No. _____

IN THE

Supreme Court of the United States

DEANDRE LORNELL BROWN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the district court's decision when imposing sentence that a defendant failed to sufficiently justify a "reduction" from the Sentencing Guidelines range (1) placed excessive weight on the advisory sentencing guidelines and impermissibly treated the guidelines as presumptively reasonable, and/or (2) impermissibly treated as the presumptive sentence from which to consider a variance or departure the original sentence by a different judge that the Court of Appeals had previously vacated, and thus committed reversible procedural error when it imposed at resentencing an identical sentence of 360 months imprisonment.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Deandre Lornell Brown, respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The memorandum disposition of the United States Court of Appeals for the Ninth Circuit is not reported in the Federal Reporter, but can be found at 802 Fed. Appx. 243 (9th Cir. 2020). Pet. App. 1a-5a (Copy of slip opinion).

JURISDICTION

The Ninth Circuit entered its memorandum decision and judgment on February 4, 2020. This petition is timely filed pursuant to Sup. Ct. R. 13 and this Court's Order dated March 19, 2020, extending the deadline to file any petition for a

writ of certiorari due on or after the date of the order to 150 days from the date of the lower court judgment, in light of the ongoing public health concerns relating to COVID-19. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 3553(a) states, in pertinent part:

(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-- *** * *** ;
>
> **(5)** any pertinent policy statement-- *** * *** ;
>
> **(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

Overview and Trial.

Deandre Brown, in his mid-twenties at the time of the alleged offenses, was a small-time pimp in a somewhat seedy section of Stockton Boulevard in Sacramento, California. Two of the three prostitutes he employed either were or had been his live-in girlfriends. The government charged that two of the prostitutes, Ashlyn A. ("AA") and Quianna M. ("QM"),[1] were or had been minors when they prostituted for Brown, or that he used force and coercion to get them to engage in prostitution.

On December 17, 2009, an indictment was filed in the Eastern District of California charging Deandre Brown with one count of conspiracy to commit sex trafficking of children or by force, fraud, and coercion in violation of 18 U.S.C. § 371 (Count One), two counts of sex trafficking of children or by force, fraud, and coercion in violation of 18 U.S.C. § 1591(a)(1) (Counts Two and Four), and two counts of participating in a sex trafficking venture in violation of 18 U.S.C. § 1591(a)(2) (Counts Three and Five). (ER 62-69).[2] A co-defendant, Brittney Beacham, was charged in Counts One, Two, and Three. (ER 62-66).

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[1] Because Ashlyn and Quianna were both minors during at least part of the time of the charged offense conduct, their full names have not been included in the brief even though both testified at trial using their full names. They shall either be referred to in this petition by their first names or by their initials.

[2] "ER" followed by a number refers to the applicable page in the Appellant's Excerpts of Record filed in the Ninth Circuit in this case. "CR" followed by a number refers to the district court's Clerks Record and is followed by the applicable docket control number. "PSR" refers to the Presentence Report prepared by the United States Probation Office in this case.

A jury trial was held in September 2010, after which Brown was found guilty on all charges. (CR 58, 59, 60, 61, 62, 63, 68, 72). Brown's counsel did not put on a case and failed even to make a motion for judgment of acquittal under Fed. R. Crim. P. 29. The government relied heavily on the testimony of the two prostitutes, as well as Brown's fiancée and former codefendant, Brittney Beacham, and the "corroborating" testimony of Sacramento Police Detective Derek Stigerts who testified both as a fact-witness and as an expert witness on pimping and prostitution.

AA met Brown while prostituting in September 2009, when she was a runaway living in the Arden Fair area of Sacramento. (ER 570-571). She was walking down the street when Brown, with QM and Beacham in the car, offered her a ride. (ER 571-573). When Ashlyn got in the car she told Brown she was 19 years old. (ER 573-574). Instead of driving her to where she was living, Brown, with Beacham and QM, drove AA to an apartment in Natomas. (ER 573-575). At that point, in an effort to persuade Brown not to take her to his apartment, Ashlyn told Brown and the women she was 16-years old, not 19. (ER 573-574).

At the apartment, Brown took AA into a bedroom, telling Beacham and QM to stay in the living room, and made her have anal sex with him. (ER 576-577). The next morning, Brown told Beacham and QM to get Ashlyn "all dressed up," and drove them to a store, to buy AA sandals to replace the tennis shoes she was wearing. (ER 580-583). Thereafter, AA, Beacham, and QM went to work prostituting on Stockton Boulevard, known as the "Blade." (ER 583-584, 589).

Brown told AA how much to charge for various sex acts and told her always to give the money to Beacham or Quianna. AA worked for Brown for about ten or eleven days, and made about $800 a day. (ER 584, 605). Ashlyn gave the money to Brown or Beacham, and Brown supported her with food, a roof over her head, and handled the money "like an accountant." (ER 588).

Beacham rented a motel room for prostitution which was used most of the time AA worked. (ER 590-591). Ashlyn was also advertised, along with Quianna and Beacham, on "RedBook," an Internet website for prostitution. (ER 594-595). Beacham set up the account for AA on RedBook and provocative pictures of her were posted on her account. (ER 595). AA claims Brown hit her on three occasions during the time she was with him. The first time, Brown wanted her to engage in sex with Quianna and Beacham while he watched, and when she refused, Brown hit her in the eye causing it to swell. (ER 605-606). Ashlyn was hit a second time at the apartment when she incorrectly rolled up Brown's computer cord. (ER 608).

AA indicated she was afraid of Brown during her time with him because the others told her Brown once put a gun in QM's mouth and threatened to kill her if she left, but she admitted she never saw Brown hit either of them. (ER 624-626).

A few days after Brown slapped her, AA left to "work on her own." (ER 612). The following morning, Ashlyn went to work prostituting on the "blade." (ER 612-613). Ashlyn was working on the "blade" the next day when Quianna approached her. (ER 613, 615). Ashlyn told her she did not want to work as a prostitute for Brown any longer. (ER 616). AA ran into Brown the next day and when she said

she did not want to work for him anymore, he hit her twice in the face and threatened her. (ER 619). Ashlyn ran crying to a Jack-in-the-Box to clean up where police arrived to question her; police took her to the hospital where she was treated. (ER 619-622).

Quianna M. first worked as a prostitute when she was 14, before meeting Brown. (ER 878-879, 920-921. QM met Brown when she was 15 years old. (ER 878, 901). They dated but she soon "stopped liking him" and told Brown she "didn't want to be around him anymore." (ER 921). Quianna had a baby in August 2007; Brown was not the father. (ER 769, 922). When QM was 17-years old, she and Brown ran into each other and began "hanging out." (ER 901). Brown suggested she start working as a prostitute again and, since she "wasn't working or doing anything," she agreed. (ER 923).

She worked on and off as a prostitute for Brown for the next several years. (ER 878). As his girlfriend, she visited Brown's family at his mother's house, and she had Brown's name tattooed on her back. (ER 918, 920-921, 923, 949). Sometime in 2009, she and Beacham both worked for Brown as prostitutes. Quianna knew Brown and Beacham were romantically involved but claimed she didn't care as "that is how the game goes" and there was "nothing" she could do. (ER 917). QM testified that Brown had been violent with her on many occasions. (ER 908-914). He hit her with belts, shoes, phone books, a gun, and his hand. (ER 908). One time, Brown hit her with a gun after she threatened to shoot him with it, and still has scars as a result. (ER 909). She says she continued to work for Brown

because she was afraid of him. (ER 915). But after Brown's arrest, she continued to work as a prostitute and to post on RedBook. (ER 943).

Original Sentencing.

Living in a poor, crime-ridden community, Brown "saw violence all around him, people getting killed, drug use, and prostitution." His 13-year old cousin was murdered and laid dead in a park "where his crack-addicted mother found him." Brown never thought he would live past 18. (PSR ¶¶ 74-75). Brown's mother, Lisa Rembert, was the sole provider of five children. Brown's father introduced her to drugs and for several years, when Brown was a young child, she descended into drugs and doing "horrible things" with no regard for her children. Brown has not seen his father since he was 13. (PSR ¶¶ 74, 77, 78).

At age 5, Brown was sexually molested by an older male relative. (PSR ¶ 78). Brown did not tell his mother her about the abuse for a long time and has "struggled" with it ever since. Rembert said the sexual abuse "marked the moment of how [Brown] felt about himself as a boy, and later as a young man" with Brown never talking about being victimized and keeping his feelings suppressed. (PSR ¶¶ 74, 75, 78).

As a young boy, Brown saw his mother beaten and physically abused by her boyfriends "to the point of hospitalization." Rembert reports Brown become "angrier and angrier" at her abuse and hated the men who beat her. Brown ran away from home when he was ten which Rembert attributes to his anger at being sexually abused. (PSR ¶¶ 78, 80).

Brown dropped out of school after 10th grade. He began smoking marijuana by14, and at some point began abusing alcohol, resulting in two of his three misdemeanor convictions for driving under the influence. (PSR ¶¶ 66-68, 75, 84-85).

The PSR calculated a total offense level of 42, and a criminal history category of III based on six criminal history points from Brown's three prior misdemeanor convictions, resulting in an advisory guideline range of 360 months to life. (PSR ¶¶ 32-71). Over the government's objections at the original sentencing, the PSR did not apply a 2-level enhancement for unusually vulnerable victim under U.S.S.G. § 3A1.1(b)(1), or a 2-level enhancement for obstruction of justice under § 3C1.1, a decision the court affirmed. (PSR ¶¶ 36-38, 41-42, 48-49, 51-52). Brown argued for a sentence of 240 months at the original sentencing, and the government asked for the high end of the guideline range, 480 months. The Probation Office recommended a sentence of 300 months after conducting a lengthy review of the 18 U.S.C. § 3553(a) factors and the sentences imposed in other sex trafficking cases in the district:

> In considering the defendant's and his mother's accounts of the negative environmental influences of the impoverished area that he grew up in and the physical violence present, it is conceivable the defendant's early exposure to crime caused him to emulate the deviant behavior around him. Specifically, emulating the exploitive pimp mentality is one of the several consequences associated with growing up inner city poverty. The pimp's primary function is the exploitation of young impressionable women. It is a known fact that violence and pimping go hand-in-hand. There is no way to soften the hard-core reality of the lifestyle of a pimp

> and a prostitute. It can also be seen as an alternative lifestyle to securing a more socially acceptable low wage job.

(PSR ¶ 118). The Probation Officer also explained that,

> The defendant's ability to humiliate and instill fear in his victims was his main weapon of control. It is unfortunate that the same fear and control forced upon him as a child and the violence he observed being inflicted upon his mother did not impress upon him to rethink his course of conduct. However, the personal history and background offer a possible explanation for his violent actions. . . . [A] sentence of 300 months imprisonment is recommended, as it reflects the very serious nature of the offense and violence involved. It also considers the defendant's background and upbringing and avoids unwarranted sentencing disparities amongst similarly situated defendants who have been sentenced in this district.

PSR ¶ 119.

The district court (Hon. Frank C. Damrell, Jr.) imposed a sentence of a total of 360 months imprisonment, consisting of 60 months for Count One and 360 months for each of Counts Two through Five, all to run concurrently, to be followed by a total of ten years supervised release, consisting of three years for Count One and ten years for each of Counts Two through Five, all to run concurrently, with conditions imposed. (CR 99, 101). Brown appealed his conviction and sentence to the Ninth Circuit Court of Appeals.

First Appeal to the Ninth Circuit.

Mr. Brown challenged both his conviction and sentence on multiple grounds. (ER 70-74). Although the Ninth Circuit held the district court had plainly erred in instructing the jury how to evaluate both lay and expert testimony offered by a

government expert at trial, the court found that prejudice had not been sufficiently established. (ER 71-72). The Ninth Circuit affirmed on all other trial grounds.

The court, however, vacated Mr. Brown's sentence, concluding that the district court failed to ensure Mr. Brown had read and discussed the presentence report with his trial counsel as required by Fed. R. Crim. P. 32(i)(1)(A), and because the 360-month term of imprisonment "violated the so-called parsimony principle that a criminal sentence be 'sufficient, but not greater than necessary' to serve the purposes codified in 18 U.S.C. § 3553(a)(2)," when the trial court explained that "'[t]he difference is 20 years [the sentence requested by defendant] versus – 25 years [the sentence recommended by the probation office] versus 30 years [the sentence imposed by the court], which is not significant.'" *United States v. Brown*, 651 Fed. Appx. 653, 655-56 (9th Cir. 2016) (unpublished). The Ninth Circuit explained that "[i]f the district court believed the difference between potential sentences was insignificant, parsimony required that the lesser sentence be imposed." *Id.* Because the court vacated Brown's sentence on these grounds, it declined to address the other challenges to Mr. Brown's sentence. *Id.* at 656.

Resentencing.

Because the original sentencing judge, Judge Damrell, had retired, the case was reassigned to Hon. John A. Mendez for resentencing. (CR 123). At the resentencing hearing in November 2017, Mr. Brown sought a sentence of 15 years imprisonment, while the government asked the court to re-impose the same 360-month sentence Judge Damrell had previously imposed. The government argued

that "[g]iven Judge Damrell's familiarity with the case, the government asks the Court to consider his evaluation of the 'appropriate' sentence." (ER 115-116). At the sentencing hearing itself, the government "strongly recommend[ed] that the Court defer to Judge Damrell's reasoned opinion. He was the trial judge." Pet. App. 18a. The district court decided to follow that suggestion, explaining that Judge Damrell's sentencing decision was "critical information" since he was the trial judge; it then repeatedly referenced Judge's Damrell's decision as its basis for Brown's sentence, repeatedly quoting the prior sentencing decision, and noting that it was "respecting Judge Damrell's views." Pet. Appx. 30a, 31a, 32a, 33a, 34a.

Judge Mendez ultimately re-imposed the same sentence Judge Damrell had previously imposed: 360 months imprisonment. The district court determined the advisory guidelines range was 360 months to life, and on multiple occasions referred to Mr. Brown's 15-year sentence request as a "reduction," describing "the reduction" at one point as "actually a 50 percent reduction below the low end of the Guidelines." Pet. Appx. 30a, 31a. And while the court acknowledged that Mr. Brown's upbringing and abuse "are factors that might, under certain circumstances, warrant a variance in this case," it focused on Judge Damrell's reasoning as warranting re-imposition of the prior sentence. Pet. Appx. 31a-34a.

The court thereafter sentenced Mr. Brown to a total of 360 months imprisonment, to be followed by a total of 60 months supervised release, re-imposing the same conditions of release previously imposed. Pet. Appx. 34a-36a.

Second Appeal to the Ninth Circuit.

Mr. Brown appealed the 360-month sentence that had been imposed by Judge Mendez at his re-sentencing, arguing as relevant to this petition, that his sentence was procedurally and substantively unreasonable. He specifically contended that the district court impermissibly treated both Judge Damrell's original sentence and the advisory guideline range as presumptively reasonable and the presumptive sentence from which to vary or depart.

The Ninth Circuit affirmed, concluding that "[t]he record belies this characterization." Pet. App. 2a. It held that "[a]lthough Judge Mendez reached the same conclusions as Judge Damrell in many respects, he did so based on his own review of the evidence and the § 3553(a) factors, not any reliance on Judge Damrell's opinion as dispositive." Pet. App. 2a. It further held that "although Judge Mendez rendered a sentence within the guideline range, he did not treat that range as dispositive. To the contrary, Judge Mendez considered 'each and every' § 3553(a) factor in depth before concluding that a 360-month sentence was appropriate." Pet. App. 2a.

REASONS FOR GRANTING THE WRIT

The writ should be granted to clarify and again make clear that the United States Sentencing Guidelines are merely advisory and just one factor among several factors under 18 U.S.C. § 3553(a) to be considered in determining an appropriate sentence, and entitled to no greater weight than any other factor. When a sentencing judge repeatedly refers to any sentence outside the guideline range as a "reduction" that must be justified, even when calling it a "variance" rather than a "departure," he has essentially returned to a mandatory sentencing scheme previously found in *Booker* to have violated the Sixth Amendment, and such a sentence cannot stand.

This Court repeatedly has emphasized that the federal sentencing guidelines are no longer mandatory. *See, e.g.*, *Nelson v. United States*, 555 U.S. 350, 351-52 (2009) (per curiam); *Gall v. United States*, 552 U.S. 38, 59 (2007); *United States v. Booker*, 543 U.S. 220, 245 (2005). They are but one of several factors, listed in 18 U.S.C. § 3553(a), for district courts to consider at sentencing. *See Kimbrough v. United States*, 552 U.S. 85, 90 (2007) ("[T]he Guidelines, formerly mandatory, now serve as one factor among several courts must consider in determining an appropriate sentence."). "[T]he District Court's overarching duty [is] to impose a sentence sufficient, but not greater than necessary to serve the purposes of sentencing." *Pepper v. United States*, 562 U.S. 476, 493 (2011) (internal quotation marks omitted); *see also* 18 U.S.C. § 3553(a). The Sentencing Guideline range is not supposed to take on an outsized role in making the sentencing decision.

When a district court gives excessive weight to one sentencing factor, it abuses its discretion. *See Pepper*, 562 U.S. at 504 (holding it improper for courts to "elevate [any] § 3553(a) factors above all others") (citing *Gall*, 552 U.S. at 49-50) (instructing sentencing courts to "consider *all* of the § 3553(a) factors" (emphasis added by Court in *Pepper*)). In particular, "the Guidelines factor [should not] be given more or less weight than any other. Based on these precedents, even the Ninth Circuit more than a decade ago recognized that while "the Guidelines are to be respectfully considered, they are [just]one factor among the § 3553(a) factors that are to be taken into account in arriving at an appropriate sentence." *United States v. Carty*, 520 F.3d 894, 991 (9th Cir. 2008) (en banc); *id.* at 994 ("It would have been error had the judge . . . weighted the Guidelines range more heavily than the other § 3553(a) factors."); *see also United States v. Autery*, 555 F.3d 864, 872 (9th Cir. 2009) ("[T]he Guidelines range constitutes only a touch-stone in the district court's sentencing considerations."). In other words, a district court "must not accord the Guideline calculation greater weight than the other § 3553(a) factors" or the resulting sentence is unreasonable. *United States v. Dewey*, 599 F.3d 1010, 1016 (9th Cir. 2010).

Nor may a district court presume that a guidelines sentence is reasonable. *See Nelson*, 555 U.S. at 351-52 ("Our cases do not allow a sentencing court to presume that a sentence within the applicable Guidelines range is reasonable."); *Gall*, 552 U.S. at 49-50 ("[T]he district judge . . . may not presume that the Guidelines range is reasonable."); *Rita v. United States*, 551 U.S. 338, 351 (2007)

("[T]he sentencing court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply."); *Carty*, 520 F.3d at 991. *See also Rita*, 551 U.S. at 364-65 (Stevens, J., concurring) ("As we stated in *Koon,* '[i]t has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.' [Because t]he Commission has not developed any standards or recommendations that affect sentencing ranges for many individual characteristics[, m]atters such as age, education, mental or emotional condition, medical condition (including drug or alcohol addiction), employment history, lack of guidance as a youth, family ties, or military, civic, charitable, or public service are not ordinarily considered under the Guidelines[, but] [t]hese are . . . matters that § 3553(a) authorizes the sentencing judge to consider . . . [and a]s such, they are factors that . . . court[s] must consider under *Booker*.") (quoting *Koon v. United States*, 518 U.S. 81, 113 (1996)).

Thus, where a district court states that it understands its discretion to deviate from the advisory guideline range, but makes additional statements that are at least ambiguous as to whether it accorded the guidelines a measure of presumptive reasonableness, remand for resentencing is appropriate. *See Nelson*, 555 U.S. at 352; *United States v. Panice*, 598 F.3d 426, 441-42 (7th Cir. 2010) (vacating and remanding for resentencing where district court appreciated advisory nature of guidelines and discretion to deviate, but made comments suggesting it

applied presumption of reasonableness to advisory range). A district court's expression that it feels constrained by the advisory guidelines is an indication that it is treating the guidelines as presumptively reasonable, necessitating remand. *See United States v. Raby*, 575 F.3d 376, 377-82 (4th Cir. 2009) (vacating and remanding for resentencing where district court felt "constrained" by advisory guidelines, which indicated presumption of reasonableness).

The law is clear: "The Guidelines are not only *not mandatory* on sentencing courts; they are also not to be *presumed* reasonable." *Nelson*, 555 U.S. at 352 (emphases in original).

But the lower courts seem to have reverted to old habits.

Here, the district court both (1) impermissibly treated the advisory guideline range as presumptively reasonable and to be followed unless defendant could justify a "reduction," and (2) improperly presumed the original sentence imposed by the prior sentencing judge—a sentence the Ninth Circuit had vacated for multiple reasons, including for violating the parsimony principle—as the presumptive sentence from which to consider a variance or departure.

At Mr. Brown's original sentencing, he received a sentence of 360 months imprisonment. The Ninth Circuit, however, vacated that sentence and ordered resentencing both for violations of Fed. R. Crim. P. 32, and because the sentence violated the parsimony principle—*i.e.*, that it impose a sentence sufficient, but not greater than necessary to serve the purposes of sentencing—when the court imposed a sentence of 360 months imprisonment even though it stated that a

difference between a sentence of "20 years versus – 25 years versus 30 years" was "not significant." *United States v. Brown*, 651 Fed. Appx. 653, 655-56 (9th Cir. 2016) (unpublished). Because the court vacated the sentence on those grounds, it declined to address Mr. Brown's other sentencing challenges on appeal (which included, for example, that the court punished him for exercising his right to a jury trial because the victims were required to testify, that the court misapprehended its authority to impose a below-guideline sentence under § 3553(a), that the court failed to properly consider Brown's history and characteristics, that court failed to explain why it rejected the Probation Office's 300-month sentencing recommendation and Brown's 240-month sentence request and instead imposed a 360-month sentence, and that the 360-month sentence was substantively unreasonable). *Id.* at 656; Appellant's Opening Br., Ninth Cir. CA No. 11-10089.

Nevertheless, at Mr. Brown's resentencing following remand, the government argued in its papers that the sentence imposed by the prior sentencing judge (Judge Damrell) should be the default: "Given Judge Damrell's familiarity with the case, the government asks the Court to consider his evaluation of the 'appropriate' sentence." (ER 115-116). And at the sentencing hearing: "We strongly recommend that the Court defer to Judge Damrell's reasoned opinion. He was the trial judge." Pet. Appx. 18a.[3] The district court decided to follow that suggestion, explaining that Judge Damrell's sentencing decision was "critical information" since he was the

[3] During the resentencing hearing, the government repeatedly referenced Judge Damrell's sentence. Pet. Appx. 28a.

trial judge; it then repeatedly referenced Judge's Damrell's decision as its basis for Brown's sentence, repeatedly quoting the prior sentencing decision, and noting that it was "respecting Judge Damrell's views." Pet. Appx. 30a, 31a, 32a, 33a, 34a.

But Judge Damrell's views were not what was relevant. And it certainly should not have been the starting point and presumptive sentence for determining the proper sentence to impose at resentencing. Judge Damrell's sentence was vacated due to *multiple* errors found by this Court, with multiple other errors not addressed because resentencing was already required. Errors permeated the entire original sentencing proceeding. And while it certainly was permissible to consider specific findings Judge Damrell had made, deferring to his error-filled sentencing decision was not appropriate. The fact that Judge Damrell had "the opportunity to observe or participate in the trial" did not mean the prior—vacated—sentencing decision was something to so heavily rely upon. Pet. Appx. 30a. The district court's deference to, and re-imposition of, the 360-month sentence Judge Damrell previously imposed in this case was improper and warrants resentencing.

But perhaps more importantly, the resentencing court also treated the advisory guideline range as the presumptive sentence to impose unless Mr. Brown could demonstrate extraordinary circumstances to justify a "reduction" from the guideline range. Pet. Appx. 30a, 31a. Mr. Brown requested a sentence of 15 years imprisonment, citing the parsimony requirements of 18 U.S.C. § 3553(a) and multiple factors in mitigation—including the fact that he has suffered from a history of childhood abuse and violence, and had been sexually molested as a small

boy. (ER 78-85).[4] Indeed, due in part to the history of sexual abuse and domestic violence, and exposure to violence at an early age suffered by Mr. Brown, the probation officer had recommended a below-guideline sentence of 300 months imprisonment. (ER 78-80; PSR ¶¶ 118-119). Mr. Brown also argued that his crimes, when compared to similar crimes in the district, and his limited criminal history, warranted a below-guideline sentence, noting also that his two victims were already involved with prostitution before they met Brown and both had had pimps before Brown. (ER 82-85).

But from the beginning, the district court treated the advisory guidelines of 360 months to life as the presumptive sentence. The court on multiple occasions referred to Mr. Brown's 15-year sentence request as a "reduction,"[5] describing "the reduction" at one point as "actually a 50 percent reduction below the low end of the Guidelines." Pet. Appx. 30a, 31a. And while the court acknowledged that Mr. Brown's upbringing and abuse "are factors that might, under certain circumstances, warrant a variance in this case," it focused on Judge Damrell's reasoning as warranting re-imposition of the prior sentence. Pet. Appx. 31a-34a.

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[4] The Probation Office had previously requested a sentence of 300 months, which was not changed at the resentencing. (PSR ¶ 110). And the government asked the court to reimpose the 360-month sentence previously imposed. (ER 108-108, 121).

[5] When the court erroneously believed Mr. Brown was seeking 20-year sentence, rather than a 15-year, sentence, the court characterized the request as a "10-year reduction." Pet. Appx. 30a.

Even defense counsel—as is often the case in today's sentencing proceedings—advocated for a "variance" to a below-guideline sentence, essentially accepting the guideline range as the presumptive sentence from which he needed the court to "vary" based on circumstances that justified a sentence below the guideline range.

But the district judge's comments revealed that, in the court's mind, all of the mitigating factors were accounted for in the guidelines, and that Mr. Brown had failed to convince him that a non-guidelines sentence was required. This manner of considering the guidelines did not treat them simply as a starting point, but as presumptively reasonable, and a range from which one should not stray except in the rarest circumstances. That is not how the guidelines are meant to be applied post-*Booker*.

The Ninth Circuit here dismissed Mr. Brown's argument that the district court had impermissibly treated the guideline range as the presumptive sentence, concluding merely that "although Judge Mendez rendered a sentence within the guideline range, he did not treat that range as dispositive. To the contrary, Judge Mendez considered 'each and every' § 3553(a) factor in depth before concluding that a 360-month sentence was appropriate." Pet. App. 2a. But the fact that Judge Mendez *considered* each of the § 3553(a) factors does not mean he did not treat the guidelines as the presumptive sentence from which to vary or depart only if the defendant could show how this case was different—in other words, "outside the heartland" as was required in the parlance of the pre-*Booker* mandatory sentencing

guideline scheme. Indeed, the fact that the court paid lip service to the § 3553(a) factors does not excuse it from having also required Mr. Brown to convince him why a "reduction" from the guideline-range was warranted—which is what Judge Mendez did here.

Rather, the district court's approach here comes dangerously close to the mandatory guidelines scheme struck down in *Booker*. As Justice Scalia explained in his concurring opinion in *Kimbrough*,

> If there is any thumb on the scales; if the Guidelines *must* be followed even where the district court's application of the § 3553(a) factors is entirely reasonable; then the "advisory" Guidelines would, over a large expanse of their application, *entitle* the defendant to a lesser sentence *but for* the presence of certain additional facts found by judge rather than jury. This, as we said in *Booker*, would violate the Sixth Amendment.

Kimbrough, 552 U.S. at 113-14 (Scalia, J., concurring).

Perhaps use of the term "variance" has become so commonplace that courts (and counsel) forget that the guidelines are not supposed to be the presumptive sentence from which a court may "vary" only in limited circumstances. Yet this case demonstrates that the arguments being presented and sentencing decisions being made have merely substituted "variance" for "departure," but apply the same pre-*Booker* mandatory sentencing scheme, where any sentence outside that guideline range—whether called a "departure" or a "variance"—must be justified and is only permitted in the most limited of circumstances. Indeed, what is a defendant like Mr. Brown supposed to take away from a sentencing proceeding which suggests

that his sentence is not based on the individualized facts of his case, but rote application of technical guidelines?

Accordingly, this Court should grant the petition to clarify and make clear that the Sentencing Guidelines range is not a factor to be weighed more heavily than any other factor in § 3553(a), and the guideline range is not the presumptive sentence from which a court may grant a "reduction" (or vary) except in limited circumstances.

CONCLUSION

For all the foregoing reasons, petitioner submits that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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