

No. _____

In the Supreme Court of the United States

MALIK JAVIER MCKENZIE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

At sentencing, the district court applied two disputed Sentencing Guidelines enhancements that increased petitioner's offense level by eight levels. On appeal, the Eleventh Circuit declined to decide whether either enhancement was correctly applied. Instead, invoking its decision in *United States v. Keene*, 470 F.3d 1347 (11th Cir. 2006), the court held that any Guidelines error was harmless because the district court stated that it would impose the same sentence "regardless of what the guidelines say," and the resulting sentence would be substantively reasonable even under the lower, correctly calculated range.

This Court has repeatedly held that a correct Guidelines calculation is the mandatory "starting point" and "initial benchmark" of every federal sentencing, *Gall v. United States*, 552 U.S. 38, 49 (2007), that the Guidelines exert an "anchor[ing]" effect on the sentence ultimately imposed, *Peugh v. United States*, 569 U.S. 530, 541 (2013), and that an incorrect range will, in the ordinary case, suffice to show a reasonable probability of a different sentence, *Molina-Martinez v. United States*, 578 U.S. 189, 200 (2016).

The question presented is:

Whether a court of appeals may treat a disputed Guidelines-calculation error as harmless based solely on a district court's generalized statement that it would impose the same

sentence regardless of the Guidelines, without deciding whether the disputed enhancements were legally valid and without requiring the district court to have identified, and explained the sentence against, the correct Guidelines range.

PARTIES TO THE PROCEEDING

Petitioner is Malik Javier McKenzie, the defendant-appellant below.

Respondent is the United States of America, the plaintiff-appellee below.

RELATED PROCEEDINGS

- *United States v. McKenzie*, No. 4:24-cr-00047-RSB-CLR-1 (S.D. Ga.) (judgment entered July 22, 2025).
- *United States v. McKenzie*, No. 4:25-cr-00065-RSB-CLR-1 (S.D. Ga.) (judgment entered July 22, 2025).
- *United States v. McKenzie*, Nos. 25-12544 & 25-12550 (11th Cir.) (opinion and judgment entered May 20, 2026; rehearing denied July 7, 2026).

There are no other proceedings directly related to this case within the meaning of Supreme Court Rule 14.1(b)(iii).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Malik Javier McKenzie respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 3a–17a) is unpublished. The judgment of the court of appeals (App. 18a) and its order denying panel rehearing (App. 37a) are unreported. The judgment of the district court (App. 19a–26a) is unreported.

JURISDICTION

The court of appeals entered judgment on May 20, 2026. Petitioner filed a timely petition for panel rehearing, which the court of appeals denied on July 7, 2026. App. 37a. This Court has jurisdiction under 28 U.S.C. § 1254(1). The petition is timely under Supreme Court Rule 13.1 and 13.3, which run the time to file from the date of the denial of rehearing.

CONSTITUTIONAL, STATUTORY, AND GUIDELINES PROVISIONS INVOLVED

Title 28 U.S.C. § 1254(1) provides in relevant part that cases in the courts of appeals may be reviewed by the Supreme Court “[b]y writ of certiorari granted upon the petition of any party.”

Title 18 U.S.C. § 3553(a) provides in relevant part that a sentencing court “shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2),” and directs the court to consider, among other factors, “the kinds of sentence and the sentencing range established for . . . the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines.”

U.S.S.G. § 3A1.2(c)(1) provides for a six-level increase where, “in a manner creating a substantial risk of serious bodily injury,” the defendant or a person for whose conduct the defendant is accountable, “knowing or having reasonable cause to believe that a person was a law enforcement officer, assaulted such officer during the course of the offense or immediate flight therefrom.”

U.S.S.G. § 3C1.2 provides for a two-level increase “[i]f the defendant recklessly created a substantial risk of death or serious bodily injury to another person in the course of fleeing from a law enforcement officer.”

STATEMENT OF THE CASE

A. Offense Conduct and Convictions

The charges arose from a March 6, 2024 traffic stop in Hinesville, Georgia. App. 3a-4a. A Hinesville Police Department officer attempted to stop a Ford Fiesta that he testified had run a stop sign; the car fled, crashed, and two men ran from it on foot. App. 4a. The officer pursued and apprehended petitioner, and drugs and a loaded pistol were found on petitioner's person. App. 4a. During the ensuing jury trial, petitioner passed a note attempting to influence a juror, and he later pleaded guilty to obstruction of justice in a separate information. App. 4a–5a.

Petitioner was convicted of possession with intent to distribute fentanyl, cocaine, carfentanil, and methamphetamine, 21 U.S.C. § 841(a)(1); possession of a machinegun in furtherance of a drug trafficking crime, 18 U.S.C. § 924(c)(1)(A), (B)(ii); and possession of a firearm by a convicted felon, 18 U.S.C. § 922(g)(1). App. 19a–20a. He also pleaded guilty to obstruction of justice, 18 U.S.C. § 1503. App. 20a. The two cases were consolidated for a combined sentencing. App. 4a.

B. The Disputed Guidelines Enhancements

At sentencing, petitioner objected to two enhancements. The first was a six-level enhancement under U.S.S.G. § 3A1.2(c)(1), which applies only to conduct “tantamount to aggravated assault” against a law enforcement officer. The second was a two-level

enhancement under U.S.S.G. § 3C1.2 for reckless endangerment during flight. App. 14a–15a. Petitioner argued that mere flight and resistance did not satisfy § 3A1.2(c)(1); that the record did not establish that he brandished or pointed a weapon at any officer; and that his identity as the driver — the predicate for much of the reckless-driving conduct — was disputed because another occupant’s phone was recovered from the driver’s seat. The district court overruled the objections, relying on three asserted acts (reckless driving, “blading” toward the officer, and struggling with the officer while armed), and it separately found by a preponderance that petitioner was the driver. App. 30a–33a (transcript excerpts).

The district court adopted a total offense level of 34 and criminal history category V, producing an advisory range of 235 to 293 months on the non-§ 924(c) counts, together with a mandatory, consecutive 360-month term on the machinegun count. App. 33a–34a. Without the two disputed enhancements, the offense level would have been 26. App. 15a.

C. The Sentence

The district court imposed a total sentence of 595 months’ imprisonment: 235 months on Count One, 180 months on Count Four, and 36 months on the obstruction count, all concurrent, plus the mandatory, consecutive 360-month term on Count Two. App. 25a, 34a–35a. In explaining the sentence, the court emphasized the dangerousness of the drugs and the machinegun, petitioner’s flight and struggle with the

officer, the jury-tampering conduct, and petitioner's criminal history. App. 14a–15a. The court stated that it found “[no] reason to vary or depart from application of the guidelines.” App. 34a. After pronouncing sentence, it added: “regardless of what the guidelines say, this is the sentence that I would have given in the case.” App. 35a.

D. The Decision Below

The Eleventh Circuit affirmed in an unpublished per curiam opinion. App. 3a–17a. As relevant here, the court did not decide whether either disputed enhancement was correctly applied. Instead, it invoked *United States v. Keene*, 470 F.3d 1347 (11th Cir. 2006), under which the court “will not rule on the validity of a disputed guideline adjustment” where “(1) the district court stated it would have given the same sentence regardless of the outcome of the disputed guideline provision; and (2) assuming that there was an error, the sentence is still reasonable.” App. 12a (quoting *Keene*). The court characterized this as “a species of the harmless error doctrine.” App. 12a (quoting *United States v. Olson*, 127 F.4th 1266, 1275 (11th Cir. 2025)).

Applying that framework, the court itself computed the range that would apply if petitioner's objections were sustained: an offense level of 26 and criminal history category V would yield 110 to 137 months on the non-§ 924(c) counts, which, combined with the mandatory 360-month term, would produce a range of 470 to 497 months. App. 15a-16a. The court then held

that the 595-month sentence — “although it would constitute an upward variance” from that lower range — was substantively reasonable, and it affirmed “because McKenzie’s 595-month sentence is substantively reasonable even without the application of the disputed guideline enhancements.” App. 17a. The court denied rehearing. App. 18a.

REASONS FOR GRANTING THE PETITION

The Eleventh Circuit affirmed a 595-month sentence without ever deciding whether the district court correctly calculated the Guidelines range — even though the disputed enhancements swung petitioner’s offense level by eight levels and, on the court of appeals’ own math, moved the low end of the advisory range by 125 months. The court excused that potential error on the strength of a single sentence: the district court’s statement that it would impose the same sentence “regardless of what the guidelines say.” That approach turns this Court’s sentencing jurisprudence on its head. It permits appellate courts to bypass the very first step of federal sentencing — a correct Guidelines calculation — whenever a district court utters a talismanic alternative-sentence statement. The question is important, recurring, and cleanly presented here. The Court should grant review.

I. The Decision Below Cannot Be Reconciled With This Court’s Holdings That the Guidelines Are the Mandatory Anchor of Federal Sentencing.

This Court has built its post-*Booker* sentencing framework on a foundational premise: “a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range.” *Gall v. United States*, 552 U.S. 38, 49 (2007). The Guidelines are “the starting point and the initial benchmark” and remain “the framework for sentencing.” *Id.* at 49; *Peugh v. United States*, 569 U.S. 530, 542 (2013). A “[Guidelines] error” is therefore treated as a “significant procedural error.” *Gall*, 552 U.S. at 51.

That premise is not formalism. This Court has recognized that the Guidelines “anchor” the sentencing decision: “[t]he federal system adopts procedural measures intended to make the Guidelines the lodestone of sentencing,” and “the Guidelines are in a real sense the basis for the sentence.” *Peugh*, 569 U.S. at 541, 542 (quotation marks omitted). Empirical reality bears this out — sentences cluster around the calculated range — which is why an incorrect starting point carries through to the sentence imposed. *Id.* at 543.

For that reason, this Court held in *Molina-Martinez v. United States* that a defendant who shows a Guidelines calculation error will, “[i]n the ordinary case,” have shown a reasonable probability of a

different sentence, because “[t]he Guidelines are not only the starting point for most federal sentencing proceedings but also the lodestar.” 578 U.S. 189, 198, 200 (2016). A district court’s later statements do not automatically neutralize the error; the anchoring effect of the wrong range persists unless the record makes clear the court would have imposed the same sentence irrespective of the correct range. *Id.* at 200–01.

The Eleventh Circuit’s *Keene* rule inverts these principles. Under *Keene*, an appellate court may decline even to decide whether the Guidelines were calculated correctly, so long as the district court said it would impose the same sentence and the sentence is substantively reasonable measured against the corrected range. App. 14a. That allows the reviewing court to skip the mandatory first step of *Gall* entirely — not to correct a calculation, but to avoid ever performing one. And it treats a generalized alternative-sentence statement as conclusive proof of harmlessness, precisely the automatic inference *Molina-Martinez* rejected.

The problem is acute where, as here, the district court made its “regardless of the guidelines” statement *after* adopting the higher, disputed range and *after* declaring that it found “[no] reason to vary or depart from application of the guidelines.” App. 24a-25a. The court never calculated the lower range; never acknowledged that the correct range might be 470 to 497 months rather than the adopted range; and never explained why the same 595-month sentence would

be appropriate as an upward variance from that lower range. It was the court of appeals, not the sentencing court, that first identified the corrected range. App. 15a–16a. On this record, the district court’s statement shows only that it would impose the same sentence given the range it used — not that the wrong range failed to anchor its judgment.

II. The Decision Below Deepens an Acknowledged Conflict Among the Courts of Appeals, and the Question Recurs Constantly.

A. The circuits are divided over what a district court must do before a Guidelines error may be excused as harmless.

The courts of appeals have split over the central question this case presents: whether a district court’s statement that it would impose the same sentence “regardless” of the Guidelines forecloses appellate review of a disputed Guidelines calculation, or whether harmlessness instead requires that the court identify the correct range and explain — in a manner that “unmistakabl[y]” untethers the sentence from the Guidelines — why it would impose the same sentence measured against that range.

On one side, the Eleventh and Fourth Circuits apply a permissive rule. Under the Eleventh Circuit’s *Keene* doctrine, the court of appeals may decline even to decide whether the Guidelines were correctly calculated so long as (1) the district court “stated it would have given the same sentence regardless of the

outcome of the disputed guideline provision,” and (2) “assuming that there was an error, the sentence is still reasonable.” App. 14a (quoting *United States v. Keene*, 470 F.3d 1347, 1349 (11th Cir. 2006)). The Fourth Circuit has expressly adopted *Keene* and applies the same two-part “assumed error harmlessness inquiry,” treating a within-range sentence as an above-Guidelines variance and affirming without reaching the disputed enhancement so long as the sentence is reasonable. See *United States v. Gomez-Jimenez*, 750 F.3d 370, 382–83 (4th Cir. 2014) (adopting *Keene* and describing the decision as “in complete parity with *Keene*”); *United States v. Savillon-Matute*, 636 F.3d 119, 123–24 (4th Cir. 2011); *United States v. Hargrove*, 701 F.3d 156, 162 (4th Cir. 2012). Under that framework, a clear alternative-sentence statement accompanied by a § 3553(a) explanation suffices, and the reviewing court supplies the substantive-reasonableness analysis by measuring the sentence against a corrected range the district court never used. App. 15a–17a. Here, the district court did not even purport to give a separate variance explanation tied to the correct range; it stated only, after adopting the disputed range and declining to vary, that it would impose the same sentence “regardless of what the guidelines say.” App. 25a–26a.

Other circuits require materially more. The First Circuit holds that, when a sentencing court errs in identifying the range, “[t]he record . . . must make the innocuous nature of the error unmistakable,” and a “brief statement that [the court] would have imposed

the same term . . . regardless” — particularly one “given in response to a question from the government after the court had . . . announced the sentence” — “is inadequate to satisfy the government’s burden to show harmless error.” *United States v. Maldonado-Negroni*, 141 F.4th 333, 336, 341–43 (1st Cir. 2025); accord *United States v.*, 848 F.3d 476, 498–99 (1st Cir. 2017) (bare affirmation insufficient where the court “started from the wrong starting point”). The Second Circuit likewise remands despite a district court’s assertion that it would impose the same sentence where the appellate court “cannot be certain that the court’s calculus would not have been altered had it appreciated the full extent of the upward variance it was contemplating.” *United States v. Seabrook*, 968 F.3d 224, 240 (2d Cir. 2020). The Seventh Circuit holds that “a conclusory comment tossed in for good measure is not enough to make a [G]uidelines error harmless.” *United States v. Asbury*, 27 F.4th 576, 581 (7th Cir. 2022) (quotation marks omitted). And the Ninth Circuit vacates and remands in the face of a Guidelines miscalculation notwithstanding the district court’s assertion “that it would have imposed the same sentence.” *United States v. Williams*, 5 F.4th 973, 978 (9th Cir. 2021).

That divide sharpens precisely where this case sits: when the sentence imposed would become an *upward variance* from the correct range, several circuits hold that a bare same-sentence statement cannot establish harmlessness, because the court must then supply the reasoned justification that an above-Guidelines sentence always requires. The Third Circuit holds

that a statement that the court would impose the same sentence “will not always suffice . . . [;] a district court still must explain its reasons for imposing the sentence under either Guidelines range.” *United States v. Zabielski*, 711 F.3d 381, 389 (3d Cir. 2013). The Tenth Circuit is in accord, finding it “hard . . . to imagine a case where it would be procedurally reasonable for a district court to announce that the same sentence would apply even if correct guidelines calculations are so substantially different, without cogent explanation.” *United States v. Peña-Hermosillo*, 522 F.3d 1108, 1117 (10th Cir. 2008). Indeed, the permissive rule has drawn a pointed dissent from within the very court that adopted it: canvassing the contrary authority, Judge Gregory warned that the *Keene* approach allows “the exception [to] swallow[] the rule,” letting district courts “impose one-size-fits-all sentences that appellate courts would refrain from meaningfully reviewing.” *Gomez-Jimenez*, 750 F.3d at 386–88 (Gregory, J., concurring in part and dissenting in part).

Even the Fifth Circuit — which, like the Eleventh, recognizes an assumed-error harmlesslessness doctrine — imposes a more demanding predicate than *Keene*. It holds that a court’s “mere recitation that it would impose the same sentence is neither necessary nor sufficient”; harmlesslessness on that basis requires that the district court have actually “entertain[ed] arguments as to the [purportedly] proper guidelines range,” and where “the correct guidelines range was not considered,” the government must “convincingly demonstrate[]” both that the court would have

imposed the same sentence and that it would have done so “for the same reasons” — a “heavy burden.” *United States v. Giglio*, 126 F.4th 1039, 1046–47 (5th Cir. 2025) (quoting *United States v. Guzman-Rendon*, 864 F.3d 409, 411 (5th Cir. 2017), and *United States v. Ibarra-Luna*, 628 F.3d 712, 714, 717 (5th Cir. 2010)).

These are not merely verbal differences. On the facts of this case, the outcome would likely differ in the First, Second, Seventh, and Ninth Circuits: the district court adopted the disputed range, expressly declined to vary from it, and offered only a post-pronouncement, unelaborated statement that it would impose the same sentence “regardless of what the guidelines say” — never calculating the correct range or explaining the sentence against it, and never confronting that the 595-month term is a far greater upward variance measured against the correct 470-to-497-month range than against the range it used. App. 15a–17a, 25a–26a. That is precisely the ambiguity the First, Second, Seventh, and Ninth Circuits — and, on an upward-variance record like this one, the Third and Tenth — hold insufficient to establish harmlessness. Under the Eleventh Circuit’s *Keene* rule and the Fourth Circuit’s parallel doctrine, by contrast, the judgment stands. The outcome of McKenzie’s appeal thus turned on the circuit in which it was heard. The conflict is acknowledged and entrenched — it has produced a reasoned intra-circuit dissent and a body of decisions on both sides — and by this Court can resolve it.

B. The question recurs constantly and governs the liberty of federal defendants.

Alternative-sentence statements are a routine feature of federal sentencing, and “assumed-error harmlessness” is a routine tool of appellate review. The standard governing when such a statement forecloses review of a Guidelines dispute therefore affects a large and recurring category of cases, as the steady stream of decisions cited above confirms. The stakes are substantial: the difference between a correct and an incorrect range is frequently measured in years, and here amounted to a 125-month swing at the low end of the advisory range. App. 15a–16a.

Left undisturbed, the decision below invites district courts to insulate Guidelines rulings from meaningful review by pairing them with a blanket statement that the same sentence would follow “regardless” of the Guidelines — and invites courts of appeals to affirm without resolving contested and often difficult Guidelines questions. That practice erodes the uniformity, transparency, and disciplined appellate development of Guidelines law that this Court’s decisions are designed to protect. *See Rita v. United States*, 551 U.S. 338, 347–48 (2007) (describing the Guidelines’ role in reducing unwarranted disparities); *Rosales-Mireles v. United States*, 139 S. Ct. 1897, 1908 (2018) (emphasizing the public interest in the fairness and integrity of Guidelines sentencing). If appellate courts may routinely decline to decide whether the range was correctly calculated,

Guidelines law will ossify and disparities will grow unchecked.

III. This Case Is an Ideal Vehicle.

This case presents the question cleanly. The Eleventh Circuit expressly declined to decide the validity of the enhancements, resting solely on *Keene*. App. 14a–17a. The question is therefore outcome-determinative and squarely presented: if a generalized alternative-sentence statement does not excuse review of a serious Guidelines dispute, the judgment cannot stand.

The issue is also fully preserved. Petitioner objected to both enhancements at sentencing and pressed the challenge on appeal. App. 14a–15a, 28a–31a. And the magnitude of the potential error is undisputed and quantified in the opinion below: an eight-level swing and a 125-month reduction in the low end of the advisory range. App. 15a–16a.

Anticipated vehicle objections do not withstand scrutiny. That the opinion is unpublished is immaterial, because it applies the Eleventh Circuit’s published, and frequently invoked, *Keene* rule. App. 14a (citing *Keene* and *Olson*). Nor does the district court’s alternative-sentence statement make this a poor vehicle; that statement is the crux of the question presented — whether such a generalized pronouncement, untethered to the correct range, suffices. Finally, although the offense conduct is serious, the mandatory 360-month term on the § 924(c)

count is not at issue; the disputed enhancements affected the remaining, discretionary portion of the sentence, and the seriousness of an offense is a reason to insist on correct sentencing procedure, not to excuse its absence.

IV. The Decision Below Is Wrong.

The judgment below is not merely cert-worthy; it is incorrect. Federal sentencing proceeds in a fixed order: the court must first calculate the correct Guidelines range, and only then decide whether to vary under § 3553(a). *Gall*, 552 U.S. at 49–50. An appellate court cannot vindicate that structure by assuming away the calculation. Where a district court adopts a disputed range, expressly declines to vary from it, and only afterward states that it would impose the same sentence “regardless of the guidelines,” the record does not establish that the erroneous range failed to anchor the sentence. *Molina-Martinez*, 578 U.S. at 200–01. It establishes the opposite.

At a minimum, before an appellate court treats a Guidelines error as harmless on the basis of an alternative-sentence statement, the record should show that (1) the district court identified the correct Guidelines range; (2) the court explained why it would impose the same sentence measured against that range; and (3) the explanation is independent of the disputed Guidelines determinations. The decision below required none of these safeguards. It permitted affirmance based on a generalized statement made

against the wrong benchmark, supplemented by an appellate reasonableness determination the district court never made. That approach conflicts with this Court's precedents and warrants review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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