No. 25-5357

In the

Supreme Court of the United States

Jessie Dejuan Sullivan,

Petitioner,

v.

United States of America,

Respondent.

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

PETITIONER'S REPLY BRIEF

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REPLY BRIEF

I. This Court Should Resolve the Circuit Split Regarding the Level of Deference to Grant District Courts that Disclaim the Impact of the Guidelines on the Sentence.

The Circuits are divided on whether a district court may insulate its Guideline errors from appellate review by saying "magic words" disclaiming reliance on the Guidelines.

In this case, the Court of Appeals accepted the disclaimer at face value, without seriously entertaining the arguments Mr. Sullivan made for why those words should not shield his case from appellate review. Although not the uniform practice of the Fifth Circuit, *see United States v. Martinez–Romero*, 817 F.3d 917, 925–26 (5th Cir. 2016), the decision below is consistent with Fifth Circuit precedent which "take(s) the district court at its clear and plain word," so long as it "did not 'beat around the bush' or equivocate." *United States v. Castro-Alfonso*, 841 F.3d 292, 298 (5th Cir. 2016); *see also United States v. Reyna-Aragon*, 992 F.3d 381, 387–89 (5th Cir. 2021); *United States v. Medel-Guadalupe*, 987 F.3d 424, 429 (5th Cir. 2021); *United States v. Redmond*, 965 F.3d 416, 420–21 (5th Cir. 2020); *United States v. Vega-Garcia*, 893 F.3d 326, 328 (5th Cir. 2018); *United States v. Guzman-Rendon*, 864 F.3d 409, 411–12 (5th Cir. 2017). Indeed, the present case shows that the Fifth Circuit will accept such a disclaimer *even* if: (1) the selected sentence falls in the middle of the incorrect range; the court (2) referenced the Guidelines in explaining its sentence; and (3) classified its sentence as "within the guideline range" in its Statement of Reasons. Record on Appeal 149, 151, 205.

The government cites to *Molina-Martinez v. United States*, 578 U.S. 189 (2016)

for the proposition 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.'" *See* Brief in Opposition at 8-9 (quoting *Molina-Martinez*, 578 U.S. at 200)). But *Molina-Martinez* suggests that such a case is the exception, not the rule, because in "***most*** cases a defendant who has shown that the district court mistakenly deemed applicable an incorrect, higher Guidelines range ***has*** demonstrated a reasonable probability of a different outcome." *Molina-Martinez*, 578 U.S. at 200 (emphasis added). Indeed, "in the ordinary case a defendant will satisfy his burden to show prejudice by pointing to the application of an incorrect, higher Guidelines range and the sentence he received thereunder." *Id.* at 201. "Absent unusual circumstances, he will not be required to show more." *Id.*

Of course, a judge may provide a "detailed explanation of the reasons the selected sentence is appropriate[,]" which could "make it clear that the judge based the sentence he or she selected on factors independent of the Guidelines." *Id.* at 200. But there is no such "detailed explanation" in this case. The only actual explanation the district court gave for the sentence is Mr. Sullivan's "absconding." *See* Initial Brief in *United States v. Sullivan*, No. 24-10799, 2025 WL 475749 at **30–31 (5th Cir. Filed Feb. 3, 2025) (citing Record on Appeal 151) ("Initial Brief."). The Fifth Circuit did not address Mr. Sullivan's point that the correct range of 30 to 37 months already takes into account the "absconding" because it includes a 2-level enhancement for

obstruction of justice and omits the 3-level reduction for acceptance of responsibility that would otherwise apply for a defendant who pled guilty. Reply Brief in *United States v. Sullivan*, No. 24-10799, 2025 WL 994080 at **20–21 (5th Cir. Filed Mar. 24, 2025) (citing Record on Appeal 197-98; U.S.S.G. § 2K2.1(a)(6)(A); U.S.S.G. Ch. 5, Pt. A (Total Offense Level 18, criminal history category II)); *see United States v. Sullivan*, No. 24-10799, 2025 WL 1392087 at *1 (5th Cir. May 14, 2025). Even at the lower range, the Guidelines account for the "absconding" by increasing Mr. Sullivan's offense level by 5 points.

While the Fifth Circuit claimed that the court also mentioned "the facts and circumstances of Sullivan's case" and "the need to comply with the sentencing purposes in 18 U.S.C. § 3553(a)(2)," *Sullivan*, No. 24-10799, 2025 WL 1392087 at *1, those are boilerplate statements that—like the disclaimer—a district court can recite at *any* sentencing to avoid appellate review. It falls short of a "***detailed*** explanation of the reasons the selected sentence is appropriate." *Molina-Martinez*, 578 U.S. at 200 (emphasis added).

The government points to parts of the record that, in its view, show that the district court would have imposed the same sentence under different Guidelines. *See* Brief in Opposition at 9-10. But the court below should have considered—on the other side of the scale—the fact that the district court sentenced Mr. Sullivan to 65 months, a number in the middle of the incorrect range of 57 to 71 months, that it arrived at that sentence after considering "the guidelines[,]" and that the statement of reasons likewise classified the sentence as a "within the guideline range"

sentence. Record on Appeal 149, 151, 205.

The government speculates that Mr. Sullivan's claim for relief would fail in the Second, Third, Ninth, and Tenth Circuits. *See* Brief in Opposition at 11-12.[1] But the government does not dispute that the Second, Third, Ninth, and Tenth Circuits apply different standards than the Eighth, Eleventh, and Fifth Circuits. As discussed, Mr. Sullivan's arguments did not receive meaningful consideration below, and there is reason to believe that he would have fared better in the Circuits that require closer scrutiny of the record despite a disclaimer.

The government correctly observes that this Court does not grant certiorari to resolve internal disagreements within a particular Circuit. *See* Brief in Opposition at 10. That the Fifth Circuit has issued conflicting rulings, however, does not mean that the Circuits are not divided. Nor does it mean that the present case—which simply takes the disclaimer at face value—does not conflict with the law of other Circuits that conduct a more searching prejudice analysis even if the district court disclaims the Guidelines.

In arguing that this case presents a "poor vehicle," Brief in Opposition at 12, the government makes three errors. First, the two cases it cites for the proposition that "no one should be permitted to take advantage of his wrong," Brief in Opposition

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[1] The government also seeks to distinguish the cases from those Circuits because they "involved harmless-error (not plain-error) review." Brief in Opposition at 11-12. But the analysis for both the third prong of plain error and harmless error generally remains the same. *See United States v. Olano*, 507 U.S. 725, 734–35 (1993). The difference lies in the shift of the burden of persuasion—where error is preserved, the proponent of the sentence bears the burden. *Id.* at 734. In the absence of objection, the appealing party bears it under the reasonable probability standard. *Id.*

at 12-13, concern factual scenarios distinct from the one at hand. *Giles v. California* discussed the common law rule allowing the admission of prior testimony "where the defendant had engaged in wrongful conduct designed to prevent a witness's testimony." 554 U.S. 353, 366 (2008). Here, there is no indication—and at no point did the government claim—that Mr. Sullivan failed to appear at his initial sentencing because he hoped that the Guidelines would be amended in his favor. *Glus v. Brooklyn E. Dist. Terminal* is a civil case, and discussed the "maxim" as one that applies in civil contract law. 359 U.S. 231, 232–233 (1959). The government has not cited any cases showing that a defendant cannot show plain error—despite being sentenced on the incorrect, and more punitive version of the Guidelines—because he did not appear at his initial sentencing.

Second, it overlooks Mr. Sullivan's explanation for why *United States v. Wickware*, 143 F.4th 670 (5th Cir. 2025) (per curiam) does not foreclose his claim. Brief in Opposition at 13-14. As Mr. Sullivan has already explained, *Wickware* explicitly declined to address his argument that the "robbery" offense as defined in Amendment 822 does not encompass Texas robbery, because the former excludes offenses that can be committed recklessly. *See* Petition at 28-30 (citing *Wickware*, 143 F.4th at 674, n.2). Because *Wickware* did not address this argument, the Fifth Circuit may address it on remand, *see De La Paz v. Coy*, 786 F.3d 367, 373 (5th Cir. 2015) (quoting *United States v. Mitchell*, 271 U.S. 9, 14 (1926)), and should resolve it in Mr. Sullivan's favor.

Third, as Mr. Sullivan explained in his Fifth Circuit briefing,[2] the plain language of Amendment 822's robbery definition makes the error clear and obvious. *See also United States v. Johnson*, 956 F.3d 740, 746 (5th Cir. 2020) ("In some circumstances, an error is 'evident from a plain reading of the statute and thus is obvious.'" (quoting *United States v. Aderholt*, 87 F.3d 740, 744 (5th Cir. 1996))); *see also United States v. Pierre,* No. 20–30728, 2022 WL 1198222, at *3 (5th Cir. Apr. 22, 2022) (unpublished) ("To prove that any error was 'clear or obvious,' a defendant need not identify a past decision of this court directly holding in the defendant's favor on the exact same issue. Instead, our rule is that a defendant must show that the error is 'clear under existing law.'") (quoting *United States v. Dunigan*, 555 F.3d 501, 506 (5th Cir. 2009)). Therefore, prong 3 is likely to be dispositive. Mr. Sullivan will be able to establish clear and obvious error based on the plain language of the Guidelines and existing law.

CONCLUSION

Petitioner Jessie Dejuan Sullivan respectfully asks this Court to grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

In the alternative, if the Court grants certiorari in *United States v. Medrano*, No. 24-7508 (U.S. Jun. 26, 2025) or in another case raising the same issues, he asks this Court to hold his petition pending the outcome.

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[2] *See* Initial Brief in *United States v. Sullivan*, No. 24-10799, 2025 WL 475749 at **14-24 (5th Cir. Filed Feb. 3, 2025); Reply Brief in *United States v. Sullivan*, No. 24-10799, 2025 WL 994080 at **1-14 (5th Cir. Filed Mar. 24, 2025).

Respectfully submitted this 28th day of October, 2025.

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