IN THE SUPREME COURT OF THE UNITED STATES

19-

UNITED STATES OF AMERICA,

Petitioner

v.

AARON CLAYTON MCVEA,

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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QUESTION PRESENTED

Is a sentence imposed under the methamphetamine sentencing guideline–a guideline crafted without benefit of Sentencing Commission expertise or empirical basis–entitled to a presumption of reasonableness? The Fifth Circuit concluded as much. But its basis for doing so–that a guideline enjoys a presumption of reasonableness regardless of its lack of empirical basis or its promulgation without benefit of Sentencing Commission expertise–conflicts with the Second Circuit's approach to review of sentences under such a guideline.

PARTIES

Aaron Clayton McVea is the Petitioner; he was the defendant-appellant below. The United States of America, Respondent; it was the plaintiff-appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Aaron Clayton McVea 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The unpublished opinion of the United States Court of Appeals for the Fifth Circuit is captioned as *United States v. McVea*, No. 18-11159, 763 F.3d 377 (5th Cir., April 3, 2019)(unpublished), and is provided in the Appendix to the Petition. [Appx. A]. The district court entered judgment on August 24, 2018, which judgment is attached as an Appendix. [Appx. B].

JURISDICTIONAL STATEMENT

The instant Petition is filed within 90 days of the judgment below, which was entered on April 2, 2019. *See* SUP. CT. R. 13.1. This Court's jurisdiction to grant certiorari is invoked under 28 U.S.C. § 1254(1).

FEDERAL STATUTE INVOLVED

18 U.S.C. § 3553(a) provides the following:

> (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 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), 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), is in effect on the date the defendant is sentenced. [FN1]
(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.

STATEMENT OF THE CASE

On February 14, 2018, McVea was charged in a single count indictment charging McVea with Conspiracy to Possess with Intent to Distribute a Controlled Substance, in violation of 21 U.S.C. §§ 846, 841(a)(l) and (b)(l)(A)(viii)). (ROA.7-8).[1] On May 1, 2018, McVea pleaded guilty to the indictment pursuant to a written plea agreement and a written factual resume.(ROA.30-37;40-58;112-118). On August 24, 2018, the district court sentenced McVea to 125 months imprisonment, a $100 special assessment; and 3 years supervised release.(ROA.40,65). On August 24, 2018, McVea timely filed notice of appeal.(ROA.44).

As a part of his guilty plea, McVea entered into a written stipulation of the following facts in his Factual Résumé:

> 1) Aaron Clayton McVea admits and agrees that on or about October 11, 2017, within the Northern District of Texas, Abilene Division, and elsewhere, he did knowingly and intentionally possess with intent to distribute a mixture or substance containing a detectible amount of methamphetamine, a Schedule II controlled substances, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C)
> 2) On October 11, 2017, an officer with the Abilene (Texas) Police Department (APD) stopped a vehicle for a traffic violation. Aaron Clayton McVea was identified as the driver of the vehicle. McVea did not have a valid driver's license. An APD officer deployed a narcotic detection dog (K9) to do a free-air sniff of McVea's vehicle. The dog alerted to the odor of a controlled substance in the vehicle.
> 3) .During a later search of McVea's vehicle, APD officers located a bag of methamphetamine, a bag of marijuana, and approximately $3,000 in the console of the vehicle. McVea was arrested, taken to the law enforcement center, and searched. A bag of methamphetamine with a gross weight of approximately 34.7 grams was found on McVea's person. This amount of methamphetamine is consistent with distribution, not personal use.

[1] For the convenience of the parties, Petitioner has included citations to the record on appeal below.

McVea admits that he knowingly or intentionally possessed the suspected methamphetamine and that he possessed it with intent to distribute it.

4) McVea agrees that he committed all the essential elements of the offense. The factual resume is not intended to be a complete accounting of all the facts and events related to the offense charged in this case. The limited purpose of this statement of facts is to demonstrate that a factual basis exists to support the defendant's guilty plea to Count One of the indictment. (ROA.30-32).

A presentence report was prepared using the November 1, 2016, edition of the United States Sentencing Guidelines. The PSR and Addendum attributed 37.06 grams of d-methamphetamine hydrochloride "ICE". (ROA.127). In doing so, the PSR reached an offense level 28. (ROA.127). Following a total three-level reduction for acceptance of responsibility, McVea's total offense level was a 25. (ROA.127).

Probation assessed 10 criminal history points, resulting in a criminal history category (CHC) V. (ROA.131). Based upon that CHC V and a Level 25 adjusted offense level, McVea's advisory range was 100-125 months. (ROA.138).

McVea's attorney filed an objection to the PSR and request for variance raising the argument that has been set forth in this brief: The sentencing guidelines increased offense levels for actual (pure) methamphetamine and ICE (80% pure methamphetamine) are unreasonable and not based on empirical study by the Sentencing Commission. (ROA.142-190). At sentencing, McVea's attorney re-urged the same argument to the district court. (ROA.61-64).

The district court overruled McVea's objection and imposed a sentence at the top of the advisory guideline imprisonment range, 125 months imprisonment. (ROA.65).

On appeal, Petitioner argued that the sentence was unreasonable because it had been based on a Guideline – the methamphetamine drug quantity Guideline – that fails to reflect the factors enumerated at 18 U.S.C. § 3553(a). The Fifth Circuit held that the presumption of reasonableness accorded within-Guideline sentences attaches even to sentences that stem from Guidelines that are not empirically based. It thus affirmed. *See* Appx. A

REASON FOR GRANTING THE WRIT

The Court should grant certiorari to resolve the important federal question–and to resolve a circuit split in authority–as to whether a sentence emanating from a guideline crafted without benefit of Sentencing Commission expertise and bereft of empirical basis is, as the Fifth Circuit claims, entitled to a presumption of reasonableness or whether, as the Second Circuit has demonstrated, such a guideline does not merit such a presumption.

Discussion

The United States Sentencing Commission "fills an important institutional role: It has the capacity courts lack to 'base its determinations on empirical data and national experience, guided by a professional staff with appropriate expertise.'" *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)). Consequently, the Guidelines generally "reflect a rough approximation of sentences that might achieve [18 U.S.C.] § 3553(a)'s objectives." *Rita v. United States*, 551 U.S. 338, 350 (2007).

But that is not always so. Some guidelines "do not exemplify the Commission's exercise of its characteristic institutional role." *Kimbrough*, 552 U.S. at 109. They do not take account of empirical data and national experience, but instead are driven by other factors. *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). Such guidelines are a less reliable appraisal of whether a sentence properly reflects § 3553(a)'s goals.

See Kimbrough, 552 U.S. at 109–10. Accordingly, they are entitled to less deference by the courts. *See id.* In *Kimbrough*, the Court identified the crack cocaine guideline as one such guideline.

As this Court opined in *Pepper v. United States*, "the District Court's overarching duty [is] to impose a sentence sufficient, but not greater than necessary to serve the purposes of sentencing." 131 S. Ct. 1229, 1243 (2011) (internal quotation marks omitted). And this Court has also observed that a district court cannot presume that the advisory guideline range for a defendant is, in fact, a reasonable sentence. *Nelson v. United States*, 555 U.S. 350, 352 (2009). Instead, a sentencing court must instead consider the purposes of sentencing and factors set forth in 18 U.S.C. § 3553 as well as the parties' arguments that the advisory guideline itself is not fair and reasonable.

In *Kimbrough*, this Court also observed, when the Sentencing Commission formulates a guideline by carrying out its institutional role of examining empirical data, national experience, and the expertise of a professional staff, sentencing courts can be confident that a sentence within the advisory guideline range will reflect a rough approximation of sentences that might achieve the sentencing goals set forth in 18 U.S.C. Section 3553(a). 552 U.S. 85, 108-09 (2007). But, on the other hand, when the Sentencing Commission creates a guideline without exercising its characteristic institutional role, then even in ordinary cases a sentencing judge could reasonably conclude that the advisory guidelines sentence yields a sentence

"greater than necessary" to achieve Section 3553(a)'s purposes. *Id*. at 109-10. *See also United States v. Henderson*, 649 F.3d 955, 960 (9th Cir. 2011) (because child pornography guideline was not developed in a manner exemplifying the Sentencing Commission's exercise of its characteristic institutional role, district judges are at liberty to vary from them based on reasonable policy disagreements).

The Methamphetamine Guideline did not receive the Sentencing Commission's empirical expertise

The advisory guideline for possession with intent to distribute methamphetamine was not formulated through the Sentencing Commission's exercise of its critical institutional role of examining empirical evidence, national experience, and considering the opinions of experts. Instead, like the guideline for crack cocaine, the methamphetamine guideline has evolved in response to congressional mandates. Indeed, the guideline related to methamphetamine was increased for the express purpose of keeping up with the guideline for crack cocaine, and now Congress, the Sentencing Commission, and numerous federal courts have recognized that the advisory crack guideline was far too severe. While problems with the crack guideline have been addressed by Congress and the Sentencing Commission, the impact that the repudiated crack guideline had on the methamphetamine guideline has not been addressed and continues to produce unreasonably severe sentences.

1. Development of Initial Federal Sentencing Guidelines Generally

The Sentencing Reform Act instructed the original Sentencing Commission to establish guidelines that would reconcile the multiple purposes of punishment[2] while also while promoting the goals of uniformity and proportionality. 28 U.S.C. § 991(b)(1)(B). The Commission was then to continually review and revise the guidelines in light of sentencing data, criminological research, and consultation with frontline actors in the criminal justice system. 28 U.S.C § 991(b)(1)(C), § 991(b)(2), § 994(o), § 995(13), (15), (16).

The original Commissioners abandoned the effort to design the guidelines based on the purposes of sentencing because they could not agree on which purposes should predominate, and instead developed the guidelines based on an empirical study of time served for various offenses before the guidelines. See U.S.S.G., Ch. 1 Pt. A(3); Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 17 (1988). Guidelines developed in this manner are normally useful in suggesting a sentence that constitutes a rough approximation of a sentence that will fulfill the sentencing objectives contained in 18 U.S.C. § 3553(a). *Kimbrough*, 552 U.S. at 109. As discussed below, the Sentencing Commission did *not* create or develop the guideline

[2] 28 U.S.C. § 991(b)(1)(A). The multiple purposes of punishment are reflected in 18 U.S.C. § 3553(a), which sets forth the basic sentencing objectives of the SRA. Those purposes include just punishment, deterrence, incapacitation, and rehabilitation. 18 U.S.C. § 3553(a); see also U.S. Sentencing Guidelines Manual § 1A1.2.

for possession with intent to distribute methamphetamine by examining empirical evidence, national experience, or the input of professional staff. As a result, the sentencing ranges it suggests cannot be said to approximate sentences that fulfill the goals set forth in 18 U.S.C. Section 3553(a).

2. Development of Federal Sentencing Guidelines for Methamphetamine Trafficking Offenses.

The drug trafficking guideline, unlike most other guidelines, was *not* created by examining empirical evidence of past sentencing practices. Instead, the first members of the United States Sentencing Commission derived the initial drug trafficking sentencing guideline largely from the mandatory minimum quantity thresholds established in the Anti-Drug Abuse Act of 1986, Pub.L. No. 99–570, § 1002, 100 Stat. 3207, 3207–2 to 3207–4. *See* United States Sentencing Commission's "Methamphetamine, Final Report" (November 1999) (hereafter "Meth Report"), p. 7.[3] As numerous courts and commentators have noted, the sentences called for by the Anti-Drug Abuse Act of 1986 "were far more severe than the average sentences previously meted out to drug trafficking offenders." *United States v. Diaz*, 2013 WL 322243 * 5 (E.D.N.Y. 2013).

The Commission's decision to base the drug trafficking guideline on mandatory minimum sentences has from the outset "had the effect of increasing prison terms far above what had been typical in past practice, and in many cases above the level required by the literal terms of the mandatory minimum statutes."

[3] Available at http://www.ussc.gov/Publications/Offense_Types/index.cfm

See U.S. Sentencing Comm'n, Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform, p. 49 (2004).[4] Put another way, the drug trafficking guideline was "born broken." *Diaz*, 2013 WL 322243 * 9.

The Anti-Drug Abuse Act of 1986 did not include mandatory minimum sentences for methamphetamine trafficking offenses, and therefore methamphetamine was not included in the "Drug Quantity Table" found in the 1987 Guidelines' Section 2D1.1. Instead, methamphetamine was covered by the drug application note that set forth the "Drug Equivalency Tables" and was assigned an equivalency equal to twice that of cocaine and .4 that of heroin. *Id*.

(b) Anti-Drug Abuse Act of 1988 Leads to Amendment 125

In 1988, Congress enacted the Anti-Drug Abuse Act of 1988, Pub.L. No. 100–690, § 6470(g), 102 Stat. 4181. In that Act, Congress established the following mandatory minimum sentences for methamphetamine:

- 5-Year Minimum: 10 grams methamphetamine or 100 grams of methamphetamine mixture.
- 10-year Minimum: 100 grams methamphetamine or 1 kilogram[5] of methamphetamine mixture.

Meth Report at pp. 7-8.

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[4] Available at http://www.ussc.gov/Research/Research_Publications/publications.cfm

[5] The 1988 Act actually mistakenly set the ten-year minimum quantity of mixture at 100 grams. This error was corrected in 1990.

The Commission responded to the 1988 Act's new mandatory minimums by incorporating these statutory penalties into the Guidelines. In November 1989, the Sentencing Commission promulgated Amendment 125, under which methamphetamine made its first appearance in the drug quantity table. U.S.S.G., App. C., Vol. I, Amend. 125. The Commission simply picked the guideline range closest to five years (level 26 - 63-78 months) and ten years (level 32 - 121 to 151 months) and then extrapolated out to correlate the rest of the offense levels and drug amounts (assuming a criminal history category of I). Meth Report at 8, 13-14. The net effect of the new mandatory minimum sentences for methamphetamine was to arbitrarily ascribe a potency approximately 2.5 times what it had been before (e.g. 1 gram of methamphetamine now equaled 5 grams of cocaine). Meth Report at p. 8.

(c) Methamphetamine Trafficking Penalty Enhancement Act of 1998

The next piece of legislation that had a major impact on the way the advisory Guidelines treat Petitioner's case is the Methamphetamine Trafficking Penalty Enhancement Act of 1998, Pub. L. No. 105–277, Div. E § 2(a), 112 Stat. 268. The express purpose of this legislation was to "increase the penalties for trafficking in methamphetamine in order to equalize those penalties with the penalties for trafficking in crack cocaine." S.B. 2024, 105th Cong., 2d Sess. (1998). The Act cut in half the quantities of methamphetamine necessary to trigger the five- and ten-year mandatory minimums. Under the amended law, the mandatory minimum

quantities became:

- 5-year minimum: 5 grams of methamphetamine or 50 grams of methamphetamine mixture;
- 10-year minimum: 50 grams of methamphetamine or 500 grams of methamphetamine mixture

Meth Report p. 12. The triggering quantities for methamphetamine offenses became equal to those for crack cocaine "an overt objective noted and apparently sought by some sponsors of the legislation." Meth Report, p. 12.

The Sentencing Commission responded to this Act by promulgating Amendment 594. U.S.S.G., App. C., Vol. II, Amend. 594. This Amendment halved the amount of "actual" and "ice" methamphetamine necessary to trigger a base offense level in the Drug Quantity Table. In effect, this doubled the previous ratio to powder cocaine from 50:1 to 100:1. The reason notes for the amendment state that the amendment is responding to "statutory changes to the quantity of methamphetamine substance triggering mandatory minimum penalties, as prescribed in the methamphetamine Trafficking Penalty Enhancement Act of 1998, Pub. L. 105-277." Of course, in the Act Congress only halved the amount of meth necessary to trigger the 5- and 10-year mandatory minimum sentences — there was no literal directive to halve the amounts for every level in the Drug Quantity Table. However, the practical effect of the legislative change to the five and ten year mandatory minimums was that the Commission did the identical adjustment for all other base levels in the November 2000 Guidelines.

3. The Methamphetamine Guideline Has Been Ratcheted Up in Response to Congressional Actions and Not Formulated by the Sentencing Commission in the Exercise of Its Institutional Role.

As the foregoing history of the methamphetamine guideline makes clear, starting at its inception and continuing through its entire development, the methamphetamine guideline has been constantly racheted up in response to Congressional actions, and not because the Sentencing Commission has looked at empirical evidence, national experience, and the opinions of professionals to determine that higher sentencing ranges were needed to fulfill the purposes of sentencing. This is problematic because guidelines based on congressional mandates are generally less reliable then those formulated when the Sentencing Commission performs its institutional role. *See Henderson*, 649 F.3d at 964-65 (Berzon, J., concurring) (discussing the "unjust and sometimes bizarre results" produced by U.S.S.G. § 2G2.2, the advisory guideline applicable to child pornography offenses, another guideline developed largely by Congressional mandates and not through the Sentencing Commission's exercise of its institutional role).

The Sentencing Commission itself has conceded that when guidelines are driven by mandatory minimums their effectiveness is questionable. "The frequent mandatory minimum legislation and specific directives to the Commission to amend the guidelines make it difficult to gauge the effectiveness of any particular policy change, or to disentangle the influences of the Commission from those of Congress."

United States Sentencing Commission, Fifteen-Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform (2004) at 73**.** The methamphetamine guideline is flawed and produces overly-severe sentences. *See United States v. Hubel*, 625 F.Supp.2d 845, 853 (D. Neb. 2008) (varying downward in case involving methamphetamine in part because guideline was promulgated in response to Congressional directives, not the Sentencing Commission's exercise of its expertise).

4. While the Crack Cocaine Guideline Has Been Reformed, the Overly-Severe Methamphetamine Guideline Remains in Place.

In recent years, crack cocaine sentences have been lowered dramatically, both with respect to mandatory minimums and the Guidelines. Most significantly, the Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372, increased the amount of crack cocaine required to trigger the five- and ten-year mandatory minimums, and the former 100:1 sentencing disparity between powder and crack cocaine has been reduced to an 18:1 disparity. The Sentencing Commission then amended the guideline for crack cocaine to reflect the changes made by the Fair Sentencing Act. Now it takes 8.4 kilograms of crack to merit the same base offense level as 1.5 kilograms of actual methamphetamine. 2012 U.S.S.G. § 2D1.1(c), Drug Quantity Table.

The crack/powder disparity problem has been replaced by the meth/cocaine disparity problem. One district judge, after describing how little methamphetamine

compared to other controlled substances it takes to trigger a five-year mandatory minimum sentence,[6] recently asked:

> Are there any factual or rational bases to set the methamphetamine quantity to trigger a five-year mandatory minimum so low in comparison to these other drugs? In Yogi Berra's words, this could be "déjà vu all over again" with penalties for methamphetamine, as with crack, driven by hysteria surrounding perceived problems that turned out to be largely illusory. *See United States v. Williams*, 788 F.Supp.2d 847, 859–61 (N.D.Iowa 2011) (observing that the crack/powder cocaine disparity in the sentencing guidelines was based on Congress's unfounded fears about crack's dangers). Indeed, the death of University of Maryland basketball star Len Bias, which spurred Congress to pass the Anti–Drug Abuse Act of 1986, making sentences for crack cocaine crimes 100 times harsher than those for powder cocaine, was mistakenly attributed to crack cocaine. Bias in fact died of an overdose of powder cocaine. See LaJuana Davis, *Rock, Powder, Sentencing—Making Disparate Impact Relevant In Crack Cocaine Sentencing*, 14 Journal of Gender, Race and Justice 375, 381–83 & n. 32 (2011).

Newhouse, 2013 WL 346432 at n. 9.

In all its years of sending the Sentencing Commission directives with respect to methamphetamine, Congress never said methamphetamine was more serious than crack cocaine. It said methamphetamine was *as* serious as crack, and

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[6] Compared to methamphetamine, marijuana, once stripped from the plant, takes 20,000 times greater quantity (100,000 grams) to trigger a five-year mandatory minimum. Compared to methamphetamine, powder cocaine takes 100 times greater quantity (500 grams) to trigger a five-year mandatory minimum. Compared to methamphetamine, heroin takes twenty times greater quantity (100 grams) to trigger a five-year mandatory minimum. Compared to methamphetamine, crack, after the passage of the Fair Sentencing Act, now takes nearly six times greater quantity (28 grams) to trigger a five-year mandatory minimum. See 21 U.S.C. § 841.

United States v. Newhouse, 2013 WL 346432 n. 9 (N.D. Iowa Jan. 30, 2013).

increased sentences accordingly. The acknowledgment that crack never should have been sentenced as severely as it was has left methamphetamine (actual) as the most severely sentenced drug under the advisory Guidelines, without any support or evidence that these severe sentences make sense. The advisory guideline range for methamphetamine does not provide useful guidance in arriving at a sentence that is "sufficient, but not greater than necessary," to achieve the purposes of sentencing.

The Fifth Circuit has not provided meaningful review

As a practical matter, the Fifth Circuit has washed its hands of any serious review–actually, *any* substantive review–of sentences obtained under non-empirically based guidelines. In *United States v. Duarte*, 569 F.3d 528, 529 (5th Cir. 2009), 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.

569 F.3d at 530 (quoting *United States v. Rosales-Robles*, 294 F. App'x 154, 155 (5th Cir. 2008)). And, the circuit court reasserted this proposition even more forcefully

in *United States v. Miller*, by stating in as many words that, essentially, courts have no duty to review a sentence for reasonableness against the backdrop of a faulty guideline promulgation process:

> 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.

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

And in Petitioner's case, the circuit court simply affirmed with the most perfunctory of explanations:

> We have held that *Kimbrough v. United States*, 552 U.S. 85, 109-10 (2007), does not disturb the presumption of reasonableness for guidelines sentences even if the relevant Guideline is not empirically based. *See United States v, Duarte*, 569 F.3d 528, 530-31 (5th Cir. 2009); *United States v. Mondragon-Santiago*, 564 F.3d 357, 366-367 (5th Cir. 2009).

United States v. McVea, 763 Fed. Appx. 377 (5th Cir. 2019)(unpublished) (Appx. A)..

The Second Circuit's Contrary Approach to the Review of Non-Empirically-Based Guidelines

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 *United States v. Dorvee*, 616 F.3d 174 (2nd Cir. 2010).

There, when examining a sentence imposed under the non-empirically based Guideline 2G2.2 (applicable to child pornography offenses), the Second Circuit refused to adopt the "hands off" reasonableness-review approach advanced by the Fifth Circuit and instead acknowledged that appellate review entails more, namely, consideration of, among other things, the non-empirically-based nature of certain guidelines:

> These errors were compounded by the fact that the district court was working with a Guideline that is fundamentally different from most and that, unless applied with great care, can lead to unreasonable sentences that are inconsistent with what § 3553 requires. Sentencing Guidelines are typically developed by the Sentencing Commission using an empirical approach based on data about past sentencing practices. *See Rita v. U.S.*, 551 U.S. 338, 349, 127 S.Ct. 2456, 168 L.Ed.2d 203 (2007). However, the Commission did not use this empirical approach in formulating the Guidelines for child pornography. Instead, at the direction of Congress, the Sentencing Commission has amended the Guidelines under § 2G2.2 several times since their introduction in 1987, each time recommending harsher penalties. See United States Sentencing Commission, *The History of the Child Pornography Guidelines*, Oct. 2009, available at http://www.ussc.gov/general/20091030_History_Child_Pornography_Guidelines.pdf (last visited April 19, 2010).7 Alan Vinegrad, *185 the former United States Attorney for the Eastern District of New York, has noted that the recent changes effected by the PROTECT Act of 2003 evince a "blatant" disregard for the Commission and are "the most significant effort to marginalize the role of the Sentencing Commission in the federal sentencing process since the Commission was created by Congress," as Congress:
>
> > (i) adopted sentencing reforms without consulting the Commission, (ii) ignored the statutorily-prescribed process for creating guideline amendments, (iii) amended the Guidelines directly through legislation, (iv) required that sentencing data be furnished directly to Congress rather than to the Commission, (v) directed the Commission to reduce the frequency of downward departures regardless of the Commission's view of the

> necessity of such a measure, and (vi) prohibited the Commission from promulgating any new downward departure guidelines for the next two years. Alan Vinegrad, *The New Federal Sentencing Law*, 15 Fed. Sent. R. 310, 315 (June 2003). The PROTECT Act of 2003 was the first instance since the inception of the Guidelines where Congress directly amended the Guidelines Manual. See United States Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform*, 2004, at 72, available at http://www.ussc.gov/15_year/chap2.pdf (last visited April 15, 2010).

* * *

> The Sentencing Commission is, of course, an agency like any other. Because the Commission's Guidelines lack the force of law, as the Supreme Court held in *United States v. Booker*, 543 U.S. 220, 245, 264, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), sentencing courts are no longer bound to apply the Guidelines. But, in light of the Sentencing Commission's relative expertise, sentencing courts "must consult those Guidelines and take them into account when sentencing." *Id.* This deference to the Guidelines is not absolute or even controlling; rather, like our review of many agency determinations, "[t]he weight of such a judgment in a particular case will depend upon the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1944); *see Kimbrough*, 552 U.S. at 109, 128 S.Ct. 558 (citing the crack cocaine Guidelines as an example of Guidelines that "do not exemplify the Commission's exercise of its characteristic institutional role"). On a case-by-case basis, courts are to consider the "specialized experience and broader investigations and information available to the agency" as it compares to their own technical or other expertise at sentencing and, on that basis, determine the weight owed to the Commission's Guidelines. *United States v. Mead Corp.*, 533 U.S. 218, 234, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001) (internal quotation marks omitted) (citing *Skidmore*, 323 U.S. at 139, 65 S.Ct. 161); *see Gall*, 552 U.S. at 51, 128 S.Ct. 586.

Dorvee, 616 F.3d at 187-88.

The Conflict between the Fifth and the Second Circuits' Approach to Review Cannot be More Pronounced

As evinced above, the Fifth Circuit's approach to the review of sentences springing from a non-empirically-based guideline could not be further from the Second Circuit's approach. In the former circuit, as a practical matter there is no substantive review afforded the guideline itself, even though the guideline calculus serves as the touchstone for the § 3553 sentencing calculus. But in the latter circuit, the consideration of such a flawed (or at least atypical) guideline receives robust consideration in the appellate review process.

This Court should use the instant case to resolve the question whether, as part of the appellate court's substantive reasonableness review, a circuit court can ignore the fact during its reasonableness review that a sentence derives from a non-empirically-based, sentencing guideline. Petitioner submits that it cannot.

CONCLUSION

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

Respectfully submitted this 2nd day of July, 2019.

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