

No. 11-257

---

IN THE  
*Supreme Court of the United States*

---

MARK HENTRY PANTLE

*Petitioner,*

v.

UNITED STATES

*Respondent.*

---

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

---

**SUPPLEMENTAL BRIEF FOR PETITIONER**

---

Thomas C. Goldstein  
Tejinder Singh  
GOLDSTEIN &  
RUSSELL, P.C.  
5225 Wisconsin Ave. NW  
Suite 404  
Washington, DC 20015

Gwendolyn Spivey  
*Counsel of Record*  
Asst. Federal Public  
Defender  
227 N. Bronough St.  
Suite 4200  
Tallahassee, FL 32301  
(850) 942-8818  
*gwen.spivey@fd.org*

## **SUPPLEMENTAL BRIEF FOR PETITIONER**

The questions presented by this case are whether a clearly erroneous increase in a defendant's Guidelines range constitutes plain error, or alternatively, whether such an error presumptively affects the defendant's substantial rights absent clear evidence that it did not affect his sentence. The Government's response to the petition is currently due November 14, 2011. Petitioner respectfully submits this Supplemental Brief to address the relationship between this case and three other pending petitions for certiorari. *Pacheco-Garcia v. United States*, No. 10-9445; *Guerrero-Campos v. United States*, No. 10-9746; *Wesevich v. United States*, No. 10-10340. The three petitions present a related question: whether a sentencing court commits plain error by applying an incorrect Guidelines range and imposing a sentence that is *within* the correct Guidelines range. The Court has now twice relisted all three petitions. Because this petition presents a similar question to the relisted petitions, but a superior vehicle to address the question, the Court may wish to hold the three petitions pending its resolution of this one, or to consider all four petitions together.

This petition and the relisted petitions present similar questions: whether the application of an erroneous Guidelines range constitutes plain error. However, in this case, but not in the relisted cases, the error resulted in a sentence greater than the high end of petitioner's correct Guidelines range. As the United States has explained in opposing review in the relisted cases, a defendant has a substantially stronger claim to relief when – as here – the erroneous sentence exceeds the high end of the correct Guidelines range:

While the advisory Guidelines range forms the “starting point and the initial benchmark,” district judges “may impose sentences within statutory limits based on appropriate consideration of all of the factors listed in [18 U.S.C.] 3553(a).” *Pepper v. United States*, 131 S. Ct. 1229, 1241 (2011) (citation omitted). *It would be one thing to presume that a reasonable probability exists that a judge might have imposed a different sentence if the judge imposed a within-range sentence, but the correct range does not overlap with the incorrect range that the judge actually applied. In that circumstance, the sentence actually imposed would reflect a departure (or variance) from the correct range when the court has not necessarily disagreed with the Guidelines’ advice. Cf. 18 U.S.C. 3553(c)(2) (requiring the court to give a “specific reason” for a non-Guidelines sentence). But it is quite different when the judge has already selected a sentence within the correct range. Under those circumstances, even if the court commits a Guidelines error, the court’s sentence accords with the Sentencing Commission’s advice, because of the overlap between the correct and incorrect ranges.*

BIO 7-8, *Pacheco-Garcia v. United States* (No. 10-9445), (footnote omitted; emphasis added); *see also* BIO 7-8, *Guerrero-Campos v. United States* (No. 10-9746) (using identical language); BIO 11-12, *Wesevich v. United States* (No. 10-10340) (same).

Not only is petitioner's claim for relief stronger, but his claim of a circuit conflict is stronger as well. In this case, the Eleventh Circuit effectively held that because the Guidelines are advisory, the application of an erroneous Guidelines range, even if it results in a sentence outside of the correct Guidelines range, does not presumptively affect substantial rights. *See* Pet. App. 11a-12a. That holding conflicts with those of the Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, and Tenth Circuits. *See* Pet. 13. The relisted cases all arise from decisions of the Fifth Circuit. That court presumes that a Guidelines error affects a defendant's substantial rights when there is no overlap between the erroneous and correct Guidelines ranges, or when there is an overlap, but the defendant's sentence is outside of the correct range. When, as here, the defendant's sentence falls outside of his correct Guidelines range, the Fifth Circuit's rule is entirely consistent with those of the Second, Third, Fourth, Sixth, Seventh, Ninth, and Tenth Circuits – the defendant's substantial rights presumptively are affected. The Eleventh Circuit's rule, on the other hand, conflicts with these holdings in all cases, and thus gives rise to a more robust conflict.

Finally, this case also more clearly frames the issue of the Guidelines' influence on the sentencing process because it allows the Court to contrast the within-Guidelines sentences that petitioner most likely would have received with the above-Guidelines sentence that he did receive. The relisted cases force the Court to compare one within-Guidelines sentence to another, and thus obscure the effect of the Guidelines.

Petitioner therefore respectfully suggests that the Court would benefit from the opportunity to consider this petition together with, or as an alternative to, the three relisted petitions.

As a result, this Court may wish to hold the relisted cases pending its disposition of this petition.<sup>1</sup>

Respectfully submitted,

Thomas C. Goldstein  
Tejinder Singh  
GOLDSTEIN &  
RUSSELL, P.C.  
5225 Wisconsin Ave. NW  
Suite 404  
Washington, DC 20015

Gwendolyn Spivey  
Counsel of Record  
Asst. Federal Public  
Defender  
227 N. Bronough St.  
Suite 4200  
Tallahassee, FL 32301  
(850) 942-8818  
gwen.spivey@fd.org

October 13, 2011

---

<sup>1</sup> As a courtesy, we are serving this Supplemental Brief on counsel in each of the relisted cases.