Case No. 21-7048

In the United States Court of Appeals
for the Tenth Circuit

United States of America,
Plaintiff-Appellee,

v.

Jimcy McGirt,
Defendant-Appellant.

On Appeal from the United States District Court
for the Eastern District of Oklahoma
The Honorable John F. Heil, III
D.C. Case No. 6:20-cr-00050-JFH-1

Appellant's Reply Brief

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Oral argument is requested.

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I. The Trial Judge Reversibly Erred by Refusing to Allow the Jury to Consider Prior Inconsistent Testimony as Substantive Evidence.

The 1997 testimony that Mr. McGirt offered at his 2020 trial was admissible for the truth of the matter asserted. As detailed below, this Court should reject the government's post-hoc efforts to excuse the trial judge's instruction barring the jury from considering the prior testimony as substantive evidence. Further, contrary to what the government claims, the erroneous instruction was not harmless. As Mr. McGirt will show, the government's case was hardly invulnerable, and the prior inconsistent testimony, if considered for its truth, might have persuaded one or more jurors to have a reasonable doubt about his guilt.

A. The impeachment-only instruction was erroneous.

Mr. McGirt's opening brief argued (at 16–17) that prior inconsistent testimony is admissible for the truth of the matter asserted—not merely as impeachment. The government admits, as it must, that Mr. McGirt is right about that: pursuant to Fed. R. Evid. 801(d)(1)(A), inconsistent statements given under oath at a prior proceeding come in as substantive evidence. *See* Gov't Br. at 13, 21–22. Nevertheless, the government maintains that it was acceptable for the trial judge to instruct the jury that it could only use the 1997 testimony to evaluate the witnesses' credibility, not as affirmative proof of anything. *See* R. vol. I at 427. According to the government (at 22–23), the instruction was proper because (1) the 1997 statements of B.C. that defense

counsel read into the record weren't from an official transcript, (2) the 1997 statements of B.C. and her mother, Ms. Kuswane, weren't actually inconsistent with their 2020 testimony, and (3) the three witnesses' prior statements lacked any substantive relevance. But none of these arguments can sustain the district court's judgment.

The government's justifications for the district court's instruction cannot even get off the ground because they're waived. The government didn't raise below any of the arguments it makes now. The district court didn't offer any of them as justification for its impeachment-only instruction.[1] And the government makes no attempt to show that its arguments present a cognizable alternative ground for affirmance. *See generally United States v. Damato*, 672 F.3d 832, 844 (10th Cir. 2012) (explaining that this Court looks to "several guiding factors in determining whether to consider an alternative theory: (1) whether the ground was fully briefed and argued here and below; (2) whether the parties have had a fair opportunity to develop the factual record; and (3) whether, in light of factual findings to which we defer or uncontested facts, our decision would involve only questions of law"). Because

[1] The record suggests that, despite defense counsel repeatedly pointing out that prior inconsistent testimony is admissible as substantive evidence, the district court simply didn't appreciate the fundamental point that there really is a prior testimony exception to the general rule that prior inconsistent statements are admissible only as impeachment. R. vol. I at 404–05, 427, vol. III at 518–20, 531–34.

the government entirely failed to brief the alternative-ground standard, its arguments should be discarded as waived. Defense counsel routinely get flagged for waiver in analogous circumstances. *See United States v. Leffler*, 942 F.3d 1192, 1196 (10th Cir. 2019) ("When an appellant fails to preserve an issue and also fails to make a plain-error argument on appeal, we ordinarily deem the issue waived (rather than merely forfeited) and decline to review the issue at all—for plain error or otherwise."). And "in the law, what is sauce for the goose is normally sauce for the gander." *Heffernan v. City of Patterson*, 578 U.S. 266, 272 (2016).

Assuming that the Court doesn't dismiss the government's arguments as waived, it should reject them as meritless.

1. The transcript of B.C.'s 1997 testimony

The government's complaint that defense counsel failed to proffer an official transcript when cross-examining B.C. distorts the facts, lacks legal foundation, and flunks the requirements for affirmance on alternative grounds.

First, the record doesn't support the government's assertion (at 22) that "there [wa]s some question as to the reliability of the transcript" that defense counsel used during B.C.'s cross-examination. During the government's redirect of B.C., everyone came to realize that the prosecution and the defense had independently obtained transcriptions of B.C.'s 1997 testimony and that

the parties' transcripts had different page numbers. R. vol. III at 261–75. Contrary to what the government suggests, however, there was no question about the reliability of the defense's transcript. Defense counsel purchased it from the court reporter, and it was designated as an official transcript. *Id*. at 274–75. No one suggested below—and the government does not maintain on appeal—that there's any substantive difference between the two transcripts in terms of what B.C. was reported to have said. In other words, the government has never disputed that what defense counsel read to the jury is precisely what B.C. said in 1997. This whole thing is a tempest in a teapot.

Second, to the extent that the government means to suggest that defense counsel was required to use some specific kind of transcript with a particular stamp or certification, that notion has no foundation in the Rules of Evidence. Mr. McGirt only needed to show, by a preponderance of the evidence, *Bourjaily v. United States*, 483 U.S. 171, 175 (1987), that the witness in fact made the inconsistent statement and that she did so under oath during a prior proceeding. *See* Fed. R. Evid. 801(d)(1)(A). Mr. McGirt easily satisfied that standard. As noted, what defense counsel read into the record was transcribed by the official court reporter. The prosecutor—who had copies of both transcripts, R. vol. III at 237—never complained that the defense's recounting of the 1997 testimony was inaccurate. The record thus shows more likely than not that B.C.'s 1997 testimony was given as read by defense counsel.

Third, even if there were something to the government's complaint (and there isn't), its argument doesn't satisfy any of the requirements for affirmance on alternative grounds. *See Damato*, 672 F.3d at 844. The government didn't object to the cross-examination of B.C. below on the grounds it presents on appeal. Further, the tossed-off sentences in the government's brief addressing the transcript issue (at 22)—which are unaccompanied by any authority—do not count as fully briefing and arguing the point on appeal. Moreover, the government's sandbagging of this issue deprived Mr. McGirt of the opportunity to fully develop the factual record below. Had the government challenged Mr. McGirt's cross-examination at the time, defense counsel could have put a line-by-line comparison of the transcripts on the record to show that they were equivalent—or, alternatively, could have used the government's copy of the transcript to question B.C. Finally, the government's argument primarily presents a question of fact (whether B.C. actually gave the testimony in question), not a pure issue of law of a sort that this Court can decide for the first time on appeal. For these reasons—not to mention the fact that the government's transcript complaint goes to just one of the three witnesses at issue—this argument isn't a plausible basis for affirmance on alternative grounds.

2. Inconsistency

Nor can the government prevail based on a gesture in the direction of Rule 801(d)(1)(A)'s inconsistency requirement. Mr. McGirt's opening brief

(at 6–7, 18–20) showed that the 1997 statements defense counsel relied on were inconsistent with the prosecution witnesses' 2020 testimony. The government, however, asserts without elaboration that, "as to B.C. and her mother, Ms. Kuswame, the state testimony does not appear to be inconsistent with the testimony offered at trial in any material manner." Gov't Br. at 22. This is mere *ipse dixit*, not a meaningful response to Mr. McGirt's arguments. Rather than repeating his arguments here, Mr. McGirt refers the Court back to his opening brief—specifically, to Section I.B of the Statement of the Case and Section I.B of the Argument—for a detailed explanation of the inconsistencies. In any event, the trial judge himself determined that the prior testimony of B.C. and Ms. Kuswane was inconsistent with their testimony in 2020. R. vol. I at 427. The government has failed to show that this determination was an abuse of discretion.

3. Substantive relevance

Finally, the government contends (at 13, 23) that the impeachment-only instruction was proper because "none of the statements were [sic] exculpatory—the only true use for any of the statements was for impeachment purposes." The district court didn't address this issue, and it's not a cognizable basis for affirmance on alternative grounds. *See United States v. Tony*, 948 F.3d 1259, 1263–64 (10th Cir. 2020). In any event, the government's position that the prior statements "held no substantive value" (at 25) is untenable.

The truth of the matter asserted in the inconsistent statements—and especially those recounted in Mr. McGirt's opening brief (at 6–7, 18–20)—strongly supported his defense.

For example, B.C.'s 1997 testimony that her mother told her to say that Mr. McGirt abused her plainly had significance far beyond the mere fact that it was different from B.C.'s 2020 testimony. The *actual truth* of the 1997 testimony—the implication that B.C.'s mother *in fact did* put these allegations into B.C.'s head—advanced Mr. McGirt's theory that the accusations originated with Ms. Kuswane and that B.C.'s case is a tragic instance of false memory. Similarly, the primary import of Ms. Kuswane's 1997 admission that B.C. stayed with her father at least part of the time while Ms. Kuswane was away in Mexico was not that the statement differed from Ms. Kuswane's 2020 testimony. The actual truth of the proposition that B.C. stayed with her father bolstered the defense theory that Mr. McGirt lacked opportunity to engage in the conduct of which he was accused—conduct that supposedly happened every day, Gov't Br. at 6. Likewise, the main thrust of Norma Blackburn's 1997 testimony that B.C. never displayed any physical or behavioral manifestations of abuse was not that such testimony damaged Ms. Blackburn's credibility. The truth of the matter asserted—that B.C.'s conduct, appearance, and demeanor during the period in question were normal—affirmatively supported Mr. McGirt's claim that she had not, in fact,

been sexually abused. And so on, for all the rest of the prior inconsistent testimony.[2]

The government, however, posits that the prior testimony had no substantive relevance because it didn't do something like "establish[] an ironclad alibi or prove[] another shooter pulled the trigger." Gov't Br. at 25. The government cites no authority for the premise that a trial judge can effectively exclude defense evidence as irrelevant unless it constitutes incontestable proof of innocence. No such authority exists. To the contrary:

> An item of evidence, being but a single link in the chain of proof, need not prove conclusively the proposition for which it is offered. It is enough if the item could reasonably show that a fact is slightly more probable than it would appear without that evidence. A brick is not a wall.

United States v. Sloan, 65 F.3d 152, 154 (10th Cir. 1995) (quoting *United States v. Porter*, 881 F.2d 878, 887 (10th Cir. 1998)) (alteration marks omitted). Here, as described above and further explored below, the prior statements, if considered for their truth, could reasonably show that Mr. McGirt's defense is

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[2] The government's brief (at 16–21) quotes most of the prior inconsistent testimony offered by the defense. But there are two problems with the government's list. First, it omits at least three significant passages of prior inconsistent testimony, R. vol. III at 254–55, 259–60, 441—including, for example, 1997 testimony that B.C.'s aunt also prodded her to accuse Mr. McGirt of abuse. *Id*. at 259–60. Second, the government's list presents the prior inconsistent statements shorn of any context, thereby giving the misleading impression that some of the statements were random and obscure. In reality, as demonstrated throughout Mr. McGirt's briefing, the prior testimony systematically supported the defense's theory of the case.

more probable than it would appear without that evidence. Accordingly, the government's relevancy argument—which isn't properly before the Court in any event—fails on the merits.

B. The impeachment-only instruction was not harmless.

The government alternatively argues that it was harmless error for the trial judge to prohibit the jury from considering the prior testimony for its truth. The Court should reject that argument, too.

The government admits (at 12) that the defense's effort to use the prior inconsistent testimony was "[t]he main defense strategy." The trial judge's instruction barring the jury from considering any of that evidence for substantive purposes implicates Mr. McGirt's constitutional right to present a defense. *See generally Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). Thus, as the government correctly suggests, the question is whether the government can establish "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Gov't Br. at 24 (quoting *United States v. Holly*, 488 F.3d 1298, 1307 (10th Cir. 2007)). The government cannot carry that burden.

As the government acknowledges (at 25), the trial judge's erroneous instruction affected "copious excerpts of state preliminary [hearing] and state trial testimony of B.C., her mother, and her grandmother." And this large volume of evidence was highly consequential. Considered cumula-

tively, and for the truth of the matter asserted, the prior inconsistent statements that the judge's instruction improperly negated could have made a substantial case for reasonable doubt.

The prior testimony indicated that, during the week in question, Mr. McGirt lacked the opportunity to engage in the conduct alleged because he was rarely, if ever, alone with B.C. On the days that B.C.'s grandmother, Ms. Blackburn, worked a shift at the hospital, B.C. often stayed at her father's house until Ms. Blackburn got off work—"about three times during that week." R. vol. III at 453, 457. And when B.C. wasn't away at her father's, either Ms. Blackburn or B.C.'s uncle, Matt, was home with B.C. *Id*. at 290–94.

The prior testimony also showed that B.C. never appeared to be in any distress. She did not appear to be afraid of Mr. McGirt. *Id*. at 450. And she did not display anything like withdrawal, crying, tantrums, or uncharacteristic bad behavior. *Id*. at 456. The government alleges that "B.C. had nightmares during that week where B.C. would shake and cry so hard that the child's hair would become wet." Gov't Br. at 5. But this allegation backfires. It only serves to underscore the importance of the 1997 testimony as substantive evidence. According to the grandmother's 1997 testimony, B.C. started having these nightmares *long before* the week that the abuse allegedly occurred—"[a]bout a year" beforehand. R. vol. IIII at 452. Thus, the prior testimony, if considered for its truth, indicated that B.C.'s nightmares were not

caused by anything that happened during the week that B.C.'s mother, Ms. Kuswane, was vacationing in Mexico.

Finally, the prior testimony suggested that the allegations against Mr. McGirt originated with B.C.'s mother, Ms. Kuswane—not B.C. herself. Mr. Kuswane had a preexisting, "hostile" attitude towards Mr. McGirt that was both intense and years in the making. *Id*. at 444–46. For some two weeks after Ms. Kuswane returned from Mexico, no allegations were made against Mr. McGirt. *Id*. at 370.[3] However, Ms. Kuswane eventually told B.C. "to say that Jimcy did these things to you," *id*. at 240–41—and B.C. did so.

Given that there was no physical or medical evidence to support the charges, it's surely possible that the prior testimony—if considered as substantive evidence—could have caused at least one juror to harbor a reasonable doubt about Mr. McGirt's guilt. It follows that the error was not harmless: the government has not shown beyond a reasonable doubt that the impeachment-only instruction did not contribute to the verdict.

In arguing otherwise, the government (at 26–29) addresses each of the prior statements piecemeal, in a divide-and-conquer fashion. But that's a

[3] The answer brief's statement of facts incorrectly asserts (at 5) that allegations against Mr. McGirt arose"[a] few days after Ms. Kuswane returned from Mexico." Although that's what Ms. Kuswane initially said on direct examination, she recanted that testimony under cross-examination and admitted that it was two weeks after she returned, not three days. R. vol. III at 371.

sleight of hand. "[T]he whole is often greater than the sum of its parts—especially when the parts are viewed in isolation." *D.C. v. Wesby*, 138 S. Ct. 577, 588 (2018) (reasonable suspicion case). Indeed, the very fact that the erroneous limiting instruction negated 28 passages of prior testimony, involving all three of the key witnesses at trial, suggests that the instruction was not harmless. *See United States v. Chavez*, 976 F.3d 1178, 1207 (10th Cir. 2020). Moreover, as shown above, it's the totality of the prior testimony, not any one statement individually, that plausibly supports reasonable doubt about Mr. McGirt's guilt.

The government maintains that the jurors wouldn't have been required to accept the inferences that Mr. McGirt wanted them to draw from the prior testimony. For example, the government proposes (at 26) that a jury reasonably could have found that B.C.'s memories of abuse were genuine even if her mother told her to make the accusations. Similarly, the government suggests (at 27) that a jury reasonably could have found that Mr. McGirt surreptitiously assaulted B.C. even while her uncle, Matt, was present. The government also submits (at 28) that a jury might have thought that the reason B.C. displayed no physical or behavioral manifestations of abuse is that the three- or four-year-old made the decision "to hide any reaction from her grandmother." But all such efforts to explain away the defense's evidence misapprehend the harmless-error standard.

It's not enough that the jury *could have* accepted the government's spin on the evidence. *See Chavez*, 976 F.3d at 1212 (explaining that, on harmless error review, inquiring into the sufficiency of the evidence is asking "the wrong question"); *United States v. Medina-Copete*, 757 F.3d 1092, 1108 (10th Cir. 2014) ("Despite our conclusion above that the evidence was sufficient to convict, we are unpersuaded under the different standard of harmless-error review that [the error] was harmless."). Instead, the question is whether "[i]t is clear beyond a reasonable doubt that a rational jury *would have* found the defendant guilty absent the error." *Neder v. United States*, 527 U.S. 1, 18 (1999) (emphasis added). It's true that a properly instructed jury still could have found Mr. McGirt guilty. But it's also true that a properly instructed jury could have found that the prior inconsistent testimony, when considered for its truth, gave rise to reasonable doubt. The fact that either course would have been a rational response to the trial evidence suffices to show that the error was not harmless. *See Neder*, 527 U.S. at 20 (explaining that the harmless-error inquiry asks whether "the record contains evidence that could rationally lead to a contrary finding"). The government's effort to explain away the prior inconsistent testimony is a closing argument for a jury on retrial, not a harmless-error argument for this Court. *See United States v. Wheeler*, 776 F.3d 736, 741 (10th Cir. 2015).

The government insists (at 29) that its case against Mr. McGirt was "overwhelming." But this isn't a fair characterization of the government's

evidence, which was almost exclusively limited to the following: (1) the testimony of B.C., who was a suggestible three- or four-year-old at the time and may have labored under false memories; (2) the testimony of B.C.'s mother, Ms. Kuswane, who had a preexisting grudge against Mr. McGirt and may have brought all this about (and then found herself in too deep); and (3) the testimony of B.C.'s elderly grandmother, who appeared to have cognitive difficulties and reversed what she'd said at the 1997 trial after feeling guilty for not supporting her granddaughter back then. While such testimony might be legally sufficient to sustain a conviction, it does not amount to overwhelming evidence.

The government claims that these witnesses were corroborated, but such claims are hollow. The government touts a "letter of confession" that it says Mr. McGirt wrote, Gov't Br. at 7, 9, 18–19, 22–23, 29—but, in reality, the government never produced any such letter. The government gestures at a contemporaneous tape recording that it says supports its case, *id.* at 6—but, again, it never actually produced such a recording. The government represents that B.C. confided in a cousin, S.H., not long after the abuse occurred, *id.*—but it didn't call S.H. to testify and didn't produce any independent evidence of the alleged conversation. Finally, the government points to the testimony of a pediatrician who examined B.C. after the allegations came to light, Gov't Br. at 4, 7, 29—but, in fact, the doctor found no physical signs of

abuse, R. vol. III at 151–56. Thus, the government's case lacked meaningful corroboration.[4]

In short, the government's evidence was not overwhelming, and the judge's erroneous instruction eviscerated Mr. McGirt's defense. The government has not shown beyond a reasonable doubt that Mr. McGirt would have been convicted had the jury been properly instructed that it could consider the prior inconsistent testimony as substantive evidence. Indeed, the government has not even shown harmlessness by a preponderance of the evidence.

* * *

It's regrettable that everyone involved may need to suffer through another trial of this case. Whether or not B.C.'s memories of abuse are mistaken, it's unfortunate that she may have to recount them in court again. But defense counsel tried their best to avoid that outcome by informing the trial court in no uncertain terms that it needed to allow the prior inconsistent testimony as substantive evidence. R. vol. I at 404–05, 427, vol. III at 518–20, 531–34. The prosecution failed to warn the trial judge that defense counsel was right, and the judge committed a serious error that struck at the heart of

[4] The government's Statement of Facts mentions (at 2 n.2) that Mr. McGirt's record includes prior sex offense convictions. But the trial judge ruled those convictions inadmissible pursuant to the ban on character evidence. R. vol. I at 376. Because the jury did not hear about the prior convictions, they have no bearing on the harmless error inquiry.

Mr. McGirt's defense. The law requires a new trial so that Mr. McGirt's defense can be fairly considered.

II. The Sentencing Judge's Plainly Erroneous Miscalculation of the Guidelines Range Affected Mr. McGirt's Substantial Rights.

The government pleads *nolo contendere* to most of Mr. McGirt's arguments on Issue II and defends Mr. McGirt's sentence on narrow grounds. Although it stops short of officially confessing error, the government does not contest Mr. McGirt's claim that the district court erred by using U.S.S.G. § 2A3.1 (1996) to determine the offense level for Count Three. *See* Opening Br. at 23–26. It similarly doesn't dispute that this error was plain. *Id*. at 26–27. Nor does the government deny that this error resulted in the district court deploying an incorrect, higher Guidelines range. *Id*. at 28–30. Further, the government does not contend that the scripted sentence the judge recited near the end of the sentencing hearing—the same sentence, word for word, that he recites at every sentencing hearing[5]—would support a holding that

[5] After the opening brief was filed, counsel obtained four additional transcripts in which Judge Heil read into the record the identical scripted sentence quoted in Mr. McGirt's opening brief (at 31). *See* Sentencing Tr. at 20–21, ECF No. 52, *United States v. Jimenez*, No. 4:21-CR-00192-JFH-1 (N.D. Okla. Feb. 25, 2022); Sentencing Tr. at 26, ECF No. 202, *United States v. Studie*, No. 4:20-cr-00095-JFH-1 (N.D. Okla. Dec. 2, 2021); Sentencing Tr. at 17, ECF No. 33, *United States v. Reyes-Cruz*, No. 4:20-cr-00221-JFH-1 (N.D. Okla. Apr. 2, 2021); Sentencing Tr. at 18, ECF No. 47, *United States v. Youngblood*, No. 4:20-cr-00174-JFH-1 (N.D. Okla. Jan. 27, 2021).

the plain error was harmless. *Id*. at 31–33. And, finally, the government does not dispute that a plain error affecting Mr. McGirt's substantial rights would also seriously affect the fairness, integrity, and public reputation of judicial proceedings. *Id*. at 33.

The government's only argument (at 31–36) is that the sentencing court's explanation of its sentencing decision shows that the Guidelines range did not matter. But the government's arguments fail to overcome the presumption that a plain Guidelines error is prejudicial, or to show that there's no reasonable possibility that Mr. McGirt would have received a lower sentence under an application of the correct Guidelines range. *See Molina-Martinez v. United States*, 578 U.S. 189, 198 (2016); *United States v. Sabillon-Umana*, 772 F.3d 1328, 1333 (10th Cir. 2014).

The thrust of the government's argument seems to be the following: If the sentencing court varied upward from a 210-to-262-month Guidelines range because a sentence in that range would not adequately reflect the seriousness of the offenses or of Mr. McGirt's criminal history, then surely the court also would have varied upward from a 188-to-235-month range for the same reasons. But this argument doesn't work. The issue is not whether a lower Guidelines range would have affected the sentencing court's binary decision of whether or not to vary upward at all. Rather, the question is whether the sentencing court, using a lower Guidelines range as its starting

point, might have varied upward to something like 360 or 405 months (more on the latter number below), instead of life imprisonment.

When a sentencing judge decides to vary, the Guidelines range still exerts a "pull" on the ultimate sentence. District courts don't just begin their analysis with the Guidelines. They also must "remain cognizant of them throughout the sentencing process." *Molina-Martinez*, 578 U.S. at 198. If a court "decides that an outside-Guidelines sentence is warranted," then it "must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance." *Gall v. United States*, 522 U.S. 38, 50 (2007). In this way, even if a sentencing court decides to vary upward, the Guidelines still "anchor the court's decision in selecting an appropriate sentence." *Molina-Martinez*, 578 U.S. at 204. And that is why, as this Court has explained, a Guidelines error "runs the risk of affecting the ultimate sentence *regardless of* whether the court ultimately imposes a sentence within or outside [the] range," *Sabillon-Umana*, 722 F.3d at 1333—i.e., even if the judge has decided upon an upward variance.

In light of these principles, we have good reason to think that the Guidelines error affected the sentence. Consider the Sentencing Guidelines Table, which provides a standardized and routinely utilized method for assessing the extent/degree of a variance. Going from the incorrect, 210-to-262-month range that the district court used to a range that includes life imprisonment required an upward variance of five offense levels. But going up

five levels from the correct, 188-to-235-month range produces a range that tops out at 405 months (not quite 34 years). Reaching a life sentence from the correct 188-to-235-month range would have required a six-level variance—a variance of a greater degree than the one the district court imposed.[6]

The Statement of Reasons quoted by the government (at 32–35) does suggest that the district court thought the interests in retribution and incapacitation were sufficiently weighty to call for a five-level variance. But did the court think those interests were enough for a *six*-level variance? Nothing the government says indicates that the court thought so. And to the extent that the record is inconclusive, such uncertainty is fatal to the government's argument: "Th[e] reasonable probability standard does not require [the defendant] to prove by a preponderance of the evidence that, but for the error, the outcome would have been different. Instead, a reasonable probability is a probability sufficient to undermine confidence in the outcome." *United*

[6] An alternative approach would be to consider the variance in percentage terms. Viewing the matter through that lens also suggests that the error affected Mr. McGirt's substantial rights. Statistically speaking, a life sentence is equivalent to 470 months. *See* U.S. Sentencing Comm'n, 2021 Annual Report and Sourcebook of Federal Sentencing Statistics 202 (2021), https://bit.ly/3uc8tVM. A 470-month sentence represents a 79% upward variance from the erroneous, 210-to-262-month Guidelines range used by the district court in this case. But a 79% upward variance from the correct, 188-to-235-month range would result in 421 months' imprisonment—a meaningfully shorter sentence. To reach a 470-month sentence from a 188-to-235-month range would require a 100% upward variance—i.e., a substantially larger variance.

States v. Benford, 875 F.3d 1007, 1017 (10th Cir. 2017) (internal punctuation and citation omitted).

In fact, however, the record affirmatively suggests that the district court would not have varied by more than five levels. According to the district court, one of the reasons that it landed on a life sentence was the following:

> Since the defendant's offense occurred in 1996, the sentencing guidelines have been revised since that time. Under the current guidelines, defendant would receive a five-level enhancement pursuant to U.S. Sentencing Guideline 4B1.5(b)(2) as a repeat and dangerous sex offender against minor children, rendering his base offense level 41 with a guideline range of imprisonment from 360 months to life.

R. vol. III at 60. In other words, the district court imposed a life sentence in substantial part because it concluded that Mr. McGirt's offense level would be five levels higher under current law, and life imprisonment was the top of the Guidelines range that would have applied if Mr. McGirt had committed these offenses today. But a five-level increase to the correct Guidelines range would produce an offense level of 40, with a Guidelines range of imprisonment from 324-to-405 months' imprisonment. Thus, the district court's rationale implies that it would have imposed a sentence of at most 405 months if it had started from the correct Guidelines range.

In spite of the foregoing, the government suggests that the Guidelines error was harmless under this Court's decision in *United States v. Gieswein*, 887 F.3d 1054 (10th Cir. 2018). Contrary to what the government implies,

however, *Gieswein* did not hold that a thorough explanation for an above-Guidelines sentence renders a Guidelines error harmless. Rather, what *Gieswein* held is that, when a district court explicitly concludes that the sentence would be the same regardless of the Guidelines range—as the judge did in *Gieswein*—a thorough explanation for *that conclusion* may contribute to a finding of harmlessness. *See Gieswein*, 887 F.3d at 1062–63 ("[I]n the vast majority of cases, it is not procedurally reasonable for a district court to announce that the same sentence would apply even if correct guidelines calculations are substantially different, without cogent explanation. In this case, the district court offered a cogent explanation.") (internal punctuation and citation omitted). In Mr. McGirt's case, the district court never concluded in the first place that its sentencing decision would be the same regardless of the Guidelines range, *see* Opening Br. at 32, so the court's explanation of Mr. McGirt's sentence can't logically be read as a justification for concluding that the Guidelines wouldn't make a difference.

Gieswein is distinguishable for another reason, too. In *Gieswein*, the procedural history of the case provided concrete proof that the Guidelines range did not matter. The appeal in *Gieswein* was from a resentencing. At the first sentencing, the district court computed the defendant's Guidelines range at 188 to 235 months' imprisonment, and it varied upward to a statutory maximum sentence of 240 months. *See Gieswein*, 887 F.3d at 1056–57. Years later, the defendant's sentence was vacated pursuant to *Johnson v. United States*,

576 U.S. 591 (2015), and the Guidelines range applied at the resentencing was 92 to 115 months. *See Gieswein*, 887 F.3d at 1057–58. Even though the Guidelines range was different, the district court again imposed the same 240-month sentence and commented that it would have gone even higher had 240 months not been the statutory maximum. *Id*. at 1058. That "[t]he district court elected to impose the same sentence even though Gieswein's new range was less than half of his prior range," this Court explained, "suggest[ed] that the court might again impose the same sentence under an even lower advisory range." *Id*. at 1062. Mr. McGirt's case does not involve the unusual situation presented in *Gieswein*.[7]

For all of these reasons, as well as those set forth in the opening brief, the Court should conclude that the presumption of prejudice controls on this record.

Conclusion

This Court should vacate and remand for a new trial. If the Court affirms Mr. McGirt's convictions, it should vacate and remand for resentencing.

[7] The government also cites *United States v. Burris*, 29 F.4th 1232 (10th Cir. 2022), but that decision doesn't help the government's argument at all. *Burris* held that the error in that case was prejudicial, not harmless.

Respectfully submitted,

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Certificate of Compliance

I hereby certify that, to the best of my knowledge and belief, formed after a reasonable inquiry, this brief is proportionally spaced and contains 5,487 words and therefore complies with the applicable type-volume limitations.

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