

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ALCADIO CABALLERO DE LA TORRE,
also known as “Coochi,” Petitioner,

v.

UNITED STATES OF AMERICA, Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT
No. 18-10612

(Mr.) Leigh W. Davis
Counsel of Record

1901 Central Drive, Suite 708
Bedford, Texas 76021
817.868.9500
817.887.2401 (fax)
Texas Bar No. 24029505
Member, Supreme Court Bar

QUESTION PRESENTED

This Court should grant this petition to address when, if ever, Sentencing Commission statistical data may be used to evaluate the reasonableness of a defendant's sentence.

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

DIRECTLY RELATED PROCEEDINGS

The following cases arose from the same Northern District of Texas case, No. 4:17-CR-194, and have been appealed to the United States Court of Appeals for the Fifth Circuit:

- *United States v. Daton Degnide*, No. 18-10300 (pending)
- *United States v. Encarnacion Hurtado-Cruz*, No. 18-10411 (remanded April 9, 2019)
- *United States v. Encarnacion Hurtado-Cruz*, 19-10752 (pending)
- *United States v. Arnoldo Morfin-Arias*, 18-10507 (affirmed April 5, 2019)
- *United States v. Efrain Sifuentes*, 18-11149 (pending)

The following cases arose from the same Northern District of Texas case, No. 4:17-CR-194, and were resolved in the district court without appeal:

- *United States v. Eduardo Grimaldo*, sentenced May 1, 2018
- *United States v. Mounib Shalash*, sentenced May 18, 2018

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The petitioner, Alcadio Caballero De La Torre also known as “Coochi,” respectfully petitions this Court for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit filed on May 3, 2019.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is *United States of America v. Alcadio Caballero De La Torre also known as “Coochi,”* No. 18-10612 (unpublished). This opinion, which is not designated for publication, is reproduced in Appendix A. The judgment entered

by the district court is reproduced in Appendix B. Caballero sought rehearing en banc, which was denied. The petition for rehearing en banc is reproduced in Appendix C. The order denying rehearing is reproduced in Appendix D. Caballero's sentencing exhibits are reproduced as Appendix D for the Court's information.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a). The Court of Appeals for the Fifth Circuit denied rehearing en banc on June 11, 2019 making this petition timely under Supreme Court Rule 13.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 18, United States Code, Section 3553(a)

(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.[1]
- (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

Proceedings Below

On August 31, 2017, Caballero and others were arrested on a complaint alleging narcotics trafficking violations filed in the Fort Worth Division of the Northern District of Texas. The government sought Caballero's detention pending trial. Caballero was found indigent and appointed counsel. After a hearing, Caballero was detained pending trial. The parties moved to extend the time to return an indictment, which was granted.

On October 18, 2017, a grand jury returned a superseding indictment adding Caballero and others to an existing narcotics—methamphetamine—trafficking case.¹ Caballero was arraigned on this indictment. The district court then entered a scheduling order for trial. Caballero elected to plead guilty before trial. He entered a plea before a magistrate judge. The plea was supported by a factual basis contained in a Factual Resume executed by Caballero and filed. The magistrate judge recommended that the plea be accepted. The district court accepted the magistrate judge’s recommendation and entered a scheduling order for sentencing.

On May 11, 2018, the district court sentenced Caballero to 151 months confinement. This was a bottom-of-the-guidelines range sentence. Caballero’s notice of appeal was timely filed on May 21, 2018. A panel of the Fifth Circuit affirmed his sentence. Caballero’s request for rehearing en banc was denied.

Statement of Relevant Facts

Caballero’s PSR calculated a Total Offense Level of 34 and Criminal History Category I. This was a guidelines range of 151–188 months. Caballero had no objections to these calculations.² The district court adopted the PSR and its conclusions:

¹ Caballero was added to an existing case; he was not named in the original indictment.

² Caballero did have a couple of objections to the PSR, but they did not pertain to the sentencing guidelines calculation. For reasons not apparent, they are missing from the record; however, they are recognized by the PSR Addendum.

The Court concludes that the total offense level is 34; that the Criminal History Category is I; that the imprisonment range is 131 -- 151 to 188 months; that the supervised release range is 2 to 5 years; that the fine range is \$15,000 to 10 -- I'm sorry, the fine range is \$35,000 to \$10 million; and a special assessment of \$100 is mandatory.

Caballero had zero criminal history points and no criminal history. Caballero was eligible for and received the safety valve reduction in USSG § 2D1.1(b)(17) and 18 U.S.C. § 3553(f). He received no enhancement for his role in the offense. He did not obstruct justice. He had lengthy substance abuse history including alcohol, methamphetamine, marijuana, and cocaine. He, unlike so many criminal defendants, also had lengthy employment history. He'd been kicked in the head by a mule as a child in Mexico, which left him with residual memory loss and migraine headaches.

At sentencing, Caballero introduced several exhibits. These were charts and data from the sentencing commission. Exhibit 1 was the Length of Imprisonment in Each Drug Type for Fiscal Year 2017. Exhibit 2 was the Length of Imprisonment in Each Drug Type for Fiscal Years 2008–2017. Exhibit 3 was Base Offense Levels for Drug Trafficking Offenders in Each Drug Type for Fiscal Year 2017. Exhibit 4 was Sentences Relative to the Guidelines Range for Drug Offenders in Each Drug Type for Fiscal Year 2017. Exhibit 5 was Length of Imprisonment by Primary Offense Category in Fiscal Year 2017 for the Northern District of Texas. Exhibit 6 was Length of Imprisonment by Primary Offense Category in Fiscal Year 2017 for the Fifth Circuit.

The important facts in these exhibits included the following: The mean or average methamphetamine sentence in 2017 was 91 months. The median

or midpoint of the data sentence was 72 months. The average methamphetamine sentence has been trending downward for the previous ten years. In Fiscal Year 2017, only 30.3% of methamphetamine sentences were within the sentencing guidelines range while 25.2% were below the guidelines range based on a 5K1.1 motion, another 11.7% were under the guidelines for other government-sponsored reasons, and 20.1% were below the guidelines range based on *Booker* departures. Only .6% of all methamphetamine sentences were above the sentencing guidelines range in Fiscal Year 2017. In Fiscal Year 2017, nationally the average and median sentences for all drug offenses were 75 and 60 months, respectively, while the average and median in the Northern District of Texas were 141 and 121 months, respectively, and the average and median in the Fifth Circuit were 82 and 60 months, respectively.

The district court sentenced Caballero to 151 months, which was the bottom of his advisory sentencing guidelines range.

Caballero objected to the reasonableness of his sentence.

REASONS FOR GRANTING THE PETITION

This Court should grant this petition to address when, if ever, Sentencing Commission statistical data may be used to evaluate the reasonableness of a defendant's sentence.

Introduction

Courts often seem reluctant to assess the reasonableness of a defendant's sentence with the Sentencing Commission's statistical data. This is true even when, as here, the data suggests that the defendant's sentence is substantively unreasonable. In other cases, the data may show the defendant's sentence to be reasonable while in others there may not be enough information for a meaningful comparison. Sometimes, courts have used the data to establish the advisory nature of the guidelines. What's more, courts seem reluctant to tackle the issue leaving some confused and conflicting jurisprudence on the point. This case presents an ideal one for the Court to grapple with this issue as Caballero is a first-time offender with mitigating circumstances, yet his sentence is dramatically higher than the average methamphetamine and drug-trafficking sentences. Thus, Caballero asks this Court to answer Fifth Circuit former chief Judge Edith Jones's call for "meaningful judicial standards" to determine the reasonableness of sentences.

Caballero's argument on appeal and the opinion

On appeal, Caballero argued that the district court erred by imposing a sentence twice the national average on a defendant who had no prior criminal history or other aggravating factors. More specifically, Caballero noted that (1) his sentence was dramatically higher than the average sentences for all methamphetamine defendants though he is a first-time offender with no ag-

gravating factors; (2) the facts of this case differentiate it from *United States v. Willingham*,³ in which the Fifth Circuit limited the use of Sentencing Commission statistics where defendants were not similarly situated; and (3) Sentencing Commission statistics show the unreasonableness of this sentence. This, Caballero contended, demonstrated the district court's failure to account for factors that should have received significant weight, giving significant weight to an irrelevant or improper factor, and clear error of judgment in balancing sentencing factors.

The panel opinion dispensed with these arguments in a single paragraph:

The district court considered the Presentence Report (PSR), the advisory guidelines range, the 18 U.S.C. § 3553(a) factors, the statements of Caballero De La Torre's sister and mother, defense counsel's arguments and exhibits concerning data prepared by the Sentencing Commission, Caballero De La Torre's allocution, and his lack of criminal history. The court ultimately determined that a sentence at the bottom of the advisory guidelines range was appropriate. Caballero De La Torre has not shown that the district court failed to consider a factor that should have been given significant weight. He has failed also to show that the district court gave too much weight to the Sentencing Guidelines. Caballero De La Torre has not shown that the district court made a clear error of judgment in weighing the § 3553(a) factors. His disagreement with the district court's weighing of the sentencing factors is insufficient to rebut the presumption of reasonableness that is applicable to within-guidelines sentences. Therefore, he has not shown that his sentence was substantively unreasonable.

United States v. Caballero, No. 18-10612, Slip Op. at 2 (May 3, 2019) (citations omitted).

³ 497 F.3d 541, 544–545 (5th Cir. 2007).

The jurisprudence of the courts of appeals provides no meaningful standards for use of statistical data to assess reasonableness, yet some sentences appear to be facially unreasonable

Though Caballero was a first-time offender, his sentence was dramatically higher than the average methamphetamine and drug-trafficking sentences imposed nationally and in the Fifth Circuit

Caballero received a sentence that is 166% of the national average sentence for methamphetamine sentences, 200% of the national average drug trafficking sentence, and 184% of the average drug trafficking sentence in this Circuit, yet he was a first-time offender with no aggravating factors and some compelling personal circumstances. It's even 10 months longer than the average drug trafficking sentence in the Northern District of Texas where the sentences are outliers even in the Fifth Circuit. And this at a time when the length of all drug sentences is trending down only 30.3% of methamphetamine sentences are within-guidelines, and .6% are above-guidelines sentences. Nonetheless, the Fifth Circuit found this a reasonable sentence.

In some cases, statistical data may show the reasonableness of a sentence

Other sentences will be clearly reasonable when compared to the statistical data. *United States v. Sullivan*, No. 17-4457 (4th Cir. December 6, 2018) (unpublished; per curiam) illustrates this. Sullivan served as Postmaster of Greenville County, South Carolina. She also operated a publishing company, HYPD Publishing. In March 2009, HYPD published an autobiography. Following the book's publication, Sullivan and her codefendant fabricated an elaborate narrative that a filmmaker had purchased the rights to the book with the intention of turning it into a movie and reality television

show. Claiming to need bridge loans while awaiting payment from the filmmaker, Sullivan and her codefendant targeted family, friends, and co-workers for “investments,” promising lucrative returns. In total, the pair fraudulently obtained \$385,425 from 33 victims.

Sullivan pleaded guilty to one count of conspiracy to commit wire fraud. The district court calculated her advisory sentencing guidelines range as 27 to 33 months. At a joint sentencing hearing, the district court heard testimony from nine victims. Six of these victims spoke exclusively of their interactions with Sullivan, and, of those six, three were Sullivan's close family members: her brother, sister, and an aunt who helped raise her. Sullivan's codefendant gave a brief statement expressing remorse. Sullivan offered longer remarks, noting that she felt "really, really bad about a couple of people" but stating that she "never sat down and schemed or scammed anything or anybody." Sullivan also asserted that she and Johnson did in fact have a “movie contract” with the filmmaker's cousin, and that she “believed in what [she] was doing” throughout the conspiracy, stating that “[t]he goal was a movie and that is where we were heading.”

The district court sentenced Sullivan's codefendant to the bottom of the advisory guidelines range, 27 months, but deferred Sullivan's sentencing for 60 days because it was considering an upward departure because a guidelines sentence might not be sufficient. At the subsequent hearing, the district court sentenced Sullivan to 48 months' imprisonment, which was 15 months above the advisory Guidelines range and 21 months greater than the codefendant's sentence. As justification, the district court cited Sullivan's aggravated role in the conspiracy, lack of remorse, and willingness to target

family members. Sullivan asked the district court to reconsider this sentence arguing that Sullivan and her codefendant were “equally involved” in the conspiracy and that Sullivan's comparatively lengthy sentence, which was characterized as “approximately twice as long” as Johnson's, was unwarranted. The district court denied the motion because the two defendants were “not similarly situated” given Sullivan's “education, her skill, her polish, [and] her ability to carry out the scheme,” as well as her “misuse of her role as a public official” and her targeting of family members.

On appeal, Sullivan argues that her 48-month sentence created an unwarranted sentencing disparity between her and other similarly situated defendants convicted of fraud offenses under 18 U.S.C. 3553(a)(6). She cited Sentencing Commission data for fraud offenses in 2016. That data showed that the mean prison sentence for defendants convicted of fraud offenses in 2016 was 25 months while the median was 13 months. This made her sentence nearly double the mean sentence and more than triple the median sentence. Further, she cited data that only 2.1% of defendants convicted of fraud offenses received an above-Guidelines sentence in 2016 and argued that she is not among the worst 2.1% of such defendants. The court noted that a sentencing disparity between similarly situated defendants had to be “substantial” and that even if one defendant's sentence “is more severe than average, that fact does not mean it was unwarranted.” *Sullivan* (quoting *United States v. Rivera-Santana*, 668 F.3d 95, 106 (4th Cir. 2012)). And the facts of *Sullivan* certainly suggested that this higher sentence was warranted.

In some cases, statistical evidence may not be useful to evaluate a sentence

In some cases, the defendant's situation and the statistical data may not be useful to analyze the defendant's sentence. In *United States v. Harris*, No. 14-4281 (6th Cir. January 14, 2016) (unpublished), Harris ran a scheme that defrauded more than 300 investors of about \$15.5 million. At 4–5. The district court varied downward from a sentencing guidelines range of 151–198 months sentencing Harris to 120 months. *Id.* At 5. On appeal, Harris contended that “his below-Guidelines sentence is unreasonable because it is disproportionate to the seriousness of his offense, greater than necessary to conform to § 3553(a), and results in a sentencing disparity.” Relying on Sentencing Commission data, he argued that his sentence was substantively unreasonable because “the average sentence for a defendant who pleaded guilty to an offense without a mandatory minimum and received a twenty-level amount-of-loss enhancement was sixty-two months. Separately, he calculates that between 2006 and 2012 the average sentence for a fraud defendant with a criminal history category of IV was thirty-six months.” *Id.* At 11–12. The court of appeals rejected this as an unwarranted sentencing disparity among defendants with similar records who have been found guilty of similar conduct because the data was not comparable to Harris's situation. “[A]ssuming Harris's statistical analysis is correct, his figures on twenty-level enhancements and category IV criminal histories were compiled separately and fail to account for the fact that he is charged with both the category IV criminal history and the twenty-level enhancement, and with other enhancements as well.” *Id.* At 12.

Courts are generally reluctant to use statistical data to assess the reasonableness of a sentence and usually avoid doing so except to show the advisory nature of the sentencing guidelines

In general, there's a reluctance to use statistical data to assess the reasonableness of sentences. "[A]verages of sentences that provide no details ... are unreliable to determine unwarranted disparity because they do not reflect the enhancements or adjustments . . . that distinguish individual cases." *United States v. Irving*, 554 F.3d 64, 76 (2nd Cir. 2009). "[C]omparisons of sentences may be treacherous because each sentencing proceeding is inescapably individualized[.]" *United States v. Rivera-Santana*, 668 F.3d 95, 106 (4th Cir. 2012). "A defendant seeking relief based on a sentencing disparity cannot present bare statistical evidence, without context, as that would not sufficiently establish that he is in a comparable factual circumstance to the individuals considered in compiling the data." *United States v. Garcia-Cervantes*, No. 10-14234, Slip Op. at 3 (11th Cir. May 4, 2011) (citing *United States v. Campbell*, 491 F.3d 1306, 1317 (11th Cir. 2007)). "Garcia-Cervantes's argument fails to create the requisite nexus between the cases that form the basis for the statistics and his own. While he refers to the broad categories described in the Sentencing Commission's report, he fails to describe the specific factual context involved in any of the cases." *Id.* at 5.

But the jurisprudence of some courts is conflicted on this point. Though the Fifth Circuit rejected the use of sentencing statistics in *United States v. Willingham*, 497 F.3d 541 (5th Cir. 2007), other Fifth Circuit cases seem to invite such data. *Willingham* rejected use of sentencing statistics to assess

sentences because of concerns about comparing the statistics to individual defendants:

Although the statistics may show a disparity between the average § 2G2.2 sentence and the advisory Guidelines range in Willingham's case, there is no indication that the disparity is unwarranted. National averages of sentences that provide no details underlying the sentences are unreliable to determine unwarranted disparity because they do not reflect the enhancements or adjustments for the aggravating or mitigating factors that distinguish individual cases. Here, the pre-sentence report indicated that 13 net points were added to Willingham's offense level under the Guidelines, reflecting several serious aggravating factors. The averages in the Report disregard individual circumstances and only reflect a broad grouping of sentences imposed on a broad grouping of criminal defendants; consequently, they are basically meaningless in considering whether a disparity with respect to a particular defendant is warranted or unwarranted.

Id. at 544–45. However, other Fifth Circuit cases ask suggest such data would be helpful in evaluating the reasonableness of the sentence and reprove the defendant for not providing it. “Smith, however, fails to provide the court with evidence, such as average sentences for similarly-situated defendants” *United States v. Smith*, 440 F.3d 704, 709 (5th Cir. 2006). “Cabrera has provided no evidence, such as nationwide sentencing statistics, of an unwarranted disparity between his sentence and the sentences of any similarly situated defendants nationwide.” *United States v. Cabrera*, No. 14-40962, Slip Op. at 2–3 (5th Cir. May 13, 2015) (unpublished).

On the other hand, courts have used Sentencing Commission data to show that the sentencing guidelines are, in fact, advisory:

If we did presume an out-of-guidelines-range sentence was unreasonable, the advisory guidelines would not be advisory. That the guidelines are in reality only advisory is made unmistakably clear by the fact that in the most recent year for which data is available more than half—54%—of the sentences imposed in federal court were

outside the guidelines range. If sentencing outside the advisory guidelines range made a sentence substantively unreasonable, half of the sentences imposed in federal courts would be substantively unreasonable.

United States v. Rosales-Bruno, 789 S.W.3d 1249, 1255–56 (11th Cir. 2015) (footnotes omitted). And from a case two years after *Booker* rejecting the notion that the presumption of reasonableness attaching to within-guidelines created a “substantial gravitational pull” tending “to produce Guidelines sentences almost as regularly as mandatory Guidelines had done.”:⁴

The strength of any such gravitational pull may reasonably be debated. Since *Booker*, and despite the presumption of reasonableness of within-Guidelines sentences, district courts have entered non-Guidelines sentences in nearly 14% of cases (not counting government-sponsored departures): a dramatic increase from the roughly 6% of non-Guidelines sentences rendered in the year prior to *Booker*. The rate of sentences issued within the Guidelines has correspondingly fallen from 72.2% to 61.5%. In this Circuit—again, despite the presumption—the rate of non-Guidelines sentences has soared from 5.1% in Fiscal Year 2004 to almost 13% in the years since *Booker*, and the rate of within-Guidelines sentences has slid from 73.9% to 61.0%. If there is a gravitational pull, escape velocity must be rather low.

United States v. Angel-Guzman, 506 F.3d 1007, 1013 (10th Cir. 2007).

Fifth Circuit former Chief Judge Jones calls for “meaningful judicial standards” to determine the reasonableness of sentences

In *United States v. Neba*, 901 F.3d 260, 262 (5th Cir. 2018), Marie Neba orchestrated a \$13 million Medicare fraud and was sentenced to 900 months—75 years. But Neba was also 54 years old with three minor children and metastasized breast cancer. *Id.* at 264. Nonetheless, this Court

⁴ *Rita v. United States*, 127 S.Ct. 2456, 2487 (2007) (Souter, J., dissenting).

recognized this as a life sentence and found it neither unreasonable nor cruel and unusual. *Id.* at 264–65. In her concurring opinion, former Chief Judge Edith Jones observed that “Ms. Neba’s case, in my view, displays the lack of meaningful judicial standards for determining the substantive reasonableness of Guidelines sentences.” *Id.* at 266 (Jones, J., concurring). Judge Jones noted that though presumptively reasonable ostensibly doesn’t mean always reasonable, *Rita v. United States*, 551 U.S. 338, 127 S. Ct. 2456, 2462 (2007) provides no guidance for what’s unreasonable—that is there’s no “threshold for an appellate finding of substantive unreasonableness[.]” *Id.* at 267. “In effect, the presumption is non-binding in theory but nearly iron-clad in fact.” *Id.* (noting that only one sentence was reversed last year for a general reasonableness challenge). Indeed, the Sentencing Commission’s Sourcebook referenced by Judge Jones reveals that only 7 sentences were reversed for an unreasonable weighing of sentencing factors in 2017. United States Sentencing Comm’n, Sourcebook of Federal Sentencing Statistics (2017) at S-149, available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2017/2017SB_Full.pdf. This raises the question “[o]n what basis may appellate courts that apply the presumption [of reasonableness to within-guidelines sentences] find an abuse of discretion for sentences that, while within the Guidelines, still embody punishment far outside of the mean for crimes of the same general sort?” *Neba*, 901 F.3d at 267.

“Ms. Neba’s resulting sentence is not similar to those of defendants sentenced for similar crimes.” *Id.* (citations omitted). When compared to the sentences for sex traffickers and child pornography offenders, “Ms. Neba’s

sentence still stands out as among the most severe I have observed.” *Id.* (citations omitted). One “way to test the ‘substantive reasonableness’ of her 75-year sentence is to assess its ‘proportionality’ against sentences that have been imposed for other federal crimes.” *Id.* And when you do that the unreasonableness of Neba’s sentence becomes apparent:

But Ms. Neba also received a *de facto* life sentence. Is thieving from Medicare, even for a long time and for lots of money, and even accompanied by attempted witness tampering, “proportional” to these crimes? Most laymen would not think so. That the presumption of reasonableness attaches to within-Guidelines sentences despite such disparities between Ms. Neba’s offense and violent, exploitative crimes suggests something “unreasonable” is afoot, either in the Guidelines themselves or in courts’ inability to assess “substantive reasonableness.”

Id. at 268.

Conclusion

This case is the ideal one for this Court to tackle the question of when, if ever, Sentencing Commission statistical data may be used to evaluate the reasonableness of a defendant’s sentence. The Sentencing Commission’s own statistical evidence shows how unreasonable Caballero’s sentence is—especially for a first-time offender with mitigating circumstances—yet it was affirmed without any discussion of this data specifically or how an unreasonable sentence should be judged generally. As Fifth Circuit Judge Jones put it, “the presumption [wa]s non-binding in theory but nearly ironclad in fact.” Therefore, Caballero asks this Court to grant this petition.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Judicial Circuit.

Dated: September 9, 2019.

Respectfully submitted,

(Mr.) Leigh W. Davis
1901 Central Drive, Suite 708
Bedford, Texas 76021
817.868.9500
817.591.4701 (fax)
Texas Bar No. 24029505
Member, Supreme Court Bar

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**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 18-10612
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED

May 3, 2019

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

ALCADIO CABALLERO DE LA TORRE, also known as “Coochi”,

Defendant-Appellant

Appeals from the United States District Court
for the Northern District of Texas
USDC No. 4:17-CR-194-3

Before STEWART, Chief Judge, and OWEN and OLDHAM, Circuit Judges.

PER CURIAM:*

Alcadio Caballero De La Torre appeals the sentence imposed following his guilty plea conviction of conspiracy to possess with intent to distribute a controlled substance. First, he argues that the 151-month sentence imposed by the district court is substantively unreasonable. Because he objected to the substantive reasonableness of the sentence in the district court, he preserved

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

No. 18-10612

the issue for appellate review. See *United States v. Powell*, 732 F.3d 361, 381 (5th Cir. 2013).

The district court considered the Presentence Report (PSR), the advisory guidelines range, the 18 U.S.C. § 3553(a) factors, the statements of Caballero De La Torre's sister and mother, defense counsel's arguments and exhibits concerning data prepared by the Sentencing Commission, Caballero De La Torre's allocution, and his lack of criminal history. The court ultimately determined that a sentence at the bottom of the advisory guidelines range was appropriate. Caballero De La Torre has not shown that the district court failed to consider a factor that should have been given significant weight. See *United States v. Simpson*, 796 F.3d 548, 558 (5th Cir. 2015). He has failed also to show that the district court gave too much weight to the Sentencing Guidelines. See, e.g., *Gall v. United States*, 552 U.S. 38, 49-50 (2007) (stating that the district court must first correctly calculate the advisory guidelines range under the Sentencing Guidelines). Caballero De La Torre has not shown that the district court made a clear error of judgment in weighing the § 3553(a) factors. See *Simpson*, 796 F.3d at 558. His disagreement with the district court's weighing of the sentencing factors is insufficient to rebut the presumption of reasonableness that is applicable to within-guidelines sentences. See *United States v. Ruiz*, 621 F.3d 390, 398 (5th Cir. 2010); *United States v. Rodriguez*, 523 F.3d 519, 526 (5th Cir. 2008). Therefore, he has not shown that his sentence was substantively unreasonable. See *Simpson*, 796 F.3d at 557-58.

Caballero De La Torre also asserts that the district court erred in imposing a four-year term of supervised release because he is a deportable alien. He did not object to the supervised release term at sentencing. However, he raised the issue in a Federal Rule of Criminal Procedure 35 motion filed after the judgment was entered.

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A district court may correct a sentence imposed as a result of an arithmetical, technical, or other clear error within 14 days after the imposition of a sentence. FED. R. CRIM. P. 35. A district court may also correct a sentence on the motion of the Government to reflect a defendant's subsequent substantial assistance. Rule 35(b). However, Rule 35 does not allow a district court to reconsider the application of the Guidelines or to reconsider the appropriateness of the sentence. *United States v. Lopez*, 26 F.3d 512, 520-21 (5th Cir. 1994); *see also United States v. Ross*, 557 F.3d 237, 241-43 (5th Cir. 2009).

Caballero De La Torre could not raise this issue in a Rule 35 motion because it is not the type of error contemplated by Rule 35(a). *See Lopez*, 26 F.3d at 520-21; *Ross*, 557 F.3d at 241-43. Therefore, review is limited to plain error. *See Puckett v. United States*, 556 U.S. 129, 135 (2009). To show plain error, he must show a forfeited error that is clear or obvious and that affected his substantial rights. *Id.* If he makes such a showing, this court has the discretion to correct the error but only if it “seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.” *Id.* (internal quotation marks and citations omitted).

The district court adopted the PSR, which expressly stated that the court ordinarily should not impose a term of supervised release on a defendant who is a deportable alien. *See* U.S.S.G. § 5D1.1(c). The district court also considered the § 3553(a) factors and made an individualized determination that the supervised release term would “provide an added measure of deterrence and protection based on the facts and circumstances of this case.” This court has held that such an explanation is sufficient to uphold a supervised release term on plain error review. *See United States v. Dominguez-Alvarado*, 695 F.3d 324, 329-30 (5th Cir. 2012). Because the district court

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considered the § 3553(a) factors and determined that the supervised release term would provide an added measure of deterrence, the district court's imposition of the four-year supervised release term was not plainly erroneous.

See id. at 329-30.

AFFIRMED.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

May 03, 2019

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing
or Rehearing En Banc

No. 18-10612 USA v. Alcadio Caballero De La Torre
USDC No. 4:17-CR-194-3

Enclosed is a copy of the court's decision. The court has entered judgment under FED. R. APP. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

FED. R. APP. P. 39 through 41, and 5TH CIR. R.s 35, 39, and 41 govern costs, rehearings, and mandates. **5TH CIR. R.s 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following FED. R. APP. P. 40 and 5TH CIR. R. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

Direct Criminal Appeals. 5TH CIR. R. 41 provides that a motion for a stay of mandate under FED. R. APP. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under FED. R. APP. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

Court Appointed Counsel. Court appointed counsel is responsible for filing petition(s) for rehearing(s) (panel and/or en banc) and writ(s) of certiorari to the U.S. Supreme Court, unless relieved of your obligation by court order. If it is your intention to file a motion to withdraw as counsel, you should notify your client promptly, **and advise them of the time limits for filing for rehearing and certiorari.** Additionally, you MUST confirm that this information was given to your client, within the body of your motion to withdraw as counsel.

Sincerely,

LYLE W. CAYCE, Clerk

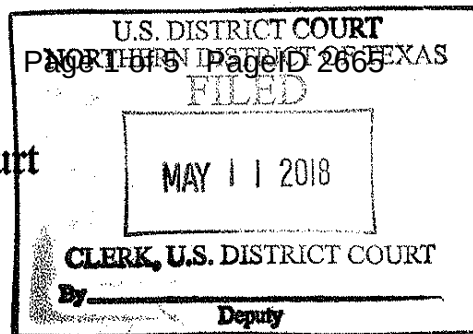
A handwritten signature in cursive script, appearing to read "Lyle W. Cayce".

By: _____
Nancy F. Dolly, Deputy Clerk

Enclosure(s)

Mr. Leigh Warren Davis
Mr. James Wesley Hendrix
Ms. Melanie Smith

B



United States District Court

Northern District of Texas
Fort Worth Division

UNITED STATES OF AMERICA §

v. §

ALCADIO CABALLERO DE LA TORRE, §
a/k/a "Coochi"

Case Number: 4:17-CR-194-A(03)

JUDGMENT IN A CRIMINAL CASE

The government was represented by Assistant United States Attorney Shawn Smith. The defendant, ALCADIO CABALLERO DE LA TORRE, a/k/a "Coochi", was represented by Leigh W. Davis.

The defendant pleaded guilty on December 4, 2017 to count one of the superseding indictment filed on October 18, 2017. Accordingly, the court ORDERS that the defendant be, and is hereby, adjudged guilty of such count involving the following offense:

<u>Title & Section / Nature of Offense</u>	<u>Date Offense Concluded</u>	<u>Count</u>
21 U.S.C. § 846(21 U.S.C. §§ 841(a)(1) and (b)(1)(A)) Conspiracy to Possess with Intent to Distribute a Controlled Substance	08/2017	1

As pronounced and imposed on May 11, 2018, the defendant is sentenced as provided in this judgment.

The court ORDERS that the defendant immediately pay to the United States, through the Clerk of this Court, a special assessment of \$100.00.

The court further ORDERS that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence address, or mailing address, as set forth below, until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court, through the clerk of this court, and the Attorney General, through the United States Attorney for this district, of any material change in the defendant's economic circumstances.

IMPRISONMENT

The court further ORDERS that the defendant be, and is hereby, committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 151 months.

The defendant is remanded to the custody of the United States Marshal.

SUPERVISED RELEASE

The court further ORDERS that, upon release from imprisonment, the defendant shall be on supervised release for a term of four (4) years. The court imposed a term of supervised release because it will provide an added measure of deterrence and protection based on the facts and circumstances of this case.

Pursuant to 18 U.S.C. §3583(d), as a condition of supervised release, upon the completion of the sentence of imprisonment the defendant shall be surrendered by the Federal Bureau of Prisons to a duly-authorized immigration official for deportation in accordance with the established procedures provided by the Immigration and Nationality Act, 8 U.S.C. § 1101 et seq. As a further condition of supervised release, if ordered deported the defendant shall remain outside the United States.

In the event the defendant is not deported immediately upon release from imprisonment, or should the defendant ever be within the United States during any portion of the term of supervised release, the defendant shall comply with the following conditions:

1. The defendant shall not unlawfully possess a controlled substance.
2. The defendant shall not commit another federal, state, or local crime.
3. The defendant shall cooperate in the collection of DNA as directed by the U.S. Probation Officer, as authorized by the Justice for All Act of 2004.
4. The defendant shall refrain from any unlawful use of a controlled substance, submitting to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer pursuant to the mandatory drug testing provision of the 1994 crime bill.
5. The defendant shall participate in a program approved by the probation officer for treatment of narcotic or drug or alcohol dependency that will include testing for the detection of substance use, abstaining from the use of alcohol and all other intoxicants during and after completion of treatment, contributing to the costs of services rendered at the rate of at least \$25 per month.
6. The defendant shall also comply with the Standard Conditions of Supervision as hereinafter set forth.

Standard Conditions of Supervision

1. The defendant shall report in person to the probation office in the district to which the defendant is released within seventy-two (72) hours of release from the custody of the Bureau of Prisons.
2. The defendant shall not possess a firearm, destructive device, or other dangerous weapon.

3. The defendant shall provide to the U.S. Probation Officer any requested financial information.
4. The defendant shall not leave the judicial district where the defendant is being supervised without the permission of the Court or U.S. Probation Officer.
5. The defendant shall report to the U.S. Probation Officer as directed by the court or U.S. Probation Officer and shall submit a truthful and complete written report within the first five (5) days of each month.
6. The defendant shall answer truthfully all inquiries by the U.S. Probation Officer and follow the instructions of the U.S. Probation Officer.
7. The defendant shall support his dependents and meet other family responsibilities.
8. The defendant shall work regularly at a lawful occupation unless excused by the U.S. Probation Officer for schooling, training, or other acceptable reasons.
9. The defendant shall notify the probation officer at least ten (10) days prior to any change in residence or employment.
10. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician.
11. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.
12. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the U.S. Probation Officer.
13. The defendant shall permit a probation officer to visit him at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the U.S. Probation Officer.
14. The defendant shall notify the probation officer within seventy-two (72) hours of being arrested or questioned by a law enforcement officer.
15. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.
16. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

The court hereby directs the probation officer to provide defendant with a written statement that sets forth all the conditions to which the term of supervised release is subject, as contemplated and required by 18 U.S.C. § 3583(f).

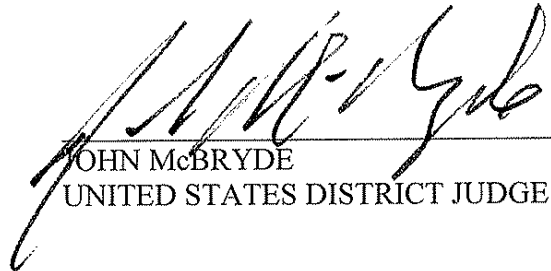
FINE

The court did not order a fine because the defendant does not have the financial resource or future earning capacity to pay a fine.

STATEMENT OF REASONS

The "Statement of Reasons" and personal information about the defendant are set forth on the attachment to this judgment.

Signed this the 11th day of May, 2018.



JOHN McBRYDE
UNITED STATES DISTRICT JUDGE

RETURN

I have executed the imprisonment part of this Judgment as follows:

Defendant delivered on _____, 2018 to _____
at _____, with a certified copy of this Judgment.

United States Marshal for the
Northern District of Texas

By _____
Deputy United States Marshal

C

No. 18-10612

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

**UNITED STATES OF AMERICA,
Plaintiff–Appellee,**

v.

**ALCADIO CABALLERO DE LA TORRE,
ALSO KNOWN AS “COOCHI”,
Defendant–Appellant**

**On Appeal from the
United States District Court
Northern District of Texas
Fort Worth Division
4:17-CR-194-3**

Appellant’s Petition for Rehearing *en banc*

(Mr.) Leigh W. Davis
Texas bar no. 24029505
1901 Central Drive Suite 708
Bedford TX 76021
817.868.9500
817.887.2401 (fax)
leighwdavis@gmail.com

Certificate of Interested Persons

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made so that the judges of this court may evaluate possible disqualification or recusal.

Parties

Alcadio Caballero De La Torre

United States of America

Counsel

For Alcadio Caballero De La Torre

(Mr.) Leigh W. Davis
1901 Central Drive, Suite 708
Bedford TX 76021
817.868.9500
817.887.2401 (fax)
leighwdavis@gmail.com
(trial and appellate counsel)

For the United States of America

Shawn Smith
US Attorney's Office
801 Cherry St
Burnett Plaza Suite 1700 Unit 4
Fort Worth, TX 76102-6882
817/252-5200
Fax: 817-252-5455
shawn.smith2@usdoj.gov
(trial counsel)

J Stevenson Weimer
US Attorney's Office
801 Cherry St Suite 1700 Unit 4
Fort Worth, TX 76102
817/252-5200
Fax: 817-252-5455
jay.weimer@usdoj.gov
(trial counsel)

James Wesley Hendrix
U.S. Attorney's Office
Northern District of Texas
1100 Commerce Street Suite 300
Dallas, TX 75242-1699
214-659-8684

214-767-4104 (fax)
wes.hendrix@usdoj.gov
(appellate counsel)

Melanie Smith
Assistant United States Attorney
Virginia Bar No. 82663
1100 Commerce Street, Third Floor
Dallas, Texas 75242-1699
214-659-8723
214-659-8746 (fax)
melanie.smith@usdoj.gov
(appellate counsel)

s/ Leigh W. Davis_____
(Mr.) Leigh W. Davis

Statement of Reasons for *en banc* Review

This proceeding involves a question of exceptional importance—how to measure the substantive reasonableness of a criminal defendant’s sentence. Last year, former Chief Judge Jones pointed out the big white elephant in the corner of the room—that there’s virtually no basis for determining whether a criminal defendant’s sentence is unreasonable. *See United States v. Neba*, No. 17-20520 (August 16, 2018) (Jones, J., concurring). In her concurring opinion, Judge Jones observed that “Ms. Neba’s case, in my view, displays the lack of meaningful judicial standards for determining the substantive reasonableness of Guidelines sentences.” *Id.* at 9 (Jones, J., concurring). Judge Jones noted that though presumptively reasonable ostensibly doesn’t mean always reasonable, *Rita v. United States*, 551 U.S. 338, 127 S. Ct. 2456, 2462 (2007) provides no guidance for what’s unreasonable—that is there’s no “threshold for an appellate finding of substantive unreasonableness[.]” *Id.* at 10. “In effect, the presumption is non-binding in theory but nearly ironclad in fact.” *Id.* at 11 (noting that only one sentence was reversed last year for a general reasonableness challenge).

“Ms. Neba’s resulting sentence is not similar to those of defendants sentenced for similar crimes.” *Id.* at 10 (citations omitted). When compared to the sentences for sex traffickers and child pornography offenders, “Ms. Neba’s sentence still stands out as among the most severe I have observed.” *Id.* at 11 (citations omitted). And indeed it is: Marie Neba orchestrated a \$13 million Medicare fraud and was sentenced to 900 months—75 years. *Id.* at 1 (opinion affirming). But Neba was also 54 years old with three minor children and metastasized breast cancer. *Id.* at 3, 5. Though recognizing this as a a life sentence, *Neba* found it neither unreasonable nor cruel and unusual. *Id.* at 4–5.

Judge Jones suggested that one “way to test the ‘substantive reasonableness’ of her 75-year sentence is to assess its ‘proportionality’ against sentences that have been imposed for other federal crimes.” *Id.* at 11. “Ms. Neba’s resulting sentence is not similar to those of defendants sentenced for similar crimes.” *Id.* at 10 (citations omitted). When compared to the sentences for sex traffickers and child pornography offenders, “Ms. Neba’s sentence still stands out as among the most severe I have observed.” *Id.* at 11 (citations omitted).

Alcadio Caballero had zero criminal history points. He had no prior offenses at all. He received no enhancement for his role in the offense. He did not obstruct justice. Though he had a lengthy substance abuse

history including alcohol, methamphetamine, marijuana, and cocaine, he also, unlike so many federal criminal defendants, had a lengthy employment history. Nonetheless, the district court imposed a sentence that is two-thirds or more greater than relevant average sentences. Caballero's 151-month sentence is 166% of the national average sentence for methamphetamine sentences. It's 200% of the national average drug trafficking sentence. It's 184% of the average drug trafficking sentence in this Circuit. It's even 10 months longer than the average drug trafficking sentence in the Northern District of Texas where the sentences are outliers even in this Circuit. And this at a time when the length of all drug sentences is trending down—in Fiscal Year 2017, 69.1% of all methamphetamine sentences were below-guidelines sentences while 30.3% of methamphetamine sentences were within the sentencing guidelines range and only .6% were above it.

This case presents an ideal opportunity to consider the reasonableness a criminal defendant's sentence as measured by the Sentencing Commission's statistical data. Caballero is literally a first time offender with no aggravating sentencing factors, yet he received a sentence far beyond the sentences imposed on methamphetamine defendants and drug traffickers generally. Therefore, this case is the ideal one for this Court to consider this issue *en banc*.

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Statement of the Issues

I. The case is the ideal vehicle for this Court to address the exceptionally important question of how to measure the substantive reasonableness of a criminal defendant's sentence. Though *Rita v. United States* allows courts to presume a within-guidelines sentence is reasonable, it provides no guidance on determining *un*reasonableness. Caballero was a first time offender with no aggravating circumstances and some mitigating personal history. A panel affirmed it though Sentencing Commission data showed it to be dramatically higher than both the average methamphetamine sentence and the average drug-trafficking sentence.

Statement of the Case

On August 31, 2017, Caballero and others were arrested on a complaint filed in the Fort Worth Division of the Northern District of Texas. ROA.2. The government sought Caballero's detention pending trial. ROA.13. Caballero was found indigent and appointed counsel. ROA.12. After a hearing, ROA.3, Caballero was detained pending trial. ROA.16. The parties moved to extend the time to return an indictment, ROA.17, which was granted. ROA.4.

On October 18, 2017, a grand jury returned a superseding indictment adding Caballero and others to an existing case.¹ ROA.21. Caballero was arraigned on this indictment. ROA.27, 28. The district court then entered a scheduling order for trial. ROA.29. Caballero elected to plead guilty before trial. He entered a plea before a magistrate judge. ROA.98, 103, 104, 105, 106. The plea was supported by a factual basis contained in a Factual Resume executed by Caballero and filed. ROA.107. The magistrate judge recommended that the plea be accepted. ROA.109. The district court accepted the magistrate judge's recommendation, ROA.120, and entered a scheduling order for sentencing. ROA.111.

¹ Caballero was added to an existing case; he was not named in the original indictment.

On May 11, 2018, the district court sentenced Caballero to 151 months confinement in the Bureau of Prisons. ROA.140, 143. Subsequently, Caballero filed a Rule 35 motion challenging the imposition of a term of supervised release under USSG 5D1.1(c). ROA.148. The district court denied this motion. ROA. 152. Caballero's notice of appeal was timely filed on May 21, 2018. ROA.153. A panel of this court affirmed his sentence.

Reasons for *en banc* Review

I. The case is the ideal vehicle for this Court to address the exceptionally important question of how to measure the substantive reasonableness of a criminal defendant's sentence. Though *Rita v. United States* allows courts to presume a within-guidelines sentence is reasonable, it provides no guidance on determining *un*reasonableness. Caballero was a first time offender with no aggravating circumstances and some mitigating personal history. A panel affirmed it though Sentencing Commission data showed it to be dramatically higher than both the average methamphetamine sentence and the average drug-trafficking sentence.

Caballero's Sentencing Guidelines calculation, the Sentencing Commission data, and the district court's decision.

Caballero's PSR calculated a Total Offense Level of 34 and Criminal History Category I. ROA.307. This was a guidelines range of 151–188 months. ROA.313. Caballero had no objections to these calculations.

ROA.328.² The district court adopted the PSR and its conclusions:

The Court concludes that the total offense level is 34; that the Criminal History Category is I; that the imprisonment range is 131 -- 151 to 188 months; that the supervised release range is 2 to 5 years; that the fine range is \$15,000 to 10 -- I'm sorry, the fine range is \$35,000 to \$10 million; and a special assessment of \$100 is mandatory.

² Caballero did have a couple of objections to the PSR, but they did not pertain to the sentencing guidelines calculation. For reasons not apparent, they are missing from the record; however, they are recognized by the PSR Addendum. ROA.328–329.

ROA.264. Caballero had zero criminal history points and no criminal history. ROA.307. Caballero was eligible for and received the safety valve reduction in USSG § 2D1.1(b)(17) and 18 U.S.C. § 3553(f). ROA.307. He received no enhancement for his role in the offense. ROA.307. He did not obstruct justice. ROA.306. He had lengthy substance abuse history including alcohol, methamphetamine, marijuana, and cocaine. ROA.311–312. He, unlike so many criminal defendants, also had lengthy employment history. ROA.312–313. He’d been kicked in the head by a mule as a child in Mexico, which left him with residual memory loss and migraine headaches. ROA.311.

At sentencing, Caballero introduced several exhibits. These were charts and data from the sentencing commission. Exhibit 1 was the Length of Imprisonment in Each Drug Type for Fiscal Year 2017. ROA.290. Exhibit 2 was the Length of Imprisonment in Each Drug Type for Fiscal Years 2008–2017. ROA.291. Exhibit 3 was Base Offense Levels for Drug Trafficking Offenders in Each Drug Type for Fiscal Year 2017. ROA.292. Exhibit 4 was Sentences Relative to the Guidelines Range for Drug Offenders in Each Drug Type for Fiscal Year 2017. ROA.293. Exhibit 5 was Length of Imprisonment by Primary Offense Category in Fiscal Year 2017 for the Northern District of

Texas. ROA.295. Exhibit 6 was Length of Imprisonment by Primary Offense Category in Fiscal Year 2017 for the Fifth Circuit. ROA.296.

The important facts in these exhibits included the following: The mean or average methamphetamine sentence in 2017 was 91 months. ROA.290. The median or midpoint of the data sentence was 72 months. ROA.290. The average methamphetamine sentence has been trending downward for the previous ten years. ROA.291. In Fiscal Year 2017, only 30.3% of methamphetamine sentences were within the sentencing guidelines range while 25.2% were below the guidelines range based on a 5K1.1 motion, another 11.7% were under the guidelines for other government-sponsored reasons, and 20.1% were below the guidelines range based on *Booker* departures. ROA.293–294. Only .6% of all methamphetamine sentences were above the sentencing guidelines range in Fiscal Year 2017. ROA.293. In Fiscal Year 2017, nationally the average and median sentences for all drug offenses were 75 and 60 months, respectively, ROA.295, while the average and median in the Northern District of Texas were 141 and 121 months, respectively, ROA.295, and the average and median in the Fifth Circuit were 82 and 60 months, respectively. ROA.295.

The district court sentenced Caballero to 151 months, which was the bottom of his advisory sentencing guidelines range. ROA.275.

Caballero objected to the reasonableness of his sentence. ROA.279.

Caballero's argument on appeal and the panel opinion.

On appeal, in an argument spanning about eight pages, Caballero argued that the district court erred by imposing a sentence twice the national average on a defendant who had no prior criminal history or other aggravating factors. More specifically, Caballero noted that (1) his sentence was dramatically higher than the average sentences for all methamphetamine defendants though he is a first-time offender with no aggravating factors; (2) the facts of this case differentiate it from *United States v. Willingham*,³ which limited the use of Sentencing Commission statistics where defendants were not similarly situated; and (3) Sentencing Commission statistics show the unreasonableness of this sentence. Appellant's Brief at 8–16. This, Caballero contended in

³ 497 F.3d 541, 544–545 (5th Cir. 2007). *Willingham* does not control this case for the reasons discussed on pages 11–13 of Appellant's initial brief. Simply put, this is because Caballero was a first-time offender who has no criminal history, no aggravating factors, and some compelling personal circumstances. His particular and unique characteristics—a first-time offender with no criminal history or aggravating factors—enable a clear assessment of his sentence against the Sentencing Commission's data. Thus, one would expect his sentence to be dramatically lower than average not dramatically higher than average.

four more pages of argument, demonstrated the district court's failure to account for factors that should have received significant weight, giving significant weight to an irrelevant or improper factor, and clear error of judgment in balancing sentencing factors. *Id.* at 16–20.

The panel opinion dispensed with these arguments in a single paragraph:

The district court considered the Presentence Report (PSR), the advisory guidelines range, the 18 U.S.C. § 3553(a) factors, the statements of Caballero De La Torre's sister and mother, defense counsel's arguments and exhibits concerning data prepared by the Sentencing Commission, Caballero De La Torre's allocution, and his lack of criminal history. The court ultimately determined that a sentence at the bottom of the advisory guidelines range was appropriate. Caballero De La Torre has not shown that the district court failed to consider a factor that should have been given significant weight. He has failed also to show that the district court gave too much weight to the Sentencing Guidelines. Caballero De La Torre has not shown that the district court made a clear error of judgment in weighing the § 3553(a) factors. His disagreement with the district court's weighing of the sentencing factors is insufficient to rebut the presumption of reasonableness that is applicable to within-guidelines sentences. Therefore, he has not shown that his sentence was substantively unreasonable.

United States v. Caballero, No. 18-10612, Slip Op. at 2 (May 3, 2019) (citations omitted).

This Court should take this case *en banc* to address the exceptionally important question of how to measure the substantive reasonableness of a criminal defendant's sentence.

This Court takes cases *en banc* to secure or maintain uniformity of the court's decisions or when the proceeding involves a question of exceptional importance. Fed. R. App. P. 35(a); 5th Cir. R. 35.6. This case involves a case of exceptional importance and is the ideal vehicle to address that question. The question, of course, is how to determine substantive reasonableness of a criminal defendant's sentence.

Caballero received a sentence that is 166% of the national average sentence for methamphetamine sentences, 200% of the national average drug trafficking sentence, and 184% of the average drug trafficking sentence in this Circuit, yet he was a first-time offender with no aggravating factors and some compelling personal circumstances. It's even 10 months longer than the average drug trafficking sentence in the Northern District of Texas, ROA.295, where the sentences are outliers even in this Circuit. *Compare* ROA.295, *with* ROA.296. And this at a time when the length of all drug sentences is trending down, ROA.291, only 30.3% of methamphetamine sentences are within-guidelines, and .6% are above-guidelines sentences. ROA.293–294. Nonetheless, a panel of this Court affirmed this sentence.

This case illustrates what Judge Jones called “the lack of meaningful judicial standards for determining the substantive reasonableness of Guidelines sentences.” *Neba*, Slip Op. at 9 (Jones, J., concurring). Judge Jones noted that though presumptively reasonable ostensibly doesn’t mean always reasonable, *Rita v. United States*, 551 U.S. 338, 127 S. Ct. 2456, 2462 (2007) provides no guidance for what’s unreasonable—that is there’s no “threshold for an appellate finding of substantive unreasonableness[.]” *Id.* at 10. “In effect, the presumption is non-binding in theory but nearly ironclad in fact.” *Id.* at 11 (noting that only one sentence was reversed last year for a general reasonableness challenge). Indeed, the Sentencing Commission’s Sourcebook referenced by Judge Jones in *Neba* revealed that only 7 sentences were reversed for an unreasonable weighing of sentencing factors in 2017. United States Sentencing Comm’n, Sourcebook of Federal Sentencing Statistics (2017) at S-149, available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-source-books/2017/2017SB_Full.pdf. This raises the question “[o]n what basis may appellate courts that apply the presumption [of reasonableness to within-guidelines sentences] find an abuse of discretion for sentences that, while within the Guidelines, still embody punishment far outside of the mean for crimes of the same general sort?” *Neba*, Slip Op. at 11.

In *Neba*, “Ms. Neba’s resulting sentence is not similar to those of defendants sentenced for similar crimes.” *Id.* at 10 (citations omitted). When compared to the sentences for sex traffickers and child pornography offenders, “Ms. Neba’s sentence still stands out as among the most severe I have observed.” *Id.* at 11 (citations omitted). One “way to test the ‘substantive reasonableness’ of her 75-year sentence is to assess its ‘proportionality’ against sentences that have been imposed for other federal crimes.” *Id.* at 11.

The Sentencing Commission’s own statistical evidence shows how unreasonable Caballero’s sentence is, yet it was affirmed without any discussion of this data specifically or how an unreasonable sentence should be judged generally. Again, as Judge Jones put it, “the presumption [wa]s non-binding in theory but nearly ironclad in fact.” *Id.* at 11. Caballero’s status as a first-time offender with no aggravating factors and a sentence dramatically above both the average methamphetamine and average drug-trafficking sentence makes his case ideal for tackling how to measure the substantive reasonableness of a criminal defendant’s sentence. Therefore, this Court should take this case *en banc* to address question of exceptional importance.

Conclusion

This Court should take this case *en banc* to address the exceptionally important question of how to measure the substantive reasonableness of a criminal defendant's sentence.

Respectfully submitted,

s/ Leigh W. Davis_____
(Mr.) Leigh W. Davis
Texas bar no. 24029505
1901 Central Drive Suite 708
Bedford TX 76021
817.868.9500
817.887.2401 (fax)
leighwdavis@gmail.com

Certificate of Service

I certify that on May 17, 2019, I electronically filed the foregoing with the Fifth Circuit Court of Appeals using the CM/ECF system which will send notification of such filing to all attorneys of record.

A paper copy of this document was served by U.S.P.S. First Class Mail to Alcadio Caballero De La Torre, 56121-177, Rivers CI, P.O. Box 630, Winton, NC 27986.

s/ Leigh W. Davis_____

(Mr.) Leigh W. Davis

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:
 - X this brief contains 2,743 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), or
 - this brief uses a monospaced typeface and contains [state the number of] lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:
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s/ Leigh W. Davis _____
(Mr.) Leigh W. Davis

Attorney for Appellants

Dated: May 17, 2019.

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 18-10612
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED

May 3, 2019

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

ALCADIO CABALLERO DE LA TORRE, also known as “Coochi”,

Defendant-Appellant

Appeals from the United States District Court
for the Northern District of Texas
USDC No. 4:17-CR-194-3

Before STEWART, Chief Judge, and OWEN and OLDHAM, Circuit Judges.

PER CURIAM:*

Alcadio Caballero De La Torre appeals the sentence imposed following his guilty plea conviction of conspiracy to possess with intent to distribute a controlled substance. First, he argues that the 151-month sentence imposed by the district court is substantively unreasonable. Because he objected to the substantive reasonableness of the sentence in the district court, he preserved

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

No. 18-10612

the issue for appellate review. See *United States v. Powell*, 732 F.3d 361, 381 (5th Cir. 2013).

The district court considered the Presentence Report (PSR), the advisory guidelines range, the 18 U.S.C. § 3553(a) factors, the statements of Caballero De La Torre's sister and mother, defense counsel's arguments and exhibits concerning data prepared by the Sentencing Commission, Caballero De La Torre's allocution, and his lack of criminal history. The court ultimately determined that a sentence at the bottom of the advisory guidelines range was appropriate. Caballero De La Torre has not shown that the district court failed to consider a factor that should have been given significant weight. See *United States v. Simpson*, 796 F.3d 548, 558 (5th Cir. 2015). He has failed also to show that the district court gave too much weight to the Sentencing Guidelines. See, e.g., *Gall v. United States*, 552 U.S. 38, 49-50 (2007) (stating that the district court must first correctly calculate the advisory guidelines range under the Sentencing Guidelines). Caballero De La Torre has not shown that the district court made a clear error of judgment in weighing the § 3553(a) factors. See *Simpson*, 796 F.3d at 558. His disagreement with the district court's weighing of the sentencing factors is insufficient to rebut the presumption of reasonableness that is applicable to within-guidelines sentences. See *United States v. Ruiz*, 621 F.3d 390, 398 (5th Cir. 2010); *United States v. Rodriguez*, 523 F.3d 519, 526 (5th Cir. 2008). Therefore, he has not shown that his sentence was substantively unreasonable. See *Simpson*, 796 F.3d at 557-58.

Caballero De La Torre also asserts that the district court erred in imposing a four-year term of supervised release because he is a deportable alien. He did not object to the supervised release term at sentencing. However, he raised the issue in a Federal Rule of Criminal Procedure 35 motion filed after the judgment was entered.

No. 18-10612

A district court may correct a sentence imposed as a result of an arithmetical, technical, or other clear error within 14 days after the imposition of a sentence. FED. R. CRIM. P. 35. A district court may also correct a sentence on the motion of the Government to reflect a defendant's subsequent substantial assistance. Rule 35(b). However, Rule 35 does not allow a district court to reconsider the application of the Guidelines or to reconsider the appropriateness of the sentence. *United States v. Lopez*, 26 F.3d 512, 520-21 (5th Cir. 1994); *see also United States v. Ross*, 557 F.3d 237, 241-43 (5th Cir. 2009).

Caballero De La Torre could not raise this issue in a Rule 35 motion because it is not the type of error contemplated by Rule 35(a). *See Lopez*, 26 F.3d at 520-21; *Ross*, 557 F.3d at 241-43. Therefore, review is limited to plain error. *See Puckett v. United States*, 556 U.S. 129, 135 (2009). To show plain error, he must show a forfeited error that is clear or obvious and that affected his substantial rights. *Id.* If he makes such a showing, this court has the discretion to correct the error but only if it “seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.” *Id.* (internal quotation marks and citations omitted).

The district court adopted the PSR, which expressly stated that the court ordinarily should not impose a term of supervised release on a defendant who is a deportable alien. *See* U.S.S.G. § 5D1.1(c). The district court also considered the § 3553(a) factors and made an individualized determination that the supervised release term would “provide an added measure of deterrence and protection based on the facts and circumstances of this case.” This court has held that such an explanation is sufficient to uphold a supervised release term on plain error review. *See United States v. Dominguez-Alvarado*, 695 F.3d 324, 329-30 (5th Cir. 2012). Because the district court

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considered the § 3553(a) factors and determined that the supervised release term would provide an added measure of deterrence, the district court's imposition of the four-year supervised release term was not plainly erroneous.

See id. at 329-30.

AFFIRMED.

D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-10612

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

ALCADIO CABALLERO DE LA TORRE, also known as "Coochi",

Defendant - Appellant

Appeals from the United States District Court
for the Northern District of Texas

ON PETITION FOR REHEARING EN BANC

(Opinion 5/3/19 , 5 Cir., _____ , _____ F.3d _____)

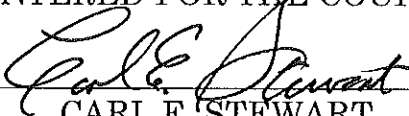
Before STEWART, Chief Judge, and OWEN and OLDHAM, Circuit Judges.

PER CURIAM:

- (X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.
- () Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court

having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:



CARL E. STEWART
CHIEF JUDGE

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

June 11, 2019

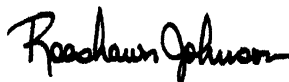
MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 18-10612 USA v. Alcadio Caballero De La Torre
USDC No. 4:17-CR-194-3

Enclosed is an order entered in this case.

Sincerely,

LYLE W. CAYCE, Clerk



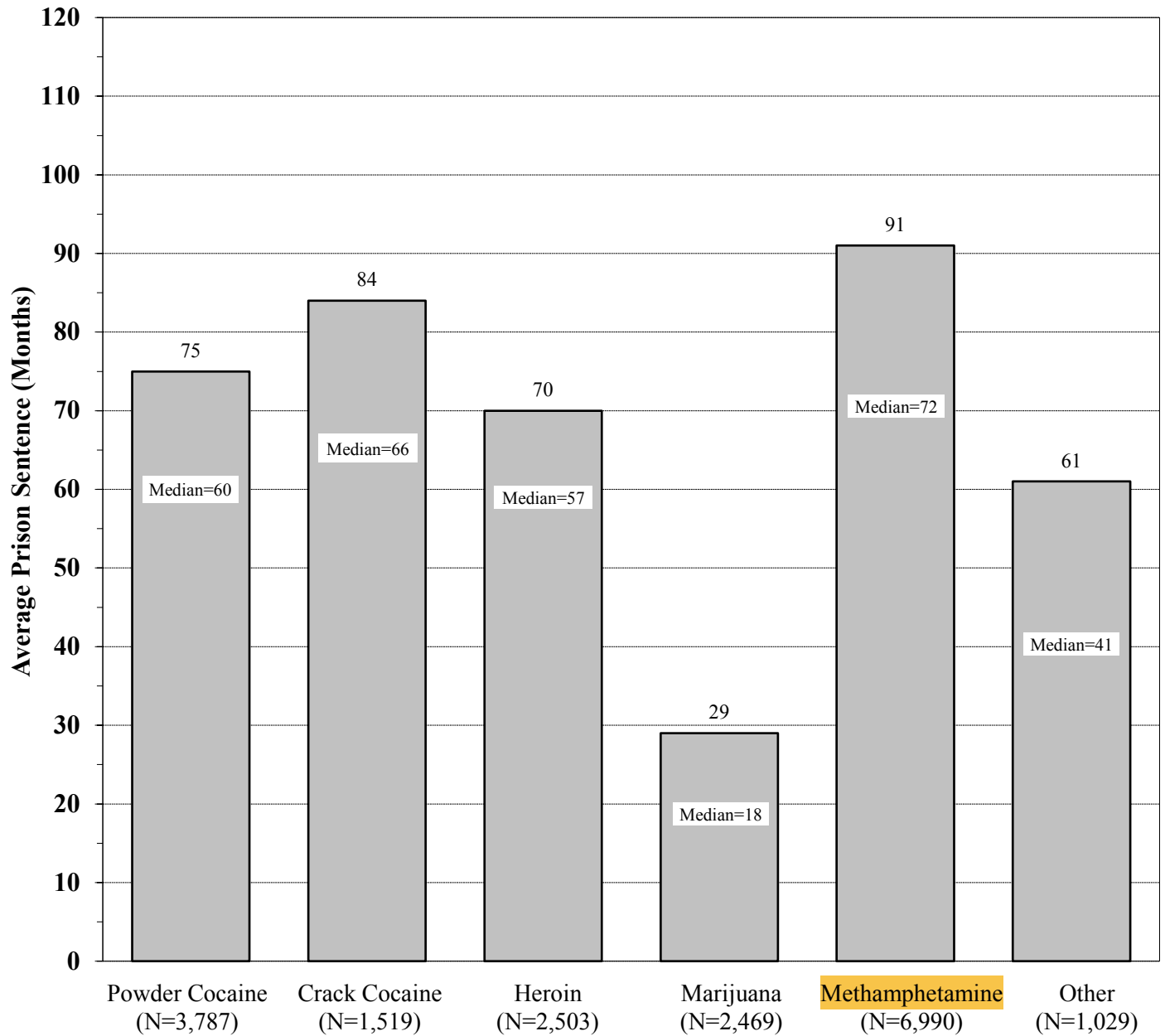
By: _____
Roeshawn A. Johnson, Deputy Clerk
504-310-7998

Mr. Leigh Warren Davis
Mr. James Wesley Hendrix
Ms. Karen S. Mitchell
Ms. Melanie Smith

E

Figure J

LENGTH OF IMPRISONMENT IN EACH DRUG TYPE¹
Fiscal Year 2017

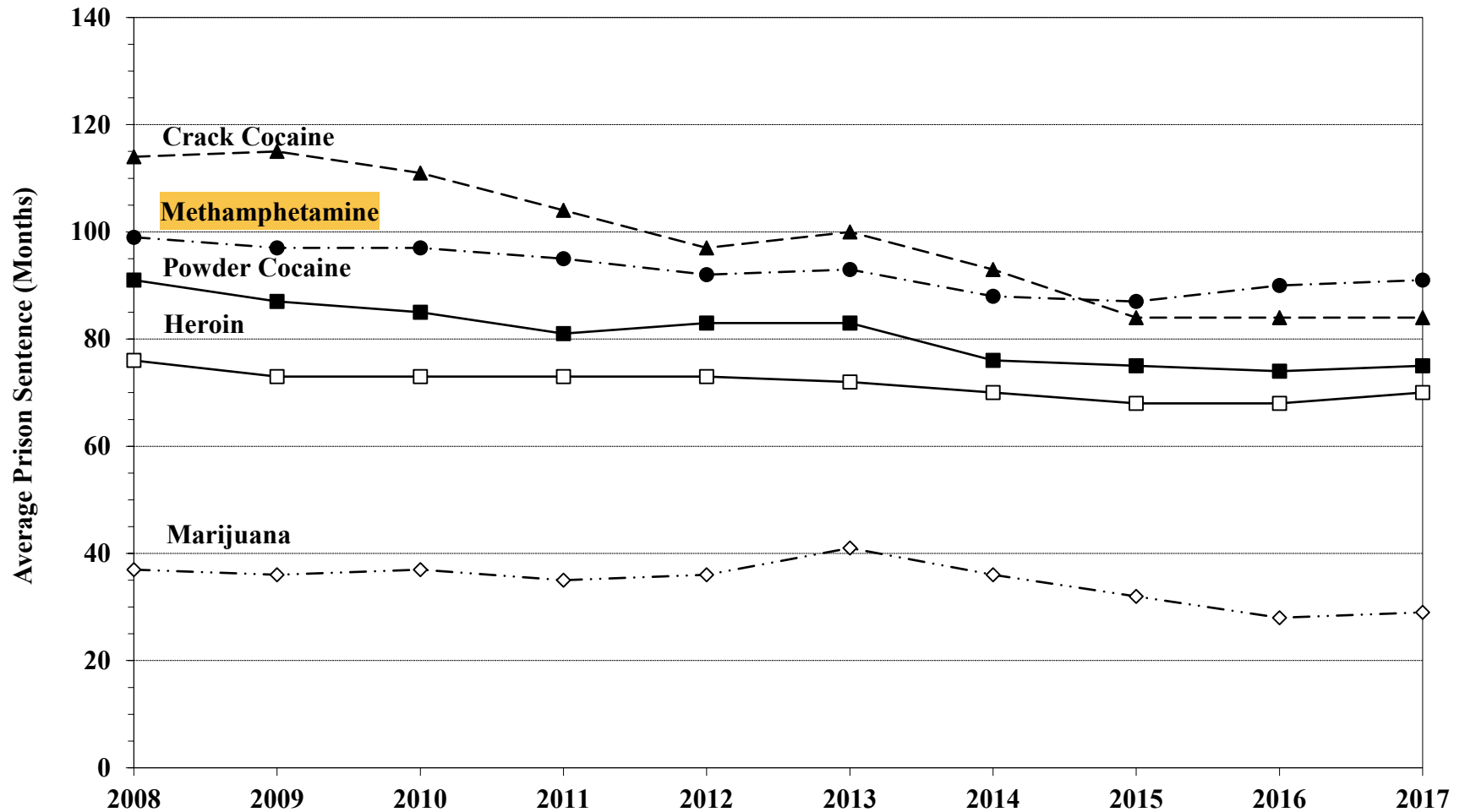


¹ Of the 66,873 cases, 4,116 had missing guideline application information. Of the remaining 62,757 cases, 19,843 were sentenced under USSG Chapter Two, Part D (Drugs). Of these, 19,750 were sentenced under §§2D1.1, 2D1.2, 2D1.5, 2D1.6, 2D1.8, or 2D2.1. Additionally, 1,450 with zero months prison ordered were excluded. Of the remaining 18,300 cases, three were excluded due to missing sentence information.

SOURCE: U.S. Sentencing Commission, 2017 Datafile, USSCFY17.

Figure L

LENGTH OF IMPRISONMENT IN EACH DRUG TYPE¹
Fiscal Years 2008 - 2017



¹ Only cases sentenced under USSG §§2D1.1 (Drug Trafficking), 2D1.2 (Protected Locations), 2D1.5 (Continuing Criminal Enterprise), 2D1.6 (Use of a Communication Facility), 2D1.8 (Rent/Manage Drug Establishment), or 2D2.1 (Simple Possession) are depicted in this figure. Cases with zero months prison were excluded. Cases missing drug type or sentencing information were also excluded. Data in this figure represent information from the Commission's ongoing data files; therefore, data points may vary from prior *Sourcebooks*. Descriptions of variables used in this figure are provided in Appendix A.

SOURCE: U.S. Sentencing Commission, 2008 - 2017 Datafiles, USSCFY08 - USSCFY17.

Exhibit No. 2
Alcadio Caballero
 4:17-CR-194-A-3

Table 42A

BASE OFFENSE LEVELS FOR DRUG TRAFFICKING OFFENDERS IN EACH DRUG TYPE¹
Fiscal Year 2017

DRUG TYPE	TOTAL	BASE OFFENSE LEVELS ^{2,3}																			
		6	8	10	12	14	16	18	20	22	24	26	28	30	31	32	33	34	36	38	43
TOTAL	18,935	115	27	57	550	401	945	601	574	525	3,233	1,255	945	3,287	307	1,979	289	1,790	813	1,223	19
Powder Cocaine	3,736	3	1	3	120	60	101	87	68	80	587	265	224	846	26	368	17	270	143	467	0
Crack Cocaine	1,526	0	4	5	82	55	78	47	58	63	501	142	76	249	0	83	4	43	21	15	0
Heroin	2,626	0	1	1	201	84	122	96	86	90	549	247	152	572	29	223	4	96	17	43	13
Marijuana	2,696	74	14	26	45	129	531	275	239	200	805	109	58	105	3	44	0	26	9	4	0
Methamphetamine	7,077	0	0	0	42	41	48	53	58	54	570	361	340	1,324	243	1,141	256	1,304	600	642	0
Other	1,274	38	7	22	60	32	65	43	65	38	221	131	95	191	6	120	8	51	23	52	6

¹ Of the 66,873 cases, 19,223 were sentenced under §2D1.1 (Drug Trafficking). Of these, 18,935 cases had complete guideline application information. Descriptions of variables used in this table are provided in Appendix A.

² Base Offense Level is that applied at time of sentencing and reflects application of the mitigating role cap on Base Offense Level as described in §2D1.1(a)(5).

³ The quantity of drugs determining the Base Offense Level applied is described in the Drug Quantity Table at §2D1.1(c) and varies by drug type and the year of the *Guidelines Manual* applied at the time of sentencing.

Table 45

SENTENCES RELATIVE TO THE GUIDELINE RANGE FOR DRUG OFFENDERS IN EACH DRUG TYPE¹
Fiscal Year 2017

DRUG TYPE	TOTAL	WITHIN GUIDELINE RANGE		UPWARD DEPARTURE ²		UPWARD DEPARTURE W/ <i>BOOKER</i> ²		ABOVE RANGE W/ <i>BOOKER</i> ²		REMAINING ABOVE RANGE	
		N	%	N	%	N	%	N	%	N	%
TOTAL	19,743	7,095	35.9	70	0.4	20	0.1	203	1.0	25	0.1
Powder Cocaine	3,988	1,625	40.7	6	0.2	1	0.0	45	1.1	3	0.1
Crack Cocaine	1,613	665	41.2	10	0.6	0	0.0	33	2.0	4	0.2
Heroin	2,707	929	34.3	17	0.6	13	0.5	50	1.8	7	0.3
Marijuana	2,833	1,333	47.1	16	0.6	2	0.1	29	1.0	7	0.2
Methamphetamine	7,255	2,199	30.3	13	0.2	0	0.0	27	0.4	3	0.0
Other	1,347	344	25.5	8	0.6	4	0.3	19	1.4	1	0.1

Exhibit No. 4
 Alcadio Caballero
 4:17-CR-194-A-3

Table 45 (cont.)

DRUG TYPE	§5K1.1 SUBSTANTIAL ASSISTANCE		§5K3.1 EARLY DISPOSITION		OTHER GOV'T SPONSORED		DOWNWARD DEPARTURE³		DOWNWARD DEPARTURE W/ <i>BOOKER</i>³		BELOW RANGE W/ <i>BOOKER</i>³		REMAINING BELOW RANGE	
	N	%	N	%	N	%	N	%	N	%	N	%	N	%
TOTAL	4,253	21.5	1,359	6.9	2,102	10.6	309	1.6	158	0.8	4,076	20.6	73	0.4
Powder Cocaine	869	21.8	169	4.2	298	7.5	68	1.7	35	0.9	852	21.4	17	0.4
Crack Cocaine	272	16.9	0	0.0	180	11.2	32	2.0	21	1.3	389	24.1	7	0.4
Heroin	535	19.8	83	3.1	358	13.2	34	1.3	26	1.0	650	24.0	5	0.2
Marijuana	313	11.0	398	14.0	258	9.1	57	2.0	9	0.3	392	13.8	19	0.7
Methamphetamine	1,830	25.2	699	9.6	849	11.7	98	1.4	58	0.8	1,458	20.1	21	0.3
Other	434	32.2	10	0.7	159	11.8	20	1.5	9	0.7	335	24.9	4	0.3

¹ Of the 66,873 cases, 19,843 were sentenced under USSG Chapter Two, Part D (Drugs). Of these, 19,750 cases were sentenced under §§2D1.1 (Drug Trafficking), 2D1.2 (Protected Locations), 2D1.5 (Continuing Criminal Enterprise), 2D1.6 (Use of a Communication Facility), 2D1.8 (Rent/Manage Drug Establishment), or 2D2.1 (Simple Possession). Of these 19,750 cases, seven were excluded due to missing information from the submitted documents that prevented the comparison of the sentence and the guideline range. Descriptions of variables used in this table are provided in Appendix A.

² See Tables 24-24B for a list of departure reasons comprising these categories.

³ See Tables 25-25B for a list of departure reasons comprising these categories.

SOURCE: U.S. Sentencing Commission, 2017 Datafile, USSCFY17.

Table 7

LENGTH OF IMPRISONMENT BY PRIMARY OFFENSE CATEGORY
Fiscal Year 2017

PRIMARY OFFENSE	National			Northern Texas		
	Mean Months	Median Months	N	Mean Months	Median Months	N
TOTAL	51	27	58,091	99	60	1,348
Murder	224	180	72	333	470	3
Manslaughter	71	60	59	--	--	0
Kidnapping/Hostage Taking	230	210	62	--	--	1
Sexual Abuse	140	120	632	199	164	24
Assault	35	24	632	--	--	2
Robbery	77	60	620	90	70	29
Arson	67	60	37	--	--	0
Drugs - Trafficking	75	60	17,795	141	121	578
Drugs - Communication Facility	38	37	190	43	48	25
Drugs - Simple Possession	5	6	957	--	--	1
Firearms	75	52	7,590	80	57	255
Burglary/B&E	20	18	29	--	--	0
Auto Theft	88	57	52	--	--	0
Larceny	20	12	365	19	15	12
Fraud	35	24	4,471	51	33	68
Embezzlement	15	11	164	17	11	4
Forgery/Counterfeiting	21	18	287	65	41	6
Bribery	25	18	114	--	--	2
Tax	19	12	263	30	36	7
Money Laundering	44	30	497	88	81	10
Racketeering/Extortion	108	60	866	66	60	17
Gambling/Lottery	9	5	12	--	--	0
Civil Rights	60	27	33	--	--	0
Immigration	13	10	18,475	24	20	219
Child Pornography	151	97	1,763	193	150	45
Prison Offenses	12	11	492	19	16	10
Administration of Justice Offenses	25	18	770	23	21	19
Environmental/Wildlife	12	6	18	--	--	0
National Defense	63	35	78	--	--	0
Antitrust	24	12	13	--	--	0
Food & Drug	20	12	23	--	--	0
Other Miscellaneous Offenses	41	12	660	24	18	11

Of the 66,873 guideline cases, 8,782 cases were excluded for one or both of the following reasons: zero months of prison ordered (8,345), or missing or indeterminable sentencing information (437).

Of the 1,430 guideline cases from the Northern District of Texas, 82 cases were excluded due to zero months of prison ordered.

SOURCE: U.S. Sentencing Commission, 2017 Datafile, USSCFY17.

Exhibit No. 5
Alcadio Caballero
4:17-CR-194-A-3

Table 7

LENGTH OF IMPRISONMENT BY PRIMARY OFFENSE CATEGORY
Fiscal Year 2017

PRIMARY OFFENSE	National			Fifth Circuit		
	Mean Months	Median Months	N	Mean Months	Median Months	N
TOTAL	51	27	58,091	43	21	15,148
Murder	224	180	72	288	290	10
Manslaughter	71	60	59	--	--	0
Kidnapping/Hostage Taking	230	210	62	212	238	22
Sexual Abuse	140	120	632	175	121	78
Assault	35	24	632	37	20	45
Robbery	77	60	620	84	64	76
Arson	67	60	37	--	--	1
Drugs - Trafficking	75	60	17,795	82	60	3,858
Drugs - Communication Facility	38	37	190	41	48	40
Drugs - Simple Possession	5	6	957	2	1	35
Firearms	75	52	7,590	67	46	1,041
Burglary/B&E	20	18	29	--	--	2
Auto Theft	88	57	52	29	18	5
Larceny	20	12	365	23	12	49
Fraud	35	24	4,471	47	24	456
Embezzlement	15	11	164	20	13	17
Forgery/Counterfeiting	21	18	287	32	24	37
Bribery	25	18	114	24	18	22
Tax	19	12	263	27	30	25
Money Laundering	44	30	497	58	34	117
Racketeering/Extortion	108	60	866	131	60	101
Gambling/Lottery	9	5	12	10	5	3
Civil Rights	60	27	33	98	44	10
Immigration	13	10	18,475	16	13	8,500
Child Pornography	151	97	1,763	176	120	221
Prison Offenses	12	11	492	18	15	77
Administration of Justice Offenses	25	18	770	23	21	164
Environmental/Wildlife	12	6	18	--	--	0
National Defense	63	35	78	31	21	18
Antitrust	24	12	13	--	--	0
Food & Drug	20	12	23	--	--	0
Other Miscellaneous Offenses	41	12	660	22	11	118

Of the 66,873 guideline cases, 8,782 cases were excluded for one or both of the following reasons: zero months of prison ordered (8,345), or missing or indeterminable sentencing information (437).

Of the 16,712 guideline cases from the Fifth Circuit, 1,564 cases were excluded due to one of the following reasons: zero months of prison ordered (1,557) or missing or indeterminable sentencing information (7).

SOURCE: U.S. Sentencing Commission, 2017 Datafile, USSCFY17.

Exhibit No. 6
Alcadio Caballero
4:17-CR-194-A-3