

IN THE
Supreme Court of the United States

ZYTRELL MONTAE HORTON,
Petitioner,
v.

UNITED STATES,
Respondent.

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The government does not—and cannot—deny the deep, longstanding circuit split at the heart of this case. A majority of circuits hold that a sentencing court’s failure to explain an above-Guidelines sentence affects a defendant’s substantial rights because, among other things, the silence itself forecloses meaningful appellate review. The Fifth Circuit holds the opposite, permitting a reviewing court to scour the record for reasons to affirm the sentence. The split is entrenched, and only this Court can resolve it.

On the merits, the Government attacks a strawman. Petitioner’s argument does not depend on whether a district court’s failure to explain an above-Guidelines sentence constitutes “structural error”; the question is whether the acknowledged violation of 18 U.S.C. § 3553(c)(2) generally affects a defendant’s substantial rights under ordinary plain-error review. The government’s and the Fifth Circuit’s position is a catch-22: It demands proof that the district court would have imposed a different sentence if it had explained itself, but the court’s silence is precisely what makes that proof impossible. The government’s and the Fifth Circuit’s position also allows a reviewing court to invent its own reasons for concluding that an above-Guidelines sentence is substantively reasonable, even if those reasons had nothing to do with why the sentencing court departed from the Guidelines range. Under this approach, § 3553(c)(2) becomes a dead letter for unpreserved errors—the less the sentencing court says, the harder it becomes for defendants to show prejudice from that silence and to obtain meaningful appellate review of their sentences.

Contrary to the government’s argument, this case is an ideal vehicle for answering the question presented. The error is conceded, the corrected range is undisputed, the variance is extraordinary, the district court imposed the same statutory maximum after remand, and the Fifth Circuit’s post hoc justifications are set out in its opinion. No factual dispute or procedural complication obscures the question presented. The Court should grant the petition.

I. There Is A Deeply Entrenched Circuit Split On The Question Presented.

The government does not (and cannot) deny the existence of a deep, longstanding, and acknowledged circuit split on how courts apply plain-error review to a sentencing court’s failure to explain its reasoning for imposing an above-Guidelines sentence.

Most circuits to consider the question have held that when a sentencing court imposes a sentence above the Guidelines range without explanation, the error at minimum affects a defendant’s substantial right to meaningful appellate review of the reasonableness of the sentence. “Defendants have a right to meaningful appellate review of their sentences and § 3553(c) facilitates such a review by requiring the district court to state its specific reasons for imposing a particular sentence.” *United States v. Blackie*, 548 F.3d 395, 402 (6th Cir. 2008). “By informing the defendant” and “the Court of Appeals as to the reasons for the sentence,” the defendant may “argue more effectively” that his sentence is unreasonable, and the reviewing court “may well become better able to hear and determine the appeal effectively.” *United States v. Lewis*, 424 F.3d 239, 247 (2d Cir. 2005). Thus, a district

court’s failure to provide a “statement of reasons is prejudicial in itself because it precludes appellate review of the substantive reasonableness of the sentence.” *In re Sealed Case*, 527 F.3d 188, 193 (D.C. Cir. 2008); *see also United States v. Brown*, 892 F.3d 385, 407-08 (D.C. Cir. 2018) (“[U]nder settled circuit law, imposing differentially harsh punishment without any differentiating reason is plain error, since dispensing with reasoned explanation eliminates meaningful appellate review.”); *United States v. Acevedo*, 219 F. App’x 828, 833 (10th Cir. 2007) (“Since Acevedo is entitled to informed appellate review of his sentence, the district court’s failure to adequately articulate its reasoning substantially affected Acevedo’s rights.”); *cf. United States v. Waknine*, 543 F.3d 546, 554-55 (9th Cir. 2008) (district court’s failure to explain reasons for a *within*-Guidelines sentence, in combination with other errors, “is sufficient to support the inference that the error must have affected the outcome of the district court proceedings” (quotation marks omitted)).

But a minority of circuits—including the Fifth Circuit—have held that a sentencing court’s failure to explain an above-Guidelines sentence does *not* affect a defendant’s substantial rights when the reviewing court can look to the record to find reasons to justify the sentence. *See United States v. Steiger*, 99 F.4th 1316, 1325-27 (11th Cir. 2024) (en banc); *United States v. Whitelaw*, 580 F.3d 256, 264 (5th Cir. 2009); *cf. United States v. Scott*, 696 F. App’x 49, 54-55 (3d Cir. 2017) (concluding sentencing court’s error did not affect defendant’s substantial rights because the sentencing court provided a *written* explanation for the sentence and the sentence was reasonable based on the facts in the record). Following this approach, the Fifth

Circuit in this case concluded that “the transcript of the sentencing hearing indicates that there were sufficient facts presented in favor of the variance,” which, apparently, meant both that the Fifth Circuit could affirm the substantive reasonableness of the sentence and made it unlikely “that explaining the sentence would ... have led the district court to change its mind.” Pet. App. A7.

There is no dispute that these approaches are irreconcilable, nor is there any dispute that Petitioner’s sentence would have been vacated if he had been sentenced in any of the circuits that comprise the majority view. Because the government cannot deny the existence of this split, it instead halfheartedly speculates that the split may change some day if the circuits in the majority abandon their approach in light of this Court’s decisions in *United States v. Marcus*, 560 U.S. 258 (2010), and *Greer v. United States*, 593 U.S. 503 (2021). BIO 13. This argument makes no sense.

First, *Marcus* is over 15 years old, and even *Greer* is over five years old. No circuit has adjusted its position on this issue in response to either case, and there is no reason to suggest any circuit will in the future.

Second, these cases have nothing to do with the question presented. *Marcus* was about whether a defendant must show individual prejudice when a judge declines to give a jury instruction on the scope of the defendant’s culpable conduct. See 560 U.S. at 260, 262-66. And *Greer* was about whether a defendant must show individual prejudice from the omission of a *mens rea* element in a plea colloquy. See 593 U.S. at 507-10. These errors and the substantial rights they might affect in some cases have nothing to do with sentencing. The question here, whether a sentencing court’s

silence on the reasons for imposing an above-Guidelines sentence affects a defendant's substantial rights, is a completely different question in a completely different context.

Next, in hopes of ginning up support for its position on the merits, the government tries to recast the split by citing a series of cases in which courts imposed a hefty burden on a defendant to show that a district court's lack of explanation for imposing a *within*-Guidelines sentence affected the defendant's substantial rights. BIO 11-12. The government misses the point. A sentencing court's failure to explain the reasoning for a within-Guidelines sentence necessarily has less of an impact on a defendant's substantial rights than a lack of explanation for an above-Guidelines sentence.

As the Fifth Circuit itself pointed out in this case, "non-Guidelines sentences require more" "explanation" than "within-Guidelines sentences." Pet. App. A6 (comparing § 3553(c)(1) with § 3553(c)(2)). When imposing an above-Guidelines sentence, the sentencing court "must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing." *Gall v. United States*, 552 U.S. 38, 50 (2007). Indeed, the greater "the extent of the deviation" from the Guidelines range, the greater the need for "compelling" justification "to support the degree of the variance." *Id.* Prejudice to a defendant's substantial rights is necessarily more substantial when a court declines to explain an above-Guidelines sentence than a within-Guidelines sentence. And cases involving within-Guidelines sentences are thus irrelevant to the question presented here.

In any event, the government agrees that there is a decades-long disagreement among the circuits about how to conduct plain-error review of a district court's failure to articulate the reasons for imposing an above-Guidelines sentence. That disagreement will not be resolved without this Court's intervention.

II. The Fifth Circuit Was Wrong.

The government devotes virtually all of the argument section in its brief to a strawman, arguing that the district court's conceded error is not technically "structural error," as defined by this Court's precedents. BIO 9-13. But Petitioner never argued otherwise. Rather, as the petition makes clear, a district court's error in failing to explain an above-Guidelines sentence satisfies plain-error review because that error ordinarily affects a defendant's substantial rights, including the right to meaningful appellate review of the reasonableness of the defendant's sentence. *E.g.*, Pet. 9-10; *see supra* 2-3.

In focusing so intensely on an argument Petitioner did not make, the government ignores the two most important points the petition did make. First, the government has no response to the point that the Fifth Circuit's approach essentially renders the procedural protections in § 3553(c)(2) a nullity. It imposes an impossible burden on defendants to show that the district court's reasoning, which is a mystery, would have changed if the district court were forced to articulate that reasoning aloud. *See* Pet. App. A6-7; Pet. 9-10. Indeed, the Fifth Circuit seems to think that if a reviewing court can identify sufficient justification for the sentence based on the facts in the record, then that must mean that the district court would have imposed the same sentence whether it had met § 3553(c)(2)'s requirement or not.

See Pet. App. A7 (concluding that “explaining the sentence would not have led the district court to change its mind” because “the transcript of the sentencing hearing indicates that there were sufficient facts presented in favor of the variance”). So not only must the defendant show that the district court’s unexplained justifications for the sentence would have fallen apart if the court had provided that reasoning aloud, he must also show that the sentence itself is unsupported by whatever facts in the record the reviewing court thinks are the most important. By imposing this impossible burden on defendants, the Fifth Circuit has functionally erased Congress’s command that a sentencing court provide ample explanation for imposing an above-Guidelines sentence, as well as the procedural protections that command was meant to provide. But this requirement is vital to defendants’ right to meaningful appellate review of their sentences. Without an explanation for a given sentence, there is no basis on which to assess the substantive reasonableness of that sentence. Pet. 9-10; *In re Sealed Case*, 527 F.3d at 193; *Lewis*, 424 F.3d at 247; *Blackie*, 548 F.3d at 402-03.

Nor does the government respond to the argument that the Fifth Circuit’s approach flies in the face of this Court’s command that a reviewing court should review the substantive reasonableness of a sentence based on the sentencing court’s reasoning—not the reviewing court’s own. *Gall*, 552 U.S. at 56-60 (reviewing reasonableness of above-Guidelines sentence based on district court’s reasoning, and admonishing reviewing court for substituting its own reasoning for that of the district court). It also deprives the defendant of the chance to meaningfully challenge

his sentence. Without an adequate explanation for the variance, the defendant has nothing to attack on appeal, the government has nothing to defend, and the appellate court has nothing to review. So what happens next, at least in the Fifth Circuit, is the defendant must disprove every possible justification for the sentence the district court imposed, including whatever the Fifth Circuit can come up with by reviewing the record itself. *See* Pet. App. A7-9. Indeed, a district court is likely better off providing no reasoning at all in support of its variance from the Guidelines, if the reviewing court will then be tasked with justifying the sentence on its own. The defendant thus loses two procedural protections in one stroke—the right to hear the actual reasons for the sentence the district court imposed, per § 3553(c)(2), and the right to meaningful appellate review of his sentence.

The government’s only other merits argument is that allowing courts to correct plainly insufficient explanations for variant sentences will somehow take away from “concentrat[ing] ... litigation in the trial courts, where genuine mistakes can be corrected easily.” BIO 10 (quoting *United States v. Vonn*, 535 U.S. 55, 72 (2002)). But the standards for plain error in the sentencing context are often less exacting precisely *because* they are much easier to correct than errors made during the guilt phase. *See Lewis*, 424 F.3d at 248. Correcting unobjected-to errors made during the guilt phase would require going back to the drawing board and running a new trial from start to finish, whereas correcting an unobjected-to sentencing error would simply require a remand for resentencing. In other words, the cost of enforcing

§ 3553(c)(2)'s command and protecting the right to meaningful appellate review is relatively small as compared to the cost of correcting other kinds of errors.

III. This Case Is An Ideal Vehicle.

Finally, this case is an unusually clean vehicle for resolving the question presented. Petitioner pleaded guilty to possessing fentanyl with intent to distribute. The original PSR calculated a 210-to-240-month Guidelines range by applying the death-resulting sentencing enhancement. *See U.S. Sent'g Guidelines Manual* § 2D1.1(a)(2) (U.S. Sent'g Comm'n 2021). On the first appeal, the Government conceded that the enhancement was plain error under *United States v. Greenough*, 669 F.3d 567, 575 (5th Cir. 2012), and the Fifth Circuit remanded for resentencing without the enhancement. At resentencing, the corrected range was 10 to 16 months—but the district court reimposed the statutory maximum, 240 months; a 224-month upward variance. Its entire explanation was a rote recitation of the § 3553(a) factors. Pet. App. A3.

The procedural history makes the issue cleaner, not harder. This case has already been before the Fifth Circuit twice. The first time, the Government conceded that the death enhancement could not apply because L.G.'s death was not part of the crime to which Petitioner pleaded guilty. The second time, the Fifth Circuit expressly held that the district court's explanation was clear error. Pet. App. A5-6. Yet, after the range collapsed from 210-240 months to 10-16 months, the district court imposed exactly the same 240-month sentence that the Fifth Circuit vacated on the first appeal. It did so without even informing Petitioner of his right to allocate and without explaining why a 224-month variance was necessary. The identi-

cal sentence, following a conceded Guidelines error and a full remand, strongly suggests that the court did not meaningfully reconsider the premise of its original sentence. Had it been required to explain aloud why 240 months was warranted, instead of 16 months or any lesser term, it might have selected a different sentence. And Petitioner could have challenged the reasonableness of the sentence based on the district court's actual reasoning—not the Fifth Circuit's own justifications.

The government's vehicle argument flips this problem on its head. The Government says this case is "a particularly inappropriate vehicle" because the Fifth Circuit did not view the deficient explanation as precluding meaningful appellate review and "fully considered" the sentence's substantive reasonableness. BIO 14. But that is precisely the problem. As explained above, an appellate court reviews the reasonableness of a sentence based on the sentencing court's reasoning—not its own. *Gall*, 552 U.S. at 56-60; *supra* 7. When the district court fails to provide that reasoning, ignoring the requirements of § 3553(c)(2), the reviewing court should not search the record for reasons to uphold the sentence. But that is exactly what the Fifth Circuit did here, prejudicing Petitioner's substantial right to meaningful appellate review along the way. Because the district court said nothing about why it selected the statutory maximum, Petitioner cannot prove what it would have said—or what sentence it would have imposed—had it articulated its reasoning aloud during sentencing. The Fifth Circuit then treated that problem as proof that the omission did not affect the sentence. Pet. App. A6-7. But the district court's silence is not neutral: It deprives the defendant of the basis to understand the punishment, the

public of assurance that like cases are treated alike, and the appellate court of the reasons it must review. *See Gall*, 552 U.S. at 50-51; *Lewis*, 424 F.3d at 247-49. The court's post hoc reconstruction cannot answer whether the district court actually would have imposed a 240-month sentence after confronting the corrected range and articulating a compelling justification. It shows only what the Fifth Circuit thought might support that sentence.

The government also does not contest that this is the third time the Fifth Circuit has applied plain-error review in a way that makes relief effectively impossible for an acknowledged sentencing error. In *Molina-Martinez v. United States*, this Court rejected the Fifth Circuit's demand for additional proof that an erroneous Guidelines calculation affected a defendant's substantial rights. 578 U.S. 189, 198 (2016). In *Rosales-Mireles v. United States*, this Court rejected the Fifth Circuit's requirement that an error must "shock the conscience" to be corrected on plain-error review. 585 U.S. 129, 136-38 (2018). This case repeats the same pattern: The Fifth Circuit recognized clear error, then imposed an impossible burden on defendants to prove prejudice resulting from that error.

Nor is the problem fading in importance. The explanation requirement is a vital safeguard against arbitrary sentencing. A rule that permits an appellate court to affirm a 224-month variance by supplying its own reasons renders § 3553(c)(2) and the promise of meaningful appellate review largely empty. This record presents no vehicle problem: The legal error is conceded, the variance is extreme, the history is

fully developed, and the Fifth Circuit's post hoc reasoning is set out in its opinion. The Court should grant the petition.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests the Court grant the petition.

Respectfully submitted,

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