

NUMBER _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2018

VINCENT BEATTY, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

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

JONATHAN D. BYRNE
ASSISTANT FEDERAL PUBLIC DEFENDER

Office of the Federal Public Defender, Southern District of West Virginia
Room 3400, Robert C. Byrd Federal Courthouse
300 Virginia Street, East
Charleston, West Virginia 25301
Telephone: 304/347-3350

Counsel for Petitioner

BRIAN J. KORNBRATH
ACTING FEDERAL PUBLIC DEFENDER

RACHEL E. ZIMAROWSKI
ASSISTANT FEDERAL PUBLIC DEFENDER

I. QUESTION PRESENTED FOR REVIEW

Whether a *sua sponte* upward variance sentence is reasonable where the advisory Guideline range accurately reflected the defendant's conduct and prior history.

II. TABLE OF CONTENTS

I.	QUESTION PRESENTED FOR REVIEW	1
II.	TABLE OF CONTENTS	2
III.	TABLE OF AUTHORITIES.....	4
IV.	OPINIONS BELOW	7
V.	JURISDICTION	7
VI.	STATUTES AND REGULATIONS INVOLVED	7
VII.	STATEMENT OF THE CASE	8
	A. Federal Jurisdiction.....	8
	B. Facts Pertinent to the Issue Presented	8
	1. Beatty pleads guilty to being a felon in possession of a firearm	9
	2. After the Government concedes that the four-level enhancement should not apply, the district court imposes a <i>sua sponte</i> upward variance sentence because of the connection between guns and drugs	10
	3. The Fourth Circuit affirms Beatty's sentence	13
VIII.	REASONS FOR GRANTING THE WRIT.....	13
	This Petition should be granted to determine whether a <i>sua sponte</i> upward variance sentence is reasonable where the advisory Guideline range accurately reflected the defendant's conduct and prior history	13
	A. The sentencing range under the Guidelines as calculated by the district court is not mandatory. Courts must therefore review Beatty's sentence for unreasonableness	14

B. It is an abuse of discretion for a district court to impose a <i>sua sponte</i> variance in cases such as this one.....	16
IX. CONCLUSION	22
APPENDIX A: Opinion of the United States Court of Appeals for the Fourth Circuit in <i>United States v. Vincent Beatty</i> , ____ F.App'x ___, 2018 WL 5809775 (4th Cir. 2018).....	A-1
APPENDIX B: Excerpt from proceedings held on April 18, 2018, <i>United States v. Vincent Beatty</i> , USDC SDWV, Case No. 2:17-cr-00168	B-1
APPENDIX C: Judgment in a Criminal Case, <i>United States v. Vincent Beatty</i> , USDC SDWV Case No. 2:17-cr-00168, Dkt. No. 52	C-1

III. TABLE OF AUTHORITIES

Cases

<i>Apprendi v. New Jersey</i> , 530 U.S. 466 (2000)	14
<i>Blakely v. Washington</i> , 542 U.S. 296 (2004)	14
<i>Gall v. United States</i> , 552 U.S. 38, 49, 51 (2007).....	14, 16
<i>Rita v. United States</i> , 551 U.S. 338 (2007).....	16
<i>Santosky v. Kramer</i> , 455 U.S. 745, 789 (1982).....	20
<i>United States v. Aguilar-Ibarra</i> , 740 F.3d 587, 591 (11th Cir. 2014)	17
<i>United States v. Beatty</i> , ___ F.App'x ___, 2018 WL 5809775 (4th Cir. 2018).....	7, 13
<i>United States v. Booker</i> , 543 U.S. 220, 261 (2005).....	14, 15
<i>United States v. Dalton</i> , 477 F.3d 195, 199 (4th Cir. 2007).....	18
<i>United States v. Green</i> , 436 F.3d 449, 456 (4th Cir. 2006)	16
<i>United States v. Newsom</i> , 428 F.3d 685, 687 (7th Cir. 2005)	16

Statutes

18 U.S.C. § 922(g)(1)	8
18 U.S.C. § 924(a)(2)	8
18 U.S.C. § 3231	8
18 U.S.C. § 3551	14
18 U.S.C. § 3553	7, 13
18 U.S.C. § 3553(a).....	13, 15, 16
18 U.S.C. § 3553(a)(1)	15

18 U.S.C. § 3553(a)(2)	15
18 U.S.C. § 3553(a)(2)(A)	16
18 U.S.C. § 3553(a)(3)-(7).....	15
18 U.S.C. § 3553(b)(1)	14
18 U.S.C. § 3742	8
28 U.S.C. § 991	14
28 U.S.C. § 1254	7
28 U.S.C. § 1291.....	7, 8
N.J. Stat. Ann. § 2C:11-1d (1996).....	19
N.J. Stat. Ann. § 2C:12-1b(7)(2006).....	19

Rules

Sup. Ct. R. 10(c).....	14
Sup. Ct. R. 13.1.....	7
Sup. Ct. R. 13.3	7

Other Authorities and Sources

U.S. Const., Amend VI.....	14
Jill Goldman et al., Admin. For Children & Families, U.S. Dep’t of Health & Human Servs., <i>A Coordinated Response to Child Abuse and Neglect: The Foundation for Practice</i> 35-38 (2003).....	20
John Pfaff, <i>Locked In: The True Causes of Mass Incarceration and How to Achieve Real Reform</i> , 194-195 (2017).....	21

Valerie Wright, <i>Deterrence in Criminal Justice: Evaluating Certainty vs. Severity of Punishment</i> , The Sentencing Project, (November 2010)	21
http://www.childwelfare.gov/pubs/usermanuals/foundation/foundation.pdf (last visited January 29, 2019)	20
http://www.sentencingproject.org/wp-content/uploads/2016/01/Deterrence-in-Criminal-Justice.pdf (last visited January 30, 2019)	21

IV. OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit in *United States v. Beatty*, ___ F.App'x ___, 2018 WL 5809775 (4th Cir. 2018), is an unpublished opinion and is attached to this Petition as Appendix A. The basis of the issue presented in this Petition was presented to the district court during the sentencing hearing. The relevant portion of the sentencing hearing transcript is attached to this Petition as Appendix B. The final judgment order of the district court is unreported and is attached to this Petition as Appendix C.

V. JURISDICTION

This Petition seeks review of a judgment of the United States Court of Appeals for the Fourth Circuit entered on November 6, 2018. This Petition is filed within 90 days of the date the court's judgment. No petition for rehearing was filed. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1291 and Rules 13.1 and 13.3 of this Court.

VI. STATUTES AND REGULATIONS INVOLVED

The issue in this Petition requires interpretation and application of 18 U.S.C. § 3553, which provides, in pertinent part:

(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; . . .

VII. STATEMENT OF THE CASE

A. Federal Jurisdiction

This Petition arises from the prosecution of Vincent Beatty (“Beatty”) for possession of a firearm. On September 26, 2017, a grand jury sitting in the Southern District of West Virginia returned an indictment charging Beatty with being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). J.A. 7-10.¹ Because that charge constitutes an offense against the United States, the district court had original jurisdiction pursuant to 18 U.S.C. § 3231. This is an appeal from the final judgment and sentence imposed after Beatty pled guilty to the indictment. J.A. 11-12. A Judgment and Commitment Order was entered on April 18, 2018. J.A. 47-53. Beatty filed a timely notice of appeal on May 2, 2018. J.A. 54. The United States Court of Appeals for the Fourth Circuit had jurisdiction to review this matter pursuant to 18 U.S.C. § 3742 and 28 U.S.C. § 1291.

B. Facts Pertinent to the Issue Presented

This Petition involves a prosecution for being a felon in possession of a firearm. At sentencing, the Government agreed that Beatty’s advisory Guideline range should

¹ “J.A.” refers to the Joint Appendix that was filed with the Fourth Circuit in this appeal.

not be enhanced based on him possessing that firearm in connection with trafficking drugs. Nonetheless, the district court imposed a *sua sponte* upward variance based on that connection.

1. Beatty pleads guilty to being a felon in possession of a firearm.

During the summer of 2017, investigators with the Metropolitan Drug Enforcement Team (“MDENT”) utilized confidential informants to make several purchases of controlled substances from Beatty at his home in Charleston, West Virginia. J.A. 58-59. On August 7, 2017, an informant told investigators that they could also purchase a firearm from Beatty. The informant met Beatty, who walked with him from Beatty’s home to another location, where the firearm was located. Beatty and the informant met a third person, Mike, who Beatty instructed to take the informant to the firearm. J.A. 59. Beatty remained outside, while the informant and Mike went inside and retrieved the firearm. The informant returned to MDENT officers with the gun and a small amount of methamphetamine. J.A. 60.

Because Beatty had been previously convicted of a felony in New Jersey, he was charged with being a felon in possession of a firearm. J.A. 7-10. He pled guilty to that offense without the benefit of a plea agreement. J.A. 11-12, 58.

Following Beatty’s guilty plea a Presentence Investigation Report (“PSR”) was prepared to assist the district court at sentencing. J.A. 55-81. The probation officer recommended that Beatty’s base offense level be 20, due to a prior conviction in New Jersey for aggravated assault that qualified as a crime of violence. J.A. 62. The

probation officer also recommended that Beatty receive a four-level enhancement for possession of the firearm in connection with another felony offense and a three-level reduction for acceptance of responsibility, for a final offense level of 21. J.A. 62-63. Combined with a Criminal History Category VI, Beatty's recommended advisory Guideline range was 77 to 96 months in prison. J.A. 68, 75.

Beatty objected to both the base offense level, because the aggravated assault conviction did not qualify as a crime of violence, and the four-level enhancement. J.A. 78-80. He laid forth those arguments in more detail in a sentencing memorandum. J.A. 19-23. He argued that the appropriate sentence was within the properly calculated Guideline range of 30 to 37 months in prison. J.A. 28. In its sentencing memorandum, the Government agreed with Beatty as to the nature of his prior conviction, but argued that the four level enhancement should apply. J.A. 13-14. As a result, it argued that the proper sentence was within a properly calculated Guideline range of 41 to 51 months in prison. J.A. 14, 17.

2. After the Government concedes that the four-level enhancement should not apply, the district court imposes a *sua sponte* upward variance sentence because of the connection between guns and drugs.

A sentencing hearing was held on April 18, 2018. J.A. 29-46. As to the New Jersey conviction for aggravated assault, the district court noted the Government's agreement that it was not a crime of violence, while stating that "I found it fairly amazing that . . . such a crime was not deemed . . . as a crime of violence" by "several

of the courts.” J.A. 32. Nonetheless, the district court recognized that a “conviction under this statute may be sustained with a mens rea of extreme indifference recklessness and it appears that’s not good enough for the Fourth Circuit.” *Id.*

With regard to the four-level enhancement for possession in connection with another felony offense, the district court stated that “[a]s I understand it, the government does not object to not awarding that as well; is that correct?” J.A. 33. The Government confirmed that it was correct, but did not explain why its position had changed. The district court went on to state that “we know here that the defendant took the money for both the methamphetamine and the drugs” and “that he was dealing heroin, at least five controlled sales of heroin, to confidential informants working for the police.” *Id.* “So,” the district court concluded, “he gets a break on this one.” *Id.*

On the basis of those findings, the district calculated Beatty’s advisory Guideline range to be 30 to 37 months in prison. J.A. 34-35. The Government did not argue for a particular sentence in light of the new Guideline calculations, but did argue that the district court should “pay particular attention . . . to the history and characteristics of the defendant, as well as the very serious nature of the crime that he’s admitted to committing.” J.A. 36. The Government highlighted the number of convictions Beatty sustained since 2004 and noted that the New Jersey conviction requires someone to, “at a minimum . . . do something that manifests extreme indifference to the value of human life.” *Id.* Beatty, therefore was “exactly the type of

person that we don't want to possess a firearm." *Id.* In response, Beatty argued that he was "somebody that acknowledges that he does have a lengthy and serious criminal history" and "that what he did in this case was wrong." J.A. 37. He also noted that he "has had an extremely rough life," that his mother was incarcerated for selling drugs when he was young, and that he "grew up in a way where this kind of conduct is acceptable." J.A. 37, 38.

The district court imposed a sentence of 60 months in prison, followed by a three-year term of supervised release. J.A. 39. The district court did note that Beatty "did have a rough upbringing," specifying that "[b]oth his parents were incarcerated for drug trafficking." J.A. 40. Beatty "appears to have struggled when his mother passed away" and became involved with drugs and alcohol at a young age. *Id.* He does not have a high school degree or equivalent and his "employment history is almost nonexistent." J.A. 41. However, Beatty "has never stayed out of trouble with law enforcement his entire adult life" and his prior convictions "didn't deter him from getting back into the criminal business." *Id.* The district court also stated that Beatty "is part of the very serious drug epidemic that we have in this community" and that he "had multiple firearms for sale" in addition to drugs. *Id.* "Guns and drugs," the district court noted, "are particularly bothersome." J.A. 42. It also noted that Beatty was, "essentially" a "career criminal . . . without meeting the legal definitions." *Id.* While the district court recognized it could not consider the New Jersey conviction for

Guideline calculation purposes, it could and did for purposes of determining the ultimate sentence. J.A. 43.

3. The Fourth Circuit affirms Beatty's sentence.

Beatty appealed his sentence, arguing that it was unreasonable to vary upward from the Guidelines based on a connection between Beatty's firearm possession and drug trafficking after having concluded there was no connection for Guideline purposes. The Fourth Circuit disagreed and affirmed the sentence in an unpublished opinion. *United States v. Beatty*, ___ F.App'x ___, 2018 WL 5809775 (4th Cir. 2018). The court concluded that the district court appropriately considered the § 3553(a) factors and fully explained its decision, highlighting "the nature and circumstances of the offense, the history and characteristics of the defendant, the need for adequate deterrence, and the need to protect the public from further crimes by Beatty." *Id.* at *2.

VIII. REASON FOR GRANTING THE WRIT

This Petition should be granted to determine whether a *sua sponte* upward variance sentence is reasonable where the advisory Guideline range accurately reflected the defendant's conduct and prior history.

The probation officer recommended enhancing Beatty's sentence based on a connection between the firearm he possessed and drug trafficking. Beatty objected to that enhancement and, eventually, the Government agreed that it should not apply. Nonetheless, the district court imposed, *sua sponte*, an upward variance based on the connection between the firearm Beatty possessed and drug trafficking. Whether such

a sentence is unreasonable is an important question of federal law that has not been, but should be, settled by this Court. Rules of the Supreme Court 10(c).

A. The sentencing range under the Guidelines as calculated by the district court is not mandatory. Courts must therefore review Beatty's sentence for unreasonableness.

In *Blakely v. Washington*, 542 U.S. 296 (2004), this Court held that Washington state's sentencing guideline scheme violated the Sixth Amendment and the Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). A year later, in *United States v. Booker*, 543 U.S. 220 (2005), this Court held that there was no substantive distinction between the Guidelines and the Washington scheme struck down in *Blakely* and that the Guidelines as applied violated the Sixth Amendment. *Id.* at 233. Specifically, this Court held that 18 U.S.C. § 3553(b)(1), which makes the Guidelines mandatory, was "incompatible with today's constitutional holding." *Id.* Rather than declare the entire Guideline sentencing scheme void, this Court excised the mandatory language from the statute. "So modified," the Court concluded, "the Federal Sentencing Act, see Sentencing Reform Act of 1984, as amended, 18 U.S.C. § 3551 *et. seq.*, 28 U.S.C. § 991 *et. seq.*, makes the Guidelines effectively advisory." *Id.*

After the removal of the "mandatory" provision of § 3553, sentencing judges are still required to "take account of the Guidelines together with other sentencing goals." *Id.* at 259. Therefore, the "district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing." *Id.* at 264. In order to ensure some degree of nationwide consistency,

“the Guidelines should be the starting point and the initial benchmark.” *Gall v. United States*, 552 U.S. 38, 49 (2007). They are “not the only consideration, however.” *Id.* If the district court decides that a sentence outside of the Guideline range is appropriate, it 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.

Taking the place of the Guidelines as the driving force in criminal sentencing is the sentencing mandate found in 18 U.S.C. § 3553(a) that directs that the district court “shall impose a sentence *sufficient, but not greater than necessary*, to comply with the purposes set forth in paragraph (2) of this subsection.” (Emphasis added.) Those purposes are: (1) the need for the sentence to reflect the seriousness of the offense, to promote respect for the law, and provide just punishment; (2) the need for adequate deterrence; (3) the need to protect the public from further crimes of the defendant; and (4) to ensure the defendant is provided “with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.” 18 U.S.C. § 3553(a)(2). In addition, the district court must also consider the nature of the offense and characteristics of the defendant, the kind of sentences available, the type and extent of sentence set forth by the Guidelines and related policy statements, avoiding unwarranted disparity in sentencing, and the need of victims to receive restitution. 18 U.S.C. § 3553(a)(1), (3)-(7).

In a post-*Booker* advisory system, Circuit Courts review the district court's sentence to determine if it is "unreasonable." *Booker*, 543 U.S. at 261. The reasonableness of a sentence "is not measured simply by whether the sentence falls within the statutory range, but by whether the sentence was guided by the Sentencing Guidelines and by the provisions of § 3553(a)." *United States v. Green*, 436 F.3d 449, 456 (4th Cir. 2006). A sentence is not "unreasonable" simply because the appellate court reviewing it would have imposed a different sentence in that case. *Gall*, 552 U.S. at 51. With regards to a sentence imposed within the advisory Guideline range, the Fourth Circuit has held that "a sentence imposed 'within the properly calculated Guidelines range . . . is presumptively reasonable.'" *Green*, 436 F.3d at 456, quoting *United States v. Newsom*, 428 F.3d 685, 687 (7th Cir. 2005); *Rita v. United States*, 551 U.S. 338 (2007)(upholding, but not mandating, the use of the presumption of reasonableness). "At bottom," the court concluded, review for reasonableness requires a determination of "whether the sentence was selected pursuant to a reasoned process in accordance with law, in which the court did not give excessive weight to any relevant factor, and which effected a fair and just result in light of the relevant facts and law." *Id.* at 457.

B. It is an abuse of discretion for a district court to impose a *sua sponte* variance in cases such as this one.

The 60-month sentence of imprisonment imposed by the district court in this case is unreasonable because it is greater than necessary to comply with the purposes of sentencing set forth in § 3553(a). Specifically, it is greater than needed "to provide

just punishment for the offense.” § 3553(a)(2)(A). The advisory Guideline range accurately reflected the severity of Beatty’s offense while also taking his prior criminal conduct into account. Therefore, the district court abused its discretion in imposing a variance sentence, particularly where the Government did not request one.

Beatty’s criminal conduct was simple and limited. He possessed, as a convicted felon, a firearm when he negotiated its purchase for a police informant. That occurred in the context of five drug sales to informants over the course of three months. There is no evidence that Beatty ever carried or used a gun during those sales, nor is there any evidence that Beatty ever did anything with a gun. There is no evidence he brandished it or threatened anyone with it. That is why, presumably, the Government eventually agreed with Beatty that the four-level enhancement for possession of a firearm in connection with another felony offense did not apply. J.A. 33.

The only comments the district court made with regard to Beatty’s conduct involved the link between guns and drugs. It noted the “particularly bothersome” connection between “[g]uns and drugs,” J.A. 42, and concluded that Beatty was “part of a very serious drug epidemic that we have in this community.” J.A. 41. However, the district court’s Guideline findings refute that connection. While the district court implied that it only sustained Beatty’s objection to the four-level enhancement because the Government agreed – stating that Beatty “gets a break on this one” – the

district court “has an independent obligation to calculate correctly the sentencing range prescribed by the Guidelines.” *United States v. Aguilar-Ibarra*, 740 F.3d 587, 591 (11th Cir. 2014)(internal quotation marks omitted). Its ultimate Guideline finding, without any appeal from the Government, must be treated as correct. The district court cannot conclude there is no connection between the firearm Beatty possessed and drugs for Guideline purposes, then impose a variance sentence based on that connection.

The main reason cited by the district court for its variance was Beatty’s criminal history. While the district court is correct that Beatty has a lengthy criminal history, that history is fully considered by the advisory Guideline range. The Guideline criminal history calculation not only includes enhancements for Beatty’s prior convictions, but includes an enhancement because at the time he committed the instant offense he was “under a criminal justice sentence” for a prior conviction for theft and trespass. J.A. 42. Even if Beatty’s criminal history score of 16 would have pushed him into a hypothetical Criminal History Category VII it would not have justified a sentence of 60 months. See, e.g., *United States v. Dalton*, 477 F.3d 195, 199 (4th Cir. 2007).

Nor does the fact that Beatty has a New Jersey conviction for aggravated assault justify a variance of nearly two years. After sustaining Beatty’s objection to that conviction’s classification as a crime of violence, the district court returned to it in explaining the sentence imposed, stating that “even though I may not consider the

aggravated assault for purposes of the guideline crime of violence provision, I can consider it and I do.” J.A. 43. However, the district court never said what that actually meant. That offense requires either that a person cause or attempt to cause “significant bodily injury purposely or knowingly or, under circumstances manifesting extreme indifference to the value of human life recklessly causes such significant bodily injury.” N.J. Stat. Ann. § 2C:12-1b(7)(2006). A “significant bodily injury” is one which “creates a temporary loss of the function of any bodily member or organ or temporary loss of any one of the five senses.” N.J. Stat. Ann. § 2C:11-1d (1996). The only information in the record about that offense is the fact of the conviction and that Beatty was “represented by counsel.” J.A. 41. The offense covers a broad range of conduct and there is nothing in the record to suggest that Beatty’s conviction involved the more serious, intentional conduct rather than reckless behavior that resulted in a temporary disruption of one of the senses. Given that the conviction was fully scored in the Guideline criminal history score there is no basis for the district court to vary based on Beatty’s New Jersey conviction.

In reviewing Beatty’s criminal history, the district court did not give enough weight to the context from which it sprang. The district court was correct in noting that Beatty had a “rough upbringing,” J.A. 40, but that understates the matter. Beatty grew up in a home where drug abuse, violence, and other criminal activity was commonplace. His parents were both involved with drugs and alcohol and conducted their activities in full view of their children. While he was a teenager, the police

raided his home, arresting his mother, father, and younger brother. He was taken in by his older brother's girlfriend, because she was the only one around who was over 18 years of age. J.A. 71. Beatty was introduced to alcohol when he was eight years old (by his aunt) and to crack cocaine and marijuana when he was around ten years old. J.A. 73. That Beatty himself fell into "the criminal business" is not surprising. There are myriad studies detailing the long-range negative consequences to children who experience the kind of environmental instability that Beatty experienced in his formative years. See, e.g., Jill Goldman et al., Admin. For Children & Families, U.S. Dep't of Health & Human Servs., *A Coordinated Response to Child Abuse and Neglect: The Foundation for Practice* 35-38 (2003).² Notably, however, "[i]t requires no citation of authority to assert that children who are abused in their youth generally face extraordinary problems developing into responsible, productive citizens." *Santosky v. Kramer*, 455 U.S. 745, 789 (1982) (Rehnquist, J., dissenting). That background does not support a downward variance from the advisory Guideline range, but its consideration shows that an upward variance is similarly inappropriate.

At bottom, the district court's variance appears to be based on a desire to deter Beatty's future conduct. The district court noted, while reviewing Beatty's criminal history, that he had "never stayed out of trouble with law enforcement his entire adult life" but that "didn't deter him from getting back into the criminal business." J.A. 41.

² Available online at <http://www.childwelfare.gov/pubs/usermanuals/foundation/foundation.pdf> (last visited January 29, 2019).

However, it is unclear how that sentence will deter anyone. The notion that lengthy sentences are the key to effective deterrence has been undermined by empirical studies, which show that the certainty of receiving punishment, rather than the severity of the punishment received, is the key to deterrence. Valerie Wright, *Deterrence in Criminal Justice: Evaluating Certainty vs. Severity of Punishment*, The Sentencing Project, (November 2010);³ see also, John Pfaff, *Locked In: The True Causes of Mass Incarceration and How to Achieve Real Reform*, 194-195 (2017) (“[w]hat really deters is the certainty of being caught”). Thus, “enhancing the severity of punishment will have little impact on people who don’t believe they will be apprehended for their actions.” Wright at 2. The efficacy of lengthy sentences is also suspect because there is a distinct risk the person serving a lengthy sentence will become institutionalized and therefore less likely to successfully reintegrate into society at the conclusion of their sentence, which increases the rate of recidivism. Wright at 7.

Beatty faced an advisory Guideline range of 30 to 37 months in prison. Even had the Government persisted in seeking the four-level enhancement he faced, at most, 51 months in prison. The district court’s decision to impose a sentence of 60 months, at the last moment of sentencing and without any notice to the parties, resulted in a sentence that is greater than necessary to achieve the purposes of

³ Available online at: <http://www.sentencingproject.org/wp-content/uploads/2016/01/Deterrence-in-Criminal-Justice.pdf> (last visited January 30, 2019).

sentencing. As a result, imposing it is substantively unreasonable and imposing it was an abuse of discretion.

IX. CONCLUSION

For the reasons stated, the Supreme Court should grant certiorari in this case.

Date: February 4, 2019.

Respectfully submitted,

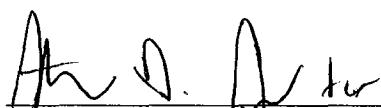
VINCENT BEATTY

By Counsel

BRIAN J. KORNBRATH
ACTING FEDERAL PUBLIC DEFENDER



Jonathan D. Byrne
Assistant Federal Public Defender
Counsel of Record



Rachel E. Zimarowski
Assistant Federal Public Defender