No. 22-340

In the Supreme Court of the United States

MARK E. PULSIFER, PETITIONER

v.

UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The United States agrees that the Court should grant certiorari in Mr. Pulsifer's case given the deepening circuit conflict over the interpretation of the 18 U.S.C. § 3553(f) safety valve allowing relief from mandatory minimum sentences. U.S. Br. 7, 11. As the government explains, Mr. Pulsifer's case "cleanly presents" the issue and "is a suitable vehicle" for resolving it, U.S. Br. 12, and it's the case the Court should hear, U.S. Br. 5-7, *Palomares v. United States*, No. 22-6391. Accordingly, the United States has recommended that the later-filed petition in *Palomares* "be held pending this Court's consideration of the petition for a writ of certiorari in *Pulsifer* … and then disposed of as appropriate in light of the Court's disposition of that case." *Id.* at 7.

Palomares argues that the Court should grant her case instead because it is "the superior vehicle." Reply 2, *Palomares*, No. 22-6391 (*Palomares* Reply). Palomares claims that "the district court's failure to grant [Pulsifer] safety-valve relief may well have been harmless error" because "Mr. Pulsifer obtained a substantial-assistance departure." *Id.* at 3-4. Respectfully, that argument is not just false but disingenuous. There is no vehicle problem, as the United States has already explained twice, and Palomares' eagerness to claim otherwise flies in the face of this Court's decisions and should give the Court pause.

Although this brief dissects Palomares' unwarranted arguments in more detail below, the point is simple: Because of its ruling on the question presented, the district court sentenced Mr. Pulsifer to a statutory mandatory minimum of 162 months—that is, 180 months minus discrete credit for an unrelated

reduction. Pet. App. 2a, 31a-32a, 39a, 41a. The district court could not have made that clearer: "the mandatory minimum at this time is 162" months. Pet. App. 39a. Because that "mandatory minimum drives the calculation," Pet. App. 31a, the district court thus did *not* sentence Mr. Pulsifer under the Guidelines, which it calculated at 120–150 months, Presentence Investigation Report ¶ 130, p. 28; Pet. 24. Thus, if Mr. Pulsifer prevails before this Court, the district court on remand will have to consider the advisory Guidelines range, which is lower than the sentence he received (and even as low as 100–125 months given a variance related to the question presented, *see* Pet. 24). That means that the district court's error on the question presented is *presumptively prejudicial as a matter of law*. *See Molina-Martinez v. United States*, 136 S. Ct. 1338, 1345, 1347 (2016). The Court should grant review in Mr. Pulsifer's case, as the government has urged, and hold *Palomares* pending its decision.

1. As the decisions below make clear, the district court's safety-valve ruling caused the court to impose an above-Guidelines sentence, and thus it was not harmless error. Pet. 24. This Court has explained that prejudice is *presumed* when there is an error in the Guidelines range. *See Molina-Martinez*, 136 S. Ct. at 1345, 1347. That presumption follows from the Guidelines' design, as the Court's decisions reiterate. "[T]he Guidelines are 'the starting point for every sentencing calculation in the federal system.'" *Hughes v. United States*, 138 S. Ct. 1765, 1775 (2018) (quoting *Peugh v. United States*, 569 U.S. 530, 542 (2013)). Thus, district courts "must begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process." *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1904 (2018) (emphasis and citation

omitted). Although they are not binding, "the Guidelines serve as 'a meaningful benchmark' in the initial determination of a sentence." *Id.* (citation omitted).

Here, if the district court got the question presented wrong, then it also got the Guidelines range wrong. That's because the district court equated the mandatory minimum sentence (162 months) with the applicable Guidelines range, when the range with the § 3553(f) safety valve would have been no higher than 120–150 months (in fact, 120–125 months with a 2-level Guidelines variance reflecting the First Step Act). Pet. 24. Thus, the § 3553(f) error was *presumptively* prejudicial.

In arguing otherwise, Palomares ignores these fundamental principles and this Court's caselaw that articulates them. That lack of candor is reason enough to dismiss her request to cut in line. She also ignores the record in Mr. Pulsifer's case. The Eighth Circuit explained that the district court "start[ed] with the fifteen year minimum" and "made an unrelated reduction under different authority," producing a mandatory minimum sentence of 162 months. Pet. App. 2a. The district court, for its part, made clear that "the mandatory minimum drives the calculation"; the lower "advisory guideline calculation" does not. Pet. App. 31a. Thus, although the district court gave Mr. Pulsifer "credit" for an unrelated "motion previously granted," it made clear that "the statutes require a mandatory minimum … with [that] credit." Pet. App. 41a. The result was that "the mandatory minimum at this time is 162" months. Pet. App. 39a.

In short, as the government explained, the district court concluded that the mandatory minimum sentence of 162 months ended the analysis, despite the

correct Guidelines range of 120–150 or even 100–125 months. Pet. 24. Thus, as the government put it in urging review in this case, the district court "would have had authority to impose an even lower sentence 'without regard to any statutory minimum' if [Pulsfier] had satisfied the requirements for safety-valve relief under Section 3553(f)." U.S. Br. 12 (quoting 18 U.S.C. § 3553(f)). The case is therefore an excellent vehicle for resolving the question presented, and just *what* Mr. Pulsifer's sentence will be under the safety valve is a question for the district court on remand—under § 3553(a) and the Sentencing Guidelines.

2. Rather than cite binding caselaw or the record in this case, Palomares speculates that Mr. Pulsifer's unrelated reduction may have been for substantial assistance under 18 U.S.C. § 3553(e). *Palomares* Reply 2-3. But that argument gets Palomares nowhere, as her attempt to grapple with the United States' response shows. Still worse, it again reflects a lack of candor with the Court about the law. A substantial-assistance reduction can be based *only* on any substantial assistance itself, not the Guidelines range or the § 3553(a) factors, and so a substantial-assistance reduction would do nothing to suggest that a court would have imposed the same sentence but for an erroneous § 3553(f) ruling.

To explain: A substantial-assistance reduction to a mandatory minimum sentence results in a sentence that is based not on a Guidelines range but on "the [defendant's] mandatory minimums and substantial assistance to the Government." *Koons v. United States*, 138 S Ct. 1783, 1790 (2018). That makes sense: A district court granting a substantial-assistance motion thus may "properly discard[] the advisory ranges, and permissibly consider[] only factors related to [the

defendant's] substantial assistance, rather than factors related to the advisory ranges, as a guide in determining how far to depart downward." *Id.* at 1789-90 (citation omitted; citing 18 U.S.C. § 3553(e); U.S.S.G § 5K1.1). Although this Court has not decided whether "§ 3553(e) *prohibits* consideration of the advisory Guidelines ranges in determining how far to depart downward," *id.* at 1790 n.3, "all 11 courts of appeals to consider the question have recognized" that because § 3553(e) "authorizes a departure below a statutory minimum only to the extent necessary to reward the defendant for his substantial assistance," U.S. Br. 32, *Koons*, No. 17-5716, 138 S. Ct. 1783 (citing decisions). And that rule is crystal clear in the Eighth Circuit, where Mr. Pulsifer was sentenced. *See United States v. Burns*, 577 F.3d 887, 894 (8th Cir. 2009) (en banc) ("[T]he district court's authority is limited to imposing a sentence below the statutory minimum only 'so as to reflect a defendant's substantial assistance,'" so a court "would thus exceed the limited authority granted by § 3553(e) if it imposed a sentence below the statutory minimum based in part upon the history and characteristics of the defendant" (quoting 18 U.S.C. § 3553(e)).

The bottom line is that Palomares' invocation of substantial assistance does nothing to suggest harmless error. And here, Pulsifer received an unrelated sentencing reduction to a mandatory minimum sentence. The district court therefore considered the slightly reduced mandatory minimum—still well above Mr. Pulsifer's Guidelines range—to *be* the mandatory minimum. As a result, it sentenced Mr. Pulsifer to that mandatory minimum, believing the § 3553(f) safety valve didn't apply and that it did not need to consider Mr. Pulsifer's Guidelines range. If

Mr. Pulsifer prevails before this Court, the district court on remand will have the opportunity to consider the correct Guidelines range, as it *must* under § 3553(a) and *Molina-Martinez*. Under *Molina-Martinez*, the Court presumes that a different range will make a difference.

All this is clear under this Court's decisions. What's unclear is why Palomares elided them.

The Court should grant Mr. Pulsifer's petition.

Respectfully submitted.

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