NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

2021

RENALDO DEMARQUIS METCALF

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Does the use of the "de facto career offender" doctrine distort the sentencing process and lead to unwarranted sentencing disparity?

TABLE OF CONTENTS

APPENDIX:

A. Fourth Circuit Opinion
Fourth Circuit Judgment
Fourth Circuit Mandate

B. MDNC Judgment

C. U.S.S.G. § 4A1.3

D. United States Sentencing Commission
Report at a Glance - "Federal Sentencing of Career Offender"
Report to the Congress: Career Offender Sentencing Enhancement submitted to Congress August 2016

United States Sentencing Commission
Quick Facts - Career Offenders - Fiscal Year 2019

United States Sentencing Commission
Report to the Congress: Career Offender Sentencing Enhancement submitted to Congress, Executive Summary, August 2016

TABLE OF AUTHORITIES

Cases

Statutes

Guidelines

Miscellaneous

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit from which review is sought is *United States v. Metcalf*, Case No. 19-4793, 822 Fed.Appx. 196 (4th Cir. Sept. 21, 2020). The mandate was issued on October 13, 2020. The original sentencing decision from the Middle District of North Carolina is *United States v. Metcalf*, No. 1:19-CR-00041-WO-1 (M.D.N.C. October 10, 2019).

JURISDICTIONAL GROUNDS

The opinion was issued in the United States Court of Appeals for the Fourth Circuit on September 21, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1), under which the Fourth Circuit held appellate jurisdiction, and the original jurisdiction of the District Court for the Middle District of North Carolina, which heard it originally as a federal criminal case.

INTRODUCTION

Mr. Metcalf petitions the Court for review of the "de facto career offender" doctrine. Under this doctrine a sentencing court varies upwards as though a defendant received an enhancement under the career offender guideline, U.S.S.G. § 4B1.1, although legally the defendant does not qualify. Normally the doctrine applies in a case in which the defendant would have qualified but for some quirk of the criminal history rules: either the age of a conviction means it does not qualify, the consolidation of a prior sentence eliminates it from counting separately, or a prior conviction has been declared invalid for some reason not involving guilt.

However, in Mr. Metcalf's case, the doctrine was invoked erroneously. Even if all his criminal history counted separately under the criminal history guidelines, Mr. Metcalf's prior convictions would not qualify him as a career offender.

The de facto career offender doctrine is a judicial extension of an already-powerful and problematic enhancement. The de facto doctrine's support in the guidelines is limited to the provision (U.S.S.G. § 4A1.3) that allows a departure for inadequate criminal history. But the Guidelines do not include any "de facto" provision and set out a specific procedure for varying upwards incrementally, which helps to blunt the force of an upward departure and key it to the Guidelines even in a departure. That incremental approach was not followed in Mr. Metcalf's case.

The de facto career offender doctrine is infrequently used. Its current application is largely a product of the Fourth Circuit, from which Mr. Metcalf's case originates. While it does not have many published de facto career offender cases, the Fourth Circuit is the locus of nearly all the appellate law on this issue. While there is no

current circuit split, the doctrine exists almost in isolation in the districts of the Fourth Circuit. This singularly frequent use of the doctrine by the Fourth Circuit makes it a good case for certiorari grant. The Court should grant the Petition so that this doctrine is more carefully circumscribed and is not applied where, as here, even the basic tenets of the judicially-created doctrine itself are not met.

PROCEEDINGS BELOW

Mr. Metcalf was indicted in case number 1:19CR41-1 and charged with violation of Title 21, United States Code, Section 841(a)(1) and (b)(1)(C), possession with intent to distribute a quantity of a mixture and substance containing a detectable amount of methamphetamine on April 15, 2019. Joint Appendix at 8. On April 15, 2019, Mr. Metcalf pled guilty to this charge. J.A. 13-19.

Though he pled guilty to a controlled substance felony, Mr. Metcalf did not qualify for enhanced penalty under U.S.S.G. § 4B1.1 (career offender). J.A. 92. In fact, none of Mr. Metcalf's convictions qualify (or would qualify even if they accrued criminal history points) as felony crimes of violence or controlled substances felonies under § 4B1.2. J.A. 93-96.[1]

At sentencing, on September 13, 2019, the district court adopted the following as to Mr. Metcalf's statutory and sentencing guideline calculations: a total offense level of 17, a criminal history category of IV, a guideline imprisonment range of 37 to 46 months, a supervised release range of not less than two years, a fine range of $10,000 to $1 million, and a special assessment of $100 which is mandatory. J.A. 50.

The district court based its findings that Mr. Metcalf's criminal history category "substantially under-represents the seriousness of [his] criminal history or the likelihood that [he] will commit other crimes" on prior sentences that did not receive

1 Mr. Metcalf has convictions for the following: North Carolina PWISD Schedule II (not a federal felony); N.C. Felon in Possession of a Firearm (not a violent felony); N.C. Felony Flee to Elude Arrest (not a violent felony); N.C. PWISD cocaine and marijuana (not federal felonies); N.C. Felony Escape Local Jail, N.C. Assault w/Deadly Weapon Inflicting Serious Injury, N.C. First Deg. Kidnapping (consolidated, not violent felonies); N.C. Felony Assault w/Deadly Weapon Inflicting Serious Injury x2 (consolidated, not violent felonies). J.A. at 93-96.

criminal history points due to their age. J.A. 156. The district court departed from the correctly calculated guideline imprisonment range of 37 to 46 months on this basis. J.A. 70-73.

The district court relied upon the concept of "de facto career offender," a doctrine long recognized by the Court of Appeals whereby sentencing courts may treat a defendant as a career offender if, but for the operation of the criminal history rules preventing the counting of criminal history points, a defendant would otherwise qualify for the enhancement under 4B1.1. *Id.* 56, 68-69.[2]

The district court did not impose a de facto career offender sentence, but it made specific reference to 4B1.1 and went so far as to say "[t]he truth of the matter is that Mr. Metcalf really falls into the category of a constructive career offender. *Id.* He doesn't have countable convictions sufficient to classify him as a career offender now, but only by virtue of the fact that he was serving all this time" and "[h]ad the Government requested it, I would likely have found [Mr. Metcalf] to be what's called a constructive career offender." J.A. 56, 68.

The district court went on to explain that, had it used the de facto career offender as the basis for its sentence, Mr. Metcalf likely would have received a sentence of "significantly more than ten years" even with 30 months of credit for the time served on his now-vacated federal sentence. *Id.* at 69.

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2 The district court referred to this as "constructive career offender," but, for clarity and consistency's sake, Mr. Metcalf will use "de facto career offender" in his brief, the term used by the Court of Appeals. *See, e.g. U.S. v. Myers*, 589 F.3d 117, 125-26 (4th Cir. 2009).

The district court gave reasons for the upward departure but did not explain its methodology in arriving at the actual sentence. The sentence was, given Mr. Metcalf's total offense level (17) and criminal history category (IV), a departure/variance above criminal history category VI. J.A. 92, 107. Mr. Metcalf was sentenced to a term of 71 months, to run consecutively to the sentence the defendant is now serving as described in paragraph 30 of the presentence report, followed by four years of supervised release. J.A. 72-73, 79.

On appeal, the Fourth Circuit held per curiam that the district court's failure to use the incremental approach was excused by the sentencing court's explanation of the sentence. *United States v. Metcalf*, 822 F. App'x. 196, 197 (4th Cir. 2020). The Court of Appeals also found the use of de facto career offender to be irrelevant, holding that "although the district court expressed a belief that Metcalf should be a career offender based on his criminal history, we reject Metcalf's contention that the district court in fact sentenced him as a de facto career offender because the district court did not use the career offender Guidelines range as a baseline or benchmark for the sentence the court ultimately imposed." *Id.*

REASONS FOR GRANTING THE WRIT

I. The de facto career offender doctrine is a judicial creation that is not uniformly applied and skews sentencing outcomes.

The de facto career offender doctrine was created by courts interpreting U.S.S.G. § 4A1.3, which allows for departures based on the inadequacy of a defendant's criminal history score. In the Fourth Circuit, the case of reference for the de facto career offender doctrine is *United States v. Cash*, 983 F.2d 558, 562 (4th Cir. 1992), in which the Court of Appeals held that

> Once the district court determines that a departure under U.S.S.G. § 4A1.3, p.s. is warranted and that the defendant's prior criminal conduct is of sufficient seriousness to conclude that he should be treated as a career offender, the district court may depart directly to the guideline range applicable to career offenders similar to the defendant. Thus, if a district court, based on reliable information, determines that a defendant's underlying past criminal conduct demonstrates that the defendant would be sentenced as a career offender but for the fact that one or both of the prior predicate convictions may not be counted under the ruling in *Jones I*, the court may depart directly to the career offender guideline range.

Cash, 983 F.2d at 562 (citing *United States v. Hines*, 943 F.2d 348, 354-55 (4th Cir.) (per curiam), *cert. denied*, 502 U.S. 993 (1991); *United States v. Kalady*, 941 F.2d 1090, 1100 (10th Cir. 1991); *United States v. Gardner*, 905 F.2d 1432, 1437-39 (10th Cir.), *cert. denied*, 498 U.S. 875 (10th Cir. 1990) ("Defendant only fails the third criteria because he had just one other conviction for a crime of violence within the fifteen-year limit of the guidelines."); *United States v. Campbell*, 888 F.2d 76, 78-79 (11th Cir. 1989), cert. denied, 494 U.S. 1032 (1990)).

Cash and the cases it cited are all mandatory guidelines cases from the early 1990s. There have been only a few published cases decided since that time that deal

directly with de facto career offender and they are all from the Fourth Circuit. *See United States v. Myers*, 589 F.3d 117, 126 (4th Cir. 2009) ("[B]ut for the dates of his earlier convictions, Myers would have had three more career offender convictions."); *United States v. Lawrence*, 349 F.3d 724, 729 (4th Cir. 2003) ["Lawrence committed two bank robberies ... which were consolidated for sentencing ... . These robberies occurred within fifty-three minutes of each other and were treated as related for Sentencing Guidelines purposes, because they "resulted from offenses that (A) occurred on the same occasion, (B) were part of a single common scheme or plan, or (C) were consolidated for trial or sentencing.").[3] [4]

The law on de facto career offender, even when a case is decided in another circuit, comes from the Fourth Circuit. *See, e.g. Brown v. Werlinger*, 437 F. App'x 164, 165 (3d Cir. 2011) (Ruling on a habeas petition challenging de facto career offender designation imposed in the M.D.N.C. pursuant to *United States v. Harrison*, 58 F.3d 115 (4th Cir. 1995)).

While it is not a classic circuit split situation, the de facto career offender does present the Court with a situation likely to cause an uneven application of federal law

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3 While not frequently involved in decisions, the doctrine has had enough of an application in the Fourth Circuit that the Court of Appeals has vacated and remanded in cases where it appears the de facto career offender determination was unsound methodologically. *See United States v. Harrison*, 58 F.3d 115, 119 (4th Cir. 1995), corrected (July 25, 1995) ("Because the record does not reflect whether the 1984 breaking and entering convictions involved dwellings or commercial structures, the district court was not at liberty to sentence Harrison as a de facto career offender. Accordingly, we cannot sustain Harrison's sentence under the de facto career offender method that we recognized in Cash.").

4 The Fourth Circuit has also marked out a limit to the extent of the upward departures allowed under the doctrine. *United States v. Howard*, 773 F.3d 519, 529 (4th Cir. 2014) ("While the de facto career offender doctrine is settled law in the Fourth Circuit, the district court's departure to de facto career offender status in this case resulted in a sentencing range—and, ultimately, an actual sentence—that was 'greater than necessary' to achieve the purposes of federal sentencing" where district court imposed life plus 60 months for a drug offense.).

across circuits. With the Fourth Circuit so much more likely to apply the doctrine, the application of § 4A1.3 will be impacted in a manner akin to a circuit split, or at least a disruption in uniformity of the application of the Sentencing Guidelines, with the Fourth Circuit applying a body of sentencing law not interpreted or applied elsewhere.

At this point, as the Court of Appeals has held, "the de facto career offender doctrine is settled law in the Fourth Circuit." *United States v. Howard*, 773 F.3d 519, 529 (4th Cir. 2014). This is striking because it cannot be said of any other circuit in the federal system. There is no obvious contrary law in other circuits, but this stems in large part from the fact that courts enjoy broad discretion at sentencing. There is, strictly speaking, no authority to negate the doctrine. But there are limits and parameters to sentencing discretion that are applied very differently than what happens under the de facto career offender doctrine.

For example, under 4A1.3, courts are supposed to articulate how many criminal history points the defendant's record fails to take into account and which criminal history category was appropriate under the departure. Under this methodology, the district court should vary "incrementally," moving up only one criminal history category at a time until it reached a level that was sufficient, but not greater than necessary to reflect the defendant's record. The larger the departure under this method, the more detailed the explanation needed to support the departure sentence — a provision that cabins the sentencing court's discretion even further.

The Fourth Circuit, like its sister circuits, follows this incremental approach endorsed by the Guidelines. *United States v. Dalton*, 477 F.3d 195, 199 (4th Cir. 2007); *United States v. Rusher*, 966 F.2d 868, 884 (4th Cir. 1992). As the Fourth Circuit held:

> [E]ven where an upward departure from Criminal History Category VI is plainly warranted, a sentencing court must depart incrementally, explaining the reasons for its departure. The Sentencing Guidelines provide that when a sentencing court "determines that the extent and nature of the defendant's criminal history ... warrant an upward departure from Criminal History Category VI" the court "should structure the departure by moving incrementally down the sentencing table to the next higher offense level in Criminal History Category VI until it finds a guideline range appropriate to the case." U.S.S.G. § 4A1.3(a)(4)(B) (emphasis added). A court, in other words, "should move to successively higher categories only upon finding that the prior category does not provide a sentence that adequately reflects the seriousness of the defendant's criminal conduct."

Dalton, 477 F.3d at 199 (*citing Cash*, 983 F.2d at 560-61).

A district court may vary or depart extensively based on an inadequate criminal history, but it must provide both an incremental analysis of the degree of departure under § 4A1.3 and the "extensive justification" required for "dramatic departures." *Dalton*, 477 F.3d at 199 (*citing United States v. Hampton*, 441 F.3d 284, 288 (4th Cir. 2006)). This should be true regardless of the analogy to career offender. The purpose of the Guidelines' incremental approach and the courts' demand for a proportionally greater justification for "dramatic" increases is obvious: to prevent dramatic, unwarranted disparities in sentencing where the courts stray extensively outside the guidelines system. The de facto career offender doctrine skews this process by providing a dramatic leap in a system designed for incremental increases.

When a defendant is designated a de facto career offender, the criminal history and applicable offense level spring upwards dramatically. Mr. Metcalf's guideline, for example, went from a total offense level of 17, a criminal history category of IV, a guideline imprisonment range of 37 to 46 months under his actual guideline, to an estimated 188 to 235 months. The sentencing court accomplishes this not by looking incrementally at the defendant's criminal history, but by classifying him or her categorically as a career offender, based on the types of previous convictions. This interpolates the categorical approach to determining which predicate convictions qualify, which is a fraught and complicated process in itself, into a sentencing process where career offender does not, by the terms of the Guidelines, even apply.

Because the law of de facto career offender has been nearly non-existent since the 1990s in any circuit outside the Fourth, the chances that this doctrine applies in a skewed and non-uniform manner are very high. A defendant being sentenced elsewhere is unlikely to find judicial imposition of the doctrine, whereas in a Fourth Circuit case that same person will find a much greater chance of application.

II. Mr. Metcalf's case illustrates the dangers of the de facto career offender doctrine.

a. The disposition below was erroneous and had a significant impact on Mr. Metcalf's sentence.

Mr. Metcalf's guideline range was 37-46 months. The district court sentenced Mr. Metcalf to 71 months in prison – 25 months above the top end of his guideline range. The basis for the court's sentence was articulated as both a departure under U.S.S.G. § 4A1.3 and an upward variance outside the guideline range.

The district court discussed the 3553(a) factors but specifically referenced the concept of "de facto career offender" in giving the reasons for the upward departure/variance. But the district court's reasoning – that Mr. Metcalf would have qualified as a career offender but for the age of his convictions, which only "aged out" of guidelines consideration due to him serving time or having consolidated judgments – was erroneous. None of Mr. Metcalf's prior convictions qualified as felony crimes of violence or controlled substances offenses under 4B1.2, regardless of their age, consolidation, or subsequent constitutionality. *See United States v. Myers*, 589 F.3d 117, 126 (4th Cir. 2009) ("For an upward departure to de facto career offender status to be permissible, 'the defendant has to have been convicted of two prior crimes each of which constitutes [a career offender predicate offense].'"(citing *United States v. Harrison*, 58 F.3d 115, 118 (4th Cir. 1995)).

Mr. Metcalf had no qualifying convictions under the career offender guideline. His lower guideline was not due to the age of his convictions, the consolidation of those convictions into a single sentence, or any other vagaries of the criminal history rules. His North Carolina predicates are simply not qualifying convictions under federal law. Mr. Metcalf has convictions for the following:[5]

- **PSR ¶ 25**: North Carolina PWISD Schedule II, which was not punishable by more than a year in prison and so is not a federal felony. *See United States v. Simmons*, 649 F.3d 237 (4th Cir. 2011);

- **PSR ¶ 26**: North Carolina Felon in Possession of a Firearm, which is not a violent felony;

5 Mr. Metcalf also had a federal conviction for felon in possession of a firearm, which was vacated, but, in any case, was not a qualifying predicate for the career offender guidelines. J.A. 97.

- **PSR ¶ 27**: North Carolina Felony Flee to Elude Arrest, which is also not a violent felony; *United States v. Barlow*, 811 F.3d 133, 136 (4th Cir. 2015) (analyzing the N.C. statute under the ACCA, and holding that "[t]he North Carolina crime of speeding to elude arrest does not have an element of use, attempted use, or threatened use of physical force against the person of another.");

- **PSR ¶ 28**: North Carolina PWISD cocaine and marijuana, because Mr. Metcalf's North Carolina criminal history category was II and these were H and I felonies, respectively under the state's structured sentencing system, they were not punishable by more than a year and therefore not federal felonies; *See Simmons*, 649 F.3d 237;

- **PSR ¶ 29**: North Carolina Felony Escape Local Jail, which is not a crime of violence under the guidelines. *See Chambers v. United States*, 555 U.S. 122 (2009), and *United States v. Clay*, 627 F.3d 959 (4th Cir. 2010);

  North Carolina Assault with a Deadly Weapon On a Government Official, which is not a crime of violence under the guidelines. *See United States v. Simmons*, 917 F.3d 312, 320-21 (4th Cir. 2019), as amended (Mar. 6, 2019) (North Carolina ADWOGO statute fails to meet the enumerated offense clause and the force clause definitions under 4B1.2.);

  North Carolina First Degree Kidnapping, which is also not a crime of violence under the guidelines. *See United States v. Walker*, 934 F.3d 375 (4th Cir. 2019) ("because both requirements of 18 U.S.C. § 1201(a) may be committed without violence, kidnapping clearly does not categorically qualify as a crime of violence under the force clause[.]"); *see also United States v. Thompson*, No. 17-4131, 2019 WL 5704693, at *2 (4th Cir. Nov. 5, 2019) (noting that it was plain error for the district court to sentence Mr. Thompson using kidnapping as a predicate, despite the fact that the district court did not have the benefit of the decision in *Walker* at sentencing); *see also United States v. Harris*, 890 F.3d 480, 490 (4th Cir. 2018) ("Kidnapping in North Carolina may be committed via deception, i.e., without force. *State v. Fulcher*, 294 N.C. 503, 523, 243 S.E.2d 338 (1978)).";

- **PSR ¶ 30**: 2 counts of North Carolina Felony Assault with a Deadly Weapon Inflicting Serious Injury, which is not a crime of violence under the guidelines. *See United States v. Vinson*, 805 F.3d 120, 126 (4th Cir. 2015) ("North Carolina law permits convictions for all forms of assault, including completed-battery assault, in cases where the defendant's conduct does not rise even to the level of recklessness.").

J.A. 93-96.

There are no valid career offender predicates in Mr. Metcalf's criminal history. The district court, however, stated that Mr. Metcalf was lucky to not be sentenced at the 4B1.1 range. Indeed, de facto career offender was the only methodological explanation the district court gave for its arrival at the 71-month sentence. Even if an upward variance was justified on bases other than the erroneous de facto career offender analysis, the district court failed to follow the well-established methodology for departing upwards based on inadequacy of criminal history. The court effectively departed above category VI by imposing a sentence of 71 months. The court did not follow the "incremental approach" mandated by § 4A1.3(a)(4)(B) and the Fourth Circuit's precedents for departures above category VI.

The court stated orally that it believed 71 months to be an appropriate sentence and, in its written order, cited several reasons why Mr. Metcalf's criminal history was underrepresented. But the district court keyed that analysis to the fact that Mr. Metcalf was "lucky" not to be considered a de facto career offender and ultimately failed to explain how it determined the extent of the departure. J.A. 55-56, 68-70.

The district court should have articulated the basis for the upward departure/variance clearly, by reference to Mr. Metcalf's sentencing grid, indicating specific incremental increases and justifying those by reference to Mr. Metcalf's actual criminal history score (which was correctly calculated under the guidelines). The methodology makes sense not only because it prevents dramatic leaps to the career offender range, but it gives reviewing courts a clearer basis to examine the basis for

the departure or variance. For instance, in Mr. Metcalf's case, the career offender doctrine was misapplied, so that justification is in applicable on appeal. But because it formed an important part of the sentencing justification, and there was no incremental analysis, it is impossible to say what role any other factors played, separate and apart from the de facto career offender doctrine, in arriving at the 71-month sentence.

The Fourth Circuit's per curiam denial of Mr. Metcalf's claim ignores both the substantive and procedural issues of imposing a sentence based on consideration of the career offender guideline. While the district court may have provided an explanation of its sentence, that explanation included the de facto career offender doctrine. A sentence that includes erroneous consideration of an enormously powerful upward enhancement, one of the biggest in the entire guidelines system, is not cured by an otherwise-adequate explanation of the sentence. Likewise, just because the district court did not ultimately apply the career offender range does not mean its use of the de facto career offender doctrine was harmless.

b. **The courts should discourage the use of the de facto career offender doctrine and require that any court applying a large departure or variance on inadequacy of criminal history grounds provide a detailed analysis of its basis for departure or variance.**

The career offender is one of the most powerful enhancements in the Sentencing Guidelines. The career offender guideline range is also one of the least-followed and most widely criticized. A huge percentage of defendants who are sentenced under the career offender guideline receive some type of variance. Many defendants—nearly half in the 2014 Sentencing Commission data—receive government-sponsored variances. *See* United States Sentencing Commission "Federal Sentencing of Career Offender,"

Report to the Congress: Career Offender Sentencing Enhancement submitted to Congress August 2016 at 1, *avail. at* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/backgrounders/RG-career-offender-rpt.pdf. Even excluding the Government-sponsored motions, over a quarter of all career offenders sentenced in 2014 were below the guidelines. *Id.*

There is a yawning gap between career offender guideline range minimum and the sentences actually imposed by judges in career offender cases. For example, the average guideline minimum increased from 207 months in fiscal year 2015 to 218 months in fiscal year 2019, while the average sentence imposed increased from 145 months in fiscal year 2015 to 152 months in fiscal year 2019. *See* United States Sentencing Commission, Quick Facts - Career Offenders - Fiscal Year 2019, *avail. at* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Career_Offenders_FY19.pdf. In other words, judges imposed sentences 66 months below the 4B1.1 guideline range in 2019.

The Sentencing Commission has already made substantial suggestions for changing the career offender guideline and, though these have yet to be adopted, they demonstrate the need for careful limits on such a powerful enhancement.

According to the Sentencing Commission:

- The career offender directive should be amended to differentiate between career offenders with different types of criminal records and is best focused on those offenders who have committed at least one "crime of violence."

- Career offenders who have committed a violent instant offense or a violent prior offense generally have a more serious and extensive criminal history, recidivate at a higher rate than drug trafficking only career offenders, and are more likely to commit another violent offense in the future.

- Drug trafficking only career offenders are not meaningfully different from other federal drug trafficking offenders and should not categorically be subject to the significant increases in penalties required by the career offender directive.

- A single definition of the term "crime of violence" in the guidelines and other federal recidivist provisions is necessary to address increasing complexity and to avoid unnecessary confusion and inefficient use of court resources.

See United States Sentencing Commission Report to the Congress: Career Offender Sentencing Enhancement submitted to Congress August 2016 at 3, *avail. at* https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/criminal-history/201607_RtC-Career-Offenders.pdf.

The Commission's suggestions focus on distinguishing between violent offenders and "drug-only" qualifiers for the career offender guideline. The goal of the suggested changes is to "meaningfully distinguish" amongst defendants who qualify for the career offender guideline by different means, because those offenders captured by the broad, powerful strokes of the career offender brush are not all alike. *Id.* The recidivism rates cited in coming to these conclusions, as well as the greater disparities in sentencing between drug offenders and career offenders, whose sole basis was drug offenses, led the Commission to be concerned about unwarranted disparities caused by the powerful career offender category.

De facto career offender further compounds this concern. It adds another group to the mix of career offender sentencings: those who do not actually qualify under the guideline. As Mr. Metcalf's case demonstrates, this de facto consideration of defendants who do not qualify as career offenders creates the possibility for additional serious sentencing disparities. De facto career offender allows a sentencing court to skip the careful, incremental approach outlined in the guidelines. The Commission has recommended more, not less, careful differentiation between career offender sentences. The de facto doctrine flies directly in the face of that recommendation, allowing courts to apply the powerful enhancement which, even where it actually applies, creates the potential for powerful sentencing disparities.

CONCLUSION

De facto career offender is a doctrine that exists in isolation in the Fourth Circuit. While there is no extant split, the law of the Fourth Circuit differs markedly from the rest of the federal system in the advanced, entrenched nature of this powerful, judge-made sentencing doctrine. The Court should grant Mr. Metcalf's Petition not simply because he was erroneously labeled a de facto career offender, but because the doctrine itself creates a substantial risk of unwarranted sentencing disparities between federal circuits. For the foregoing reasons, the Petitioner respectfully requests this Court grant his petition for writ of certiorari to examine the use of the de facto career offender guideline and its non-uniform application across the circuits.

This the 17 day of February 2021.

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Respondent.

ENTRY OF APPEARANCE AND CERTIFICATE OF SERVICE

I, John A. Duberstein, Assistant Federal Public Defender, Middle District of North Carolina, having been admitted to practice before the state and federal courts situated in North Carolina and before this Court, and the Office of the Federal Public Defender for the Middle District of North Carolina having been appointed to represent the Petitioner, Renaldo Demarquis Metcalf, in the United States Court of Appeals for the Fourth Circuit, pursuant to the provisions of the Criminal Justice Act, 18 U.S.C. § 3006A, hereby enter my appearance in this Court with respect to this Petition for Writ of Certiorari.

I further certify that today, as counsel for Petitioner, I have served one copy of the Petition for Writ of Certiorari (complete with Appendix) and Petitioner's Request

to Proceed in *Forma Pauperis* in the above-entitled case upon Terry M. Meinecke, AUSA, and the Solicitor General for the United States Department of Justice, 950 Pennsylvania Avenue, NW, as well as all others required to be served.

This the 17 day of February 2021.

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APPENDICES