burden that a \$30,000 fine would impose upon Mr. Parum’s three dependents, relative to the burden that alternative punishments (such as community service) would impose, as required by the second factor under section 3572(a).

Relying on its prior precedent, the Fifth Circuit rejected Mr. Parum's argument:

Because Parum did not object to the district court's imposition of the fine, this court's review is for plain error. *See Puckett v. United States*, 556 U.S. 129, 135, 129 S.Ct. 1423, 173 L.Ed.2d 266 (2009); *United States v. Pacheco-Alvarado*, 782 F.3d 213, 220-21 (5th Cir. 2015). Where, as in the instant case, the district court imposes a fine that is within the applicable guidelines range, the fine is presumed reasonable. *See Pacheco-Alvarado*, 782 F.3d at 220-21.

The PSR indicated that Parum had the ability to pay a fine, and Parum bore the burden of establishing his inability to pay. *See United States v. Fair*, 979 F.2d 1037, 1041-42 (5th Cir. 1992); *United States v. Matovsky*, 935 F.2d 719, 722 (5th Cir. 1991). The district court explicitly determined that Parum had the ability to pay a fine and, through its adoption of the PSR, the district court sufficiently considered facts relevant to the 18 U.S.C. § 3572(a) factors, including the impact of the fine on Parum's dependents. *See* § 3572(a)(2); *United States v. Harris*, 702 F.3d 226, 230 (5th Cir. 2012); *United States v. Puig-Infante*, 19 F.3d 929, 943 (5th Cir. 1994). More explicit rationale is not necessary in light of Parum's failure to object to the finding that he had the ability to pay a fine. *See United States v. Voda*, 994 F.2d 149, 155 n.14 (5th Cir. 1993); *Matovsky*, 935 F.2d at 722. Accordingly, the district court did not commit plain error in imposing the \$30,000 fine. *See Puckett*, 556 U.S. at 135, 129 S.Ct. 1423.

Pet. App. 1a.

## REASONS FOR GRANTING THE WRIT

- I. To the extent that the Fifth Circuit found that the district court enjoyed the “benefit of a legal presumption that the Guidelines sentence should apply,” the opinion below is in conflict with this Court’s holding in *Nelson v. United States*, 555 U.S. 350 (2009).**

Before imposing a fine, a district court “shall” consider the burden that the fine will impose on any person who is financially dependent on the defendant, relative to the burden that alternative punishments would impose. 18 U.S.C. § 3572(a)(2). In the case below, however, the district court failed to consider the burden that a \$30,000 fine would impose upon Mr. Parum’s three dependents, relative to the burden that alternative punishments (such as community service) would impose, as required by the second factor under section 3572(a). By failing to follow Congress’ directive in § 3572(a)(2), the district court erred. The error was plain because § 3572(a)(2) clearly requires, before imposing a fine, the district court’s consideration of the burden fine would impose upon the defendant’s dependents, relative to the burden that alternative punishments (such as community service) would impose. 18 U.S.C. § 3572(a)(2) (“In determining whether to impose a fine, and the amount, time for payment, and method of payment of a fine, the court *shall consider*, in addition to the factors set forth in section 3553(a)— . . . (2) the burden that the fine will impose upon the defendant, any person who is financially dependent on the defendant, or any other person (including a government) that would be responsible for the welfare of any person

financially dependent on the defendant, relative to the burden that alternative punishments would impose . . . .” (italics added for emphasis)).

Significantly, “while courts of appeals ‘may apply a presumption of reasonableness to a district court sentence that reflects a proper application of the Sentencing Guidelines,’ . . . ‘the sentencing court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply,’ . . . . Instead, the sentencing court must first calculate the Guidelines range, and then consider what sentence is appropriate for the individual defendant in light of the statutory sentencing factors, 18 U.S.C. § 3553(a) [and § 3572(a)(2)], explaining any variance from the former with reference to the latter.” *Nelson v. United States*, 555 U.S. 350, 351 (2009) (citations omitted). Accordingly, to the extent that the Fifth Circuit found that the district court enjoyed the “benefit of a legal presumption that the Guidelines sentence should apply,” the opinion below is in conflict with this Court’s holding in *Nelson*. Moreover, the district court below had to “consider what sentence is appropriate for the individual defendant in light of the statutory sentencing factors,” including § 3572(a)(2), but failed to do so. *Id.*

**II. The decision below is in conflict with this Court’s holdings in *Gall v. United States*, 552 U.S. 38 (2007).**

In a case concerning 18 U.S.C. § 3553 (factors to consider in imposing a sentence), this Court held in *Gall v. United States*, 552 U.S. 38 (2007) that a district court “may not presume that the Guideline range is reasonable” but rather “must make

an individualized assessment based on the facts presented.” *Id.* at 50. “After settling on the appropriate sentence, [the district court] must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing.” *Id.* Because *Gall* concerned § 3553(a) (factors to consider in imposing a sentence) and the case below involved § 3572(a) (factors to consider in imposing a fine), the Fifth Circuit’s opinion is in conflict with *Gall*. After all, a fine is a component of a sentence. See 18 U.S.C. § 3572(a) (“In determining whether to impose a fine, and the amount, time for payment, and method of payment of a fine, the court shall consider, in addition to the factors set forth in section 3553(a)-- . . . .”); see also *Pinkerton v. United States*, 328 U.S. 640, 641 n. 1 (1946) (referring to a fine and imprisonment collectively as a “general sentence of fine and imprisonment”).

Here, the district court found “the guideline range to be fair and reasonable.” Pet. App. 13a. In other words, the district court presumed that the Guideline range was “reasonable.” The record is devoid of any evidence that the district court specifically considered the burden that a \$30,000 fine would impose upon Mr. Parum’s three dependents, relative to the burden that alternative punishments would impose, as required under 18 U.S.C. § 3572(a)(2). In fact, there was no reference made to § 3572(a)(2) or the possibility of an alternative punishment, in lieu of a fine, in either the PSR or at the sentencing. Had the Fifth Circuit applied the holdings in *Gall* to § 3572(a)(2), it could not have found that the district court “sufficiently considered facts relevant to the 18 U.S.C. § 3572(a) factors, including the impact of

the fine on Parum's dependents." Pet. App. 1a. Finally, the district court did not "make an individualized assessment based on the facts presented" or "adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing." *See Gall*, 552 U.S. at 50.

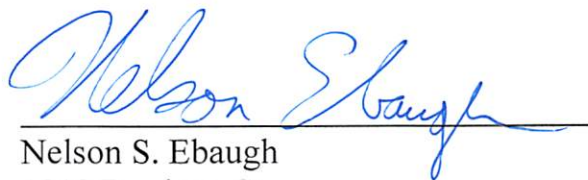
In sum, the decision below is in conflict with this Court's holdings in *Gall*. Accordingly, this Court should grant review to reiterate that a district court "may not presume that the Guideline range is reasonable" but rather "must make an individualized assessment based on the facts presented." *See Gall*, 552 U.S. at 50.

### CONCLUSION

For the reasons stated above, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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