NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ERIC TROY SNELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

1. Does the Fourth Circuit's practice of not addressing erroneous Sentencing Guidelines calculations but affirming a sentence under "assumed error harmlessness" review violate *Gall*'s directive that a properly calculated Guidelines range remain "a meaningful benchmark throughout the process of appellate review"?

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RULE 14.1(b)(iii) STATEMENT

There are no proceedings in state or federal trial or appellate courts, including proceedings in this Court, that are directly related to this case.

OPINIONS BELOW

1. Opinion, United States Court of Appeals for the Fourth Circuit, *United States of America v. Eric Troy Snell*, Court of Appeals No. 19-4351, affirming the district court, July 27, 2020.

2. Judgment, United States District Court for the District of Maryland, *United States of America v. Eric Troy Snell*, District Court No. 1:17-cr-00602-CCB-1, sentencing Mr. Snell, May 1, 2019.

JURISDICTIONAL STATEMENT

Snell was sentenced on April 26, 2019, with the Judgment issuing May 1, 2019. (App. 011). He appealed, challenging the district court's application of two Guidelines enhancements and its decision not to grant a downward adjustment for acceptance of responsibility. The United States Court of Appeals for the Fourth Circuit entered its Opinion affirming the Judgment on July 27, 2020. (App. 01). This Court's jurisdiction is invoked under Title 28, United States Code, § 1254(1).

Rule 13.1 of the Supreme Court, in combination with this Court's Order of March 19, 2020, allows for 150 days within which to file a Petition for a Writ of Certiorari after entry of the judgment of the Court of Appeals. Accordingly, this Petition is timely filed.

Pursuant to Rule 29.4(a), appropriate service is made to the Solicitor General of the United States and to Assistant United States Attorney Leo Wise, who appeared in the United States Court of Appeals for the Fourth Circuit on behalf of the United States Attorneys Office, a federal office which is authorized by law to appear before this Court on its own behalf.

Petitioner Snell respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Fourth Circuit. In that Opinion, the Fourth Circuit assumed that Snell raised meritorious challenges to the district court's application of two Guidelines enhancements, but nonetheless affirmed the above-Guidelines sentence because the district court said it would impose the same sentence regardless of Guidelines error. The court's ruling completely divorced Snell's sentence from appropriate Guidelines consideration, contrary to *Gall v. United States*, 552 U.S. 38 (2007), *Kimbrough v. United States*, 552 U.S. 85 (2007) and their progeny.

Alternatively, Snell requests a summary disposition on the merits and remand under Rule 16.1.

STATUTORY PROVISION INVOLVED

18 U.S.C. § 3553. Imposition of a sentence (App. 017)

STATEMENT OF THE CASE AND FACTS

I. The government investigates and charges Snell, who pleads guilty and is sentenced.

The Baltimore Police Department's corrupt Gun Trace Task Force (GTTF) for years engaged in the same street crime it was supposed to stop. GTTF member Jemell Rayam was arrested and began cooperating, eventually telling investigators he twice gave his friend, Philadelphia police officer Eric Snell, stolen drugs to be sold in that city. Rayam told agents that Snell's brother sold the drugs, after which Snell paid Rayam the proceeds by depositing funds in Rayam's bank account, and returned some of the drugs unsold. (Indictment, R.1, pp. 1-6).[1]

The government worked extensively to corroborate Rayam's information, and in November 2017 obtained an indictment charging Snell with conspiring to distribute heroin and cocaine. (*Id.*) Applying for a tracking warrant to facilitate Snell's arrest, the government told the district court in Philadelphia it had corroborated Rayam's statements through bank and phone records, security-camera photos of

[1] Relevant documents not contained in the Appendix are cited by their location in the district-court record ("R. __") or the Fourth Circuit record ("App. R. ___").

Snell making bank deposits, historical cell-site analyses of numerous cellphones, GPS information, toll records, text messages, a recorded jailhouse call from Rayam to Snell, and statements from two other cooperating GTTF officers. (Application & Affidavit for Tracking Warrant, R. 30-3, pp. 1-21). Agents also applied for a search warrant, detailing much of the same information. (Application, R.30-4, pp. 1-17).

Three days later FBI agents arrested Snell at his Philadelphia home, seizing two service handguns and two disassembled, unregistered rifles from Snell's bedroom. (FBI 302, R. 30-5, pp. 1-3). In the basement they found ammunition for Snell's service weapons (though none for the rifles) and a razor containing drug residue. On the drive to Baltimore, Snell engaged the arresting FBI agents in a wide-ranging soliloquy touching on the Philadelphia police department, his children, his love of Philadelphia Eagles football, and his claim that the cash deposits he made to Rayam's bank account were for a "gambling debt." (*Id.*) Thanks to its extensive investigation, the government already knew the latter statement was false. Its case was so airtight that midway through Rayam's testimony, Snell changed his plea to guilty without benefit of an agreement. (Rearraignment TR, R.71, pp. 2-23).

The government agreed with the recommendation of the presentence report (PSR) for five two-level enhancements, resulting in a Guidelines range of 151-188 months, though it requested a below-Guidelines sentence of 150 months. (R.81, Gov't. Sent. Mem.). Snell, who had no prior offenses, opposed all five enhancements and argued for a Guidelines range of 51-63 months. (R.79, Snell Sent. Mem.). The district court rejected three of the enhancements but applied two, and calculated a Guidelines range of 78-97 months. (Sent. TR, App. 07; Statement of Reasons, R.90 (Sealed), pg. 1).

The court then varied upward, giving Snell a 108-month sentence to account for his abuse of trust as a police officer. (Sent. TR, App. 07-09; Judgment, App. 011; R.90 (Sealed) Statement of Reasons, pg. 1). It added that "even if I'm wrong on the guidelines, this is the sentence that I think is appropriate under 3553(a) and is sufficient without being greater than necessary…." (Sent. TR, App. 09).

II. The Fourth Circuit disregards the district court's Guidelines error as harmless, based on the district court's comment.

Snell appealed, and in his briefs established legal error in the application of both enhancements. The obstruction enhancement of USSG §3C1.1 was improperly applied because the court did not make

the requisite finding of willful intent to obstruct. (Opening Brief, App. R.29, pp. 32-33; Reply, App. R.40, pg. 12). Of even greater import, Comment Note 4(G) to USSG §3C1.1 requires that an unsworn falsehood to law enforcement *significantly* obstruct or impede the investigation, and Snell's "gambling debt" comment did not – by the time he made it, agents had established conclusively that his bank deposits were drug-sale proceeds. Snell proved that the additional investigatory legwork the government blamed on his untruth either predated it or involved GTTF members, not Snell. (Opening Brief, App. R.29, pp. 19-32; Reply, App. R.40, pp. 4-12).

Snell also established that the dangerous-weapon enhancement of USSG §2D1.1(b)(1) did not apply because the government failed to prove a sufficient temporal connection between the weapons and his criminal conduct of 12 months earlier. (Opening Brief, App. R.29, pp. 34-37; Reply, App. R.40, pp. 12-13. He showed it was "clearly improbable" the guns had anything to do with drug activity – the two handguns were required in his police work, and there was no ammunition in the house for the disassembled rifles. (Opening Brief, App. R.29, pp. 37-39; Reply, App. R.40, pp. 12-13). And he noted that

the government could not meet the "high bar" of establishing harmless error: the district court's statement that it would impose the same sentence even if it was wrong on the Guidelines did not reflect its consideration of that sentence in light of Snell's calculated range. (Reply, App. R.40, pp. 13-14).

The Fourth Circuit affirmed in a six-paragraph unpublished opinion issued without oral argument. (App. 01). Applying its "assumed error harmlessness inquiry," the court assumed error in the Guidelines calculation but it found it harmless because the district court said it would have imposed the same sentence even without error, and that sentence "would be [substantively] reasonable even if the Guidelines issue had been decided in the defendant's favor." (App. 03, citing *United States v. Gomez-Jimenez*, 750 F.3d 370, 382 (4th Cir. 2014) (brackets omitted). The appellate court did not compare the sentence against Snell's asserted Guidelines range of 51-63 months. It also disregarded the lack of any elaboration by the district court as to why, having imposed a sentence 11 percent above the top end of its Guidelines range (78-97 months), it also would have been substantively

reasonable to exceed Snell's range by 71 percent to impose the same 108-month sentence.

REASONS FOR GRANTING THE WRIT

I. The Fourth Circuit's "assumed error harmlessness inquiry" completely excises the Guidelines from the array of factors considered in sentencing, contrary to *Gall v. United States*.

1. While *United States v. Booker*, 543 U.S. 220 (2005) rendered the Sentencing Guidelines advisory rather than mandatory, they still play an important role in sentencing. But the Fourth Circuit's "assumed error harmlessness inquiry," by not requiring either the district court or circuit court to compare the sentence against a correct Guidelines range, improperly removes the Guidelines from *any* consideration. This Court should grant certiorari and issue a course-correction barring the circuit courts from this troubling practice.

2. The Guidelines "should be the starting point and the initial benchmark" for sentencing determinations, *Gall v. United States*, 552 U.S. 38, 49 (2007), since "in the ordinary case, the [Sentencing] Commission's recommendation of a sentencing range will 'reflect a rough approximation of sentences that might achieve § 3553(a)'s objectives." *Kimbrough v. United States*, 552 U.S. 85, 89 (2007),

quoting *Rita v. United States*, 551 U.S. 338, 350 (2007). The post-*Booker* sentencing scheme "aims to achieve uniformity by ensuring that sentencing decisions are anchored by the Guidelines and that they remain a meaningful benchmark *throughout the process of appellate review*." *Peugh v. United States*, 569 U.S. 530, 541 (2013) (emphasis added), citing *Kimbrough*, 552 U.S. at 107.

District courts are to begin all sentencing proceedings by correctly calculating the applicable Guidelines range. *Gall*, 552 U.S. at 49. After giving both parties an opportunity to argue for their desired sentence, the court is to consider all of the 18 U.S.C. § 3553(a) factors to determine whether they support the party's requested sentence. *Id.* at 50-51. Importantly, "[t]he fact that § 3553(a) explicitly directs sentencing courts to consider the Guidelines supports the premise that district courts must begin their analysis with the Guidelines *and remain cognizant of them throughout the sentencing process*." *Gall*, 552 U.S. at 50 n. 6 (emphasis added). "Even if the sentencing judge sees a reason to vary from the Guidelines, 'if the judge uses the sentencing range as the beginning point to explain the decision to deviate from it, *then the Guidelines are in a real sense the basis for the*

sentence.'" *Peugh*, 569 U.S. at 542, quoting *Freeman v. United States*, 564 U.S. 522, 529 (2011) (plurality opinion) (Court's emphasis). Miscalculation of the Guidelines range is a significant procedural error. *Gall*, 552 U.S. at 51.

3. Under its "assumed error harmlessness inquiry," the Fourth Circuit assumes an error in Guidelines calculation, but considers it harmless if it determines 1) the district court would have reached the same result even if it had decided the Guidelines decision the other way, and 2) the sentence still would be substantively reasonable. (App. 03, citing *Gomez-Jimenez*, 750 F.3d at 382). The Fourth Circuit adopted the principle from *United States v. Keene*, 470 F.3d 1147 (11th Cir. 2006), *see Gomez-Jimenez*, 750 F.3d at 385, but the Eleventh Circuit has effectively abandoned it, employing it only once post-*Gall*, in an unpublished decision, *United States v. Braithwaite*, 449 F. App'x 809 (11th Cir. 2011).

Rather than have the sentencing court "remain cognizant of [the Guidelines] throughout the sentencing process," however, the Fourth Circuit's analysis allows it to paper over erroneous Guidelines calculation merely by stating it would impose the same sentence in any

event. Thus, Snell's 108-month sentence was imposed and affirmed without *either* court discussing whether the 71-percent deviation from the correct Guidelines range, i.e. Snell's, is substantively reasonable, based on the extent of that deviation.

As Chief Judge Gregory has noted, "assumed error harmlessness inquiry" in the Fourth Circuit "has placed *Gall* in mothballs, available only to review those sentences where a district court fails to cover its mistakes with a few magic words." *Gomez-Jimenez*, 750 F.3d at 391 (Gregory, J., concurring in part and dissenting in part). "*Gall* is essentially an academic exercise in our circuit now…." *Id.*

4. The Fourth Circuit's willingness to declare a sentence substantively reasonable without analyzing it against the defendant's asserted Guidelines range creates a split with other circuits that refuse to disregard the Guidelines in that fashion. *See United States v. Langford*, 516 F.3d 205, 213 (3d Cir. 2008) ("[o]ur reasonableness review relies on a district court's reasoning from the starting point of the correctly calculated Guidelines through the § 3553(a) factors"); *United States v. Lanesky*, 494 F.3d 558, 561-562 (6th Cir. 2007) ("without considering the sentence in light of a properly calculated

guideline range, we cannot conclude with certainty that the defendant's substantial rights were unaffected…we cannot be certain that this error did not cause the defendant to receive a more severe sentence"); *United States v. Bah*, 439 F.3d 423, 431 (8th Cir. 2006) ("where, as here, the sentencing court pronounces an identical alternative sentence, not based on any alternative guidelines calculation but instead intended to cover any and all potential guidelines calculation errors, the sentencing court effectively has ignored the requirement…to 'first determine the appropriate guidelines sentencing range' for the alternative sentence") (citation omitted); *United States v. Munoz-Camarena*, 631 F.3d 1028, 1031 (9th Cir. 2011) ("A district court's mere statement that it would impose the same above-Guidelines sentence no matter what the correct calculation cannot, without more, insulate the sentence from remand, because the court's analysis did not flow from an initial determination of the correct Guidelines range").

Even the Eleventh Circuit, originator of the "assumed error harmlessness inquiry," now insists on such calculation. *United States v. Dunkley*, 812 F. App'x 820, 825 (11th Cir. 2020) (*Booker*'s consultation requirement "at a minimum, obliges the district court to calculate

correctly the sentencing range prescribed by the Guidelines," and while court can still sentence outside of the Guidelines, "the requirement of consultation is inescapable") (court's emphasis) (citation omitted).

In contrast, the First Circuit (like the Fourth) will find Guidelines error harmless simply because the district court said it would impose the same sentence anyway under § 3553(a). *United States v. Tavares*, 705 F.3d 4, 25 (1st Cir. 2013) (failure to calculate Guidelines range was harmless where district court acknowledged each side's range but said both were insufficient and imposed a sentence in excess of both). And at least one, the Sixth, now has a foot in both camps. *United States v. Montgomery*, 815 F. App'x 962 (6th Cir. 2020) (imposition of aggravating-role enhancement was harmless error where district court at sentencing said it "would have imposed the same sentence under § 3553(a) even if the guidelines calculation is determined to be wrong") (citing cases) (cleaned up).

5. *Munoz-Camarena*, *supra*, underscores why "assumed error harmlessness inquiry" is incompatible with *Gall*, *Kimbrough* and *Peugh*. In *Munoz-Camarena*, the district court erroneously calculated a Guidelines range of 33-41 months, then imposed a 65-month sentence,

stating that it would impose the same sentence even if it was wrong on the Guidelines. Reversing, the Ninth Circuit held that such a statement on its own could not insulate the sentence from remand because the court's analysis did not flow from a correct Guidelines calculation. 631 F.3d at 1031. Because the district court "must explain, among other things, the reason for the *extent* of a variance," and that extent "necessarily is different when the range is different…a one-size-fits-all explanation ordinarily does not suffice." *Id.* (court's emphasis, citation omitted).

The Fourth Circuit's "assumed error harmlessness inquiry" let the district court shirk that responsibility in sentencing Snell with exactly that one-size-fits-all explanation. While the court's actual sentence was 11 percent above the top end of its Guidelines range, it is fully *71 percent* above the top end of that for which Snell advocated. The same explanation the district court gave in justifying the 11-percent variance *a fortiori* cannot justify the far larger deviation from Snell's range, since "the extent necessarily is different when the range is different." *Munoz-Camarena*, 631 F.3d at 1031.

By rubber-stamping the district court's flawed explanation, the Fourth Circuit's "assumed error harmlessness inquiry" disregarded *Gall*'s directive to gauge substantive reasonableness against the totality of circumstances, "including the extent of any variance from the Guidelines range." 552 U.S. at 51. Because the analyses of both courts "did not flow from an initial determination of the correct Guidelines range," *Munoz-Camarena*, 631 F.3d at 1031, it contravenes *Gall*. *See also Langford*, 516 F.3d at 215 ("…while the district court is free to make its own reasonable application of the § 3553(a) factors, and to reject (after due consideration) the advice of the Guideline [citation], it must first duly consider the correct Guidelines" (citing *Kimbrough*, 552 U.S. at 113 (Scalia, J., concurring)). "Thus, a district court's incorrect Guidelines calculation will thwart not only its ability to accomplish the analysis it is to undertake, but our reasonableness review as well." *Id.*

6. Unsurprisingly, district courts have learned that their Guidelines analyses can be shielded from appellate review merely by reciting that the same sentence would be imposed regardless of any Guidelines error. The judge who sentenced Snell has couched other sentencing decisions in similar language, and had them affirmed under

"assumed error harmlessness inquiry." *See United States v. Pearson*, 596 F. App'x 198, 199 (4th Cir. 2015) (affirming sentence where court indicated that "[t]he sentence I have come to is the one that I think is appropriate, even if I am wrong about the one point for acceptance of responsibility….I would impose the same sentence"); *United States v. Bowman*, 717 F. App'x 202, 206 (4th Cir. 2017) ("the district court made clear that the issue of whether the two level decrease applied was irrelevant to the ultimate sentencing decision"). The judge also has made similar statements in other cases where no sentencing issue is raised on appeal. (5/24/19 Sent. TR, R. App. 19-2 in 4th Cir. No. 19-4392, *United States v. Grinder* , pg. 136/JA 804 ("…the sentence I'm about to impose is appropriate, regardless of my calculations and errors one way or the other, if there are any on the guidelines….")).

In *Montgomery*, *supra*, after a similar district-court statement led to affirmance as harmless Guidelines error, defendant on rehearing pointed out that the same district judge routinely includes that statement in his standard sentencing colloquy. Though the Sixth Circuit rejected the argument as untimely, one judge noted that such rote incantations deserve no appellate deference:

> We see no reason why we should give any weight to boiler-plate language designed to thwart a deserved resentencing. The purpose of our harmless-error analysis is to avoid the efficiency cost of resentencing in cases where we are absolutely certain that the district court would have announced the same sentence had it not erred. That aim plainly is not served by a standard-issue pledge that the district court would have come to the same result under the § 3553(a) factors had it calculated the Guidelines range correctly. [*United States v. Montgomery (On Reh'g)*, 969 F.3d 582 (6th Cir. Aug. 5, 2020) (Order) (Moore, J.)].

Plainly, district courts have figured out how to "bulletproof" their sentences from appellate review through such talismanic recitations. Granting the writ will allow this Court to end that unjust practice.

7. Alternatively, the Court should consider summary disposition under Rule 16.1 and a remand for the Fourth Circuit to determine whether any Guidelines-calculation error truly was harmless.

a. The Fourth Circuit misapplied its own "assumed error harmlessness" standard, under which it must be "certain" the district court would have imposed the same sentence even under defendant's Guidelines range, and that it would be reasonable. *United States v. Gomez*, 690 F.3d 194, 203 (4th Cir. 2012). For one thing, the district court's perfunctory statement that it would impose the same sentence

cannot support to a "certainty" that it actually would have done so under a corrected Guidelines range. *See Gomez-Jimenez*, 750 F.3d at 389 (Gregory, J., concurring in part and dissenting in part) ("I do not believe that a simple statement that the [district] court would have imposed the same sentence is sufficient, at least where the imposed sentence exceeds what would have been the Guidelines range absent the procedural error) (footnote omitted).

Indeed, as discussed above, such certainty *cannot* exist where the sentence flows from an incorrect Guidelines calculation. To show reasonableness, a district court must explain the reason for the extent of a variance – and that extent cannot even be known, absent the correct Guidelines calculation. *Munoz-Camarena*, 631 F.3d at 1031. Further, the district court's explanation for why it exceeded an erroneous Guidelines top by 11 percent cannot do double-duty and justify exceeding the correct upper limit by 71 percent.[2]

[2] The Fourth Circuit incorrectly described the district court's upward variance as based on "a request from the Government." (App. 03). Though the government agreed with the PSR's range of 151-180 months, it requested a sentence *below* that range. (Govt's Sent. Mem. R.81 (Sealed), pg. 1).

b. Even if Snell's ultimate sentence stands, the error in Guidelines calculation was not harmless for him. Under 28 C.F.R. § 550.55(b) and BOP Program Statement 5331.02, the dangerous-weapon enhancement will prevent Snell from obtaining a one-year sentence reduction to which he would be entitled under 18 U.S.C. § 3621(e)(2)(B) for completing the BOP's Residential Drug Abuse Treatment Program, for which the district court recommended him and for which he will become eligible in 2022. (Sent. TR, App. 010; *see also Hendricks v. Jenkins*, 2020 Westlaw 5430821, at *1-2 (N.D. Cal. Sept. 10, 2020)).

Snell has been a model prisoner. *United States v. Snell*, 2020 Westlaw 4053823, at *3 (D. Md. July 20, 2020) (denying compassionate release but noting "Snell's good conduct in the BOP is commendable"). Even if the district court's erroneous assessment of the dangerous-weapon enhancement is "harmless" in terms of judicial review of the sentence under § 3553(a), it cannot truly be deemed "harmless" where it will keep him incarcerated a full year longer than he should be. *See* Murray, Justin, *Policing Procedural Error in the Lower Criminal Courts* (August 17, 2020). FORDHAM LAW REVIEW, Forthcoming, NYLS Legal Studies Research Paper No. 3675869, available at

SSRN: https://ssrn.com/abstract=3675869 (advocating consideration of additional factors beyond whether procedural error affected the outcome, including whether error "caused substantial harm to a legally protected interest unrelated to the outcome").

8. This Court should end the circuit split under which similarly situated defendants face dramatically different sentences based solely on the happenstance of where that sentence is imposed. A defendant (like Snell) sentenced in the Fourth Circuit can have erroneous Guidelines calculations overlooked, and an unreasonably lengthy sentence affirmed, where the district court simply recites that it would impose the same sentence even if it erred on the Guidelines. Worse, that can happen where the Guidelines error demonstrably imposes a harm completely separate from the litigation – such as here, where the wrongful dangerous-weapon enhancement will keep Snell from obtaining a one-year sentence reduction.

In contrast, a defendant appealing his sentence in a circuit that faithfully applies *Gall* will have his sentence meaningfully reviewed on appeal. Even if it is affirmed as substantively reasonable, he still can obtain significant relief, such as correction of an erroneous Guidelines

enhancement that is having substantial spillover ramifications on him elsewhere.

CONCLUSION/RELIEF REQUESTED

The circuit courts are divided on the extent to which they adhere to this Court's instruction not only to begin the sentencing analysis with the Guidelines, but also to "*remain cognizant of them throughout the sentencing process*." *Gall*, 552 U.S. at 50 n. 6 (emphasis added). The Fourth Circuit's "assumed error harmlessness inquiry" allows district courts to completely unmoor their sentencing decisions from Guidelines analysis in a manner that improperly disregards and evades this Court's sentencing directives. It renders *Gall* a dead letter in that circuit.

Petitioner Snell urges this Court to grant certiorari review to resolve this important question, or in the alternative, grant summary relief under Rule 16.1.

Respectfully submitted,

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