No._____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2019

NATHAN THOMAS TRUJILLO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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QUESTIONS PRESENTED

A. WHETHER THE COURT ERRED IN HOLDING THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WITH ITS SENTENCE?

B. WHETHER THE COURT ERRED IN HOLDING THE DISTRICT COURT SUFFICIENTLY ADDRESSED A VARIANCE REQUEST FROM THE GUIDELINES ON POLICY GROUNDS PURSUANT TO *KIMBROUGH v. UNITED STATES*, 552 U.S. 85 (2007)?

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Nathan Thomas Trujillo petitions for a Writ of Certiorari to review the United States Court of Appeals for the Ninth Circuit's memorandum affirming the District Court's decision not to vary downward from a within the Guidelines sentence.

JURISDICTION

The court of appeals issued its memorandum of Mr. Trujillo's appeal on March 10, 2020. Appendix A. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

OPINION BELOW

United States Court of Appeals for the Ninth Circuit issued its memorandum affirming the District Court's sentencing. The memorandum is attached as Appendix A.

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

This case involves the Fifth Amendment to the Constitution of the United States. Appendix B. This case involves Chapter 2, Part D of the United States Sentencing Guidelines. Appendix C.

STATEMENT OF THE CASE

Nathan Trujillo pled guilty in federal court to a three count Indictment for Conspiracy to Possess with Intent to Distribute Methamphetamine and Possession with Intent to Distribute Methamphetamine in violation of Title 21 U.S.C. § 841(a)(1) and (b)(1)(A) and Possession of a Firearm in furtherance of a Drug Trafficking Crime in violation of Title 18 U.S.C. § 924(c)(1)(A). The charges stem from an investigation by the Eastern Montana High Intensity Drug Trafficking Area (EMHIDTA) Task Force, the Federal Bureau of Investigation's Big Sky West Transnational Organized Crime Task Force (TOC), the Montana Department of Criminal Investigations, the Montana Highway Patrol and the United States Attorney's Office. The two drug offenses carried a punishment range of 10 years to

Life, and the gun offense carried a mandatory minimum sentence of five years to Life to be served consecutive to the sentences on the drug offenses.

The imprisonment range recommended by the United States Sentencing Guidelines for the drug offenses was 188 months to 235 months imprisonment. This range was at least four levels higher on the Guidelines Table than it would have been if the offenses were scored as mixture of methamphetamine rather than actual methamphetamine. Under the Guidelines scheme, one gram of actual methamphetamine is treated as equivalent to 10 grams of methamphetamine mixture. This creates an inherent disparity of sentencings contrary to 18 U.S.C. § 3553(a)(6). Moreover, because the drug-sentencing table under 2D1.1 of the Guidelines is not based upon empirical data like most other Guidelines calculations, the Sentencing Commission eschewed its traditional role thereby creating a more arbitrary scheme. Finally, because this ratio was created to ensure that drug dealers closure to the source are held more accountable for the increase in purity, there must be change since the notion of purity by proxy in today's methamphetamine market is a fallacy and fails to hold up against current statistics of overall average purity levels.

The sentence that the district court imposed was within the statutory limits. For the two drug counts, that meant a sentence of no fewer than ten years of imprisonment based upon the amount of methamphetamine being over 50 grams of

actual methamphetamine. For the gun count, that meant a five-year mandatory minimum sentence to run consecutively to the 10-year minimum sentence of the drug counts.

The sentence imposed of 188 months on the drug counts was within and at the low-end of the Sentencing Guidelines range promulgated by Congress, which created the United States Sentencing Commission. To this sentence, the district court ran the 60 months on the gun count consecutively which was mandated for a total sentence of 248 months. Mr. Trujillo, however, requested a total sentence of 190 months, which comported to be 130 months on the drug counts and 60 months on the gun count.

In ordering a sentence of 248 months imprisonment, the district court made several observations in ordering the sentence. The district court observed the seriousness of the offense, his criminal history, and the need to protect the public. The appellate court in its memorandum opinion reiterated this when it held that the district court did not abuse its discretion when it ordered a within-Guidelines sentence. *See Gall v. United States*, 552 U.S. 38, 51 (2007); *United States v. Guitierrez-Sanchez*, 587 F.3d 904, 908 (9th Cir. 2009); *see also* Title 18 U.S.C. § 3553(a).

To its credit, the district court did concede that Mr. Trujillo was facing a lot of time not only due to the guideline range but also the statutory mandatory

minimum sentences. The district court later in its review acknowledged Mr. Trujillo's argument based upon the 10:1 ratio between methamphetamine mixture and actual methamphetamine. "I understand the argument . . . about the purity, and I don't necessarily reject that argument completely. I think there needs to be some review by the Sentencing Commission as far as the appropriateness of the Sentencing Commission as far as the appropriateness of the guideline ranges given the reality, but I don't think this is the case for that." (Appendix D. Sent. Trans. p. 16). The district court then proceeded to distinguish the facts in Mr. Trujillo's case by pointing out factors of why his case was not the right one. For example, the district court highlighted Mr. Trujillo's role in the conspiracy. While conceding that his precise role within the chain was unknown, the court acknowledged that at least it was high enough to be able to procure the multiple pounds of actual methamphetamine. (Sent. Trans. p. 16).

Mr. Trujillo sought to highlight the existence of mitigating factors, which offered the district court the opportunity to vary downward. These factors included a psychological report which described Mr. Trujillo's dysfunctional childhood filled with marijuana sales by his mother, a sexual assault by a nonfamily member, and even the murder of his best friend at 8 years of age. In addition, Mr. Trujillo's criminal history was fraught with status offenses as well as historical offenses. Finally, Mr. Trujillo argued for the district court to rule that a policy disagreement

with the Sentencing Guidelines existed based upon the archaic and arbitrary 10:1 ratio between the Guidelines of methamphetamine mixture and actual methamphetamine.

On appeal by Mr. Trujillo, the United States Court of Appeals for the Ninth Circuit affirmed. In a memorandum opinion, it found the sentence to be reasonable and determined that the district court sufficiently explained the sentence, including its determination that a departure from the Guidelines on policy grounds pursuant to *Kimbrough v. United States*, 552 U.S. 85 (2007), was unwarranted. *See United States v. Carty*, 520 F.3d 984, 992 (9th Cir. 2008) (en banc).

SUMMARY OF ARGUMENT

The district court abused its discretion when it sentenced Mr. Trujillo to 248 months imprisonment by not fully appreciating the mitigating factors which would allow for a reasonable sentence under 18 U.S.C. § 3553(a).

Additionally, district courts are permitted to vary from the recommended Guidelines range based upon policy disagreements of the Sentencing Guidelines. In Mr. Trujillo's case, the district court did not fully appreciate the arguments presented and failed to take advantage of an important historical factor of judicial independence in our Guidelines scheme.

ARGUMENT

I. THE APPELLATE COURT ERRED IN HOLDING THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WITH ITS WITHIN THE GUIDELINES SENTENCE.

"The former mandatory nature of the guidelines was . . . an essential factual predicate to the finding of a Sixth Amendment violation by the *Booker* Court. It was the mandatory nature of the guidelines that rendered them statute-like and thus subjected guideline[] sentences . . . to the rule of *Apprendi*. And, it was the guidelines in their mandatory form that supplied the maximum sentence authorized by the jury verdict. *See Blakely v. Washington*, 124 S. Ct. 2531, 2537 (2004) (stating that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant")". *United States v. Hughes*, 401 F.3d 540, 553 (4th Cir. 2005) (*Hughes II*); *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

In *Booker*, the Supreme Court granted certiorari to determine whether the Sixth Amendment as construed in *Blakely* applies to the federal sentencing guidelines. In an opinion authored by Justice Stevens, the Court ruled that the mandatory nature of the federal sentencing guidelines triggers the Sixth Amendment, as was the case with the state sentencing scheme at issue in *Blakely*. Because judge-found facts are essential to an enhanced sentence under the Guidelines (i.e., absent those facts, a judge is required to sentence within a lower

range), those facts must be found by a jury beyond a reasonable doubt unless they are admitted by the defendant. *United States v. Booker*, 125 S. Ct. 738, 749-50 (2005).

In fashioning a remedy, the Court ruled that severance and excision of the sections of the Sentencing Reform Act that make the sentencing guidelines mandatory would both cure the Sixth Amendment problem and be preferred (over total invalidation of the Sentencing Reform Act) by Congress. The result is that the sentencing guidelines are now "effectively advisory." *Booker*, 125 S. Ct. at 756-57. Moreover, "18 U.S.C. § 3553(a)(2) is still operative . . . along with other sentencing factors enumerated by Congress." *United States v. Cantrell*, 433 F.3d 1269, 1279 (9th Cir. 2006). Therefore, in sentencing a defendant, a district court must impose a sentence that is "sufficient but not greater than necessary" to achieve the four (4) purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2):

> (A) retribution (to reflect seriousness of the offense, to promote respect for the law, and to provide "just punishment");
> (B) deterrence;
> (C) incapacitation ("to protect the public from further crimes"); and
> (D) rehabilitation ("to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner").

In fashioning a sentence minimally sufficient to comply with these purposes, a district court must consider five additional factors: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the kinds of

sentences available; (3) the guidelines and policy statements issued by the Sentencing Commission, including the sentencing guidelines; (4) the need to avoid unwarranted sentencing disparity; and (5) the need to provide restitution to the victim. *See* 18 U.S.C. § 3553(a)(1)-(7). Neither the statute itself nor Booker suggests that any one of these factors is to be given greater weight than any other factor. However, it must be kept in mind that all of the factors are subservient to § 3553(a)'s mandate under the parsimony provision to impose a sentence not greater than necessary to comply with the four purposes underlying the Sentencing Reform Act.

Sentencing post-*Booker* is therefore comprised of two distinct considerations: the sentencing mandate contained in the prefatory clause of § 3553(a) and the "factors" to be considered in fulfilling the mandate. The sentencing mandate, e.g., sentences must be "sufficient but not greater than necessary," sets forth a limiting principle favorable to defendants and is the overriding principle that limits the sentence a court may impose.

The district court had its opportunity to exercise discretion and still order a substantial sentence. It did not. By not following its independent authority, the district court abused its discretion. Moreover, the appellate court erred by finding that the district court did not abuse its discretion.

In Mr. Trujillo's set of facts, he argued for a downward variance to 130 months imprisonment from a Guidelines range of 188 to 235 months imprisonment. He listed several mitigating factors, which provided a sufficient basis to vary downward. These factors consisted of a dysfunctional childhood where he was sexually abused, forced to sell drugs for his mother, and witnessed the murder of his best friend at 8 years of age. In addition, Mr. Trujillo's criminal history consists of many status offenses as well as other felonies indicative of a drug addict. As argued before the district court, Mr. Trujillo never had any substantive drug treatment either. These are mitigating factors that the district court should have considered in varying downward its sentence.

II. THE APPELLATE COURT ERRED IN HOLDING THE DISTRICT COURT SUFFICIENTLY ADDRESSED A DOWNWARD VARIANCE REQUEST FROM THE GUIDELINES ON POLICY GROUNDS PURSUANT TO *KIMBROUGH v. UNITED STATES*, 552 U.S. 85 (2007).

The Ninth Circuit on appeal found the district court sufficiently explained the sentence, including its determination that a variance from the Guidelines on policy ground was unwarranted. In doing so, the Ninth Circuit did not consider the numerous reasons articulated by Mr. Trujillo. Rather, it simply followed the fleeting analysis and engagement conducted by the district court.

Due to increases in the average purity of methamphetamine sold today, purity is no longer an accurate indicator of one's culpability or role in the drug enterprise.

This reality raises doubt that the drug quantity table of U.S.S.G. § 2D1.1 is an accurate structure to promote the twin goals of uniformity and proportionality in sentencing.

Being arrested for high quality methamphetamine of over 90 percent was once the outlier; today it is the norm. There is no distinguishing between a high-level drug dealer close to the source and a street level drug addict feeding the addiction anymore. In today's market, both extremes are treated the same in punishment whereas that was not always the case. Today, a street level dealer who is caught with 5.3 grams of methamphetamine (clear user levels) at 95 percent purity can be charged with a five-year mandatory minimum sentence by the Federal government. Today, a street level dealer with personal-user amount of methamphetamine of 52.75 grams (not even 2 ounces) at 95 percent purity can be charged with a 10-year mandatory minimum sentence by the Federal government.

Not only does this place more addicts in our penal system for an unreasonable amount of time, it completely renders impotent and useless any discretion over sentencing for a district court – unless the person is safety valve eligible or cooperates – neither of which occurred with Mr. Trujillo. This is nothing short of a travesty rendering the notion of "purity by proxy" fallacious. While the 10:1 ratio presumes, an average purity of 10 percent, all methamphetamine finding its way onto the streets today has a purity well over 90 percent.

Moreover, the 10:1 ratio should be rejected as contrary to 18 U.S.C. § 3553(a)(6) because it creates unwarranted sentencing disparities. While the sentencing court did not reject Mr. Trujillo's methamphetamine purity argument completely, it observed that Trujillo's set of facts was not the right case. The record is clear that neither the district court nor the Ninth Circuit gave these issues a thorough analysis.

The harsh sentences for methamphetamine create a disparity that is contrary to § 3553(a)(6) on several levels. First, there should be a concern for the arbitrariness of the testing process. "[T]he prevalence of high-purity methamphetamine effectively guarantees that a defendant's base offense level under the Guidelines will substantially increase if the methamphetamine is tested for purity, which is a decision that can be entirely arbitrary." *See United States v. Pereda*, 2019 U.S. Dist. LEXIS 19183, *9-10 (D. Colo., February 6, 2019).

In this same context, the Guidelines treat methamphetamine in general more harshly than other substances and even worse for pure methamphetamine. "By way of illustration, 500 grams of actual methamphetamine earns a base offense level of 34, while the same quantities of other drugs result in lower base offense levels: fentanyl (30), cocaine base (crack) (30), heroin (26), and cocaine (24)." *United States v. Bean*, 371 F. Supp. 3d 46, 53 (D.N.H. 2019) (citing U.S.S.G. § 2D1.1(c)); *see also*, *United States v. Rodriguez*, 382 F. Supp. 3d 892, 898 (D. Alaska 2019)).

Furthermore, the drug sentencing table under § 2D1.1 reflects a relinquishment of the Commission's traditional "institutional" role. "The crack cocaine Guidelines, however, present no occasion for elaborative discussion of this matter because those Guidelines do not exemplify the Commission's exercise of its characteristic institutional role[,]" which is to "base its determinations on empirical data and national experience" *Kimbrough*, 552 U.S. at 109.

In short, just as the Kimbrough decision and the Fair Sentencing Act of 2010 created much needed sentencing reform with regard to the 100-1 ratio for cocaine and crack cocaine, perhaps there will soon be a reform abolishing the 10-1 ratio for methamphetamine mixture and actual methamphetamine.

CONCLUSION

FOR THESE REASONS, Petitioner asks that this Honorable Court grant a writ of certiorari and review the judgement of the court of appeals.

Dated this 8th day of June, 2020.

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