No. 23-578

# In the Supreme Court of the United States

CHRISTOPHER KINZY, 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**

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## QUESTION PRESENTED

Whether the court of appeals correctly determined that an asserted error in the calculation of petitioner's advisory Sentencing Guidelines range was harmless, where the district court considered the alternative guidelines range and made clear that it would impose the same sentence even if petitioner were correct about the proper guidelines range.

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### OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-35a) is not published in the Federal Reporter but is available at 2023 WL 4763336.

### JURISDICTION

The judgment of the court of appeals was entered on July 26, 2023. On October 16, 2023, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including November 27, 2023, and the petition was filed on that date. 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 Eastern District of Louisiana, petitioner was convicted of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1). See Pet.

App. 36a. The district court sentenced petitioner to 87 months of imprisonment, to be followed by three years of supervised release. *Id.* at 38a, 40a. The court of appeals affirmed. *Id.* at 1a-35a.

1. In 2021, a police officer stopped petitioner's car, which had heavily tinted windows and a tinted cover obscuring its license plate. Presentence Investigation Report (PSR) ¶ 6. The officer approached the vehicle, saw a handgun near petitioner's lap, and sought to secure petitioner's hands. *Ibid.* But petitioner reached for the gun and said "I'm not going back to jail. I'm going to shoot you. I'll kill you." *Ibid.*

A struggle ensued. PSR ¶ 6. Officers were ultimately able to disarm and arrest petitioner. *Ibid.* During the struggle, petitioner inflicted injuries on one officer that required hospitalization and surgery. PSR ¶¶ 6, 7.

Petitioner subsequently pleaded guilty to possessing a firearm after a felony conviction. Pet. App. 36a.

2. Applying the 2021 version of the advisory Sentencing Guidelines, the Probation Office's presentence report calculated a total offense level of 21 and a criminal history category of VI, which produced an advisory range of 77 to 96 months of imprisonment. PSR ¶¶ 20, 32, 73. In calculating that advisory range, the presentence report determined that one of petitioner's prior Louisiana convictions qualified as a "crime of violence" for purposes of setting a base offense level of 20 under Sentencing Guidelines § 2K2.1(a)(4)(A). See PSR ¶ 12; Supp. Addendum to the PSR 1.

Petitioner objected, arguing that his prior Louisiana conviction did not qualify as a "crime of violence." C.A. ROA 168-169. He also requested that the district court sentence him to 51 months of imprisonment regardless of how it resolved his guidelines objection, arguing that

such a sentence was sufficient but not greater than necessary to achieve the sentencing purposes in 18 U.S.C. 3553(a). C.A. ROA 247, 254; see Pet. App. 59a-60a.

For its part, the government argued that petitioner's prior conviction was for a crime of violence and therefore agreed with the Probation Office that petitioner's advisory guidelines range was 77 to 96 months' imprisonment. C.A. ROA 179-183. The government also maintained, however, that "should the [c]ourt sustain [petitioner's] objection regarding his prior conviction for a crime of violence" it should impose "an upward variance to the same range, 77 to 96 months." *Id.* at 183-184; see *id.* at 185. The government explained that petitioner's extensive criminal history—as well as his violent threats and resistance to the officers who arrested him—justified such a departure. *Id.* at 183-185.

3. At petitioner's sentencing hearing, the district court determined that petitioner's prior Louisiana conviction triggered the crime-of-violence guideline and that petitioner's advisory guidelines range was 77 to 96 months' imprisonment. Pet. App. 56a-57a. Petitioner again requested a 51-month sentence, emphasizing the "circumstances" of his prior conviction; his "personal circumstances"; and the fact that a 51-month sentence "would have been the top of the guidelines had the [c]ourt sustained" his crime-of-violence objection. *Id.* at 59a-60a.

After considering petitioner's and the government's written and oral arguments, see Pet. App. 54a-62a, the district court imposed a sentence of 87 months of imprisonment, to be followed by three years of supervised release, *id.* at 38a, 40a, 62a-63a. At the sentencing hearing, the government inquired whether the court "would have imposed the same sentence" if "the alternative

guidelines range suggested by [petitioner]" had "been in effect." *Id.* at 65a. The court responded that "[t]he sentence that I crafted is what I believe is appropriate for [petitioner] in this case. It reflects the seriousness of his offense, his criminal history, and also protects the public. And I would have imposed the same sentence under either scenario to answer your question." *Id.* at 66a.

4. The court of appeals affirmed in an unpublished, nonprecedential decision. Pet. App. 1a-35a. Although the court took the view that petitioner's prior Louisiana conviction did not qualify as a crime of violence under Sentencing Guidelines § 2K2.1(a)(4)(A), Pet. App. 2a-19a, it found that the error, and the resulting increase in petitioner's advisory guidelines range, was harmless, *id.* at 19a-35a.

The court of appeals explained that, under its precedents, an error in calculating a Sentencing Guidelines range is harmless if the district court "(1) considered the correct [guidelines] range" at sentencing "and (2) stated that it would impose the same sentence either way." Pet. App. 22a; see *id.* at 20a. And the court of appeals found that the district court in this case "did 'consider' the proper range, *i.e.*, the range that would apply absent the erroneous crime-of-violence finding, because that range featured prominently in the parties' written sentencing materials and at the sentencing hearing." *Id.* at 24a; see *id.* at 23a-27a.

In particular, the court of appeals emphasized that—both before and during the sentencing hearing—petitioner repeatedly requested a 51-month sentence based on case-specific considerations. Pet. App. 25a. The court also observed that the district court had explicitly stated that it "would have imposed the same sen-

tence" even if petitioner's proposed guidelines range had applied. *Id.* at 28a. Accordingly, the court of appeals found that the district court's crime-of-violence determination was harmless. *Ibid.*

After finding the guidelines error harmless based on the record in this case, see Pet. App. 19a-28a, the court of appeals discussed its harmless-error doctrine more generally, *id.* at 28a-35a. Among other things, the court noted that its harmless-error decisions have not "required that district courts offer a more detailed explanation of" why the same sentence was appropriate even if the court applied an incorrect guidelines range. *Id.* at 33a. The court indicated that implementing such a requirement might be "prudent" in "an appropriate case" but declined to do so because petitioner "ha[d] not * * * asked" the court to "take such a step." *Id.* at 34a; see *id.* at 34a n.14 (explaining that petitioner had "[i]nstead" "oppos[ed] * * * the Government's harmlessness position" on other grounds).

Petitioner did not seek en banc review of the panel's decision.

## ARGUMENT

Petitioner contends (Pet. 25-28) that the court of appeals erred in affirming his sentence based on its determination that error in the calculation of his advisory guidelines range did not affect the sentence imposed, and therefore was harmless. That contention lacks merit, and the court's unpublished, nonprecedential decision does not conflict with any decision of this Court or implicate a disagreement among the courts of appeals that merits this Court's review. This Court has repeatedly and recently denied petitions for writs of certiorari that

have raised similar issues.* The same result is warranted here.

1. The court of appeals correctly applied established principles of harmless-error review in determining that the asserted error in the district court's calculation of petitioner's advisory guidelines range was harmless. Pet. App. 19a-28a.

a. In *Gall* v. *United States*, 552 U.S. 38 (2007), this Court stated that under the advisory Sentencing Guidelines, an appellate court reviewing a sentence, within or outside the guidelines range, must ensure that the sentencing court made no significant procedural error, such as by failing to calculate or incorrectly calculating the guidelines range, treating the guidelines as mandatory, failing to consider the sentencing factors set forth in 18 U.S.C. 3553(a), making clearly erroneous factual findings, or failing to explain the sentence. 552 U.S. at 51. The courts of appeals have consistently recognized that errors of the sort described in *Gall* do not automat-

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* See *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*, 139 S. Ct. 785 (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). The pending petition for a writ of certiorari in *Houston* v. *United States*, No. 23-6841 (filed Feb. 20, 2024), also raises a similar issue.

ically require a remand for resentencing, and that ordinary appellate principles of harmless-error review apply. As the Seventh Circuit has explained:

> A finding of harmless error is only appropriate when the government has proved that the district court's sentencing error did not affect the defendant's substantial rights (here—liberty). To prove harmless error, the government must be able to show that the Guidelines error "did not affect the district court's selection of the sentence imposed."

*United States* v. *Abbas*, 560 F.3d 660, 667 (2009) (citation omitted); see Fed. R. Crim. P. 52(a) ("Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.").

A sentencing court may confront a dispute over the application of the Sentencing Guidelines. When the court resolves that issue and imposes a sentence inside or outside the resulting advisory guidelines range, it may also explain that, had it resolved the disputed issue differently and arrived at a different advisory guidelines range, it would nonetheless have imposed the same sentence in light of the factors enumerated in Section 3553(a). Under proper circumstances, that permits the reviewing court to affirm the sentence under harmless-error principles even if it disagrees with the sentencing court's resolution of the disputed guidelines issue.

This Court in *Molina-Martinez* v. *United States*, 578 U.S. 189 (2016), analogously 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"). Although *Molina-Martinez* concerned the requirements of plain-error review under Federal Rule of Criminal Procedure 52(b), the principle it recognized applies with equal force in the context of harmless-error review under Rule 52(a).

b. Applying ordinary principles of harmless-error review to the circumstances of this case, the court of appeals correctly determined that any error in the district court's calculation of petitioner's advisory guidelines range was harmless because it did not affect the district court's determination of the appropriate sentence. Pet. App. 19a-28a.

As the court of appeals observed, the district court "did 'consider' the proper range, *i.e.*, the range that would apply absent the erroneous crime-of-violence finding, because that range featured prominently in the parties' written sentencing materials and at the sentencing hearing." Pet. App. 24a. And the district court expressly stated that it "would have imposed the same sentence" regardless of the correct guidelines range. *Id.* at 66a.

In support of that statement, the district court emphasized that the sentence that it imposed "is what I believe is appropriate for [petitioner] in this case" and "reflects the seriousness of [petitioner's] offense, his criminal history, and also protects the public." Pet. App. 66a. And the court had determined that sentence to be the right one only after considering petitioner's repeated argument—both in briefing and at the sentencing hearing—that a lower term of imprisonment

was appropriate irrespective of the guidelines range. See pp. 2-4, *supra*.

The court of appeals therefore correctly found that the "record" in this case shows that "the district court thought the sentence it chose was appropriate irrespective of the Guidelines range," *Molina-Martinez*, 578 U.S. at 200, and that the district court's error in calculating petitioner's guidelines range was accordingly harmless, see *ibid.* Further review of that fact-bound conclusion is unwarranted.

2. Petitioner faults the court of appeals for finding harmless error based on a "simple statement" by the district court that "it would impose the same sentence either way." Pet. 17 (citation omitted). That argument was not clearly preserved and is meritless in any event.

a. As the court of appeals noted, petitioner did not squarely press that argument below, and, although the court flagged the argument, it did not pass upon its merits. Pet. App. 33a-34a & n.14; see Pet. C.A. Br. 34 (arguing simply that "[t]he government cannot satisfy its 'heavy burden' of proving that [the guidelines] error * * * was harmless on this record"); Pet. C.A. Reply Br. 14-19 (primarily arguing that a different line of Fifth Circuit harmless-error precedent controlled).

This Court should follow suit and adhere to its traditional rule precluding a grant of certiorari in such situations. See *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (noting the Court's "traditional rule * * * preclud[ing] a grant of certiorari * * * when 'the question presented was not pressed or passed upon below'") (citation omitted). That is particularly appropriate where the decision below is unpublished and nonprecedential and the court of appeals expressly noted that it might be "prudent" "[i]n an appropriate case" to "require[]"

district courts to "offer a more detailed explanation of" the appropriateness of an imposed sentence under a different guidelines range. Pet. App. 33a-34a.

b. In any event, petitioner's argument is wrong and misreads this Court's precedent. Petitioner first reads (Pet. 17-19, 25-28) *Gall* v. *United States* and *Rita* v. *United States*, 551 U.S. 338 (2007), to bar a court of appeals from upholding a sentence on harmless-error review unless the district court extensively explains why it would have imposed the same sentence if it calculated an incorrect guidelines range. But both of those decisions simply addressed the proper procedure for imposing a sentence. See *Gall*, 552 U.S. at 51; *Rita*, 551 U.S. at 356-357. Neither actually found sentencing error in the case before it, and thus neither addressed the circumstances in which an error would be harmless—let alone overrides the Court's subsequent observation in *Molina-Martinez* that an error may be nonprejudicial. See *Gall*, 552 U.S. at 53-60; *Rita*, 551 U.S. at 356-360.

Petitioner errs (Pet. 19) in asserting that the decision below in fact conflicts with this Court's decision in *Molina-Martinez*. As discussed, see pp. 7-8, *supra*, *Molina-Martinez* recognized that where 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. 578 U.S. at 200. The Court emphasized that "[t]he Government remains free to 'point to parts of the record'—*including relevant statements by the judge*—'to counter any ostensible showing of prejudice the defendant may make.'" *Id.* at 200-201 (brackets and citation omitted; emphasis added).

*Molina-Martinez* contrasted situations in which the record indicates that the judge thought the sentence appropriate regardless of the guidelines range with those in which "the record is silent as to what the district court might have done." 578 U.S. at 201. While the latter would be indicative of prejudice, see *ibid.*, the court of appeals correctly determined that this is not such a case, Pet. App. 27a-28a. Rather, the district court explicitly stated that it "thought the sentence it chose was appropriate irrespective of the Guidelines range." *Molina-Martinez*, 578 U.S. at 200. And the government and court of appeals have identified numerous "parts of the record" that confirm that the district court considered the alternative range and alternative sentences. *Ibid.* (citation omitted).

Petitioner's reliance (Pet. 19) on *Rosales-Mireles* v. *United States*, 585 U.S. 129 (2018), is similarly misplaced. That decision did not discuss when a guidelines error may prove harmless; it addressed only when a guidelines error will "seriously affect[] the fairness, integrity or public reputation of judicial proceedings" for purposes of the fourth prong of plain-error review. *Id.* at 137 (quoting *United States* v. *Olano*, 507 U.S. 725, 736 (1993)); see Fed. R. Crim. P. 52(b). And like *Molina-Martinez*, it did not foreclose affirmance of a sentence when the record shows that the district court would have reached the same outcome irrespective of a guidelines error. See *Rosales-Mireles*, 585 U.S. at 142 ("There may be instances where countervailing factors satisfy the court of appeals that the fairness, integrity, and public reputation of the proceedings will be preserved absent correction.").

c. Petitioner errs in suggesting (Pet. 15, 19, 29) that record-specific determinations that errors were harm-

less in cases like this diminish the guidelines' "anchoring role" or "effect" and harm the integrity of the judicial system. Harmless-error review does not alter the principle that "the Guidelines should be the starting point" for a district court's determination of the appropriate sentence. *Gall*, 552 U.S. at 49. Such review simply identifies cases, like this one, where the sentencing court found that factor to be overwhelmed by others.

Harmless-error review in cases like this thus "merely removes the pointless step of returning to the district court when [the court of appeals is] convinced that the sentence the judge imposes will be identical" regardless of the correct range. *Abbas*, 560 F.3d at 667. And far from undermining appellate review, "[a]n explicit statement that the district court would have imposed the same sentence under two different ranges can help to improve the clarity of the record, promote efficient sentencing, and obviate questionable appeals." *United States* v. *Zabielski*, 711 F.3d 381, 389 (3d Cir. 2013).

3. The court of appeals' unpublished and nonprecedential decision does not implicate a disagreement among the courts of appeals that warrants this Court's review. Indeed, the Fifth Circuit has not definitively addressed the extent to which a district court must provide an explanation of the rationales underlying its conclusion that the same sentence is warranted regardless of the correct guidelines range. The court here went so far as to indicate that it might be "prudent" "[i]n an appropriate case" to "require[]" district courts to "offer a more detailed explanation." Pet. App. 33a-34a. A litigant in a future case who properly preserves arguments supporting that approach can raise them before another Fifth Circuit panel, and, if necessary, the en banc court.

In any event, petitioner overstates (Pet. 20-24) any disagreement among the courts of appeals. Courts of appeals generally find guidelines calculation errors harmless in circumstances like these, where the district court considered the correct guidelines range; found that the same sentence was appropriate regardless of the correct range; and explained that, whatever the proper range, the sentence reflected "the seriousness of [the defendant's] offense, his criminal history," and public-safety concerns. Pet. App. 66a; see, *e.g.*, *United States* v. *Ahmed*, 51 F.4th 12, 22-23 (1st Cir. 2022); *United States* v. *Jass*, 569 F.3d 47, 68 (2d Cir. 2009), cert. denied, 558 U.S. 1159, and 559 U.S. 1087 (2010); *United States* v. *Mills*, 917 F.3d 324, 330-332 (4th Cir. 2019); *United States* v. *Morrison*, 852 F.3d 488, 491-492 (6th Cir. 2017); *United States* v. *Caraway*, 74 F.4th 466, 468-470 (7th Cir. 2023); *United States* v. *Sanchez-Martinez*, 633 F.3d 658, 660-661 (8th Cir. 2011); *United States* v. *Goldman*, 953 F.3d 1213, 1221-1223 (11th Cir. 2020). To the extent that some formal differences exist in the articulated requirements for a harmless-error determination when a district court's explicit explanation of the irrelevance of an asserted sentencing error is succinct, those differences have little substantive effect and do not create a conflict warranting this Court's review.

For example, petitioner errs in contending (Pet. 20-22) that the decision below conflicts with decisions of the Third Circuit. The Third Circuit has declined to find a guidelines-calculation error harmless where a district court "provided *no* explicit statement that it would have" imposed the same sentence after considering an alternative guidelines range. *United States* v. *Raia*, 993 F.3d 185, 196 (2021) (emphasis added); see *United States* v. *Hester*, 910 F.3d 78, 84, 91-92 (2018) (remand-

ing for resentencing where the district court indicated only that it had varied downward to "mitigate [the] effect" of a possible guidelines error, not that it would impose the same sentence irrespective of an error). And when "nothing in the record suggest[ed] that the District Court properly determined the alternative Guidelines range," the Third Circuit has refused to credit a "bare statement" that the district court would have imposed the same sentence. *United States* v. *Smalley*, 517 F.3d 208, 214-215 (2008); see *United States* v. *Wright*, 642 F.3d 148, 154 n.6 (2011) (concluding that *Smalley* required a remand for resentencing). But petitioner does not identify any Third Circuit decision that has required resentencing where, as here, the record demonstrates that the district court was aware of petitioner's alternative sentencing range; the court expressly stated that it would have imposed the same sentence regardless of the asserted guidelines error; and the court indicated that in any event the imposed sentence was justified by the Section 3553(a) factors. See pp. 2-4, *supra*.

Petitioner is likewise mistaken (Pet. 22-23) in asserting a clear conflict between the decision below and the Tenth Circuit's decision in *United States* v. *Peña-Hermosillo*, 522 F.3d 1108 (2008). The court there made clear that "[i]n this case we need not determine when, if ever, an alternative holding based on the exercise of" sentencing discretion "could render a procedurally unreasonable sentence calculation harmless." *Id.* at 1117-1118. And while the court ordered resentencing where a district court offered "no more than a perfunctory explanation for its alternative holding"—namely, "a vague statement that the sentence is appropriate under § 3553(a)," *ibid.*—the district court in petitioner's case said more. It explicitly explained that petitioner's sen-

tence was warranted even if it had incorrectly calculated the guidelines range because of "the seriousness of [petitioner's] offense, his criminal history," and public-safety concerns. Pet. App. 66a.

Petitioner also wrongly claims (Pet. 24) that the decision below conflicts with the Sixth Circuit's decision in *United States* v. *O'Georgia*, 569 F.3d 281 (2009). The district court there did not even announce that it would have imposed the same sentence had it erred in its guidelines calculation. See *id.* at 296-297. And although the Sixth Circuit has evinced hesitation where one particular sentencing judge routinely used "boiler-plate language designed to thwart a deserved resentencing," petitioner has not identified any Sixth Circuit decision requiring resentencing where a district court provided an explanation like the one provided here. *United States* v. *Montgomery*, 969 F.3d 582, 583 (2020) (declining to grant panel rehearing because the defendant failed to previously raise the argument). Indeed, the Sixth Circuit often finds erroneous guidelines calculations harmless when district courts make statements like those in this case. See, *e.g.*, *United States* v. *Wright*, No. 22-5452, 2023 WL 4995748, at *5 (Aug. 4, 2023); *United States* v. *Collins*, 800 Fed. Appx. 361, 362-363 (2020) (citing cases); *Morrison*, 852 F.3d at 491-492.

The Ninth Circuit alone appears to have issued decisions that might suffice to show that it would disagree with the Fifth Circuit's decision in this case. See *United States* v. *Dominguez-Caicedo*, 40 F.4th 938, 963-964 (2022), cert. denied, 143 S. Ct. 2615 (2023); *United States* v. *Vederoff*, 914 F.3d 1238, 1242-1243, 1248-1249 (2019). But the Ninth Circuit generally demands more "than other circuits do to show that an arguable guideline error was harmless." *United States* v. *Cabrera*, 83

F.4th 729, 741 n.1 (2023) (Hamilton, J., concurring) (collecting cases), petition for cert. pending, No. 23-6976 (filed Mar. 5, 2024); see *id.* at 743 (Collins, J., concurring). That outlier approach creates at most a limited circuit split, which does not warrant further review.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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