No. _____

IN THE
Supreme Court of the United States

DAN WAYNE STREETMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
to the Ninth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In *United States v. Booker*, 543 U.S. 220 (2005), this Court held that the Sentencing Guidelines were not mandatory. In *Kimbrough v. United States*, 552 U.S. 85 (2007), the Court held that, under *United States v. Booker*, it is not an abuse of discretion for a district court to reject application of a guideline based on policy disagreements with that guideline. In *Gall v. United States*, 552 U.S. 38 (2007), this Court rejected a presumption of reasonableness for guideline sentences.

This Court's precedent establishes, however, that a district court is not free to ignore the Sentencing Guidelines, and that the advisory guideline range serves as a starting point and initial benchmark, in order to achieve consistency. *Gall v. United States*, 552 U.S. 38, 49 (2007); *Freeman v. United States*, 131 S. Ct. 2685, 2692 (2011). The failure to correctly calculate the guideline range is reversible error. *See Gall*, 552 U.S. at 51. While not every guideline is the product of careful study, *id.* at 46 n.2, *Kimbrough v. United States*, 552 U.S. 85, 96 (2007), even when a guideline is unsound, it still "must [be] treat[ed] ... as the 'starting point and the initial benchmark.' " 552 U.S. at 108 (*quoting Gall*, 552 U.S. at 49). Moreover, once a court correctly calculates the Guidelines range and sentences the defendant within that range, the sentence may be presumed reasonable. *Rita v. United States*, 551 U.S. 338, 351 (2007).

This case presents two questions stemming logically from *Booker*, *Kimbrough* and *Gall*:

1. In the post-*Booker* world of non-mandatory guidelines, is it an abuse of discretion to refuse to reject a guideline on policy grounds where the guideline is manifestly not based on the United States Sentencing Commission's exercise of its characteristic institutional role, but is instead based on political concerns; and
2. Is U.S.S.G. §2G2.1, as applicable to the production of child pornography, a guideline not based on the Sentencing Commission's exercise of its characteristic institutional role?

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COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Dan Wayne Streetman, respectfully prays that a writ of certiorari issue to review the published decision of the United States Court of Appeals for the Ninth Circuit, entered on June 5, 2018. (App. 1-4).

OPINIONS AND ORDERS BELOW

Dan Streetman was indicted on May 3, 2016, on the charges of Production of Child Pornography in violation of 18 U.S.C. § 2251(a) [Counts 1-3], Transportation with Intent to Produce Child Pornography in violation of 18 U.S.C. § 2423(a) [Count 4], Possession of Child Pornography in violation of 18 U.S.C. § 2252A(a)(5)(B) [Count 5], along with forfeiture allegations.

On December 13, 2016, Mr. Streetman entered a plea of guilty pursuant to a plea agreement. That plea agreement called for Mr. Streetman to plead guilty to Counts 1-3, with Counts 4-5 being dismissed at the time of sentencing. The District Court subsequently sentenced Mr. Streetman on May 4, 2017 to fifteen years' incarceration on Count 1, fifteen years on Count 2, and thirty years on Count 3, all to run consecutively for a total of sixty years' incarceration, followed by a lifetime supervised release term.

Mr. Streetman's timely notice of appeal was filed on May 8, 2017. On June 5, 2018, the United States Court of Appeals issued a memorandum disposition affirming the District Court's decision (1) to reject Mr. Streetman's challenge to U.S.S.G.

§2G2.1, and (2) to reject Mr. Streetman's arguments that the guideline calculations in this case amounted to improper double- or triple-counting. (App. 1-4).

STATEMENT OF JURISDICTION

The Court of Appeals affirmed the District Court's judgment and sentence in this matter. The Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291. The jurisdiction of this Court is invoked pursuant 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 2251

(a) Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, or who transports any minor in or affecting interstate or foreign commerce, or in any Territory or Possession of the United States, with the intent that such minor engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct, shall be punished as provided under subsection (e), if such person knows or has reason to know that such visual depiction will be transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed, if that visual depiction was produced or transmitted using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer, or if such visual depiction has actually been transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed.

(b) Any parent, legal guardian, or person having custody or control of a minor who knowingly permits such minor to engage in, or to assist any other person to engage in, sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct shall be punished as provided under subsection (e) of this section, if such parent, legal

guardian, or person knows or has reason to know that such visual depiction will be transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed, if that visual depiction was produced or transmitted using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer, or if such visual depiction has actually been transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed.

(c) (1) Any person who, in a circumstance described in paragraph (2), employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, any sexually explicit conduct outside of the United States, its territories or possessions, for the purpose of producing any visual depiction of such conduct, shall be punished as provided under subsection (e).

(2) The circumstance referred to in paragraph (1) is that—

(A) the person intends such visual depiction to be transported to the United States, its territories or possessions, by any means, including by using any means or facility of interstate or foreign commerce or mail; or

(B) the person transports such visual depiction to the United States, its territories or possessions, by any means, including by using any means or facility of interstate or foreign commerce or mail.

(d) (1) Any person who, in a circumstance described in paragraph (2), knowingly makes, prints, or publishes, or causes to be made, printed, or published, any notice or advertisement seeking or offering—

(A) to receive, exchange, buy, produce, display, distribute, or reproduce, any visual depiction, if the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct and such visual depiction is of such conduct; or

(B) participation in any act of sexually explicit conduct by or with any minor for the purpose of producing a visual depiction of such conduct;

shall be punished as provided under subsection (e).

(2) The circumstance referred to in paragraph (1) is that—

(A) such person knows or has reason to know that such notice or advertisement will be transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means including by computer or mailed; or

(B) such notice or advertisement is transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means including by computer or mailed.

(e) Any individual who violates, or attempts or conspires to violate, this section shall be fined under this title and imprisoned not less than 15 years nor more than 30 years,

but if such person has one prior conviction under this chapter, section 1591, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, abusive sexual contact involving a minor or ward, or sex trafficking of children, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 25 years nor more than 50 years, but if such person has 2 or more prior convictions under this chapter, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to the sexual exploitation of children, such person shall be fined under this title and imprisoned not less than 35 years nor more than life. Any organization that violates, or attempts or conspires to violate, this section shall be fined under this title. Whoever, in the course of an offense under this section, engages in conduct that results in the death of a person, shall be punished by death or imprisoned for not less than 30 years or for life.

U.S.S.G. §2G2.1. Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production

(a) Base Offense Level: 32

(b) Specific Offense Characteristics

(1) If the offense involved a minor who had (A) not attained the age of twelve years, increase by 4 levels; or (B) attained the age of twelve years but not attained the age of sixteen years, increase by 2 levels.

(2) (Apply the greater) If the offense involved—

(A) the commission of a sexual act or sexual contact, increase by 2 levels; or

(B) (i) the commission of a sexual act; and (ii) conduct described in 18 U.S.C. § 2241(a) or (b), increase by 4 levels.

(3) If the defendant knowingly engaged in distribution, increase by 2 levels.

(4) If the offense involved material that portrays (A) sadistic or masochistic conduct or other depictions of violence; or (B) an infant or toddler, increase by 4 levels.

(5) If the defendant was a parent, relative, or legal guardian of the minor involved in the offense, or if the minor was otherwise in the custody, care, or supervisory control of the defendant, increase by 2 levels.

(6) If, for the purpose of producing sexually explicit material or for the purpose of transmitting such material live, the offense involved(A) the knowing misrepresentation of a participant's identity to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage

sexually explicit conduct; or (B) the use of a computer or an interactive computer service to (i) persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in sexually explicit conduct, or to otherwise solicit participation by a minor in such conduct; or (ii) solicit participation with a minor in sexually explicit conduct, increase by 2 levels.

(c) Cross Reference

(1) If the victim was killed in circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply §2A1.1 (First Degree Murder), if the resulting offense level is greater than that determined above.

(d) Special Instruction

(1) If the offense involved the exploitation of more than one minor, Chapter Three, Part D (Multiple Counts) shall be applied as if the exploitation of each minor had been contained in a separate count of conviction.

STATEMENT OF THE CASE

Dan Streetman was indicted on May 3, 2016, on the charges of Production of Child Pornography in violation of 18 U.S.C. § 2251(a) [Counts 1-3], Transportation with Intent to Produce Child Pornography in violation of 18 U.S.C. § 2423(a) [Count 4], Possession of Child Pornography in violation of 18 U.S.C. § 2252A(a)(5)(B) [Count 5], along with forfeiture allegations.

On December 13, 2016, Mr. Streetman entered a plea of guilty pursuant to a plea agreement. That plea agreement called for Mr. Streetman to plead guilty to Counts 1-3, with Counts 4-5 being dismissed at the time of sentencing. There was no agreement as to sentencing recommendations.

The PSR found that Counts 1-3 were specifically excluded from a grouping analysis. The PSR found the adjusted offense level for Count 1 to be 40, for Count 2 to be 36 and for Count 3 to be 40. The multiple count adjustment added three levels, resulting in a combined adjusted offense level of 43. A five-level enhancement was added for a pattern of activity, while a three-level reduction was applied for acceptance of responsibility. The resulting adjusted offense level of 45 was reduced to the total offense level of 43, which represented the maximum allowable offense level.

The PSR found that Mr. Streetman had a criminal history score of zero points, which placed him in Criminal History Category I. The PSR computed his guideline custody range at 1080 month, by applying the maximum guideline range for each count (360 months) consecutively.

Mr. Streetman filed objections to the PSR. A number of objections were factual in nature, and not a subject of this appeal. Mr. Streetman also objected to the application of the five-level pattern-of-activity enhancement in concert with the multiple-count adjustment and consecutive sentencing. Mr. Streetman argued that applying these enhancements and sentencing provisions in concert amounted to impermissible triple-counting. Rather, Mr. Streetman asserted that the proper advisory range was 292-360 months, based on application of the statutory maximum sentence. Mr. Streetman also objected to application of U.S.S.G. §2G2.1 as a whole, based upon the flaws in the guideline's adoption and numerous amendments thereafter. Mr.

Streetman also submitted a sentencing memorandum in support of his request for concurrent sentencing between fifteen and thirty years.

At the sentencing hearing, the Court first heard argument on the factual sentencing objections, and ruled by granting in part and denying in part. After argument, the Court denied Mr. Streetman's objection to triple-counting. The Court also denied the challenge to the guideline as a whole. The Court computed the applicable guideline range, the statutory sentencing ranges and monetary obligations in conformity with the PSR.

The Court heard testimony from a victim's mother. The Court heard testimony from FBA Special Agent Leland McEuen regarding factual issues. Counsel for Mr. Streetman presented sentencing arguments. The government presented sentencing arguments. Counsel for Mr. Streetman presented rebuttal argument. Mr. Streetman spoke. The Court discussed sentencing factors. The Court sentenced Mr. Streetman to fifteen years' incarceration on Count 1, fifteen years on Count 2, and thirty years on Count 3, all to run consecutively for a total of sixty years' incarceration, followed by a lifetime supervised release term.

On appeal, the United States Court of Appeals found that the District Court had not erred in rejecting Mr. Streetman's challenge to the validity of U.S.S.G. §2G2.1. (App. 2). That Court also found that the District Court engaged in no

impermissible double- or triple-counting in applying a multiple count analysis, a pattern of activity enhancement and consecutive sentencing. (App. 2-4)

REASONS FOR GRANTING THE WRIT

I. Only this Court can resolve the tension between the competing legal values espoused in its past precedent

A. Courts are free to disagree with guidelines as a matter of policy

The authority of a district court to vary from a guideline range based solely on policy disagreements with the guidelines is a key component of this Court's holdings designed to ensure that the guidelines are truly advisory and do not violate the Sixth Amendment. *Kimbrough v. United States*, 552 U.S. 85, 101-02 (2007) (holding that, because "the Guidelines are now advisory ..., as a general matter, courts may vary [from Guidelines ranges] based solely on policy considerations, including disagreements with the Guidelines." (internal punctuation omitted)) (*citing Rita v. United States*, 551 U.S. 338, 351 (2007) (district courts may find that the "Guidelines sentence itself fails properly to reflect § 3553(a) considerations"); *cf. Cunningham v. California*, 549 U.S. 270, 274-75, 278-81, 292-93 (2007).

This Court, in rejecting the Government's argument that a policy-based variance is entitled to less deference on appeal than a fact-based variance, held that because "the cocaine Guidelines, like all other Guidelines, are advisory only," it "would not be an abuse of discretion for a district court to conclude when sentencing

a particular defendant that the crack/powder disparity yields a sentence 'greater than necessary' to achieve § 3553(a)'s purposes, even in a mine-run case." *Kimbrough*, 552 U.S. at 91, 109-10. The Court made clear that, if "closer review" could ever apply, it cannot apply when the guideline was not developed by the Commission in its "characteristic institutional role" based on "empirical data and national experience." *Id.* at 109-10. District courts are "entitled" to disagree with such guidelines and such disagreement is "not suspect." *Spears v. United States*, 555 U.S. 261, 264-66 (2009).

B. But courts must use the guidelines as a starting point and initial benchmark

A district court is not free to ignore the United States Sentencing Guidelines. This Court's direction to district courts is unambiguous - the Guidelines must be considered first. "As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark." *Gall v. United States*, 552 U.S. 38, 49 (2007) (emphasis added); *see also Freeman v. United States*, 131 S. Ct. 2685, 2692 (2011) ("The Guidelines provide a framework or starting point - a basis, in the commonsense meaning of the term - for the judge's exercise of discretion.").

Consideration of the Guidelines range is so important that failure to correctly calculate it is reversible error. *See Gall*, 552 U.S. at 51 (holding that in reviewing a sentence, the appellate court "must first ensure that the district court committed no

significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range"). District courts must also justify any deviation from the sentencing range recommended by the Guidelines:

> A district judge must give serious consideration to the extent of any departure from the Guidelines and must explain his conclusion that an unusually lenient or an unusually harsh sentence is appropriate in a particular case with sufficient justifications. For even though the Guidelines are advisory rather than mandatory, they are, as we pointed out in Rita, the product of careful study based on extensive empirical evidence derived from the review of thousands of individual sentencing decisions.

Id. at 46. This Court has instructed district courts that they "must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance," *id.* at 50, and has instructed courts of appeals that they will "take into account ... the extent of any variance from the Guidelines range," *id.* at 51.

C. Policy disagreements do not alter the fundamental role played by the guidelines

While this Court has recognized that not every guideline is the product of careful study, *Gall* at 46 n.2, *Kimbrough v. United States*, 552 U.S. 85, 96 (2007), even when a guideline is unsound, it still "must [be] treat[ed] ... as the 'starting point and the initial benchmark.' " 552 U.S. at 108 (*quoting Gall*, 552 U.S. at 49). Moreover, once a court correctly calculates the Guidelines range and sentences the defendant within that range, the sentence may be presumed reasonable. *Rita v. United States*, 551 U.S.

338, 351 (2007). The presumption of reasonableness attached to within-Guidelines sentences on appellate review provides that within-Guidelines sentences remain the default outcome. *See Rita*, 551 U.S. 338. *Rita* acknowledged that the "presumption [might] encourage sentencing judges to impose Guidelines sentences," even though district judges cannot apply the presumption themselves. *Id.* at 354. Therefore, even though district courts have the authority to vary from the Guidelines range, district courts must begin with the Guidelines. *See also* U.S. Sent'g Comm'n, Report on the Continuing Impact of United States v. Booker on Federal Sentencing Part A, at 5 (2012), http://www.ussc.gov/sites/ default/files/pdf/news/congressional-testimony-and-reports/book er-reports/2012-booker/Part_A.pdf ("The guidelines have remained the essential starting point for all federal sentences and have continued to influence sentences significantly.").

The Sentencing Guidelines continue to have "force as the framework for sentencing." *Peugh v. United States*, 133 S.Ct. 2072, 2083 (2013). The Guidelines have a strong gravitational pull because they are the only 18 U.S.C. § 3553(a) factor with a numerical value. This number has an anchoring effect, and a sentence within or near the Guidelines range will likely avoid reversal on appeal.

The Guidelines range also "serves as a psychological 'anchor,' which appears to simplify or obviate the daunting task of evaluating the seriousness of the offense, the dangerousness of the offender, and other considerations relevant to the statutory purposes." Paul J. Hofer, *Beyond the "Heartland": Sentencing Under the Advisory Federal*

Guidelines, 49 Duq. L. Rev. 675, 689 (2011). As the Honorable Nancy Gertner has explained:

> Anchoring is a strategy used to simplify complex tasks, in which numeric judgments are assimilated to a previously considered standard. When asked to make a judgment, decision-makers take an initial starting value (i.e., the anchor) and then adjust it up or down. Studies underscore the significance of that initial anchor; judgments tend to be strongly biased in its direction.

Hon. Nancy Gertner, *What Yogi Berra Teaches About Post-Booker Sentencing*, 115 YALE L.J. POCKET PART 127 (2006), http://yalelawjournal.org (quotation marks omitted). "Whether [judges] like that number or not, even if they are angry about that number, does not matter; they will still be influenced by that number. That is the psychological fact." Panel Discussion, *Federal Sentencing Under "Advisory" Guidelines: Observations by District Judges*, 75 Fordham L. Rev. 1, 17-18 (2006).

As Mark W. Bennett explains in *"Confronting Cognitive 'Anchoring Effect' And 'Blind Spot' Biases In Federal Sentencing: A Modest Solution For Reforming A Fundamental Flaw*, 104 J. Crim. L. & Criminology 489 (2014): "Comprehensive data from the USSC establishes that the new [post-*Booker/Gall*] discretion has, for the most part, had a surprisingly limited impact on federal sentencing. This is due primarily to the robust anchoring impact of first computing the advisory Guidelines sentencing range before considering the other non-numerical § 3553(a) sentencing factors." *Id.* at 533-534. *See also, United States v. Ingram*, 721 F.3d 35, 40 (2d Cir. 2013) (Calabresi, J., concurring) (discussing how "anchoring effects" influence judgments and noting that the court "cannot be confident that judges who begin" at a higher guidelines range "would end

up reaching the same 'appropriate' sentence they would have reached" if they started from a lower guidelines range); Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 Science 1124, 1124 (1974) (classic theoretical work on how framing and expectations influence judgment).

Academic research and sentencing statistics bear out these observations from the bench. One scholar noted that:

> [A]n empirical analysis of the Sentencing Guidelines' practical effects on sentencing in actual cases [] demonstrates ... that the Guidelines continue to be applied as the default benchmark for sentencing in all federal criminal cases. ... [A] review of post-Booker sentencing statistics and reversal rates throughout the federal court system presents a clear picture of the central role that the Sentencing Guidelines continue to play as the de facto arbiter of "reasonableness."

James R. Dillon, *Doubting Demaree: The Application of Ex Post Facto Principles to the United States Sentencing Guidelines After United States v. Booker*, 110 W. Va. L. Rev. 1033, 1089 (2008).

Not only do judges sentence within the Guidelines range most of the time, but departures from the range mimic pre-*Booker* departures - the median decrease is still about twelve months. See Amy Baron-Evans & Kate Stith, Booker Rules, 160 U. Penn. L. Rev. 1631, 1677 & n.252 (2012) (analyzing Commission data on extent of non-government sponsored departures and variances from 2003 through 2012). Thus, the advisory Guidelines have nearly the same pull that the mandatory Guidelines had before Booker. As Chief Judge McKee of the Third Circuit testified, "[t]he average sentence length has closely tracked the guideline minimum for a long period of time."

Theodore McKee, Chief U.S. Circuit Judge, U.S. Court of Appeals for the Third Circuit, Statement Before the U.S. Sentencing Commission 19 (Feb. 16, 2012), http://www.ussc.gov/Legislative_and_ Public_Affairs/PubHc_Hearings_and_Meetings/2012021516/Testimony_16_McKee.pdf.

D. Maintaining nationwide uniformity in sentencing can only be achieved by this Court

1. Avoiding unwarranted sentencing disparity is an important goal

When this Court severed and excised those provisions of the Sentencing Reform Act that made the Guidelines mandatory to remedy the Sixth Amendment problem, it noted that the advisory Guidelines system would "continue to move sentencing in Congress' preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary." *United States v. Booker*, 543 U.S. 220, 264-65 (2005). This Court has held that district courts must "consider the need to avoid unwarranted - disparities along with other § 3553(a) factors - when imposing sentences," and in doing so, must "take account of sentencing practices in other courts.... [T]hese disparities must be weighed against the other § 3553(a) factors and any unwarranted disparity created by [the Guidelines range] itself." *Kimbrough*, 552 U.S. at 108.

Thus, while lockstep uniformity in sentences among individual defendants or among districts is no longer the goal of the sentencing system, avoiding unwarranted

disparities remains an important goal even post-*Booker*. As the Sentencing Commission has described it, "[u]nwarranted disparity is defined as different treatment of *individual* offenders who are similar in relevant ways, or similar treatment of *individual* offenders who differ in characteristics that are relevant to the purposes of sentencing." U.S. Sent'g Comm'n, Fifteen Years of Guideline Sentencing: An Assessment of How Well the Federal Criminal Justice System Is Achieving the Goals of Sentencing Reform 113 (2004) (emphasis in original). When a sentencing disparity is not relevant to or justified by differences among the circumstances of the offense, the characteristics of the defendant, or the purposes of sentencing, the disparity is unwarranted.

The continuing magnetism of the Guidelines in the sentencing process is not surprising. *Booker* itself confirmed that the Sentencing Commission would continue "writing Guidelines" so as to "promote uniformity in the sentencing process." 543 U.S. at 263264. But of course only Guidelines that truly "guide" sentencing decisions can promote uniformity.

2. The genesis of U.S.S.G. §2G2.1 demonstrates that it is not the product of the Sentencing Commission's neutral institutional role

Courts have long recognized the crucial role that the Sentencing Commission's expertise plays in federal sentencing. Emphasizing the importance of the Commission's national experience and empirical studies, in 2006, the Seventh Circuit

asserted that "the sentencing guidelines represent 18 years of careful thought about appropriate sentences for federal criminal offenders." *United States v. Robinson*, 435 F.3d 699, 701 (7th Cir. 2006) (emphasis added). The sentencing guidelines have been utilized because the "Commission is uniquely qualified to conduct studies using its vast database, obtain the views and comments of various segments of the federal criminal justice community, review the academic literature, and report back to Congress in a timely manner." *See* U.S. Sentencing Commission, Fifteen Years of Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform, at xvii (2004).

However, the Commission has acknowledged that the goals of sentencing reform have not been fully achieved because "in some cases, the results of research and collaboration have been overridden or ignored . . . through enactment of mandatory minimums or specific directives to the Commission." *Id.* This Court has recognized that "not all of the Guidelines are tied to this empirical evidence." *Gall v. United States*, 128 S.Ct. 586, 594 n.2. (2007); *see also Kimbrough v. United States*, 128 S.Ct. 558 (2007). The child pornography guidelines are precisely the type of flawed guidelines referenced in *Rita* and *Gall.*

The child-pornography sentencing guidelines, U.S.S.G. §§ 2G2.1-.2, like the drug guidelines at issue in *Kimbrough v. United States*, 552 U.S. 85 (2007), are atypical in that they were not based on the Sentencing Commission's nationwide empirical study of criminal sentencing. "In the main, the Commission developed Guidelines

sentences using an empirical approach based on data about past sentencing practices." *Kimbrough*, 128 S.Ct. at 567. But the guidelines for child exploitation offenses were not crafted this way. Instead, "[m]uch like policymaking in the area of drug trafficking, Congress has used a mix of mandatory minimum penalty increases and directives to the Commission to change sentencing policy for sex offenses." U.S. Sentencing Comm'n, Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform 72-73 (November 2004).

The evolution of the child pornography guidelines demonstrates that it was driven by political concerns separate and apart from careful study by the commission. When Congress first enacted 18 U.S.C. § 2251 in 1978, the maximum penalty was less than what is now the mandatory minimum. Then, the offense of production of child pornography carried a maximum penalty of 10 years' imprisonment, and there was no mandatory minimum sentence. *See* Pub.L. 95-225, § 2(a), 92 Stat. 7. There was a 15-year maximum and a mandatory 2-year sentence in the case of a prior violation of the same statute. *Id.*

The Committee Reports from both the House of Representatives and Senate show Congress never intended the statute to apply to the conduct here--the taking of photographs for personal reasons. While Congress has since added language to the statute about using materials shipped in interstate commerce and court decisions have held that the use of a camera or computer made out-of-state is sufficient to bring the

conduct within the statute, *see, e.g., United States v. Grzybowicz*, 747 F.3d 1296, 1306-1307 (11th Cir. 2014), Congress initially targeted those who shipped the images across state lines:

> There is presently no Federal Statute that prohibits the use of children in the production of materials that depict explicit sexual conduct. The Committee bill would prohibit the production of such materials for this purpose if the materials involved were to be mailed or otherwise transported in interstate commerce.
>
> S. Rep. No. 95-438, at 3 (1977).

The concern was with the business of child pornography as evidenced by the conclusion "[t]hat child pornography and child prostitution have become highly organized, multimillion dollar industries that operate on a nationwide scale." *Id.* at 5. The concern was that "thousands of copies can be made from a single negative" and that "[a]s a result the cost of producing child pornography are minimal but the profits are often enormous." *Id.* at 6. Congress was confident, too, that federal prosecutors would not pursue "individual acts involving the use of children."

> The Committee is aware that Section 2251 may literally encompass isolated, individual acts involving the use of children in the production of sexually explicit materials. Section 2251 is not intended to reach all such isolated incidents, which are often are more appropriately the subject of state or local concern. The Committee fully intends that federal prosecutors will wisely exercise their discretion to reach only those cases which are the proper subject of Federal concern.

Id. at 16. The Committee Report from the House of Representatives shows, as well, that the legislation was aimed at something more than photographs taken for private purposes: "[T]he Committee agreed to report out a section of the bill which would

penalize those people who induce a child to engage in sexually explicit conduct for promoting a film or photograph which would be transported in interstate commerce." H.R. Rep. No. 95-696, at 10 (1977).

With the advent of the Internet and the widespread access to child pornography, the penalties have increased dramatically. In 1986, Congress increased the mandatory minimum to 5 years for repeat offenders. *See* Pub.L. 99-500, Title I, § 101(b), 100 Stat. 1783-74. Ten years later, in 1996, Congress established a minimum mandatory sentence of 10 years for a first offender, with a maximum penalty of 30 years. *See* Pub.L. 104-208, Div. A, Title I, § 101(a), 110 Stat. 3009-30. The penalty for those with a prior conviction was increased to a minimum mandatory of 15 years, with a maximum sentence of 30 years and, for the first time, the recidivism provision applied to a conviction based on "the laws of any State relating to the sexual exploitation of children." *Id.* In 2003, Congress increased the penalties to what they are now: a 15-year mandatory minimum and a 30-year maximum for first offenders and a 25-year mandatory minimum with a 50-year maximum for those with a prior qualifying conviction. *See* Pub.L. 108-21, Title I, § 103(a)(1)(A), 117 Stat. 652, 653, 683.

In modifying § 2251 and increasing the penalties, Congress has continued to make findings that show it was addressing something more aggravated than the taking of photographs for private purposes. Among the findings in support of the 1986

amendments, was that "child exploitation has become a multi-million-dollar industry, infiltrated and operated by elements of organized crime, and by a nationwide network of individuals openly advertising their desire to exploit children." Pub.L. 99-500, Title I, § 101(b), 100 Stat. 1783-74. When in 2003, Congress increased the maximum penalties to their current levels, the findings included a quote from the Supreme Court decision in *New York v. Ferber*, 458 U.S. 747, 760 (1982): "The most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe penalties on persons selling, advertising, or otherwise promoting the product." Pub.L. 108-21, Title I, § 103(a)(1)(A), 117 Stat. 676. In its 2008 findings supporting a modification of the statute, Congress included the observation that "Child pornography is estimated to be a multibillion dollar industry of global proportions, facilitated by the growth of the Internet." Pub.L. 110-358, § 102, 122 Stat. 4001.

Each sentencing guideline "carve[s] out a 'heartland,' a set of typical cases embodying the conduct that each guideline describes." U.S.S.G., Ch. 1, Ft. A, §4(b). A district court may depart from a guideline in an atypical case outside this "heartland" - that is, where there is "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the" guidelines. 18 U.S.C. § 3553(b); U.S.S.G. §5K2.0. The fact that Congress intended to punish the production of child pornography for the purpose of sales or other distribution thus provides ample support for a departure in this case. The creation of pornographic

images for personal use was simply not the harm that Congress intended to punish in drafting this statute. Thus, Mr. Streetman's conduct falls outside the heartland of the type of conduct envisioned by the statute.

"A 'departure' is typically a change from the final sentencing range computed by examining the provisions of the Guidelines themselves. It is frequently triggered by a prosecution request to reward cooperation . . . or by other factors that take the case 'outside the heartland' contemplated by the Sentencing Commission when it drafted the Guidelines for a typical offense." *United States v. Cruz-Perez*, 567 F.3d 1142, 1146 (9th Cir. 2009). The Sentencing Guidelines provide that a below-guideline sentence might be warranted where the offense conduct "may not cause or threaten the harm or evil sought to be prevented by the law proscribing the offense at issue." U.S.S.G. §5K2.11. This is precisely the issue with Mr. Streetman. Even if the statutory and guideline framework is generally appropriate, its application is not appropriate under the particular facts presented here.

3. The political interference in the child pornography guidelines raises separation-of-powers concerns

The Sentencing Commission was designed to be an independent, neutral, expert agency in the Judicial branch. It is the promulgator of the Sentencing Guidelines. In *United States v. Mistretta*, 488 U.S. 361 (1989), the Court rejected a separation-of- powers attack on the constitutionality of those Guidelines in general

because the Commission seemed to have enough freedom from the political branches to truly act as a neutral and expert agency when promulgating Guidelines. The *Mistretta* court understood the Commission to be a "peculiar institution" because the Commission, as formed by the Sentencing Reform Act of 1984, is an "independent" and "expert" agency within the Judiciary that exercises "administrative powers" to create legislative-like rules to guide individual adjudications in the area of criminal sentencing – an area that "has been and should remain 'primarily a judicial function.'" *Mistretta*, 488 U.S. at 368, 379, 384, 390, 404 (quoting legislative report).

The *Mistretta* Court saw the new agency to have both substantial congressional guidance and substantial discretion in its promulgation of Guidelines. *Id.*, 374-78, 393-94, 407-08. Thus, the Court essentially held that the Sentencing Reform Act, when delineating the Commission's relationship with the political branches, had successfully navigated the Scylla and Charybdis of excessive independence and excessive subservience. *Id.*

Nonetheless, the *Mistretta* Court said it was "troubled" somewhat by the defendant's argument that "the Judiciary's entanglement in the political work of the Commission undermines public confidence in the disinterestedness of the Judicial Branch." *Id.* at 407. Because the Commission is a part of the Judiciary and is engaged in work that is "primarily a judicial function," *id.* at 390, the Judiciary's imprimatur of "impartiality and nonpartisanship" is stamped on each Guideline. *Id.* at 407. Indeed, the cover of the Guidelines Manual says the Guidelines are promulgated by the

Commission – an agency of the Judiciary. The *Mistretta* Court was "troubled" because, if the Guidelines are not in fact impartial and nonpartisan, the Judiciary would in fact be promulgating the edicts of a political branch, and so its "integrity" would be "undermined." *Id.* at 404, 407.

The *Mistretta* Court allayed its own concern by reiterating its understanding of the nature of the Sentencing Commission and its work. The Court approved the Judiciary's entanglement in the Commission's somewhat political work because the Court believed the promulgation of the Guidelines would in fact be "essentially a *neutral* endeavor and one in which judicial participation is peculiarly appropriate." *Id.* at 407 (italics added). The *Mistretta* Court believed neutral, "judicial experience and expertise" would in fact "inform the promulgation" of Guidelines. *Id.* at 408. The Court believed this would be so because the Commission was created as "an independent agency in every relevant sense," was expressly charged with using sciences and expertise to develop, review and revise Guidelines, and was left with "significant discretion to determine which crimes have been punished too leniently, and which too severely." *Id.* at 374, 377, 393. The Court observed that "[d]eveloping proportionate penalties for hundreds of different crimes by a virtually limitless array of offenders is precisely the sort of intricate, labor-intensive task for which delegation to an expert body is especially appropriate." *Id.* at 379. In sum, the *Mistretta* Court believed that the Judiciary could, without undermining its integrity, promulgate the

Guidelines because those Guidelines would be the product of the independent exercise of expert and reasonable discretion.

When expressing these beliefs, the *Mistretta* Court also described an important boundary – a limit to the Judiciary's permissible "entanglement" in "political work." *Id.* at 407. Setting that boundary, the Court reiterated that "[t]he legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship." *Id.* at 407. And the Court concluded: "That reputation may not be borrowed by the political Branches to cloak their work in the neutral colors of judicial action." *Id.* Nonetheless, the Supreme Court indicated that the separation-of-powers doctrine would be breached if a political branch tried to "cloak [its own] work" in the "neutral colors of judicial action" by commandeering the Sentencing Commission. *Id.* at 407. This is precisely what occurred with the Feeney Amendment.

4. There is significant and increasing evidence that U.S.S.G. §2G2.1 is unworthy of respect

The guideline range set forth in the PSR of 1080 months is in excess of conduct that is far more aggravated. The comparison of his offense to others with similar penalties shows the penalties are disproportionally harsh. Had he committed second degree murder in violation of 18 U.S.C. § 1111, he would not be facing a mandatory minimum, and his guideline range would be roughly 20 to 24 years for Criminal History Category I. The penalties for acts of terrorism are less than those Mr. Streetman faces. If an individual used a "weapon that is designed . . . to release

radiation at a level dangerous to human life," in violation of 18 U.S.C. § 2332h (a)(1)(A), (c)(2), he would be facing a harsh 30-year minimum mandatory sentence, as would someone who used a missile designed to destroy an aircraft in violation of, 18 U.S.C. § 2332g (a)(1)(A), (c)(2).

Between October 1, 2015 and September 30, 2016, nearly 30% of the defendants sentenced under U.S.S.G. §2G2.1 received downward variances or other non-government sponsored below-guideline sentences.[1] There has been a demonstrated trend in downward variances in cases sentenced under U.S.S.G. §2G2.1. In 1992 88.9% of defendants received a within-guideline sentence and none received a below-guideline sentence.[2] In fiscal year 2007, 63% of defendants received a within-guideline sentence, while 11% of defendants sentenced under U.S.S.G. §2G2.1 received sentences below the guideline range.[3] In fiscal year 2015, by contrast, only

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[1] *See* United States Sentencing Commission Quarterly Report, Fourth Quarter 2016, at 16 *available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/ federal-sentencing-statistics/quarterly-sentencing-updates/USSC_Quarter_Report_4th_16_Final.pdf (last accessed December 27, 2016).

[2] 2012 Report, p. 254.

[3] United States Sentencing Commission Final Quarterly Report 2007, at 14, *available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-entencing-statistics/quarterly-sentencing-updates/USSC_2007_Quarter_Report_Final.pdf (last accessed December 27, 2016).

42% of defendants sentenced under U.S.S.G. §2G2.1 received within-guideline sentences.[4]

This trend toward below-guideline sentences has an inverse relationship with the guideline itself, which has been steadily increasing. In the original 1987 guidelines, U.S.S.G. §2G2.1 provided for a base offense level of 25. U.S.S.G. §2G2.1 (1987). In 1996, the Commission increased the base offense level to 27 and added a 2-level increase if the offense involved the use of a computer. U.S.S.G. App C., amend 537 (Nov. 1, 1996). In 2004, the Commission again increased the base offense level to the current level of 32 and added five additional specific offense characteristics. U.S.S.G. App C., amend. 664 (Nov. 1, 2004).

This inverse relationship implies that district courts often feel that the advisory guideline range recommended by application of U.S.S.G. §2G2.1 yields unreasonably inflated ranges inconsistent with 18 U.S.C. § 3553(a), and precludes imposition of a sentence of imprisonment that is "greater than necessary" to fulfill § 3553(a)'s statutory sentencing factors. This is corroborated by the statement of reasons forms collected in the 70 out of 200 production cases in which courts downwardly departed in fiscal year 2010. In 53.5% of those 70 cases, the court varied downward based on

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[4] United States Sentencing Commission Final Quarterly Report 2015, at 14. *available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/quarterly-sentencing-updates/USSC-015_Quarterly_Report_Final.pdf (last accessed December 27, 2016).

the "nature and circumstances of the offense [and/or] the history and characteristics of the defendant," and in 18% of those cases, the court varied downward "based on the defendant's mental or emotional conditions."[5]

That judges are choosing to vary in child pornography cases is not indicative of judges who impose sentences "inconsistently and without regard to the federal sentencing Guidelines" process, but rather as an important mechanism by which the courts provide feedback to the Sentencing Commission.[6] After all, the Commission envisioned that such feedback from the courts would improve its ability to fulfill its ongoing statutory responsibility under the Sentencing Reform Act to periodically refinements to the Guidelines.[7] Moreover, the courts have held that a district court may "'vary from Sentencing Guideline ranges based solely on policy considerations, including disagreements with the Guidelines.'" *United States v. Engle,* 592 F.3d 495, 502 (4th Cir. 2010) (quoting *Kimbrough*, 552 U.S. at 101); *see also Spears v. United States*, 555 U.S. 261 (2009) (emphasizing a district court may categorically reject an unreasonably

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[5] 2012 Report, p. 255–56.

[6] Troy Stabenow, *A Method for Careful Study: A Proposal for Reforming the Child Pornography Guidelines*, 24 Fed. Sent'g Rep. 108, 109 (2011).

[7] *See* U.S. Sent'g Comm'n, *Report to Congress: Downward Departures from the Federal Sentencing Guidelines* (Oct. 2003), at 5, 20, *available at* http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/departures/200310-rtc-downward-departures/departrpt03.pdf (last accessed December 27, 2016).

high Guideline that "yielded an excessive sentence in light of the sentencing factors outlined in 18 U.S.C. § 3553(a)").[8]

For these reasons, it was error to overrule Mr. Streetman's objection and calculate sentencing ranges pursuant to this invalid guideline.

CONCLUSION

Based on the arguments discussed herein, it is requested that this Court grant this Petition for Writ of Certiorari, reverse the Ninth Circuit's decision affirming the District Court's denial of Mr. Streetman's challenge to the validity of U.S.S.G. §2G2.1, reverse the judgment and remand for a new sentencing hearing consistent with this court's decision.

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Respectfully Submitted,

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[8] "The Guidelines and congressionally directed ranges are significantly harsher than community sentiment recommends." Judge James S. Gwin, Juror Sentiment on Just Punishment: Do the Federal Sentencing Guidelines Reflect Community Values?, 4 *Harv. L. & Pol'y Rev.* 173, 195 (2010).

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