

No. \_\_\_\_\_

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IN THE  
SUPREME COURT OF THE UNITED STATES

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JOSEPH THOR PERKINS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

---

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

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PETITION FOR WRIT OF CERTIORARI

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Manny K. Atwal  
First Assistant Defender  
(Counsel of Record)

U.S. Courthouse, Suite 107  
300 South Fourth Street  
Minneapolis, MN 55415  
(612) 664-5858  
Counsel for Petitioner

## **QUESTION PRESENTED**

### **I.**

Whether a sentencing court can abuse its discretion by not varying downward further based on this Court’s decisions mandating that a sentencing court meaningfully “consider all of the § 3553(a) factors” when formulating the appropriate criminal sentence?

## **LIST OF PARTIES**

All parties appear in the caption on the cover page of this Petition.

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**PETITION FOR WRIT OF CERTIORARI**

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Petitioner Joseph Perkins requests a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

**OPINION BELOW**

The opinion of the Eighth Circuit Court of Appeals is reported as an unpublished opinion at *United States v. Perkins*, \_\_\_ Fed. Appx. \_\_\_, 2019 WL 4594779 (8th Cir. Sept. 23, 2019), and the original slip opinion is reprinted in the Appendix to this Petition. (App. A).

## **JURISDICTION**

Petitioner was charged by indictment filed in the United States District Court for the District of Minnesota, alleging federal crimes relating to the production of child pornography. After having reached a plea agreement, Petitioner entered a guilty plea and the matter proceeded to the sentencing phase. After briefing and argument on this latter topic—the details of which are at issue in this Petition—the district court imposed a 336-month prison term. The Eighth Circuit Court of Appeals affirmed by unpublished opinion filed on September 23, 2019. (App. A). Under 28 U.S.C. § 1254(1), this Court has jurisdiction to review the decision of the Court of Appeals.

## STATUTE INVOLVED

This Petition involves provisions of the United States Code, particularly—

\* \* \*

### 18 U.S.C. § 3553

#### **Imposition of a sentence**

##### **(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 . . . the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines . . . issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code . . .;
- (5) any pertinent policy statement . . . issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code . . .;
- (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.

\* \* \*

## **INTRODUCTION**

Petitioner asks this Court to consider whether a sentencing court can abuse its discretion by not varying downward further based on this Court's decisions mandating that a sentencing court meaningfully "consider all of the § 3553(a) factors" when formulating the appropriate criminal sentence.

## **STATEMENT OF THE CASE**

1. Petitioner was charged by indictment alleging federal crimes relating to production of child-pornographic materials. Both parties submitted pretrial motions, however, prior to litigating those motions, Petitioner reached an agreement by which he would enter a guilty plea to one violation of 18 U.S.C. §§ 2251(a), production of child pornography. Petitioner then changed his plea accordingly, and the matter proceeded to sentencing.

2. The district court's probation office assembled a Presentence Investigation Report, which included suggested findings pertinent to the United States Sentencing Guidelines (USSG). Specifically, the probation office made recommendations as to the appropriate criminal history category, offense level, and sentencing range under the Guidelines. The district court determined an advisory Guidelines sentencing range and found the statutory maximum penalty to be thirty years.

3. Petitioner's counsel submitted a detailed sentencing position paper, (App. B), highlighting a number of points bearing upon the statutorily-mandated sentencing factors, 18 U.S.C. § 3553(a), including—

(a). His addiction to pornography.

- (b). His severe depression.
- (c). His lack of prior treatment.
- (d). His dedication to his religion.
- (e). His victims were all teenager and were not forced to meet Mr. Perkins.

4. Petitioner's counsel distilled all of these arguments during the sentencing hearing and argued for a mandatory minimum term of 15 years. Instead, the district court imposed a 336-month prison term, a 24-month downward variance from the recommended Guidelines range.

5. Petitioner appealed to the Eighth Circuit Court of Appeals, challenging the reasonableness of district court's sentencing.

6. The Court of Appeals affirmed the district court's sentencing procedure. (App. A).

## REASONS FOR GRANTING THE PETITION

- I. This Court should grant the Petition to review a circuit opinion of federal sentencing procedure which states that it is nearly inconceivable that a sentencing court abused its discretion by not varying downward further.**

By way of the Question Presented, *supra*, Petitioner asks this Court to consider whether a sentencing court can abuse its discretion by not varying downward further.

### **A. The post-*Booker/Gall* scheme of federal sentencing.**

The Sentencing Reform Act of 1984 (SRA), Pub. L. 98-473, Ch. II (1984), instituted the modern federal scheme of criminal sentencing procedure by, *e.g.*, (i) creating the federal Sentencing Commission; (ii) contemplating the United States Sentencing Guidelines; and (iii) promulgating the factors that federal district courts must take into account when imposing a criminal penalty. *See, e.g., Mistretta v. United States*, 488 U.S. 361, 363-70 (1989) (discussing SRA and its legislative history). The overriding purpose of the SRA was to assure “certainty and fairness” in the federal sentencing process.

In 2005 this Court held that the SRA contained a serious flaw placing it at odds with the Sixth Amendment, *i.e.*, the statutory scheme permitted a judicial officer to make factual determinations—above and beyond any facts that a jury had necessarily found upon rendering a guilty verdict—that effectively increased the defendant’s maximum penalty. *United States v. Booker*, 543 U.S. 220, 230-44 (2005). After contemplating a number of options to remedy the scheme, this Court settled on the seemingly least-intrusive solution of excising the few statutory provisions which made the Sentencing Guidelines mandatory and binding upon sentencing judges. *Id.*

at 259-60. And though this Court expressly invited Congress to re-formulate the statute, *id.* at 265, the Legislative Branch has thus far signaled its approval of this Court’s solution by declining to do so.

Nonetheless, in this post-*Booker* era lower courts have sometimes found it difficult to settle on the appropriate sentencing procedures to balance the now-advisory federal Sentencing Guidelines, with the now-mandatory sentencing considerations set out in 18 U.S.C. § 3553(a)—the statute at issue in the Question Presented and reproduced *supra*, Statute Involved. *See Booker*, 543 U.S. at 259-60.

Hence, this Court has been called upon to supply guidance from time to time. Perhaps most prominently, in *Gall v. United States*, 552 U.S. 38, 49 (2007) this Court instructed that “a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range” to serve as an “initial benchmark.” That decision went on to explain that the parties must then be granted an opportunity to argue for the sentence they deem most appropriate, after which sentencing judge is obliged to “consider all of the § 3553(a) factors to determine whether they support the sentence requested.” *Id.* at 49-50 (emphasis added).

Still, lower courts have sometimes established circuit rules that ultimately fail as contrary to post-*Booker/Gall* SRA sentencing procedures. For example, in the initial *Gall* decision this Court invalidated a circuit rule which required a district judge to find “extraordinary circumstances” to vary below a Guidelines sentencing range. *Id.* at 47. Later, this Court has overturned a number of other circuit rules which curtailed a sentencing court’s consideration of information pertinent to mandatory § 3553(a) factors, instead holding that a sentencing court may consider:

(i). Any policy disagreement with the applicable federal Sentencing Guideline.

*Kimbrough v. United States*, 552 U.S. 85, 93 & 108-12 (2007).

(ii). Any post-sentencing rehabilitation evinced by the defendant. *Pepper v. United States*, 562 U.S. 476, 486-87 & 504-05 (2011).

(iii). Any statutory minimum sentence associated with other counts of conviction. *Dean v. United States*, 137 S. Ct. 1170, 1175 & 1178 (2017).

This despite this Court’s *Booker/Gall* mandate that a sentencing court is to “consider all of the § 3553(a) factors to determine whether they support the sentence requested by a party.” *Gall*, 552 U.S. at 49-50. And despite the clear SRA mandate that a sentencing court “shall consider” all of those same statutory factors.

**B. There is a conflict with the statutory mandate and this Court’s decisions.**

In construing the post-*Booker/Gall* SRA, this Court has made clear that sentencing courts are not free to pick and choose which § 3553(a) sentencing factors to consider when imposing a prison term. Rather, this Court has said that a district court is to “consider all of the § 3553(a) factors to determine whether they support the sentence requested by a party.” *Gall*, 552 U.S. at 49-50 (emphasis added).

Moreover, this Court has flatly rejected any proposed construction of the SRA which would have effect of “elevat[ing] [one or more] § 3553(a) factors above all others.” *Pepper*, 562 U.S. at 504. All these conclusions conform to the SRA’s text and purpose, as the language commands that, in “determining the particular sentence to be imposed,” a sentencing court “shall consider” the sentencing factors listed in the Statute Involved, reproduced earlier. 18 U.S.C. § 3553(a) (emphasis added).

Thus, for example, a sentencing court is obliged to study a presentence investigation report directly pertinent to the sentencing factor of the “nature and circumstances of the offense” as well as the “history and characteristics of the defendant.” *Id.* § 3553(a)(1). And a sentencing court is required to correctly determine the advisory sentencing range generated by the United State Sentencing Guidelines, as this directly informs the sentencing factor involving the “sentencing range . . . as set forth in the guidelines . . . issued by the Sentencing Commission.” *Id.* § 3553(a)(4).

This necessarily means that a district court must give due consideration to any colorable presentation that bears upon any or all of those same SRA sentencing factors. *See, e.g., Pepper*, 562 U.S. at 491-92 & 504-05 (observing that evidence of defendant’s post-sentencing rehabilitation is “clearly relevant” to “history and characteristics” sentencing factor of § 3553(a)(1), and reversing a circuit rule precluding consideration of such information on re-sentencing); *United States v. Cunningham*, 429 F.3d 673, 678 & 679-80 (7th Cir. 2005) (remand required when sentencing judge declined to address proffered evidence of defendant’s psychiatric problems and substance abuse and offered as relevant to several § 3553(a) factors).

**C. The case at hand presents a good vehicle by which to review the Question Presented.**

As discussed earlier, *supra* Statement of the Case, in this case Petitioner pleaded guilty to a federal offense. And the particular offense at issue is one that commonly results in below-Guidelines variant sentences—very often far below the advisory Guidelines range. Aware of this, Petitioner’s counsel supplied the sentencing court with a detailed sentencing pleading. (App. B).

And yet, the district court imposed a 336-month prison term, varying downward but only by 24-months. The Court of Appeals decision in reviewing the reasonableness of the sentence quoted another Circuit case and found that “it is nearly invincible that the court abused its discretion in not varying downward still further. (App. A).

## CONCLUSION

For all these reasons, Petitioner asks the Court to grant this Petition for a Writ of Certiorari.

Dated: December 20, 2019

*Respectfully submitted,*

*s/Manny K. Atwal*

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Manny K. Atwal  
First Assistant Defender  
(Counsel of Record)

U.S. Courthouse, Suite 107  
300 South Fourth Street  
Minneapolis, MN 55415  
(612) 664-5858