No. __-_____

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT DION ABLES,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

Petition for Writ of Certiorari
to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether factual error is categorically immune from plain error review?

II. Whether sentences arising under Guideline 2G2.2 tend to produce substantively unreasonable sentences in the ordinary case? Whether a court of appeals may evaluate the empirical foundation of a Sentencing Guideline, or policy critiques of the Guideline, in order to determine whether the sentences it produces are reasonable in the ordinary case?

PARTIES

Robert Dion Ables is the petitioner; he was the defendant-appellant below. The United States of America is the respondent; it was the plaintiff-appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Robert Dean Ables respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The district court entered judgment on July 7, 2017, which judgment is attached as an appendix.[1] The unpublished opinion of the United States Court of Appeals for the Fifth Circuit is captioned as *United States v. Ables*, 728 Fed. Appx. 394 (5th Cir. June 25, 2018)(unpublished), and is provided as an appendix to the Petition.[2]

JURISDICTIONAL STATEMENT

The instant Petition is filed within 90 days of an opinion affirming the judgment, which was entered on June 25, 2018.[3] This Court's jurisdiction to grant *certiorari* is invoked under 28 U.S.C. § 1254(1).

FEDERAL STATUTES, RULES AND SENTENCING GUIDELINES INVOLVED

Section 3553(a) of Title 18 provides:

> (a) Factors to be considered in imposing a sentence. The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider--
> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
> (2) the need for the sentence imposed--
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
> (B) to afford adequate deterrence to criminal conduct;
> (C) to protect the public from further crimes of the defendant; and
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
> (3) the kinds of sentences available;
> (4) the kinds of sentence and the sentencing range established for--
> (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines--

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[1] [Appendix A].

[2] [Appendix B].

[3] *See* SUP. CT. R. 13.1.

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g) [18 USCS § 3742(g)], are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement--

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g) [18 USCS § 3742(g)], is in effect on the date the defendant is sentenced.[;]

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

Federal Rule of Criminal Procedure 52(b) provides:

(b) PLAIN ERROR. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

Federal Sentencing Guideline 1B1.3(a) provides:

(a) Chapters Two (Offense Conduct) and Three (Adjustments). Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:

(1) (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and

(B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all acts and omissions of others that were--

(i) within the scope of the jointly undertaken criminal activity,

(ii) in furtherance of that criminal activity, and

(iii) reasonably foreseeable in connection with that criminal activity;

that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense...

USSG 2G2.2 provides:

(a) Base Offense Level:
(1) 18, if the defendant is convicted of 18 U.S.C. § 1466A(b), § 2252(a)(4), § 2252A(a)(5), or § 2252A(a)(7).
(2) 22, otherwise.
(b) Specific Offense Characteristics
(1) If (A) subsection (a)(2) applies; (B) the defendant's conduct was limited to the receipt or solicitation of material involving the sexual exploitation of a minor; and (C) the defendant did not intend to traffic in, or distribute, such material, decrease by 2 levels.
(2) If the material involved a prepubescent minor or a minor who had not attained the age of 12 years, increase by 2 levels.
(3) (Apply the greatest):
(A) If the offense involved distribution for pecuniary gain, increase by the number of levels from the table in § 2B1.1 (Theft, Property Destruction, and Fraud) corresponding to the retail value of the material, but by not less than 5 levels.
(B) If the defendant distributed in exchange for any valuable consideration, but not for pecuniary gain, increase by 5 levels.
(C) If the offense involved distribution to a minor, increase by 5 levels.
(D) If the offense involved distribution to a minor that was intended to persuade, induce, entice, or coerce the minor to engage in any illegal activity, other than illegal activity covered under subdivision (E), increase by 6 levels.
(E) If the offense involved distribution to a minor that was intended to persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct, increase by 7 levels.
(F) If the defendant knowingly engaged in distribution other than distribution described in subdivisions (A) through (E), increase by 2 levels.
(4) If the offense involved material that portrays (A) sadistic or masochistic conduct or other depictions of violence; or (B) sexual abuse or exploitation of an infant or toddler, increase by 4 levels.
(5) If the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor, increase by 5 levels.
(6) If the offense involved the use of a computer or an interactive computer service for the possession, transmission, receipt, or distribution of the material, or for accessing with intent to view the material, increase by 2 levels.
(7) If the offense involved--
(A) at least 10 images, but fewer than 150, increase by 2 levels;
(B) at least 150 images, but fewer than 300, increase by 3 levels;
(C) at least 300 images, but fewer than 600, increase by 4 levels; and
(D) 600 or more images, increase by 5 levels.
(c) Cross Reference
(1) If the offense involved causing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct, apply § 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), if the resulting offense level is greater than that determined above.

STATEMENT

A. Facts

Petitioner Robert Dion Ables pleaded guilty to one count of receiving child pornography, and two counts of producing it.[4] At least two of these offenses – counts two and three, the production offenses – were committed in connection with an extortionate scheme. First, Mr. Ables would contact underage girls on the internet, pretending to be a minor girl like themselves.[5] He would then offer to exchange compromising pictures, sending them pictures of girls obtained on the internet.[6] Then, he used the pictures he received to extort progressively more explicit photos from them.[7] Next, he would correspond with adult male pedophiles on the internet, again posing as a minor girl.[8] During these conversations, he would send the pictures he obtained from his minor girl victims.[9] Finally, he would extort money from the pedophile victims, threatening to contact law enforcement about the pictures they received.[10]

Evidently this course of conduct sat poorly with Mr. Ables's conscience. When law enforcement detected his activity, he immediately confessed and cooperated from the first moment of contact. As the Presentence Report (PSR) related:

> Ables agreed to participate in a post-arrest interview with HSI agents. Ables was told that agents were conducting a search in order to locate a cellular telephone that was used to engage in criminal conduct related to child pornography. Ables stated he had lived at the residence for over one year, and that he was unemployed at that time. Ables provided his cellular telephone number and stated that he had the phone number for approximately three years. When asked how he paid for his cellular

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[4] *See* (ROA.34-38). Citations to the record on appeal in the Fifth Circuit are included in hopes they are of use to the government in answering the Petition, or the Court in evaluating it.

[5] (ROA.132).

[6] (ROA.132).

[7] (ROA.130).

[8] (ROA.130).

[9] (ROA.130).

[10] (ROA.130).

> phone due to being unemployed, Ables admitted he knew why agents were there and that he would be forthright in answering questions. Ables then stated, "I'm the guy you guys are looking for. There's a 110 percent no doubt."[11]

Within three months of the arrest, Mr. Ables agreed to plead guilty to the three charges described above.[12]

B. District court proceedings

The first count of conviction arose under 18 U.S.C. §2252(a)(2): receipt of child pornography. This count charged Mr. Ables with receiving an image of a girl under 12 years old.[13] He obtained the charged image on July 5, 2014.[14] But there is no information in the record about the origin of this photo, nor whether the defendant used this image in his extortion scheme.[15] The second and third counts of conviction arose under 18 U.S.C. §2251(a): production of child pornography. These counts involved images the defendant extorted from two minor girl victims.[16]

The Presentence Report (PSR) calculated a recommended Guideline sentence of 80 years imprisonment.[17] This stemmed from a total offense level of 52 (reduced by operation of the Guidelines to 43), and a criminal history category of I.[18] Count one was governed by USSG §2G2.2 – in applying that Guideline Probation assessed six separate offense level enhancements. These included, *inter alia*:

- six levels for distributing child pornography for pecuniary gain (extorting money from the pedophile victims), USSG §2G2.2(b)(3)(A),

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[11] (ROA.130).

[12] (ROA.38).

[13] (ROA.36).

[14] (ROA.38).

[15] (ROA.129-131, 134-135, 137-138).

[16] (ROA.36-37).

[17] (ROA.140).

[18] (ROA.148).

- four levels for possessing images depicting sadomasochistic conduct or abuse of toddlers, USSG §2G2.2(b)(4),
- five levels for a pattern of sexual abuse, USSG §2G2.2(b)(5), and
- five levels for possessing more than 600 images, USSG §2G2.2(b)(7).[19]

Although the PSR described the defendant's extortion schemes in some detail, it contained very little information about the image charged in count one, or about the images that gave rise to enhancements under USSG §2G2.2. There is no evidence in the PSR that the defendant distributed the particular image named in count one. The PSR stated that the defendant obtained images of child pornography during a two year period between July 5, 2014 and December 2016,[20] but did not specify the time when he received images of sadomasochistic conduct, or when his collection passed any particular numerical threshold.[21]

In addition to enhancements for pecuniary gain, sadomasochism, and numerosity, the defendant received an enhancement on count one for a "pattern of sexual abuse," USSG §2G2.2(b)(5). This enhancement was expressly premised on the defendant's conduct with the victims named in counts two and three.[22]

The PSR found the adjusted offense level on count one to be 46.[23] Count two – a production offense – produced an offense level of 38.[24] Count three – another production offense – produced an offense level of 36.[25] Probation found that none of the three counts were properly grouped

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[19] (ROA.137-138).

[20] (ROA.134) (PSR, ¶38),

[21] (ROA.134)(PSR, ¶38); (ROA.137)(PSR, ¶55).

[22] (ROA.137)(PSR, ¶56).

[23] (ROA.138)(PSR, ¶62).

[24] (ROA.138-139)(PSR, ¶70).

[25] (ROA.139)(PSR, ¶77).

together under USSG §3D1.2.[26] It accordingly applied a one level multi-count adjustment under USSG §3D1.4 to count one, the count with the highest adjusted offense level.[27] Finally, the PSR added yet another five offense levels for a pattern of prohibited sexual conduct under USSG §4B1.5, replicating the prior five level adjustment applied to count one.[28] This produced a total offense level of 52.[29] That number was reduced three points for acceptance of responsibility before settling at 43 by operation of the Guidelines.[30] The defendant was placed in criminal history category one, because he possessed just one criminal history conviction for stealing a debit card.[31] An offense level of 43 and a criminal history category of I gave rise to a recommended Guideline sentence of life, shortened to 80 years by the combined statutory maximums.[32]

The defense made no objections to the Guideline calculations,[33] and the court imposed the recommended sentence of 80 years imprisonment.[34]

C. Petitioner's contentions on appeal

On appeal, Petitioner raised numerous plain errors in the determination of his offense level. First, he challenged the enhancements for sado-masochistic images and more than 600 images on the grounds that they represented misapplications of the relevant conduct Guideline.[35] Specifically, he contended that the record showed no connection between the image named in the count one of

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[26] (ROA.139)(PSR, ¶78).

[27] (ROA.140)(PSR, ¶80).

[28] (ROA.140)(PSR, ¶82)

[29] (ROA.140)(PSR, ¶82).

[30] (ROA.140)(PSR, ¶¶82, 83-85).

[31] (ROA.141-142).

[32] *See* USSG Ch. 5A; USSG §5G1.1(b); (ROA.148)(PSR, ¶134).

[33] (ROA.157)

[34] (ROA.113-114).

[35] (Initial Brief, at pp.13-18).

the indictment and the images that produced these enhancements.[36] Second, he maintained that the district court erred in applying a six level enhancement – to count one – for distributing images whose value exceeded $40,000.[37] He questioned whether the amount of money obtained in extortion really represented the "retail value" of an image, and, again, noted that the record contained no evidence of any connection between the images that produced pecuniary gain to him, and the image named in count one of the indictment.[38] Finally, he challenged a one-level multi-count adjustment under USSG §3D1.4, contending that count one should have been grouped with the other counts under USSG §3D1.2(b).[39]

In connection with these arguments, Petitioner addressed Fifth Circuit case law regarding plain error review of factual questions.[40] Some Fifth Circuit precedent holds that all relevant conduct determinations are factual in nature, and hence categorically immune from plain error review.[41] But Petitioner argued that the court had previously afforded plain error review of relevant conduct determinations arising under USSG §2G2.1, the offense Guideline for child pornography.[42] And, he argued that the court also afforded review to the total failure to make relevant conduct findings.[43]

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[36] (Initial Brief, at pp.13-18).

[37] (Initial Brief, at pp.18-19).

[38] (Initial Brief, at pp.18-19).

[39] (Initial Brief, at pp.19-20).

[40] (Initial Brief, at pp.9-13).

[41] *See United States v. McCaskey*, 9 F.3d 368, 376 (5th Cir. 1993); *United States v. Vital*, 68 F.3d 114, 118-119 (5th Cir 1995); *United States v. Pofahl*, 990 F.2d 1456, 1478-1479 (5th Cir. 1993); *United States v. Ybarra*, 626 Fed. Appx. 472, 473 (5th Cir. 2015) (unpublished); *United States v. Rogers*, 599 Fed. Appx. 223, 225 (5th Cir. 2015) (unpublished); *United States v. Goodley*, 531 Fed. Appx. 452, 452-453 (5th Cir. 2013) (unpublished).

[42] (Initial Brief, at p.10)(citing *United States v. Buchanan*, 485 F.3d 274, 286-287 (5th Cir. 2007)).

[43] (Initial Brief, at pp.10-11) (citing *United States v. Ruiz*, 43 F.3d 985, 992 (5th Cir. 1994)).

Finally, he alternatively maintained that en banc Fifth Circuit precedent and the precedent of this Court abrogate the rule that factual error may never be plain.[44]

Petitioner also raised two sentencing issues to preserve review, both of which were foreclosed. He argued that the Guidelines require that the defendant's offense level should be capped at 43 before any adjustment is subtracted for acceptance of responsibility.[45] Finally, he contended that the sentence was substantively unreasonable because the relevant Guideline regularly produces sentences that are higher than necessary to achieve the goals specified in 18 U.S.C. §3553(a).[46]

D. The government's contentions on appeal

The government conceded that the district court had plainly erred in applying the grouping rules, but argued that the error was harmless because it did not affect the Guideline range.[47] It fought all the other claims of error.[48] As to the relevant conduct issues, it argued that the issues were factual, and that all factual error was categorically immune from plain error review.[49] The overwhelming weight of Fifth Circuit precedent, it argued, supported the rule that factual error may never be plain. It noted that the Fifth Circuit:

> has applied this rule over a hundred times —most recently, in *United States v. Maxey*, 699 F. App'x 435 (5th Cir. Nov. 1, 2017), when the defendant attempted to attack the drug-quantity amount in the PSR. *Id*. at 435.
>
> [FN 2]
>
> In the interest of brevity, the government will not cite all of the cases that have applied this rule. Rather, it warrants to the Court that its Westlaw search turned up well over 100 cases in which the Court has resolved factual issues by applying the rule. In fact, the Court has applied the rule at least twelve times in the last two years. *See Maxey*, 699 F. App'x at 435; *United States v. Glaze*, 699 F. App'x 311, 311 (5th

[44] (Initial Brief, at pp.11-13).

[45] (Initial Brief, at pp.26-28).

[46] (Initial Brief, at pp.29-31).

[47] [Appendix C, at pp. 24-25].

[48] [Appendix C, at pp. 7-24].

[49] [Appendix C, at pp. 7-11].

> Cir. Oct. 16, 2017); *United States v. Oti*, 872 F.3d 678, 694 (5th Cir. Oct. 3, 2017); *United States v. Reynolds*, __ F. App'x __, 2017 WL 3328154, at *3 n.6 (5th Cir. Aug. 3, 2017); *United States v. Sphabmisai*, __ F. App'x __, 2017 WL 3271060, at *1 (5th Cir. Aug. 1, 2017); *United States v. Bookout*, 693 F. App'x 332, 333 (5th Cir. July 13, 2017); *United States v. McCain-Sims*, 695 F. App'x 762, 766 (5th Cir. Jun. 12, 2017); *United States v. Ramirez-Castro*, 687 F. App'x 400, 400 (5th Cir. Apr. 25, 2017); *United States v. Cooper*, 669 F. App'x 243, 244 (5th Cir. Oct. 4, 2016); *United States v. Rios*, 669 F. App'x 193, 194 (5th Cir. Sept. 20, 2016); *United States v. Ayala*, 667 F. App'x 840, 840 (5th Cir. Aug. 1, 2016); *United States v. Chavira*, 647 F. App'x 503, 503 (5th Cir. May 10, 2016).[50]
>
> It did not address the foreclosed issues.

E. The Fifth Circuit opinion

Following the roadmap offered by the government, the Fifth Circuit affirmed.[51] It agreed with the government that the district court plainly erred in applying the grouping rules, but also found the error harmless.[52]

The remaining unforeclosed Guideline issues, it held, were categorically immune from plain error review because they were factual in nature.[53] Further, it rejected any challenge to the prohibition on finding plain factual error as foreclosed by Fifth Circuit precedent.[54] And it declined to find any conflict between this rule and *United States v. Olano*, 507 U.S. 725 (1993), and *Puckett v. United States*, 556 U.S. 129 (2009).[55]

Finally, it agreed that the challenge to offense levels exceeding 43, and the reasonableness challenge were foreclosed.[56]

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[50] [Appendix C, at p. 8, & n.2]

[51] [Appendix B].

[52] [Appendix B, at p.3].

[53] [Appendix B, at pp.1-3].

[54] [Appendix B, at p.2].

[55] [Appendix B, at p.2].

[56] [Appendix B, at pp.3-4].

REASONS FOR GRANTING THE WRIT

The decision below conflicts with the decisions of most other circuits, the precedent of this Court, and the plain text of Federal Rule of Criminal Procedure 52 on the important, recurring, question of whether factual error can ever be plain.

A. The decision below conflicts with that of other courts of appeals.

Federal Rule of Appellate Procedure 52 limits review of unpreserved error. When a party fails to object in district court, a court of appeals may offer relief only for "plain error."[57] The Rule contains a single restriction on the kind of plain error that is eligible for relief – such error must "affect[] substantial rights."[58] It does not mention any distinction between legal and factual error.

Nonetheless, the Fifth Circuit has held that factual error is categorically immune from plain error review.[59] This precedent – often termed "the *Lopez* rule" – is applied with striking frequency, and to a wide variety of "factual errors." These include simple misstatements of prior testimony,[60] and other matters of pure historical fact.[61] But they also include mixed questions of fact and law pertaining to the meaning of the sentencing Guidelines,[62] or the mathematical method by which drug

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[57] Fed. R. Crim. P. 52(b).

[58] *Id.*

[59] *See United States v. Lopez*, 923 F.2d 47, 50 (5th Cir. 1991).

[60] *See United States v. Carlton*, 593 Fed. Appx. 346, 348-349 (5th Cir. December 10, 2014)(unpublished)(erroneous recitation of trial testimony in support of Guideline enhancement), *cert. denied* __U.S.__, 135 S.Ct. 2399 (June 22, 2015).

[61] *See United States v. Sphabmisai*, 703 Fed. Appx. 275, 276 (August 1, 2017)(unpublished)(whether defendant actually undertook drug deliveries); *United States v. Hawkins*, 670 Fed. Appx. 309, 310 (5th Cir. November 9, 2016)(unpublished)(whether defendant fled law enforcement and damaged property).

[62] *See United States v. Rogers*, 599 Fed. Appx. 223, 225 (5th Cir. April 14, 2015)(application of USSG §1B1.3); *United States v. Glaze*, 2017 U.S. App. LEXIS 20173, at *2 (5th Cir. October 16, 2017)(unpublished)(sufficiency of nexus between firearm and other offense under USSG §2K2.1(b)(6)); *United States v. McCain-Sims*, 695 Fed. Appx. 762, 767 (June 12, 2017)(unpublished)(whether defendant's participation in offense is properly characterized as "minor").

quantity is calculated.[63] Further, the *Lopez* rule is applied to questions about whose merits the Court expresses no opinion,[64] and to plain and conceded errors resulting in obviously erroneous terms of imprisonment.[65] As the government commented below, there are "well over 100 cases in which th[at] Court has resolved factual issues by applying the rule."[66]

The view of the Fifth Circuit conflicts with the decisions of other courts of appeals. As Justice Sotomayor observed in an opinion respecting the denial of certiorari, nine other circuits have applied plain error review to claims of factual error.[67] The Tenth Circuit has articulated a rule like that applied below,[68] but does not apply it when the defendant can show a high probability of success on remand.[69] In short, the courts of appeals are clearly divided.

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[63] *See United States v. Reynolds,* 703 Fed. Appx. 295, 298, n.6 (5th Cir. August 3, 2017)(unpublished)(method by which drug purity is averaged).

[64] *See Hawkins*, 670 Fed. Appx. at 310.

[65] *See Carlton*, 593 Fed. Appx. at 348-349.

[66] [Appendix C, at p.8, n.2](citing *United States v. Maxey*, 699 Fed. Appx. 435, 435 (5th Cir. Nov. 1, 2017)(unpublished); *Glaze*, 699 F. Appx. at 311 (5th Cir. Oct. 16, 2017)(unpublished); *United States v. Oti*, 872 F.3d 678, 694 (5th Cir. Oct. 3, 2017)(unpublished); *Reynolds*, 703 Fed. Appx. At 298, n.6; *Sphabmisai*, 703 Fed. Appx. at 276; *United States v. Bookout*, 693 Fed. Appx. 332, 333 (5th Cir. July 13, 2017)(unpublished); *McCain-Sims*, 695 Fed. Appx. at 767; *United States v. Ramirez-Castro*, 687 Fed. Appx. 400, 400 (5th Cir. Apr. 25, 2017)(unpublished); *United States v. Cooper*, 669 Fed. Appx. 243, 244 (5th Cir. Oct. 4, 2016)(unpublished); *United States v. Rios*, 669 Fed. Appx. 193, 194 (5th Cir. Sept. 20, 2016)(unpublished); *United States v. Ayala*, 667 Fed. Appx. 840, 840 (5th Cir. Aug. 1, 2016)(unpublished); *United States v. Chavira*, 647 Fed. Appx. 503, 503 (5th Cir. May 10, 2016)(unpublished)).

[67] *See Carlton v. United States*, 135 S.Ct. 2399, 2400 & n* (June 22, 2015)(Sotomayor, J., opinion respecting denial of certiorari)(citing *United States v. Thomas*, 518 Fed. Appx. 610, 612-613 (11th Cir. 2013); *United States v. Griffiths*, 504 Fed. Appx. 122, 126-127 (3rd Cir. 2012)(unpublished); *United States v. Durham*, 645 F. 3d 883, 899-900 (7th Cir. 2011); *United States v. Sahakian*, 446 Fed. Appx. 861, 863 (9th Cir. 2011)(unpublished); *United States v. Romeo*, 385 Fed. Appx. 45, 50 (2d Cir. 2010)(unpublished); *United States v. Gonzalez-Castillo*, 562 F. 3d 80, 83-84 (1st Cir. 2009); *United States v. Sargent*, 19 Fed. Appx. 268 (6th Cir. 2001) (unpublished); *United States v. Wells*, 163 F. 3d 889, 900 (4th Cir. 1998); *United States v. Saro*, 24 F. 3d 283, 291 (D.C. Cir. 1994)).

[68] *See United States v. Overholt*, 307 F. 3d 1231, 1253 (2002).

[69] *See United States v. Dunbar*, 718 F. 3d 1268, 1280 (10th Cir. 2013).

B. This Court should resolve the circuit split.

1. This Court should overrule the prohibition on plain error review of factual error.

This conflict merits the Court's attention, for several reasons. First, the position of the Court below conflicts with the precedent of this Court, as Justice Sotomayor also observed.[70] This Court has cautioned against the use of *per se* rules in deciding what is and is not plain error.[71] A holding that no factual error can ever be plain is the quintessential example of such a *per se* rule. It is directly contrary to this Court's opinion in *Puckett*.

Second, and as again observed by Justice Sotomayor,[72] the Fifth Circuit's position directly conflicts with the text of Rule 52. The Rule demands only that error be plain and prejudicial in order to make the defendant eligible for relief.[73] Its language simply does not distinguish between factual and legal error. The courts are not at liberty to alter the plain text of Rule 52 where doing so would disrupt the careful balance it has struck.[74]

This view of the Rule is confirmed by the Advisory Notes. Both of the cases discussed in the Rule 52's Advisory Notes suggest that factual plain errors are properly resolved on appeal even in the absence of objection. The 1944 Advisory Notes explain that:

> [the] rule is a restatement of existing law, *Wiborg v. United States*, 163 U.S. 632, 658; *Hemphill v. United States*, 112 F.2d 505 (C.C.A. 9th), reversed 312 U.S. 657. Rule 27 of the Rules of the Supreme Court (28 U.S.C., Appendix) provides that errors not specified will be disregarded, "save as the court, at its option, may notice

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[70] *See Carlton*, 135 S.Ct. at 2400 (Sotomayor, J., opinion respecting the denial of certiorari)("...in all the years since the doctrine arose, we have never suggested that plain-error review should apply differently depending on whether a mistake is characterized as one of fact or one of law.").

[71] *Puckett v. United States*, 556 U.S. 129, 142 (2009)("We have emphasized that a '*per se* approach to plain-error review is flawed.'")(quoting *United States v. Young*, 470 U.S. 1, 17, n. 14 (1985)).

[72] *See Carlton*, 135 S.Ct. at 2400 (Sotomayor, J., opinion respecting the denial of *certiorari*).

[73] *See* Fed. R. Crim. P. 52(b)("A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.").

[74] *See Bank of Nova Scotia v. United States*, 487 U.S. 250, 254-255 (1988).

> a plain error not assigned or specified." Similar provisions are found in the rules of several circuit courts of appeals.[75]

Both *Wiborg* and *Hemphill* were criminal cases bearing on the power of the Court to review the sufficiency of evidence in the absence of an objection. *Wiborg* concerned a violation of the neutrality act committed on the high seas.[76] The defendants were accused of transporting a military expedition to Cuba; under the neutrality act, the defendants' guilt turned on whether they left the territorial waters of the United States intending to lead such an expedition.[77] If they formed this intent outside of U.S. territorial waters, no violation would have occurred.[78] The Court noted the absence of a proper sufficiency objection on behalf of any defendant.[79] It nonetheless proceeded to reverse the conviction of one defendant on the grounds that there was insufficient evidence tending to show that the military nature of the trip was communicated to him prior to leaving U.S. territorial waters.[80] It pointed out:

> No motion or request was made that the jury be instructed to find for defendants or either of them. Where an exception to a denial of such a motion or request is duly saved, it is open to the court to consider whether there is any evidence to sustain the verdict, though not to pass upon its weight or sufficiency. And although this question was not properly raised, yet if a plain error was committed in a matter so absolutely vital to defendants, we feel ourselves at liberty to correct it.[81]

Wiborg accordingly refutes any notion that errors involving factual questions – such as the timing of criminal intent – are immune from reversal absent an objection.

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[75] Fed. R. Crim. P. 52(b), advisory committee's notes (1944).

[76] *See Wiborg v. United States*, 163 U.S. 632, 654 (1896).

[77] *See Wiborg*, 163 U.S. at 648-649, 655.

[78] *See id.* at 655.

[79] *See id.* at 658.

[80] *See id.* at 659-660.

[81] *Wiborg*, 163 U.S. at 658.

The other case cited by the Advisory Notes as exemplary of "current law" is similar. In *Hemphill*, the court of appeals refused to consider the defendant's challenge to the sufficiency of the evidence in support of his conviction because it had not been raised in the appropriate forum.[82] This Court summarily reversed and remanded with instructions to the court of appeals to consider the sufficiency of evidence in support of the verdict.[83] Both cases thus emphasize the power of reviewing courts to reverse cases involving factual error even where no objection is lodged below. Nothing about Rule 52 – neither its text, nor its commentary, nor its history – suggests an intent to limit plain error review to purely legal questions.

Third, the *Lopez* rule depends on the capacity of circuit courts neatly to classify every claim of error as either "factual" or "legal." This is not easy: the failure to adduce sufficient evidence on a given point, for example, may be understood either as the factual error of weighing the evidence incorrectly, or as the legal error of misapplying the correct legal standard. Similarly, the proper legal characterization of undisputed evidence may be described as either legal or factual. The present case illustrates the point. The court below reasoned that claims "pertaining to the type and number of images involved" and to "the money he received from extorting pedophiles" were necessarily factual.[84] But it might just as easily have understood the claims as a legal questions: the sufficiency of the evidence that images on a computer are part of a "common scheme" or "course of conduct" under USSG §1B1.3(a)(2), and the meaning of "retail value" under USSG §2G2.2(b)(3)(A). Notably, the District of Columbia Circuit has held that many relevant conduct determinations are in fact mixed questions of fact and law, meriting a more stringent standard of review than "clear error."[85]

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[82] *See Hemphill v. United States*, 112 F.2d 505, 506 (9th Cir. 1940), *reversed by* 312 U.S. 657 (1941).

[83] *See Hemphill*, 312 U.S. at 658.

[84] [Appendix B, at p.2].

[85] *See United States v. Mellen*, 393 F.3d 175, 183 (D.C. Cir. 2004).

Fourth, and perhaps most importantly, the categorical prohibition on reversing plain factual error virtually invites miscarriages of justice. In many cases, it may be harder to identify factual than legal error as plain. But the categorical prohibition on reversing plain factual error surely encompasses many situations in which defendants have been subjected to unmistakably erroneous decisions: cases where disputed conduct is caught on tape,[86] where defendants establish iron-clad alibis to relevant conduct, or where the unchallenged findings of a PSR "are internally contradictory, wildly implausible, or in direct conflict with the evidence that the sentencing court heard at trial."[87] The court system's interest in finality is adequately protected by the requirement that all unpreserved error must be plain to be reversed. The unique contribution of the rule applied below is to preclude reversal of ***precisely those*** factual errors that would otherwise meet the exacting standards of Rule 52. The rule ought to be abandoned.

The case that drew an opinion from Justice Sotomayor well illustrates that point. In that case, the district court premised a sentence enhancement on a witness's trial testimony that the defendant intended to distribute marijuana in prison.[88] Contrary to the prosecutor's faulty representation to the trial court, however, there was no such testimony in the trial record – the sentence was affirmed due to the *Lopez* rule.[89] *Carlton*, then, demonstrates the kind of flagrant miscarriage of justice – sometimes caused primarily by government misstatements of fact – occasioned by the *Lopez* rule.

2. Review should not be delayed in hopes that the Fifth Circuit will rectify the split itself.

In *Carlton*, Justice Sotomayor expressed hope that the Fifth Circuit would revisit its application of the *Lopez* rule.[90] This hope should not further delay resolution of the conflict, for

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[86] *See United States v. Claiborne*, 676 F.3d 434 (5th Cir. 2012).

[87] *Saro*, 24 F.3d at 291.

[88] *See Carlton*, 135 S.Ct. at 2399.

[89] *See id.*

[90] *See id.* at 2400.

several reasons. First, in the years since *Carlton*, the Fifth Circuit has shown absolutely no interest in revisiting the *Lopez* rule. To the contrary, it has applied the rule unblinkingly at the rate of about once every two months, and to a wide variety of purportedly factual claims.

Second, notwithstanding occasional deviations from the *Lopez* rule in the Fifth Circuit, that Court applied it with "regularity and consistency ...for the past 26 years."[91] As the government warranted below, there are more than 100 cases disposing of arguably factual claims of plain error in this period.[92] Here, it expressly declined to hear any challenge to the *Lopez* rule, on the ground that such was well-settled in its precedent. A panel has said that it is powerless to reconsider the categorical prohibition on plain factual error, even after *Carlton*. This Court should take it at its word.

Third, the Fifth Circuit has already issued an en banc decision that should have dispensed with the Rule. The *Lopez* rule may be traced to the Fifth Circuit's civil jurisprudence predating *United States v. Olano*, 507 U.S. 725 (1993). That older, civil, precedent limited plain error review to cases where "a pure question of law is involved and the refusal to consider it will result in a miscarriage of justice."[93] But in *United States v. Calverley*, 37 F.3d 160 (5th Cir. 1994)(en banc), the en banc court explicitly overruled this formulation, grounding future uses of the doctrine instead in Rule 52 and *Olano*.[94] It makes little sense to await another possible en banc decision on the question, after the court below has failed to apply the controlling law that emanated from its last such decision.

Finally, even if the Fifth Circuit did abandon the *Lopez* rule, this would not alleviate the division in the courts of appeals. The Fourth, Sixth, and Tenth Circuits have all applied a similar

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[91] [Appendix C, at p.9].

[92] *See* [Appendix C, at p.8, n.2].

[93] *Holiday Inns, Inc. v. Alberding*, 683 F.2d 931, 933 (5th Cir.1982).

[94] *See Calverley*, 37 F.3d at 163-164.

prohibition.[95] The rule is simply too convenient a tool for busy circuit courts. It will not be extinguished without intervention from this Court.

C. The present case is an appropriate vehicle.

The present case is an excellent vehicle to resolve the conflict. The court below quite explicitly held that factual error may never be plain, and offered no other rationale for its decision.[96]

In the absence of the *Lopez* rule, Petitioner would be due relief. Under USSG §1B1.3, conduct outside the offense of conviction may sometimes be used to enhance the defendant's offense level. Specifically, such conduct may be considered where it and the offense of conviction comprise a common scheme or plan, or a common course of conduct.[97]

Here, the defendant was convicted on count one of receiving a particular image of child pornography. Other images found on his computer and cellular phone generated large enhancements to his count one Guideline. At least three of these enhancements – those for sadomasochistic images, numerosity, and pecuniary distribution – were plainly not shown to be relevant conduct. Put simply, there is no evidence that the images that generated these enhancements were part of a common scheme or course of conduct with respect to the image charged in count one.

Here, the record reflects that Mr. Ables received child pornography between July 2014 and December 2016.[98] It does not show when in that period he received the particular images that depict

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[95] *See United States v. Alford*, 1994 U.S. App. LEXIS 14582 (4th Cir. June 14, 1994)(unpublished)("Questions of fact capable of resolution by the district court during sentencing, such as the defendant's role in the offense, cannot constitute plain error.")(citing *Lopez*, 923 F.2d at 50); *accord United States v. Kent*, 1998 U.S. App. LEXIS 3750, 7-8 (6th Cir. Mar. 2, 1998)(unpublished)(citing *United States v. Saucedo*, 950 F.2d 1508, 1518 (10th Cir. 1991), *disapproved on other grounds by Stinson v. United States*, 508 U.S. 36, 123 L. Ed. 2d 598, 113 S. Ct. 1913 (1993)); *see also United States v. Smith*, 531 F.3d 1261, 1271 (10th Cir. 2008)("'While we have reviewed sentencing errors that were not raised in the district court under a plain error standard, plain error review is not appropriate when the alleged error involves the resolution of factual disputes.'") (quoting *United States v. Easter*, 981 F.2d 1549, 1555-1556 (10th Cir. 1992)).

[96] *See* [Appendix B, at p.2].

[97] *See* USSG §1B1.3(a)(2).

[98] *See* (ROA.134)(¶38)

sadomasochistic conduct.[99] Nor does it show when his collection crossed any particular numerical threshold.[100] Further, there is no evidence that the images generating enhancements for sado-masochism or numerosity were similar to the count one image, nor that they were acquired as part of a common scheme. To be sure, Mr. Ables was engaged in a scheme to acquire and distribute child pornography. He sent child pornography to minor victims to obtain more such pornography.[101] And then he sent that pornography to pedophiles to extort money from them.[102] But there was no evidence that the image charged in count one was involved in those schemes. Nor was there evidence that the images that generated USSG §2G2.2 enhancements for sadomasochism and numerosity were involved in that conduct. There is accordingly grossly insufficient evidence to support a relevant conduct finding on these two enhancements.

Finally, there was no evidence that the images distributed for pecuniary gain were similar to, nor acquired in a common scheme with, the count one image. The district court imposed a six level adjustment for distributing child pornography for pecuniary gain.[103] In so doing, it treated the "retail value" of these images as more than $40,000, reasoning that this was the amount the defendant's pedophile victims paid in extortion.[104] Even accepting the very dubious proposition that extorted amounts are a commodity's "retail value," the enhancement was improperly imposed.

These plain errors – factual though they may or may not be – affect substantial rights and merit remand. The defendant received 15 offense levels on count one for the possession of sadomasochistic images, possession of more than 600 images, and distribution of child pornography

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[99] *See* (ROA.134)(¶38).

[100] *See* (ROA.134)(¶38).

[101] *See* (ROA.137-138).

[102] *See* (ROA.137-138).

[103] *See* (ROA.137)(¶54).

[104] *See* (ROA.137)(¶54).

for pecuniary gain.[105] In the absence of these unsupported enhancements, the defendant's offense level on count one would have been 31, rather than 46. As the court below agreed, count one plainly should have been grouped with at least one other count of conviction. If the defendant's count one offense level had been reduced to 31 from 46, then the highest offense level for any group of closely related counts would have been 38, associated with count two.[106] Further, in the absence of the plain grouping error discussed above, there would have been just two groups of closely related counts, rather than three. The group containing count two therefore would have been enhanced two levels under USSG §3D1.4. To the resulting offense level of 40, the district court could have then added the same five levels for a pattern of sexual abuse under USSG §4B1.5, and subtracted three levels for acceptance of responsibility, for a total offense level of 42.[107] A level 42, combined with the defendant's criminal history category of I, would have produced a Guideline range of 30 to 80 years, rather than merely 80 years.[108]

The plain Guideline errors in this case changed the minimum recommended sentence from thirty years to eighty years. Clearly, there is a reasonable probability that this massive alteration of the recommended sentence changed the outcome to some extent.[109]

Plain Guideline error affecting the likely term of imprisonment presumptively merits remand.[110] The error need not be a miscarriage of justice, a shock to the conscience, or grounds to question the integrity or competence of the district judge.[111] Here, the Guideline error produced an

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[105] *See* (ROA.137-138).

[106] *See* (ROA.137-139).

[107] *See* (ROA.139-140).

[108] *See* USSG Ch. 5A.

[109] *See United States v. Molina-Martinez*, __U.S.__, 136 S.Ct. 1338 (2016).

[110] *See Rosales-Mireles v. United States*, __U.S.__, 138 S.Ct. 1897 (2018).

[111] *See Rosales-Mireles*, 138 S.Ct. at 1906-1907.

increase in the minimum recommended sentence of ***50 years***. This astronomical increase in the recommended term of imprisonment amply justifies the presumption in favor of remand when there is plain Guideline error.

II. The courts of appeals are divided as to whether Guideline 2G2.2 tends to produce unreasonable sentences in the ordinary case, and on the broader question of whether courts of appeals may evaluate a Guideline's empirical foundation, and policy critiques of the Guideline, in a reasonableness inquiry. The Fifth Circuit's view likely conflicts with this Court's Guidance in *Kimbrough v. United States*, 552 U.S. 85 (2007), and *Pepper v. United States*, __ U.S. __, 131 S.Ct. 1229 (2011).

The United States Sentencing Commission "fills an important institutional role: it can 'base its determinations on empirical data and national experience, guided by a professional staff with appropriate expertise.'"[112] Consequently, the Guidelines generally "reflect a rough approximation of sentences that might achieve [18 U.S.C.] § 3553(a)'s objectives."[113]

But that is not always so. Some guidelines "do not exemplify the Commission's exercise of its characteristic institutional role."[114] They do not take account of empirical data and national experience, but instead are driven by other factors.[115] Such guidelines are a less reliable appraisal of whether a sentence properly reflects § 3553(a)'s goals.[116]

In *Kimbrough*, the Court identified the crack cocaine guideline as one such guideline. The child pornography guideline, §2G2.2, is another. But the courts of appeals differ over whether, when reviewing a sentence for reasonableness, §2G2.2's provenance matters. They also differ on the more

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[112] *Kimbrough v. United States*. 552 U.S. 85, 109 (2007) (quoting *United States v. Pruitt*, 502 F.3d 1154, 1171 (10th Cir. 2007) (McConnell, J., concurring)).

[113] *Rita v. United States*, 551 U.S. 338, 350 (2007).

[114] *Kimbrough*, 552 U.S. at 109.

[115] *See id*. (crack cocaine guideline keyed to statutory minimum sentences for crack offenses instead of being based on empirical data); *Gall v. United States*, 552 U.S. 38, 46 n.2 (2007) (same)

[116] *See Kimbrough*, 552 U.S. at 109–10.

broadly reaching question of whether a court of appeals may evaluate the foundations of a Guideline in deciding whether the sentences it produces are reasonable.

Reviewing a child pornography sentence, the Second Circuit observed that Guideline 2G2.2, is "fundamentally different from most" because the Sentencing Commission "did not use [an] empirical approach in formulating" that guideline.[117] Instead, like the crack cocaine guideline, §2G2.2 is the product of Congressional policy.[118] The result of years of amendments—both by the Commission acting at Congress's direction, and by Congress itself—§2G2.2 contains enhancements that "routinely result in Guidelines projections near or exceeding the statutory maximum, even in run-of-the-mill cases."[119] The flaws in guideline §2G2.2's development led the Second Circuit to conclude that it was "an eccentric Guideline of highly unusual provenance which, unless carefully applied, can easily generate unreasonable results."[120] Accordingly, the guideline's lack of empirical basis was an important factor that led the Second Circuit to conclude that a particular defendant's "sentence was substantively unreasonable[.]"[121]

The Ninth Circuit has employed similar reasoning, albeit in connection with a different Guideline. In *United States v. Amezcua-Vasquez*, 567 F.3d 1050 (9th Cir. 2009), the Ninth Circuit reversed a re-entry defendant's 52 month Guideline sentence as substantively unreasonable.[122] The court in that case determined that application of a 16 point offense level increase for an aged prior conviction could not plausibly produce a reasonable application of 18 U.S.C. §3553(a)(2).[123] The Ninth Circuit, in other words, is willing to evaluate the substantive policy choices embodied by the

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[117] *United States v. Dorvee*, 616 F.3d 174, 184 (2d Cir. 2010).

[118] *See id.* at 184–85.

[119] *Id.* at 186.

[120] *Id*. at 188.

[121] *Id*.

[122] *See Amezcua-Vasquez*, 567 F.3d at 1054-1058.

[123] *See id.*

Guidelines in order to evaluate the reasonableness of a sentence. Thus in the Second and Ninth Circuits, certain Guidelines of unusual provenance that produce extraordinary results may be given special scrutiny in reasonableness review.

The Fifth Circuit, however, "has not followed the course that the Second Circuit has charted with respect to sentencing Guidelines that are not based on empirical data."[124] In *Duarte*, for example, the Fifth Circuit rejected wholesale any consideration of a guideline's lack of empirical foundation in reviewing the reasonableness of a sentence, saying:

> It is true that the *Kimbrough* Court "recognized that certain Guidelines do not take account of empirical data and national experience," but absent further instruction from the Court, we cannot read *Kimbrough* to mandate wholesale, appellate-level reconception of the role of the Guidelines and review of the methodologies of the Sentencing Commission. Whatever appropriate deviations it may permit or encourage at the discretion of the district judge, *Kimbrough* does not force district or appellate courts into a piece-by-piece analysis of the empirical grounding behind each part of the sentencing guidelines.[125]

The court reasserted this proposition even more forcefully in *Miller*, ruling that:

> Empirically based or not, the Guidelines remain the Guidelines. It is for the Commission to alter or amend them. The Supreme Court made clear in *Kimbrough v. United States* that "[a] district judge must include the Guidelines range in the array of factors warranting consideration," even if the Commission did not use an empirical approach in developing sentences for the particular offense. Accordingly, we will not reject a Guidelines provision as "unreasonable" or "irrational" simply because it is not based on empirical data and even if it leads to some disparities in sentencing. The advisory Guidelines sentencing range remains a factor for district courts to consider in arriving upon a sentence.[126]

The Fifth Circuit's refusal to consider a guideline's lack of empirical foundation when reviewing a sentence for reasonableness is directly contrary to the Second Circuit's approach in *Dorvee*, and the Ninth Circuit's in *Amezcua-Vasquez*. Further, the Fifth Circuit's view likely

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[124] *United States v. Miller*, 665 F.3d 114, 120–21 (5th Cir. 2011) (citing *United States v. Mondragon-Santiago*, 564 F.3d 357, 367 (5th Cir. 2009), and *United States v. Duarte*, 569 F.3d 528, 529 (5th Cir. 2009)).

[125] *Duarte*, 569 F.3d at 530 (quoting *United States v. Rosales-Robles*, 294 F. App'x 154, 155 (5th Cir. 2008)).

[126] *Miller*, 665 F.3d at 121. (quoting *Kimbrough*, 552 U.S. at 91; alteration in *Miller*).

conflicts with this Court's Guidance in *Kimbrough v. United States*, 552 U.S. 85 (2007), and *Pepper v. United States*, __ U.S. __, 131 S.Ct. 1229 (2011).

The length of a federal sentence is determined by the district court's application of 18 U.S.C. § 3553(a).[127] A district court must impose a sentence that is adequate, but no greater than necessary, to achieve the goals set forth in 18 U.S.C. § 3553(a)(2).[128] The court must also consider the defendant's Guideline range, which functions as a benchmark and starting point in the federal sentencing process.[129] Reasonableness review determines whether a district court has abused its discretion in applying the 18 U.S.C. § 3553(a) factors.[130]

While the Guidelines are intended to represent a "rough approximation" of the 18 U.S.C. § 3553(a) factors, *Kimbrough v. United States*, 552 U.S. 85 (2007), makes clear that in some cases the Guidelines and statutory factors diverge.[131] The central position of the advisory Guidelines in federal sentence is due in large part to the process used to produce them: an empirical inquiry that attempts to recreate pre-Guidelines practice, with deference to Congressional policy, social science research, and the input of the legal and law enforcement communities.[132] But when Guidelines are not a product of such study, and do not reflect independent Congressional directive, they are not necessarily accurate in their approximation of 18 U.S.C. §3553(a).[133] That federal courts must examine the rationale of each Guideline they apply in order to determine its role in applying 18 U.S.C. §3553(a) is confirmed by *Pepper v. United States*, __ U.S. __, 131 S.Ct. 1229 (2011).

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[127] *See Booker*, 543 U.S. at 259-260.

[128] *See* 18 U.S.C. § 3553(a)(2).

[129] *See Booker*, 543 U.S. at 259-260.

[130] *See Gall*, 552 U.S. at 51.

[131] *Rita*, 551 U.S. 350; *see Kimbrough*, 552 U.S. at 109-110 (approving a variance on the basis of policy disagreement with Guideline).

[132] *See Kimbrough*, 552 U.S. at 107-108.

[133] *See id.*

In *Pepper*, this Court dealt with a district court's right to consider evidence of post-sentencing rehabilitation.[134] The Sentencing Commission issued a policy statement finding post-sentencing rehabilitation irrelevant.[135] It reasoned that consideration of this matter was contrary to Congressional policy assigning "Good Conduct Time" determinations to the Bureau of Prisons rather than the courts.[136] It also thought that the consideration of post-sentencing rehabilitation increased sentencing disparity between defendants who did and did not receive appellate relief.[137]

This Court, however, thought that this particular provision was not due the deference typical of the Commission's work because it "rest[ed] on wholly unconvincing policy rationales not reflected in the sentencing statutes Congress enacted."[138] It thought that Congressional authorization of the Good Conduct Time regime had little or nothing to do with the independent consideration of rehabilitation by the judiciary.[139] Further, it did not think that Congressional disfavor toward sentencing disparity extended to the consequences of "the ordinary operation of appellate sentencing review."[140] This Court accordingly undertook an independent analysis of the relationship between post-sentencing rehabilitation and the § 3553(a) factors, finding it relevant.[141]

The view of the Fifth Circuit applied below is that such considerations – policy critiques of federal Guidelines – are simply off-limits to reviewing courts. Its conclusory recitation that "the Guidelines remain the Guidelines" ignores the careful inquiries undertaken in *Pepper* and

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[134] *See Pepper*, 131 S.Ct. at 1246-1249.

[135] *See* USSG § 5K2.19.

[136] *See* USSG § 5K2.19, comment. (backg'd).

[137] *See* USSG § 5K2.19, comment. (backg'd).

[138] *Pepper*, 131 S.Ct. at 1247.

[139] *See id*. at 1248.

[140] *Id*.

[141] *See id*. at 1247.

Kimbrough. Indeed, it tends to ignore the sea-change heralded by *Booker* itself, which placed 18 U.S.C. §3553(a), rather than the Guidelines, at the center of federal sentencing policy.

CONCLUSION

FOR THESE REASONS, Petitioner asks that this Honorable Court grant a writ of *certiorari*.

Respectfully submitted this 24th day of September, 2018.

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