No. _____

IN THE
Supreme Court of the United States

MICHAEL JOHNSON,
Petitioner,
v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Eighth Circuit's test that "extraordinary variances do not require extraordinary circumstances" conflicts with this Court's mandate "that a major departure [from the Guidelines] should be supported by a more significant justification than a minor one" in *Gall v. United States*, 552 U.S. 38 (2007).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Michael Johnson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (Pet. App. A) is published at 916 F.3d 701. The judgment of the United States District Court for the Western District of Missouri (Pet. App. C) is unpublished.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on February 22, 2019. Petitioner's request for rehearing and rehearing *en banc* was denied on April 8, 2019. (Pet. App. B). This Court has jurisdiction under 28 U.S.C. §1254 (1).

STATUTORY PROVISIONS INVOKED

18 U.S.C. § 3553 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--

(i) issued by the Sentencing Commission . . .

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

INTRODUCTION

The federal courts of appeals review criminal sentences and set aside those they find unreasonable. In *Gall v. United States*, 552 U.S. 38, 46 (2007), this Court articulated how sentences should be reviewed by appellate courts for reasonableness, after the Sentencing Guidelines became "advisory." *Id.*, citing *United States v. Booker*, 543 U.S. 220 (2005). A sentencing judge has wide latitude to decide the proper degree of punishment for an individual offender and a particular crime, based on an abuse-of-discretion review. *Gall*, 552 U.S. at 46. However, the sentencing judge must give serious consideration to the extent of any departure from the Guidelines and must explain its conclusion that an unusually harsh sentence is appropriate in a particular case with sufficient justifications. *Id.*

Gall empowered the courts of appeals to review the reasonableness of a sentence outside the Guidelines, by taking "the degree of variance into account and consider the extent of a deviation from the Guidelines." *Id.* at 47. Specifically, a major departure from the Guidelines "should be supported by a more significant justification than a minor one." *Id.* at 50. This Court, however, rejected a "rigid mathematical formula" to review sentences, or "an appellate rule that requires 'extraordinary' circumstances to justify a sentence outside the Guidelines range." *Id.*

Federal courts of appeals have become intractably divided over how these standards should be applied when reviewing the reasonableness of sentences. The Eighth Circuit is an outlier, concluding that its review of sentences is so minimal that "even extraordinary variances do not require extraordinary circumstances." *United States v. Johnson*, 916 F.3d 701, 703 (8th Cir. 2019). In contrast, the Sixth Circuit frames its review as one with teeth, concluding that pursuant to *Gall*, "extraordinary circumstances *may* justify extraordinary variances." *United States v. Robinson*, 669 F.3d 767, 779 (6th Cir. 2012) (emphasis added).

The question presented is extremely important, because this Court found "it uncontroversial that a major departure [from the Guidelines] should be supported by a more significant justification than a minor one." *Gall*, 552

U.S. at 50. Extreme sentencing variances *must* require extraordinary circumstances, otherwise extreme sentences will be immune from correction by the courts of appeals. Furthermore, without that principle to guide courts in the future, it is difficult to discern how circuit court judges will be able to determine when sentencing mistakes are made below. "In sentencing, as in other areas, district judges at times make mistakes that are substantive. At times, they will impose sentences that are unreasonable. Circuit courts *exist* to correct such mistakes when they occur." *Rita v. United States,* 551 U.S. 338, 354 (2007), emphasis added.

STATEMENT OF THE CASE

1. In 2016, Petitioner Michael Johnson pleaded guilty to possession with intent to distribute cocaine base, in violation of 21 U.S.C. § 841. The police caught Mr. Johnson with 23.3 grams of cocaine, which was worth less than $1,000.00.

After he pled guilty, the Probation Office's presentence investigation report did not identify any justification for varying outside the sentence recommended by the Guideline range of 57-71 months' imprisonment, nor did the government seek an above-Guidelines sentence. However, the district court sentenced Mr. Johnson, then age 61, to 204 months of imprisonment.

Mr. Johnson's 204 month sentence was more than triple the low end of the Guidelines range.

The district court concluded that the Guidelines are "way insufficient in this case" (Sent. Tr., pg. 29), elaborating as follows:

> So then we look at your history and characteristics, and that is a problem for you; right? I mean, that's a big problem for you. I take notes, and you've -- let's see. We have a murder second degree, which is paragraph 32. You received a 25-year sentence on that, on April 19th, 1997. . . .
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> ***
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> And I guess before you were off parole on that, paragraph 33 came, which was conspiracy to distribute 50 grams or more of cocaine base, distribution of at least 5 grams but less than 50 grams of cocaine base, and possession with intent to distribute cocaine base, which is -- as I think [the government] noted is the similar conduct we're addressing here today. In that case you received 135 months on each count, and you got your supervision revoked at that time . . .
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> ***
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> So it is -- it is a situation where you will get a variance in this case. You know, my position is you don't get less time the more crimes you commit for deterrence to take effect. And these prior convictions and your -- the way you handled them after that on supervision and during incarceration are problematic.

(Sent Tr., pg. 27-30).

Mr. Johnson's trial counsel objected to the district court's sentence as being procedurally and substantively unreasonable.

2. Mr. Johnson appealed his sentence to the Eighth Circuit, which

affirmed. In concluding that his sentence was substantively reasonable, the panel noted that its review was an abuse-of-discretion standard, and that the district court has "wide latitude" to weigh the §3553(a) factors. *Johnson*, 916 F.3d at 703. "We may consider the extent of any deviation from the guideline range, but *Gall* forbids requiring proportional justifications for variances from the range, *and even extraordinary variances do not require extraordinary circumstances*." *Id*.; emphasis added.

In applying this test, the panel concluded that Mr. Johnson's sentence was both procedurally and substantively reasonable because "[v]iewing the record as a whole, the district court faced a defendant who had committed a serious drug offense after a lengthy and sustained criminal history that included a murder, a pattern of drug-related offenses, and a history of incorrigibility while on supervision." 916 F.3d at 703. The panel failed to discuss the extent of the district court's variance in sentencing Mr. Johnson above the Guidelines, or how neither probation nor the prosecutor requested an upward variance. *Id*. The panel also did not discuss that it was undisputed that for his 204 month sentence to be a within Guidelines' sentence, Mr. Johnson could have been in possession of approximately 18 pounds of base cocaine, which has a street value of well over $200,000.00 (Mr. Johnson's 23.3 grams of crack was not even worth $1,000). *Id*.

Judge Grasz "concur[ed] dubitante." *Id.* at 704-06. He noted that while Mr. Johnson's sentence was "excessive", affirmance was mandated by established precedent because appellate review of sentences "that dramatically deviate from the Guidelines" is typically "an exercise in futility" and "akin to a rubber stamp." *Id.*

3. Mr. Johnson filed a petition for rehearing and petition for rehearing *en banc*, but the Eighth Circuit denied that petition on April 8, 2019. (Pet. App. B).

REASONS FOR GRANTING CERTIORARI

The courts of appeals are conflicted over the proper standard of review in determining the reasonableness of a criminal defendant's sentence. This Court should use this case – which cleanly presents the legal issue – to resolve the conflict over this important question.

I. The lower courts are in conflict over the question presented.

1. The Eighth Circuit has repeatedly held that, under its standard of review, "even extraordinary variances do not require extraordinary circumstances." *Johnson*, 916 F.3d at 703. In contrast, the Sixth Circuit flips the test, concluding that pursuant to *Gall* "extraordinary circumstances *may* justify extraordinary variances." *Robinson*, 669 F.3d at 779, emphasis added. It has been widely noted that the federal courts of appeals "approach

substantive reasonableness review inconsistently." *United States v. Irey*, 612 F.3d 1160, 1260 (11th Cir. 2010); *see also United States v. Feemster*, 572 F.3d 455, 467 (8th Cir. 2009) (Colloton, J., concurring) ("[O]ne searches in vain for a principled basis on which to conduct a consistent and coherent appellate review for reasonableness."); *see also United States v. Funk*, 534 F.3d 522, 530 (6th Cir. 2008) (Boggs, C.J., dissenting) ("This case represents essentially a judgment call under the rather unclear standard of 'reasonableness' that we have been given by the Supreme Court in the wake of *Rita*, *Kimbrough*, and *Gall*.").

2. Other circuits, while they may at times frame the scope of appellate review similarly to the Eighth Circuit, far more frequently conclude that a sentence is unreasonable. This has been implicitly acknowledged by the Eighth Circuit itself. *See Johnson*, 916 F.3d at 704 (referring to *United States v. Martinez*, 821 F.3d 984 (8th Cir. 2016), as "one of *this court's* more aggressive applications of abuse-of-discretion review") (emphasis added); *see also Johnson*, 916 F.3d at 706, fn 3 (Grasz, J., concurring) (pointing to "difficult but pressing question of whether *this circuit's* pre-*Gall* language describing abuse of discretion" is proper based on Supreme Court case law) (emphasis added).

Specifically, the Second Circuit has held, *en banc*, that a sentence is substantively unreasonable if it "cannot be located within the range of permissible decisions." *United States v. Cavera*, 550 F.3d 180, 189 (2d Cir. 2008). In applying this test in the last two years, the Second Circuit has reversed an unreasonable sentence on no less than four occasions. *See United States v. Sawyer*, 892 F.3d 558, 561 (2d Cir. 2018) (30 year sentence is substantively unreasonable, but subsequent 25 year sentence after re-sentencing subsequently affirmed); *see also United States v. Brooks*, 889 F.3d 95, 101 (2d Cir. 2018) (life term of supervised release found unreasonable, analyzing Sentencing Commission statistics); *United States v. Singh*, 877 F.3d 107, 116–17 (2d Cir. 2017) (almost triple the Guidelines sentence found substantively unreasonable, after reviewing Sentencing Commission statistics); *United States v. Jenkins*, 854 F.3d 181, 193 (2d Cir. 2017) (analyzing Sentencing Commission statistics in concluding that sentence was without any reasonable justification, and created the type of unwarranted sentencing disparity that violates §3553(a)(6)).

3. No other circuit was located that employed the Eighth Circuit's test, that "even extraordinary variances do not require extraordinary circumstances." That is not surprising because that test conflicts with *Gall*,

"that a major departure [from the Guidelines] should be supported by a more significant justification than a minor one." *Gall*, 552 U.S. at 50.

This conflict is entrenched, and only this Court can resolve it.

II. The question presented is extremely important.

The question presented is one of exceptional importance because thousands of defendants challenge the reasonableness of their sentences on direct appeal each year. *U.S. Sentencing Comm'n, Report on the Continuing Impact of United States v. Booker on Federal Sentencing*, Part B Appellate Review, Appeals Data Analysis 2012, Figure B-8, at pg. 38. The question presented therefore determines whether a large number of federal prisoners will be able to obtain relief from unreasonable sentences. The relief is also significant because for many defendants, like Mr. Johnson, the question will determine whether they will continue to serve "effectively a life sentence." *Johnson*, 916 F.3d at 704 (Grasz, J., concurring).

A defendant's ability to successfully challenge the substantive reasonableness of a sentence should not turn on the fluke of geography. But that is the current state of the law. Had Mr. Johnson been sentenced in the Sixth Circuit, he could have pointed to a different test, a far more reasonable test, and a test in line with this Court's sentencing jurisprudence that

"extraordinary circumstances *may* justify extraordinary variances." *United States v. Robinson*, 669 F.3d 767, 779 (6th Cir. 2012) (emphasis added).

It cannot be disputed that the Guidelines must be the touchstone in how to punish serious crimes "in the initial determination of a sentence and through the process of appellate review." *Rosales-Mireles v. United States*, 138 S.Ct. 1897, 1904 (2018). However, if extreme sentencing variances do not require extraordinary circumstances, sentencing courts may routinely ignore the Guidelines at their whim, which seriously undermines Congress' directive "to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553 (a)(6). And, of course, the Guidelines also help to anchor sentences, giving meaning to Congress' "general directive" to "impose a sentence sufficient, but not greater than necessary . . ." *Gall*, 552 U.S. at 50, fn 6 (quoting 18 U.S.C. § 3553(a)).

District courts must follow the above directives of Congress and this Court when sentencing defendants. If they do not, appellate courts must be empowered to reverse sentences because "[c]ircuit courts exit to correct such mistakes when they occur." *Rita*, 551 U.S. at 354.

III. The Eighth Circuit's ruling is incorrect.

1. The Eighth Circuit's interpretation of *Gall*, in determining the standard of review for the reasonableness of sentence, is incorrect. "We find it uncontroversial that a major departure [from the Guidelines] should be supported by a more significant justification than a minor one." *Gall*, 552 U.S. at 50. However, in affirming Mr. Johnson's upward variance sentence, conspicuously absent from the Eighth Circuit's analysis is an application of this proposition from *Gall*, in evaluating whether Mr. Johnson's sentence is substantively reasonable. Rather, the majority opinion applies a test that is in tension with *Gall*, that "even extraordinary variances do not require extraordinary circumstances." *Johnson*, 916 F.3d at 703, citing *United States v. McGhee*, 512 F.3d 1050, 1052 (8th Cir. 2008).

2. In *McGhee*, the Eighth Circuit correctly noted that *Gall* rejected "'an appellate rule that requires 'extraordinary' circumstances to justify a sentence outside the Guidelines range.'" *Id.* at 1051-52, quoting *Gall*, 552 U.S. at 595. But the Eighth Circuit's analysis in *McGhee* went too far in concluding that *Gall* also "preclude[d] a requirement of 'extraordinary circumstances' to justify an 'extraordinary variance.'" *Id*. at 1052. Put simply, a "major departure" from the Guidelines requires a determination of whether it is "supported by a more significant justification." *Gall*, 552 U.S. at 50.

3. There is no dispute that the district court did not need an extraordinary circumstance to sentence Mr. Johnson outside the Guidelines, but that does not end the inquiry. The problem with the Eighth Circuit's substantive reasonableness test is that it analyzes all upward variances identically, when *Gall* recognized that not all variances are the same.[1]

The Sentencing Commission has determined that a drug crime like Mr. Johnson's constitutes an offense level 22, based on the weight of the cocaine base (23.3 grams). *See* U.S.S.G § 2D1.1. In making this determination, the Sentencing Commission established a Drug Quantity Table, which calculates punishment based on the type and weight of the drugs involved because it reflects the extent of the culpable conduct. *See United States v. Reyes-Santiago*, 804 F.3d 453, 461 (1st Cir. 2015). Congress, too, has adopted such an approach to sentencing drug crimes, where the amount of cocaine is at times a dispositive factor to sentencing. *Compare* 21 U.S.C. § 841(b)(1)(A), to 21 U.S.C. § 841(b)(1)(B).

Accordingly, pursuant to the Drug Quantity Table, the amount of drugs in one's possession makes a *massive* distinction, with those in

[1] The Eighth Circuit's test analyzes a 72 month sentence identically to Mr. Johnson's 204 month sentence, because they are both upward variances. But these sentences are not the same, because Mr. Johnson's actual sentence of 204 months, is over ten years more time in prison than the 72 month sentence.

possession of less drugs given more sentencing leniency. However, in reviewing Mr. Johnson's massive upward variance sentence, the Eighth Circuit failed to consider the weight of Mr. Johnson's crack cocaine. This illustrates why its test for substantive reasonableness is flawed, because the Eighth Circuit failed to consider one of the most important factors in determining how long his drug sentence should be.

4. In affirming Mr. Johnson's sentence, the Eighth Circuit left the central question unanswered: Was there a significant justification for this major departure? It is true that *"Gall* forbids requiring proportional justifications for variances from the range" *Johnson*, 916 F.3d at 703, and therefore a bright line test may not be drawn in determining when a significant justification is lacking from a major departure sentence. However, *Gall* requires a balancing test in reviewing the reasonableness of a sentence, and the Eighth Circuit has erred in skewing its test against meaningful appellate review of unreasonable sentences.

IV. This case is an excellent vehicle to resolve this split.

This case is an ideal vehicle for resolving this circuit split, in order to provide lower courts with guidance in this important area of the law.

1. The sole determinative factor, as to whether Mr. Johnson's sentence

is an unreasonable sentence, is which circuit's test is applied to review his sentence. For example, had Mr. Johnson been sentenced in the Second Circuit, there is a likelihood that his sentence would have been found substantively unreasonable.

In *Singh*, in concluding that the defendant's sentence was unreasonable, the Second Circuit held that "a major variance must be supported by 'a more significant justification.'" 877 F.3d at 117, quoting *Gall*. After announcing that standard, the Second Circuit then turned to the Sentencing Commission's statistics to conclude that the justification offered by the district court was insufficient to support the magnitude of the variance in sentencing the defendant. *Id.* This was because "the sentence of 60 months drastically exceeded nationwide norms", where the average sentence was 18 months. *Id*. The Second Circuit also examined the defendant's extensive criminal history, and although his criminal history score was found to be underrepresented because the bulk of the defendant's offenses were more than twenty years old, the court nonetheless concluded that the age of the offenses supported a lesser sentence because he "was only 21 and 22 years old when he committed those offenses." *Id*.

Mr. Johnson made a similar showing as in *Singh* before the Eighth Circuit that his sentence drastically exceeded nationwide norms, which went

unrebutted by the government, and unanalyzed by the Eighth Circuit. Specifically, Mr. Johnson demonstrated to the Eighth Circuit that he was sentenced to 204 months' imprisonment, when the Sentencing Commission statistics highlighted that his sentence is approximately triple the mean or medium sentence for the same category of offense, for the years of 2014, 2015, and 2016. Thus, Mr. Johnson's sentence is a "dramatic" upward variance, one that would have been likely reversed by the Second Circuit.

It was also undisputed before the sentencing court, and the Eighth Circuit, that there was nothing atypical, much less egregious, about Mr. Johnson's conduct in possessing 23 grams of crack cocaine with an intent to distribute. Mr. Johnson did not have a weapon, or engage in violent conduct. Accordingly, for his 204 month sentence to be a within Guidelines' sentence, Mr. Johnson could have been in possession of approximately 18 pounds of base cocaine, which has a street value of well over $200,000.00, Tellingly, Mr. Johnson's 23.3 grams of crack cocaine was not even worth $1,000. Thus, Mr. Johnson's case is an excellent vehicle to resolve this circuit split because, again, the sole factor determining whether his sentence is reasonable is which circuit's reasonableness test is applied to his case.

To be sure, Mr. Johnson committed a homicide over 40 years ago, but this does not make him disqualified for a meaningful review of the

reasonableness of his sentence. Mr. Johnson has not disputed that his criminal history warranted an upward variance in his sentence; rather, it is only the extent of that variance that is at issue. This is a distinction with a *massive* difference. "To a prisoner, this prospect of additional time behind bars is not some theoretical or mathematical concept", because it "has exceptionally severe consequences for the incarcerated individual and for society which bears the direct and indirect costs of incarceration." *Rosales-Mireles v. United States*, 138 S.Ct. 1897, 1907 (2018).

2. The only basis to affirm Mr. Johnson's sentence is to conclude that "even extraordinary variances do not require extraordinary circumstances." However, because this Court has already concluded "that a major departure [from the Guidelines] should be supported by a more significant justification than a minor one." *Gall*, 552 U.S. at 50, this Court should grant certiorari and instruct the lower courts to give Mr. Johnson the sentencing relief to which he is entitled.

CONCLUSION

For the forgoing reason, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Appendix A - Judgment of the Eighth Circuit Court of Appeals

Appendix B – Order denying rehearing by the Eighth Circuit Court of Appeals

Appendix C – Judgment of the District Court