No. 25-5357

IN THE SUPREME COURT OF THE UNITED STATES

JESSIE DEJUAN SULLIVAN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

D. JOHN SAUER
Solicitor General
Counsel of Record

MATTHEW R. GALEOTTI
Acting Assistant Attorney General

ANN O'CONNELL ADAMS
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 922(g)(1) violates the Second Amendment on its face.

2. Whether the court of appeals erred in denying plain-error relief on petitioner's claim of Sentencing Guidelines error, where it found -- in light of the district court's express statement that it would have imposed the same sentence even if its Guidelines calculation were incorrect -- that petitioner had not demonstrated a reasonable probability of an outcome-determinative error.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A2) is available at 2025 WL 1392087.

JURISDICTION

The judgment of the court of appeals was entered on May 14, 2025. The petition for a writ of certiorari was filed on August 12, 2025. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Northern District of Texas, petitioner was convicted on

one count of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1). Judgment 1. The district court sentenced petitioner to 65 months of imprisonment, to be followed by three years of supervised release. Judgment 2. The court of appeals affirmed. Pet. App. A1-A2.

1. In 2021, police officers in Arlington, Texas ran the license plate of a vehicle parked at a convenience store. Presentence Investigation Report (PSR) ¶¶ 7-8. They found an active warrant for petitioner associated with the vehicle. PSR ¶ 8. Officers approached petitioner at his vehicle, smelled marijuana inside, and saw a firearm magazine in the pocket of his cargo pants. PSR ¶ 9. A search of the vehicle uncovered a loaded handgun on the driver's side floorboard. Ibid. Officers arrested petitioner for the outstanding warrant. PSR ¶ 12. A federal grand jury in the Northern District of Texas returned an indictment charging petitioner with possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1). Indictment 1. Petitioner pleaded guilty. Judgment 1.

Using the 2021 Guidelines Manual the Probation Office calculated petitioner's base offense level as 20 because he had previously been convicted of Texas robbery, which the Probation Office found to be a crime of violence under Sentencing Guidelines § 2K2.1(a)(4)(A) (2021). PSR ¶¶ 22-23; Third PSR Addendum ¶¶ 22-23. The Probation Office added a two-level enhancement because

the firearm in his possession was stolen, and it declined to reduce petitioner's base offense level for acceptance of responsibility because he had violated the terms of his pretrial release. PSR ¶ 24; PSR Addendum ¶¶ 21, 30-31; Third PSR Addendum ¶¶ 24, 30. The Probation Office also added a two-level obstruction-of-justice enhancement because petitioner failed to appear for his July 2022 sentencing hearing and was not apprehended for two years. Third PSR Addendum ¶ 27. Combined with his criminal history category, the calculated offense level of 24 yielded a Guidelines range of 57 to 71 months. Id. ¶ 69.

2. At sentencing, petitioner did not object to the classification of his prior Texas robbery conviction as a crime of violence, but did object to the absence of a reduction for acceptance of responsibility and to the obstruction enhancement. D. Ct. Doc. 30 (June 29, 2022); D. Ct. Doc. 35, at 1-3 (July 15, 2022); D. Ct. Doc. 46, at 1 (Aug. 9, 2024). The district court overruled petitioner's objections. 8/30/24 Sent. Tr. 5 (Sent. Tr.).

The district court sentenced petitioner to 65 months of imprisonment. Sent. Tr. 10. The court explained that it had "considered the guidelines, but also * * * considered all of th[e] factors in" 18 U.S.C. 3553(a), and had determined that 65 months was sufficient but not greater than necessary to comply with the purposes in Section 3553(a)(2). Sent. Tr. 12. The court

also made clear that "given the unique facts and circumstances of this case * * * and [petitioner] absconding, this would have been the same sentence [the court] would have given * * * even if we didn't have the guidelines." Ibid.

In a written statement of reasons, the district court reiterated 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." D. Ct. Doc. 52, at 4 (Aug. 30, 2024).

3. The court of appeals affirmed in an unpublished per curiam opinion. Pet. App. A1-A2. The court rejected petitioner's argument, raised for the first time on appeal, that Section 922(g)(1) is facially unconstitutional. Ibid. The court observed that the argument was foreclosed by circuit precedent. Ibid. (citing United States v. Diaz, 116 F.4th 458 (5th Cir. 2024), cert. denied, 145 S. Ct. 2822 (2025)).

The court of appeals additionally rejected petitioner's argument, also raised for the first time on appeal, that the district court erred by failing to apply the 2023 Guidelines that were in effect at the time of sentencing and classifying petitioner's prior conviction for Texas robbery as a crime of violence under Guidelines § 2K2.1(a)(4)(A). Pet. App. A2. The court explained that even if petitioner could show a clear or obvious error, he could not succeed on plain-error review because

he failed to demonstrate that any error affected his substantial rights. Ibid.

The court of appeals observed that the district court's reasons for imposing the sentence -- including the facts and circumstances of the case, the fact that petitioner "failed to appear for his original sentencing date and avoided apprehension for nearly two years," and "the need to comply with the sentencing purposes" in 18 U.S.C. 3553(a)(2) -- were "untethered" from the Guidelines. Pet. App. A2. And the court of appeals therefore found that petitioner had not shown a reasonable probability that he would have received a different sentence but for the alleged error. Ibid.

ARGUMENT

Petitioner renews his contentions that Section 922(g)(1) violates the Second Amendment on its face, Pet. 7-19, and that he is entitled to relief on plain-error review for an asserted misapplication of the Sentencing Guidelines, Pet. 19-30. The court of appeals correctly rejected those contentions, and its decision does not implicate any conflict in the circuits that would warrant this Court's review.

1. Petitioner contends (Pet. 7-19) that 18 U.S.C. 922(g)(1), the federal statute that prohibits a person from possessing a firearm if he has been convicted of "a crime punishable by imprisonment for a term exceeding one year," ibid.,

violates the Second Amendment on its face. For the reasons set out in the government's brief opposing certiorari in French v. United States, 145 S. Ct. 2709 (2025) (No. 24-6623), the claim that Section 922(g)(1) is facially unconstitutional does not warrant this Court's review. See ibid. (denying certiorari). As the government explained in French, that contention plainly lacks merit, and every court of appeals to consider the issue since United States v. Rahimi, 602 U.S. 680 (2024), has recognized that the statute has at least some valid applications. See Br. in Opp. at 3-6, French, supra (No. 24-6623).

In any event, this case would be a poor vehicle to determine the facial validity of Section 922(g)(1) because petitioner failed to preserve this challenge in the district court. See Pet. C.A. Br. 37 (acknowledging failure to raise Second Amendment challenge in district court). Throughout the time that Rahimi was pending and after it was decided, this Court consistently denied petitions raising Second Amendment challenges to Section 922(g)(1) when the petitioners failed to preserve their claims in the lower courts. See, e.g., Trammell v. United States, 145 S. Ct. 561 (2024) (No. 24-5723); Chavez v. United States, 145 S. Ct. 459 (2024) (No. 24-5639); Dorsey v. United States, 145 S. Ct. 457 (2024) (No. 24-5623). This Court should follow the same course here.

2. Petitioner also contends (Pet. 19-30) that the court of appeals erred in affirming his sentence on plain-error review based

on its determination that petitioner had not shown a reasonable probability that he would have received a lower sentence but for purported Guidelines errors he asserted for the first time on appeal. This Court has repeatedly denied petitions for writs of certiorari that have raised similar issues.* The same result is warranted here.

a. When a defendant fails to object to an alleged error in the district court, he may not obtain relief from that error on appeal unless he establishes reversible "plain error" under Federal Rule of Criminal Procedure 52(b). See Puckett v. United States, 556 U.S. 129, 134-135 (2009). Reversal for plain error "is to be 'used sparingly, solely in those circumstances in which

* See, e.g., Slater v. United States, 2025 WL 2906502 (2025) (No. 24-7208); Kinzy v. United States, 144 S. Ct. 2682 (2024) (No. 23-578); Brooks v. United States, 143 S. Ct. 585 (2023) (No. 22-5788); Irons v. United States, 143 S. Ct. 566 (2023) (No. 22-242); Brown v. United States, 141 S. Ct. 2571 (2021) (No. 20-6374); Rangel v. United States, 141 S. Ct. 1743 (2021) (No. 20-6409); Snell v. United States, 141 S. Ct. 1694 (2021) (No. 20-6336); Thomas v. United States, 141 S. Ct. 1080 (2021) (No. 20-5090); Torres v. United States, 140 S. Ct. 1133 (2020) (No. 19-6086); Elijah v. United States, 586 U.S. 1068 (2019) (No. 18-16); Monroy v. United States, 584 U.S. 980 (2018) (No. 17-7024); Shrader v. United States, 568 U.S. 1049 (2012) (No. 12-5614); Savillon-Matute v. United States, 565 U.S. 964 (2011) (No. 11-5393); Effron v. United States, 565 U.S. 835 (2011) (No. 10-10397); Rea-Herrera v. United States, 557 U.S. 938 (2009) (No. 08-9181); Mendez-Garcia v. United States, 556 U.S. 1131 (2009) (No. 08-7726); Bonilla v. United States, 555 U.S. 1105 (2009) (No. 08-6668). Other petitions raising similar issues are currently pending. See Medrano v. United States, No. 24-7508 (filed June 24, 2025); Phillips v. United States, No. 24-1295 (filed June 18, 2025).

a miscarriage of justice would otherwise result.'" United States v. Young, 470 U.S. 1, 15 (1985) (citation omitted). To establish reversible plain error, a defendant must show "(1) 'error,' (2) that is 'plain,' and (3) that 'affect[s] substantial rights.'" Johnson v. United States, 520 U.S. 461, 466-467 (1997) (quoting United States v. Olano, 507 U.S. 725, 732 (1993)) (brackets in original). If those prerequisites are satisfied, the court of appeals has discretion to correct the error based on its assessment of whether "(4) the error seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." Id. at 467 (citation and internal quotation marks omitted; brackets in original). "Meeting all four prongs is difficult, 'as it should be.'" Puckett, 556 U.S. at 135 (quoting United States v. Dominguez Benitez, 542 U.S. 74, 83 n.9 (2004)).

In Molina-Martinez v. United States, 578 U.S. 189 (2016), this Court analyzed an error in the calculation of the Sentencing Guidelines under plain-error review. See id. at 194. The Court recognized that when the "record" in a case shows that "the district court thought the sentence it chose was appropriate irrespective of the Guidelines range," the reviewing court may determine that "a reasonable probability of prejudice does not exist" for purposes of plain-error review, "despite application of an erroneous Guidelines range." Id. at 200; see id. at 204 (indicating that a "full remand" for resentencing may be

unnecessary when a reviewing court is able to determine that the sentencing court would have imposed the same sentence "absent the error").

Here, as the court of appeals recognized (Pet. App. A2), the record contains clear indications that the district court would have imposed a 65-month sentence regardless of the Guidelines. The district court stated that explicitly at the sentencing hearing when it explained that it had "considered the guidelines" but had also considered the Section 3553(a) factors and the "unique facts and circumstances of this case" -- which included petitioner failing to appear for his 2022 sentencing hearing and absconding for two years -- and determined that 65 months was the appropriate sentence regardless of the Guidelines. Sent. Tr. 10, 12. The district court then confirmed in its written statement of reasons that it would have imposed a 65-month term of imprisonment even if the Guidelines calculations were incorrect. See D. Ct. Doc. 52, at 4. The court of appeals' factbound assessment of the record in this case, and the sufficiency of petitioner's showing of a reasonable probability of a different outcome had the alleged Guidelines errors not occurred, does not warrant this Court's review. See Sup. Ct. R. 10; see also, e.g., United States v. Johnston, 268 U.S. 220, 227 (1925) (explaining that the Court ordinarily does not "grant * * * certiorari to review evidence and discuss specific facts").

b. Contrary to petitioner's contention (Pet. 20-23), the court of appeals' unpublished and nonprecedential decision does not implicate a disagreement among the courts of appeals that warrants this Court's review. Petitioner characterizes (Pet. 23) the court of appeals' decision as holding that "a District Court's Guideline disclaimer is enough to make [an] error harmless," and faults it for relying on a "routine Guideline disclaimer[]," see, e.g., Pet. 24. But the district court's express determination here that it would have imposed the same sentence "even if we didn't have the guidelines" was based on the "unique facts and circumstances of this case." Sent. Tr. 12. And, as the court of appeals recognized, Pet. App. A2, and as just discussed, the record undermines petitioner's claim of a reasonable probability of a different outcome in other ways as well.

Petitioner errs in asserting (Pet. 20-23) that the decision below implicates a conflict in the circuits warranting this Court's review. Petitioner himself describes (Pet. 22-23) the court below as lacking a fixed approach to prejudice analysis in cases of Guidelines error, and "[i]t is primarily the task of a Court of Appeals to reconcile its internal difficulties," United States v. Wisniewski, 353 U.S. 901, 902 (1957) (per curiam). In addition, the decision below is nonprecedential, Pet. App. A1 n.*, and can therefore create neither circuit law nor a conflict of binding authority within or between circuits.

In any event, the out-of-circuit decisions that petitioner cites as conflicting, see Pet. 21-22, do not indicate that those circuits would have reached a different result in the particular circumstances of this case. The Second Circuit's decision in United States v. Feldman, 647 F.3d 450 (2011), for example, involved harmless-error (not plain-error) review and a record that the court viewed as insufficient to meet the government's burden to show harmlessness. See id. at 457-460; see also Olano, 507 U.S. at 734 (explaining parties' respective burdens on harmless- and plain-error review).

The Second Circuit's decision in United States v. Seabrook, 968 F.3d 224 (2020), was likewise on harmless-error review, involved a low-end Guidelines-range sentence, and highlighted the district court's repeated focus on the Guidelines in deciding on a sentence. See id. at 231-234. The Third Circuit's decision in United States v. Wright, 642 F.3d 148 (2011) -- which involved a below-Guidelines sentence and an objection that was raised in the district court, id. at 151-152 -- is likewise inapposite. The Ninth Circuit's decision in United States v. Williams, 5 F.4th 973 (2021), assessed harmless error and the district court there selected a within-Guidelines sentence and "gave no explanation of why an above-Guidelines sentence would be appropriate." Id. at 978; see United States v. Munoz-Camarena, 631 F.3d 1028, 1030-1031 & n.5 (9th Cir. 2011) (per curiam) (applying harmless-error review

and providing nonexhaustive list of circumstances in which error could be harmless). And in United States v. Gieswein, 887 F.3d 1054, cert. denied, 586 U.S. 911 (2018) -- another case involving harmless-error review, the Tenth Circuit affirmed the sentence at issue, rejecting the defendant's claim of prejudice. Id. at 1061-1064.

c. In any event, this case would be a poor vehicle to address the question presented because the district court did not err, plainly or otherwise, in calculating petitioner's Guidelines range or his base offense level of 20.

As a threshold matter, it is not clear that the district court erred in applying the 2021 version of the Guidelines. Although 18 U.S.C. 3553(a)(4)(A)(ii) directs a sentencing court to the Guidelines "in effect on the date the defendant is sentenced," the 2021 Guidelines were the ones in effect on the date that the sentencing would have occurred but for petitioner's own deliberate misconduct -- failing to show up and then going on the lam for two years. Even if the Guidelines might have been amended in his favor by the time he was apprehended and sentenced in 2024, allowing petitioner to seek a lower sentence on that basis would be in tension with "the principle that no one should be permitted to take advantage of his wrong." Giles v. California, 554 U.S. 353, 366 (2008); see, e.g., Glus v. Brooklyn E. Dist. Terminal, 359

U.S. 231, 232-233 (1959) (discussing history and broad applicability of that "maxim").

Even if petitioner could seek to profit from his own wrongdoing, the revision to the Guidelines manual did not affect the classification of petitioner's Texas robbery offense as a crime of violence. In 2023, the Sentencing Commission amended Guidelines § 4B1.2 to define the enumerated offense of "robbery" as "the unlawful taking or obtaining of personal property from the person * * * against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property." Sentencing Guidelines § 4B1.2(e)(3). But after the court of appeals' decision below, it recognized in a published decision, United States v. Wickware, 143 F.4th 670 (5th Cir. 2025) (per curiam), that Texas robbery remains a crime of violence after the relevant Guidelines amendment. See id. at 674-675.

As Wickware explains, the elements of Texas robbery match the elements of the Guidelines' new definition of robbery. 143 F.4th at 672-675. Texas robbery -- which is defined as intentionally, knowingly, or recklessly causing bodily injury to another "in the course of" committing a theft -- requires that force be used "in the course of" a robbery and is not meaningfully different than the Guidelines' requirement that the robbery be conducted "by means of" force. Id. at 672, 674 (citation omitted). And the elements of Texas robbery are "the same or narrower than those of the

Guidelines' generic robbery offense." Id. at 675. Accordingly, although the court of appeals decided this case based on the plain-error requirement that the defendant show prejudice, its precedent now also forecloses petitioner's arguments on plain-error elements one (error) and two (plainness).

Although petitioner argues (Pet. 28-30) that Wickware is "wrong," Pet. 28, he does not suggest that the issue independently warrants further review, or show how any error could be deemed plain. See Braxton v. United States, 500 U.S. 344, 347-349 (1991) (explaining that the Sentencing Commission is the proper body to resolve disputes about the interpretation of the Sentencing Guidelines). Petitioner would therefore not be entitled to plain-error relief even if he were correct with respect to his argument about the application of the plain-error prejudice requirement. See Supervisors v. Stanley, 105 U.S. 305, 311 (1882) (explaining that this Court does not grant a writ of certiorari to "decide abstract questions of law * * * which, if decided either way, affect no right" of the parties).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

D. JOHN SAUER
Solicitor General

MATTHEW R. GALEOTTI
Acting Assistant Attorney General

ANN O'CONNELL ADAMS
Attorney

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