No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ARLOW ANTONE KAY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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Date Sent by Federal Express Overnight Delivery: August 20, 2018

QUESTION PRESENTED

Have the departure provisions of the United States Sentencing Guidelines been rendered "obsolete" and "superfluous" by this Court's opinion in *United States v. Booker*, 543 U.S. 220 (2005), rendering robust appellate review of district courts' applications of these provisions unnecessary?

PARTIES TO THE PROCEEDING

All parties to the proceeding are listed in the caption. The petitioner is not a corporation.

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Petitioner Arlow Antone Kay respectfully requests that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on May 21, 2018.

OPINION BELOW

The court of appeals' memorandum (App. A) is designated "Not for Publication," but is published in the Federal Appendix at 722 F. App'x 750. The district court's sentencing (App. B) is unreported.

JURISDICTION

The United States District Court for the District of Arizona had jurisdiction over the government's federal charges against Mr. Kay pursuant to 18 U.S.C. § 3231. The judgment of the United States Court of Appeals for the Ninth Circuit was entered on May 21, 2018. App. A at 1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL PROVISION

The Sixth Amendment to the United States Constitution provides as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

1. Arlow Antone Kay is a 33-year-old member of the Navajo Nation and resident of northern Arizona. In late January of 2016, the government filed an

indictment charging Mr. Kay with one count of second degree murder in violation of 18 U.S.C. §§ 1111 and 1153. The indictment charged that on or about July 3, 2015, Mr. Kay "with malice aforethought did unlawfully kill" Danny Yellowhair.

Mr. Kay waived his right to a jury trial and entered into a joint stipulation with the government establishing the following facts as undisputed:

1. On July 3, 2015, Mr. Kay and Danny Yellowhair ("Mr. Yellowhair") were drinking together at a location near Kayenta, Arizona, on the Navajo Indian Reservation, in the District of Arizona. The location was near the home of Mike Gray, on the east side of Diamond Towing Yard in Kayenta.

2. At some point, an argument ensued between Mr. Kay and Mr. Yellowhair because Mr. Yellowhair made disparaging comments about Mr. Kay's family members.

3. If called to testify, Lance Benally ("Mr. Benally") would state that he was sitting outside Mike Gray's house with Mr. Yellowhair, Mr. Kay, and others, drinking 40-ounce bottles of beer. Mr. Benally would testify that he saw an argument between Mr. Kay and Mr. Yellowhair. Mr. Benally would further testify that, at some point, he saw Mr. Kay get up, pull out a small knife, walk towards Mr. Yellowhair, and begin to stab Mr. Yellowhair.

4. The Kayenta Police Department received a call on July 3, 2015 at 8:37 p.m., from a Rosie (Rosita) Holiday, about a stabbing. Police responded to the location described by the caller, a green trailer, where they found Mr. Yellowhair. Officers who responded to the scene would testify they found Mr. Yellowhair at the Holiday trailer which was located approximately 130 yards from Mike Gray's residence. These officers would also testify that there was a trail of blood leading from the Gray residence to the Holiday residence.

5. Police who responded to the Gray residence found Mr. Kay, who had not left the scene. He was arrested at that time. At the time of his arrest, two knives were taken from Mr. Kay. One of the knives had blood on it.

6. Mr. Yellowhair was transported to the Kayenta Health Center and later evacuated via helicopter to the San Juan Regional Medical

Center, in Farmington, New Mexico. Mr. Yellowhair was taken into the trauma room at the San Juan Regional Medical Center "under CPR situation." He was subsequently pronounced dead.

7. If called to testify, Lauren Dvorscak, MD, would state that she performed an autopsy of Mr. Yellowhair, on July 4, 2015. Dr. Dvorscak would testify that Mr. Yellowhair sustained 15 stab wounds, two of which punctured a vital organ. Dr. Dvorscak would also testify that a contributory condition to Mr. Yellowhair's death was cirrhosis.

8. The incident between Mr. Kay and Mr. Yellowhair, described herein, took place on the Navajo Indian Reservation. The Navajo Nation is a federally- recognized Indian tribe. Mr. Kay is an Indian who is subject to the special jurisdiction of the United States on Indian reservations.

The district court conducted a brief bench trial on these stipulated facts. Mr. Kay's counsel (intending that Mr. Kay would receive a two-level reduction in his United States Sentencing Guidelines (Guidelines) offense level for acceptance of responsibility), declined to present argument. (All references to the Guidelines herein are to the 2016 edition of the United States Sentencing Guidelines Manual, which was applied here without objection from either party.) The government argued that the stipulated facts confirmed that Mr. Kay acted with malice and was guilty of second degree murder.

The court "adopt[ed] the parties' facts as the [c]ourt's factual findings," and proceeded to render its verdict. The court noted that "[t]he only arguable proof of malice aforethought" was the facts stipulated in paragraphs 2 and 3, but these facts were "unclear": They established that Mr. Kay acted in the course of an argument, after Mr. Yellowhair made "disparaging comments" about his family members, and there was "no other evidence or proffered testimony to prove malice aforethought here." Based on this "very limited evidence," the court concluded that the

government had failed to prove that Mr. Kay was guilty of second degree murder. Finding that the stipulated facts were sufficient to prove "that Mr. Kay intentionally killed Mr. Yellowhair while in a sudden quarrel or heat of passion caused by adequate provocation," however, the court found Mr. Kay guilty of the lesser included offense of voluntary manslaughter.

2. Eight days later the government filed a motion requesting a "5-level upward departure" pursuant to Guidelines § 5K2.8 – the policy statement covering "extreme conduct" – and a 180-month sentence. The government argued that such a departure was appropriate because the evidence of provocation justifying the voluntary manslaughter verdict was limited, and because the killing was "unusually heinous and cruel." The government further argued that § 5K2.8 was applicable because Mr. Kay stabbed Mr. Yellowhair 15 times – a "gratuitous infliction of injury" – and Mr. Kay was "bigger and younger" than Mr. Yellowhair.

Two months later the probation officer circulated a draft presentence report. The base offense level for voluntary manslaughter is 29. Guidelines § 2A1.3. The probation officer deducted two levels for Mr. Kay's acceptance of responsibility pursuant to Guidelines § 3E1.1(a), yielding an adjusted offense level of 27. Because Mr. Kay had no countable criminal history, his criminal history category was I. With an offense level of 27 and a criminal history category of I, Mr. Kay's Guidelines sentencing range was 70 to 87 months. Guidelines ch. 5, pt. A. The probation officer acknowledged that Mr. Kay's offense conduct "appear[ed] to be related to his alcohol abuse and his failure to control his temper when intoxicated,"

and that since the offense, Mr. Kay had "completed an anger management class and substance abuse treatment." But the probation officer nevertheless recommended a "six-level upward departure, pursuant to U.S.S.G. § 5K2.8," and 168-month sentence. The probation officer asserted that this upward departure was appropriate "to address the unusually heinous and brutal conduct of the defendant" in light of the "excessive physical violence" of the offense.

Mr. Kay filed a sentencing memorandum requesting a sentence within the 70-to-87-month Guidelines sentencing range. He argued that such a sentence would be sufficient to achieve the purposes of sentencing consistent with 18 U.S.C. § 3553(a). Mr. Kay also stressed the connection between the offense and his alcohol abuse, the aberrant nature of his conduct, and the positive steps he had recently taken toward his rehabilitation – including his completion of classes in anger management, graduate equivalency, and substance abuse.

3. After confirming that neither party objected to the presentence report, the district court adopted the probation officer's Guidelines calculations, setting the initial Guidelines sentencing range at 70 to 87 months. App. B at 3-4. The court heard the statements of Mr. Yellowhair's widow and daughter, both of whom urged the court to impose the 15-year statutory maximum sentence. *Id*. at 4-9. Mr. Kay declined to allocute, but his counsel noted that he deeply regretted his role in Mr. Yellowhair's death, and highlighted the steps he had taken to address the substance-abuse and anger problems that had contributed to his actions. *Id*. at 10-12. Mr. Kay's counsel argued against the government's requested upward

departure, noting that only two of the stab wounds Mr. Yellowhair suffered reached "vital organs," and that Mr. Yellowhair "probably bled more profusely because of other preexisting conditions." *Id*. at 12. Mr. Kay's counsel also reminded the court of the evidence indicating that faulty medical treatment following the incident had contributed to Mr. Yellowhair's death, and noted that these facts suggested that "this wasn't a particularly cruel or heinous type of circumstance." *Id*. at 12-13.

The government countered that an upward departure was justified by Mr. Kay's "extreme conduct." *Id*. at 15. The government noted that Mr. Kay was larger and younger than Mr. Yellowhair, stressed the "disparity in the injuries to the victim versus the defendant," and described the incident as a "surprise attack." *Id*. at 15-16. The government also asserted that "this is a voluntary manslaughter that is really close to a second" (*i.e.*, a second degree murder) because what led to it was "a nothing argument." *Id*. at 18.

The court acknowledged that Mr. Kay's offense conduct had been "aberrant," and that he had "made attempts for rehabilitation already." *Id*. at 24. But the court nevertheless "agree[d] with the government and presentence report author" that an "upward variance" was necessary. *Id*. at 24-25. The court referred to "Sentencing Guideline 5K2.1 and 5K2.8," noting that these provisions "permit the Court to consider the means by which Mr. Yellowhair's life was taken." *Id*. at 25. The court found that "the infliction of 15 stab wounds" was "extreme conduct," explaining that "when one looks at the medical examiner's exhibit, it's degrading to the victim's body, and it is a gratuitous infliction of injury to the victim." *Id*. The court further

reasoned that there was "some merit to considering the relative size of Mr. Kay to Mr. Yellowhair," noting that Mr. Kay was "very large" and "youthful." *Id*. The court stated that on these grounds it would "upward vary pursuant to 5K2.1 and 5K2.8." *Id*. The court added that it had "also reviewed guideline 5K2.6," which "permits the [c]ourt to consider that a dangerous weapon was used here." *Id*. Pursuant to these upward departure factors, the court determined to sentence Mr. Kay consistently with "an offense level of 33." *Id*. at 26.

At criminal history category I, an offense level of 33 yielded a Guidelines sentencing range of 135 to 168 months. Guidelines ch. 5 pt. A. The court sentenced Mr. Kay to "a term of 168 months as provided by the presentence report writer," followed by a three-year term of supervised release. App. B at 26.

4. Mr. Kay appealed his judgment to the Ninth Circuit, arguing (*inter alia*) that the district court had erred in relying on the departure provisions set forth in Sections 5K2.1, 5K2.6, and 5K2.8 in determining his sentence. Mr. Kay argued that the circumstances referenced in these departure provisions failed to distinguish his case from the "heartland" of voluntary manslaughter cases. *Koon v. United States*, 518 U.S. 81, 94, 98 (1996) (noting that departures from the Guidelines range are intended to occur only where the factors justifying them are sufficiently unusual that they serve to take the case "outside the heartland of cases in the Guideline" and render the case "atypical").

Section 5K2.1 applies to cases in which "death resulted." But the fact that "death resulted" could not distinguish Mr. Kay's offense from the "heartland" of

voluntary manslaughter cases, Mr. Kay observed, because death results in literally *every* voluntary manslaughter case. 18 U.S.C. § 1112(a) ("Manslaughter is the unlawful killing of a human being without malice.").

Section 5K2.6 applies "[i]f a weapon or dangerous instrumentality was used or possessed in the commission of the offense." But the district court did not explain its implicit conclusion that Mr. Kay's use of a knife served to distinguish this case from the heartland of voluntary manslaughter cases, and Mr. Kay argued that this premise was inherently implausible. *Cf. United States v. Barber*, 119 F.3d 276, 285 (4th Cir. 1997) (en banc) ("Although it is true that a murder may be committed by means other than with a weapon or dangerous instrumentality, generally speaking it is difficult to imagine anything more within the heartland of conduct encompassed by the second-degree murder guideline than the use of a dangerous weapon."); *United States v. Kelly*, 1 F.3d 1137, 1142 (10th Cir. 1993) ("The fact that the end result of a defendant's conduct is murder necessarily implies that the instrumentality effectuating the death of the victim was dangerous in the manner it was used."). This factor therefore could not justify the district court's departure here.

Finally, Section 5K2.8 applies "[i]f the defendant's conduct was unusually heinous, cruel, brutal, or degrading to the victim." In support of its reliance on this provision, the district court first pointed to the fact that Mr. Kay stabbed Mr. Yellowhair "not once or twice but multiple times, 15 times." Mr. Kay argued that

the premise that this fact distinguished Mr. Kay's offense from the "heartland" of voluntary manslaughter cases flew in the face of the statute defining the crime as a homicide committed "[u]pon a sudden quarrel or heat of passion." 18 U.S.C. § 1112(a). Mr. Kay noted that a person wielding a knife in the throes of a sudden quarrel or heat of passion is more, not less, likely to inflict numerous wounds. Indeed, the pattern of injuries here – a large number of wounds apparently inflicted rapidly, carelessly, and at random, only two of which touched vital organs – suggested a homicide falling firmly within the heartland of voluntary manslaughter. A single fatal injury to the heart or throat, by contrast, would tend to suggest a premeditated murder. In light of the district court's misapplication of these departure factors (and other sentencing errors), Mr. Kay argued, the court of appeals should vacate his sentence and remand the case for resentencing.

The court of appeals rejected Mr. Kay's arguments in a brief unpublished memorandum. App. A. Citing its opinions in *United States v. Mohamed*, 459 F.3d 979 (9th Cir. 2006), and other cases, the court of appeals held that it "need not consider whether the district court correctly applied a departure provision set forth in the Guidelines, but rather review[ed] the deviation from the applicable range for reasonableness." App. A at 3. The court reasoned that the sentence was "'sufficient, but not greater than necessary'" and qualified as "reasonable." *Id.* (*quoting* 18 U.S.C. § 3553(a)). Except for a modification to one of the supervised release conditions, the court affirmed Mr. Kay's sentence. *Id.* at 4.

REASON FOR GRANTING THE WRIT

The circuit courts are deeply divided over the effect of this Court's opinion in *United States v. Booker*, 543 U.S. 220 (2005), on their review of sentencing courts' applications of the Guidelines' departure provisions. The majority of circuits to have addressed the question have concluded that, because the Guidelines remain an important part of the sentencing process, and because the application of the departure provisions constitutes an integral part of the application of the Guidelines, departure rulings should continue to be subject to robust appellate scrutiny, as they were in the pre-*Booker* era of mandatory Guidelines. But as this case illustrates, the Seventh and Ninth Circuits have adopted a very different view. These courts have taken the position that *Booker* has rendered the Guidelines' departure provisions "obsolete" and "superfluous," and on this basis they have concluded that the application of these provisions no longer need be rigorously scrutinized on appeal. Instead, they have concluded, a sentence involving the application of departure provisions should be affirmed regardless of any error in the application of these provisions, provided that the final sentence qualifies as "reasonable."

The position of the Seventh and Ninth Circuits is wrongheaded, and impossible to reconcile with this Court's precedents. It rests on flawed assumptions regarding the significance of the advisory Guidelines in sentencing, the likelihood that a district court would modify the sentence upon remand, and the importance of granting appellate relief where a district court has imposed a sentence based on a

miscalculation of the Guidelines range. During the thirteen years since *Booker* was issued, this circuit split has thoroughly percolated, and become firmly entrenched. And the two circuits on the wrong side of the split account for a large proportion of federal sentences imposed across the country. This Court should accordingly grant a writ of certiorari and reject the misguided view adopted by the Seventh and Ninth Circuits with respect to this important issue of federal sentencing law.

ARGUMENT

This Court should grant certiorari to resolve a circuit split regarding the standard by which circuit courts review sentencing courts' applications of the Guidelines' departure provisions.

In *Booker*, this Court held that because a mandatory Guidelines framework would violate a criminal defendant's Sixth Amendment right to have the maximum sentence to which he is exposed determined solely based on facts found beyond a reasonable doubt by a jury, the Guidelines must be construed as advisory only. 543 U.S. at 246. The Court further held that courts of appeals should review sentencing decisions made pursuant to the now-advisory Guidelines for "reasonableness." *Id.* at 264. These holdings raised the question of how courts of appeals should review a district court's application of the provisions set forth in Part 5K of the Guidelines, which in the pre-*Booker* mandatory Guidelines system permitted district courts to "depart" from the Guidelines range in narrowly-defined circumstances. A circuit split on this question quickly opened up in the wake of *Booker*.

The majority of circuits recognized that several compelling factors called for continued robust appellate review of Guidelines departure decisions.

First, although *Booker* rendered the Guidelines advisory, the Guidelines continue to play "an integral role in criminal sentencing." *United States v. Jackson*, 467 F.3d 834, 838 (3d Cir. 2006); *see also United States v. Gutierrez-Hernandez*, 581 F.3d 251, 256 (5th Cir. 2009) ("The properly-calculated guideline sentencing range is the point from which the court may vary, a necessary factor in determining reasonableness."); *United States v. Dixon*, 449 F.3d 194, 203-04 (1st Cir. 2006) ("Although the guidelines have become advisory rather than mandatory, determining the correct [Guidelines sentencing range] remains an appropriate starting point for constructing a defendant's sentence."); *United States v. Hawk Wing*, 433 F.3d 622, 631 (8th Cir. 2006) ("When a court of appeals reviews a district court's sentencing determination for reasonableness, the correct guidelines range is still the critical starting point for the imposition of a sentence") (internal quotation marks omitted); *United States v. Crawford*, 407 F.3d 1174, 1178 (11th Cir. 2005) ("Although *Booker* established a 'reasonableness' standard for the sentence finally imposed on a defendant, the Supreme Court concluded in *Booker* that district courts must still consider the Guidelines in determining a defendant's sentence.") (citations omitted). This fact behooves courts of appeals to "require that the entirety of the Guidelines calculation be done correctly, including rulings on Guidelines departures." *Jackson*, 467 F.3d at 838; *see also United States v. Robertson*, 568 F.3d 1203, 1211 (10th Cir. 2009) ("[W]e have concluded not only that the Guidelines departures 'survive *Booker*,' but also that our pre-*Booker* cases provide the standard for when to depart from the recommended [Guidelines] range.") (citations omitted);

Crawford, 407 F.3d at 1178 ("*Booker* does not alter our review of the application of the Guidelines").

Second, *Booker*'s articulation of a "reasonableness" standard of review of sentencing decisions (543 U.S. at 261) must be understood to include review for procedural errors, including errors in the application of Guidelines departure provisions. *United States v. Selioutsky*, 409 F.3d 114, 118 (2d Cir. 2005) ("An error in determining the applicable Guideline range or the availability of departure authority would be the type of procedural error that could render a sentence unreasonable under *Booker*.").

Third, *Booker* "left in force 18 U.S.C. § 3742(f) which provides: 'If the court of appeals determines that . . . the sentence was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate.'" *Gutierrez-Hernandez*, 581 F.3d at 256; *accord Crawford*, 407 F.3d at 1178 ("*Booker* did not affect 18 U.S.C. section 3742(f), which mandates remand of any case in which the sentence was imposed as a result of an incorrect application of the sentencing guidelines") (internal quotation marks omitted).

In view of these considerations, these circuits have continued to apply robust appellate review to district courts' application of the Guidelines' departure provisions after *Booker*. *See*, *e.g.*, *United States v. Walker*, 665 F.3d 212, 233 (1st Cir. 2011). Indeed, some circuits have stated that *Booker* did not alter the standard

by which they review Guidelines departure decisions. *See*, *e.g.*, *Robertson*, 568 F.3d at 1211; *Crawford*, 407 F.3d at 1178.

The Seventh and Ninth Circuits, however, have adopted a very different view.

The Seventh Circuit has taken the position that "the concept of 'departures' has been rendered obsolete in the post-*Booker* world." *United States v. Arnaout*, 431 F.3d 994, 1003 (7th Cir. 2005). The Seventh Circuit reasoned that "after *Booker* what is at stake is the reasonableness of the sentence, not the correctness of the 'departures' as measured against pre-*Booker* decisions that cabined the discretion of sentencing courts to depart from guidelines that were then mandatory." *United States v. Johnson*, 427 F.3d 423, 426 (7th Cir. 2005). The Seventh Circuit construed *Booker*'s reasonableness standard as providing that "[s]entences varying from the guidelines range . . . are reasonable so long as the judge offers appropriate justification under the factors specified in 18 U.S.C. § 3553(a)." *Id.*; *accord United States v. Pankow*, 884 F.3d 785, 793-94 (7th Cir. 2018) (*citing Johnson*, 427 F.3d at 426).

The Ninth Circuit has aligned itself with the Seventh Circuit's position. In *United States v. Mohamed*, 459 F.3d 979 (9th Cir. 2006), the Ninth Circuit surveyed the conflicting circuit approaches and concluded that that "better view" was "to treat the scheme of downward and upward 'departures' as essentially replaced by the requirement that judges impose a 'reasonable' sentence." *Id.* at 986. The court reasoned that it would be "redundant" to require district courts to conduct "two

exercises – one to calculate what departure would be allowable under the old mandatory scheme and then to go through much the same exercise to arrive at a reasonable sentence." *Id*. at 986-87. The court further reasoned that the "use and review" of departures after *Booker* "would result in wasted time and resources in the courts of appeal, with little or no effect on sentencing decisions." *Id*. at 987. "After all," the court reasoned, "if a district court were to employ a post-*Booker* 'departure' improperly, the sentencing judge still would be free on remand to impose exactly the same sentence by exercising his discretion under the now-advisory guidelines." *Id*. That sentence "would then be reviewed for reasonableness, in which case it is the review for reasonableness, and not the validity of the so-called departure, that determines whether the sentence stands." *Id*. In addition, the court posited, harmlessness review would require affirmance notwithstanding an "erroneous departure," provided that the resulting sentence was reasonable. *Id*.

On these grounds, the Ninth Circuit concluded that after *Booker* it would "review the district court's application of the advisory sentencing guidelines only insofar as they do not involve departures." *Id*. In cases in which the district court "framed its analysis in terms of a downward or upward departure," the court would "treat such so-called departures as an exercise of post-*Booker* discretion to sentence a defendant outside of the applicable guidelines range" and subject it to "a unitary review for reasonableness." *Id*.; *accord United States v. Kaplan*, 839 F.3d 795, 804 (9th Cir. 2016), *cert. denied*, 137 S. Ct. 1116 (2017), *and cert. denied sub nom. Strycharske v. United States*, 137 S. Ct. 1358 (2017) ("In this circuit, post-*Booker*

departures may not form the basis of a procedural error.") (*citing Mohamed*, 459 F.3d at 987); *cf. United States v. Diosdado-Star*, 630 F.3d 359, 365-66 & n.2 (4th Cir. 2011) (opining that "any sentence, within or outside of the Guidelines range, as a result of a departure or of a variance, must be reviewed by appellate courts for reasonableness pursuant to an abuse of discretion standard" and "offer[ing] no comment on the observation of several other circuit courts of appeals that the departure provisions of the Guidelines are obsolete") (*citing Mohamed*, 459 F.3d at 985-87, *and Arnaout*, 431 F.3d at 1003-04); *United States v. McBride*, 434 F.3d 470, 477 (6th Cir. 2006) ("we believe that Guideline departures are still a relevant consideration for determining the appropriate Guideline sentence[; t]his Guideline sentence is then considered in the context of the section 3553(a) factors").

The upshot of the approach taken by the Seventh and Ninth Circuits is that a district court's misapplication of a Guidelines departure factor, no matter how egregious it may be, is not treated as grounds for a resentencing unless it happens to yield a sentence that the court of appeals deems "unreasonable." This case is a perfect example: The district court here among other things treated the fact that death resulted from Mr. Kay's offense as a proper basis for an upward departure pursuant to Guidelines § 5K2.1, notwithstanding the fact that death results in literally *every* voluntary manslaughter case. App. B at 25. The court of appeals was unconcerned, adhering to its strict head-in-the-sand policy with respect to misapplications of the Guidelines departure provisions, pursuant to which it "need

not consider whether the district court correctly applied a departure provision set forth in the Guidelines." App. A at 3.

The position of the Seventh and Ninth Circuits is insupportable, both as a matter of logic and when assessed in light of the principles outlined in this Court's post-*Booker* sentencing opinions.

The notion that a misapplication of a Guidelines departure provision should be overlooked as long as the final sentence falls within the bracket of what the court of appeals considers "reasonable" essentially treats the district court's application of the Guidelines as a hollow and pointless exercise. It is akin to holding that errors in the presentation of evidence and argument at trial should be ignored, as long as the trial evidence was sufficient to support the guilty verdict. The reason this is not the law is that, regardless of how "reasonable" the guilty verdict may have been, a jury presented only with *proper* evidence and argument might have voted to acquit – and the defendant has a right not to be convicted on the basis of a fundamentally flawed proceeding.

The same basic principle should hold true in a sentencing: A district judge who has arrived at a sentence based in part on a misapplication of a Guidelines departure provision might well have arrived at a *different* sentence had he correctly applied that departure provision – and he might well do so on remand, after the court of appeals has alerted him to his error. In relying on a Guidelines departure provision, the sentencing judge presumably intended to factor the Sentencing Commission's institutional knowledge and expertise into his sentencing decision.

See Kimbrough v. United States, 552 U.S. 85, 108-09 (2007) (noting that Sentencing Commission "has the capacity courts lack to base its determinations on empirical data and national experience, guided by a professional staff with appropriate expertise.") (internal quotation marks omitted). After being informed that the Commission's knowledge and expertise did *not* actually lead it to make the recommendation that the judge initially drew from its departure provisions, the sentencing judge might well change his mind about what constitutes the appropriate sentence.

The Ninth Circuit's assumption that the sentencing judge would adhere to his original sentencing ruling regardless of having been reversed for misapplying a Guidelines departure provision, and that remanding for this reason would accordingly be pointless, suggests that the Ninth Circuit presumes that a sentencing judge's reliance on the Guidelines is undertaken merely for the sake of appearances, to ensure affirmance by the court of appeals. Such cynicism flies in the face of the presumption that district judges know and follow the law. *Walton v. Arizona*, 497 U.S. 639, 653 (1990), *overruled on other grounds by Ring v. Arizona*, 536 U.S. 584 (2002). And it is difficult to square with Ninth Circuit precedent holding that Guidelines errors call for reversal even where the district judge expressly states that he would impose the same sentence again, if the case were to be remanded for resentencing. *United States v. Gardenhire*, 784 F.3d 1277, 1283-84 (9th Cir. 2015).

This Court's post-*Booker* decisions bolster these common-sense points, support the reasoning of the circuit courts that have rejected the Seventh and Ninth Circuits' approach, and confirm the appropriateness of continuing to apply robust appellate review of Guidelines departure decisions after *Booker*.

This Court has repeatedly affirmed that the Guidelines continue to play a crucial role in the sentencing determination. *See, e.g., Gall v. United States*, 552 U.S. 38, 49, 50 n.6 (2007) (district court "should begin all sentencing proceedings by correctly calculating the applicable Guidelines range," treat that range as "the starting point and the initial benchmark" in sentencing, and "remain cognizant of [the Guidelines] throughout the sentencing process"); *Kimbrough*, 552 U.S. at 101 (noting that 18 U.S.C. § 3553(a) "still requires a court to give respectful consideration to the Guidelines"); *Freeman v. United States*, 564 U.S. 522, 529 (2011) ("Even where the judge varies from the recommended range, 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 a basis for the sentence.") (citation omitted); *Peugh v. United States*, 569 U.S. 530, 541 (2013) ("The post-*Booker* federal sentencing scheme aims to achieve uniformity by ensuring that sentencing decisions are anchored by the Guidelines and that they remain a meaningful benchmark through the process of appellate review."); *Beckles v. United States*, 137 S. Ct. 886, 899 (2017) ("The Guidelines today play a central role in federal sentencing."); *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1904 (2018) ("Courts are not bound by the Guidelines, but even in an advisory capacity the Guidelines serve as a

meaningful benchmark in the initial determination of a sentence and through the process of appellate review.") (internal quotation marks omitted).

This Court has also confirmed that courts of appeals should not hesitate to vacate and remand sentences that are based on miscalculations of the Guidelines, regardless of the likelihood that the district court will reimpose the same sentence on remand. Most notably in *Molina-Martinez v. United States*, 136 S. Ct. 1338 (2016), the Court held that a district court's application of an incorrect Guidelines range can be treated as evidence of an effect on substantial rights for purposes of plain error review, even where the final sentence fell within the correct Guidelines range. *Id*. at 1345. And in *Rosales-Mireles v. United States*, the Court held that a Guidelines error that is plain and affects substantial rights will "in the ordinary case" seriously affect the fairness, integrity, or public reputation of judicial proceedings, calling for reversal even where the error is not preserved and accordingly plain error review applies. 138 S. Ct. at 1903. The Court noted that a remand for resentencing is not particularly burdensome on the courts or parties, given that "'[a] resentencing is a brief event, normally taking less than a day and requiring the attendance of only the defendant, counsel, and court personnel.'" *Id*. at 1908 (*quoting United States v. Williams*, 399 F.3d 450, 456 (2d Cir. 2005)).

These recent holdings constitute a forceful rejection of the Ninth Circuit's premise in *Mohamed* that the hypothetical likelihood of the district court reimposing the same sentence on remand renders reversal for misapplication of the Guidelines a pointless and intolerable waste of resources. 459 F.3d at 987.

The error in the approach to this question adopted by the Seventh and Ninth Circuits is thus evident, and calls for correction by this Court. As the above-cited cases demonstrate, the circuit split on this question has thoroughly percolated in the thirteen years since *Booker* was issued. The split is now firmly entrenched, and has been expressly remarked upon in numerous published circuit court opinions. *See, e.g., Gutierrez-Hernandez*, 581 F.3d at 255-56 & nn.11-13; *Robertson*, 568 F.3d at 1210-11 & n.5; *Jackson*, 467 F.3d at 838 n.5; *Mohamed*, 459 F.3d at 985-87. It gives rise to a patent disparity in sentencing review between the geographic regions covered by the circuits on either side of the split, with even egregious errors in the application of Guidelines departure provisions being essentially ignored in the Seventh and Ninth Circuits, while they are treated as compelling grounds for resentencing in the other circuits. Moreover, last year the two circuits on the wrong side of the split accounted for almost one-fifth of all original sentencing appeals. *See* U.S. Sentencing Comm'n, Annual Reports and Sourcebooks (2017) (tbl. 56).[1] In short, the circuit courts' disagreement on this important issue calls out for resolution by this Court.

[1] https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2017/Table56.pdf.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be granted.

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