No. _____

In The

Supreme Court of the United States

MIKKEL MCKINNIE,

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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QUESTIONS PRESENTED

I. Whether the Lower Courts Erred in Not Applying the Court's Precedent in Burrage v. United States, 571 U.S. 204 (2014), to Upward Variances When a Death is Alleged to Result from a Violation of 21 U.S.C. § 841.

II. Whether Defendant's Sentence of 120 Months is Substantively Reasonable When His Guideline Range was 20 to 27 Months.

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ORDER BELOW

The order appealed from is the Judgment located at the CM/ECF Docket of the Fourth Circuit in United States v. Mikkel McKinnie, Case No. 19-4888, Docket Entry No. 61, entered on December 27, 2021. A copy of the published opinion of the Fourth Circuit is attached. United States v. McKinnie, 21 F.4th 283 (4th Cir. 2021).

JURISDICTIONAL STATEMENT

This Petition for Writ of Certiorari is from a final judgment by the Fourth Circuit Court of Appeals on December 27, 2021 on direct appeal of a sentence imposed against Petitioner Mikkel McKinnie in the United States District Court for the Eastern District of North Carolina for a criminal violation of 21 U.S.C. § 841(a)(1). Accordingly, the Court has jurisdiction over this Petition for Writ of Certiorari and the matter referenced herein pursuant to 28 U.S.C. § 1254 and 28 U.S.C. § 2101.

CONSTITUTIONAL PROVISIONS INVOLVED

"No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const. amend V.

STATEMENT OF THE CASE

A. Procedural History

On July 25, 2018, a federal grand jury for the Eastern District of North Carolina returned a two-count Indictment against Mr. McKinnie. [J.A. at 14-16.][1] Count One charged that on or about November 28, 2016 in the Eastern District of

[1]References in the Statement of the Case are to the Joint Appendix filed in the Fourth Circuit in this case.

North Carolina Mr. McKinnie did knowingly and intentionally distribute a quantity of a mixture and substance containing a detectable amount of heroin in violation of 21 U.S.C. § 841(a)(1). Count Two charged that on or about November 30, 2016, Mr. McKinnie did knowingly and intentionally distribute a quantity of a mixture and substance containing a detectable amount of heroin and fentanyl, also in violation of 21 U.S.C. § 841(a)(1). [J.A. at 14-16.]

On October 18, 2018 a Superseding Indictment was filed in the case. [J.A. at 17-19.] The Superseding Indictment contains the same two counts from the original Indictment, but Count Two was amended to allege that "serious bodily injury and death of a person known to the grand jury resulted from use of such heroin and fentanyl." [J.A. at 17.] On July 10, 2019, a Second Superseding Indictment was filed against Mr. McKinnie. [J.A. at 20-22]. The Second Superseding Indictment contains the same two Counts with the same offense date, but the drug alleged in each Count was changed to omit heroin and include fentanyl. [J.A. at 20-22]. On August 5, 2019, Mr. McKinnie pled guilty to Count One of the Second Superseding Indictment. [J.A. at 23-52.]

On November 9, 2019, the Government filed a motion and memorandum seeking an upward departure and/or variance based upon the death of one of Mr. McKinnie's customers. [J.A. at 53-63.] On November 12, 2019, the Court conducted a sentencing hearing and filed a written Judgment sentencing Mr. McKinnie to 120 months of imprisonment and three years of Supervised Release, with a Special Assessment of $100.00. [J.A. at 64-152.] Trial counsel for Mr. McKinnie filed a Notice of Appeal to the Fourth Circuit Court of Appeals. [J.A. at 153.]

On December 27, 2021, the Fourth Circuit Court of Appeals published a written opinion affirming the District Court. United States v. McKinnie, 21 F.4th 283 (4th Cir. 2021).

B. Statement of the Facts

According to the Pre-Sentence Report in this case,

> 7. On November 30, 2016, a confidential informant (CI) notified the Fuquay-Varina Police Department (FVPD), in Fuquay-Varina, North Carolina, that he/she had purchased heroin from Elliott McKinnie (unindicted), and Elliott McKinnie had warned him to "be careful." The CI explained that Elliott McKinnie had someone pass out for eight hours following the use of the heroin. Despite the warning, the CI purchased heroin from Elliot McKinnie on the same day and overdosed as well. Two dosage units of Narcan were required to revive the CI. The CI went on to explain he/she had purchased heroin from Elliot McKinnie's brother, **MIKKEL MCKINNIE**, for over one year (since 2015), but did not provide amounts of same.
>
> 8. As a result of an investigation into a heroin and fentanyl overdose resulting in death on December 1, 2016, the FVPD determined **MIKKEL MCKINNIE** may have distributed the victim fentanyl. A subsequent search of **MIKKEL MCKINNIE'S** phone revealed that on November 21, 2016, **MIKKEL MCKINNIE** texted a known drug dealer and advised that he (**MCKINNIE**) had a "brick" (1 gram of heroin, not included in total accountability to avoid potential double counting). On November 27, 2016, **MIKKEL MCKINNIE** advised the victim that his supplier was coming from New Jersey with "some China White s8 chunks." On November 28, 2016, the victim reached out to **MIKKEL MCKINNIE**, who warned the victim that people were "going out on this shit." The victim stated, "I'll take a g" (1 gram of a fentanyl). Surveillance video confirmed **MIKKEL MCKINNIE** and the victim met at a gas station in Fuquay-Varina, North Carolina, later on November 28, 2016. The manager of the gas station observed the victim leaving the restroom impaired and called 911. Officers responded just after the victim and **MIKKEL MCKINNIE** had fled the scene. Later that night, the victim texted **MIKKEL MCKINNIE** and apologized for putting him in that position. Also, that night **MIKKEL MCKINNIE** texted his supplier, Anthony Scott (unindicted), and commented on the strength of the China White, stating, "Thinking about dude ass earlier m.f. couldn't even walk, talk, think[,] that m.f. was gone bro fr fr that shit st8 fire my word[.]"

> 9. Text messages between **MIKKEL MCKINNIE** and the victim confirmed that on evening of November 30, 2016, the victim asked **MIKKEL MCKINNIE** about the "China White." **MIKKEL MCKINNIE** advised the victim he had "2.5 left" (2.5 grams of fentanyl). The victim indicated he wanted "a half of the China" (not included in total accountability to avoid potential double counting). **MIKKEL MCKINNIE** and the victim agreed to meet later the same night1. At 10:42pm, on November 30, 2016, **MIKKEL MCKINNIE** called the victim. At 10:44pm cell towers determine that **MIKKEL MCKINNIE'S** phone entered the area of the victim's home, and by 10:53pm, **MIKKEL MCKINNIE'S** phone left the area. On December 1, 2016, at approximately 10:00am, the victim was found dead of an apparent overdose. A spoon next to the body tested positive for the presence of fentanyl. The toxicology report indicated the defendant had a combination of 6-monoacetylmorphine (a heroin metabolite), morphine, fentanyl, and alprazolam in his system. The autopsy report indicated the victim died from an acute intoxication from a combination of heroin, fentanyl, and alprazolam.

[J.A. at 200-202.]

The Probation Officer found that the accountable drug weight attributable to Mr. McKinnie was 3.5 grams of fentanyl, 8.125 grams of heroin, and 1.2 grams of cocaine, having a total converted drug weight of 17.11 kilograms. [J.A. at 202.]

As mentioned above, on November 8, 2019, the Government filed a document entitled *Sentencing Memorandum and Motion for Upward Departure and/or Upward Variance From the Guidelines*. [J.A. at 50-60.] In it, the Government moved for an upward departure under U.S.S.G. § 5K2.1 and U.S.S.G. § 5K2.21, and in the alternative an upward variance under the 18 U.S.C. § 3553(a) sentencing factors. [J.A. at 54-58.]

At the sentencing hearing, the trial court first determined Mr. McKinnie's guideline range to be 21 to 27 months, based on a total offense level of 12 and a criminal history category of IV. [J.A. at 67.] Neither party objected to that range. [J.A. at 67.] The trial court then turned to hearing the Government's motion. [J.A. at 67.]

The Government first called Ryan Blackwell to the stand. [J.A. at 68.] Mr. Blackwell testified that he was employed by the Fuquay Varina Police Department from May of 2014 until November 2018, and that he had served as the lead investigator of an overdose call the Fuquay Varina Police Department received on December 1, 2016. [J.A. at 69-70.] The overdose victim passed away, and the autopsy report determined that his death was caused by intoxication from heroin, alprazolam, and fentanyl. [J.A. at 70-71.]

At the bathroom where the decedent was originally located, there were two syringes and a spoon containing a white, powdery substance. The spoon was submitted to the City/County Bureau of Identification (sic) and contained fentanyl, but no other substance. [J.A. at 72-73.] The two used syringes found near the body were also submitted to the City/County Bureau of Investigation (sic). The CCBI concluded from its analysis of the two syringes that one syringe tested positive for heroin, and the other tested positive for heroin and fentanyl. [J.A. at 73-74.]

After searching the decedent's cell phone, Mr. McKinnie was identified as a suspect in the investigation through text messages between Mr. McKinnie and the decedent organizing the sale and delivery of China White fentanyl. [J.A. at 75.]

Mr. Blackwell testified that Mr. McKinnie had sold China White fentanyl on November 28, 2016 at a Sheetz gas station located in Fuquay Varina. [J.A. at 76.] He also testified that Mr. McKinnie had sold the decedent additional China White fentanyl on November 30, 2016. [J.A. at 76.]

With respect to the November 30, 2016 sale, Mr. Blackwell testified based on text messages and cell site location information that the decedent had gone to Durham earlier on that day to purchase heroin from another source. [J.A. at 88-90]. Later in the evening, Mr. McKinnie and the decedent started exchanging text messages, and they had a conversation at 9:53 P.M. [J.A. at 91-92.] At 10:44 P.M., the devices "did cross paths and whatnot as far as that data showed." [J.A. at 92.] Finally, after reviewing the decedent's text messages for the evening of November 30, 2016 and in the early morning hours of December 1, 2016, Mr. Blackwell testified that it did not appear that the decedent obtained or attempted to obtain heroin or fentanyl from someone else during that time. [J.A. at 93-94.]

On cross examination, trial counsel for Mr. McKinnie asked the following line of questions:

> Q. Okay. And you indicated in your testimony that, based on what other officers or investigators may have told you, that the cell site information on November 30th or 2016 indicates that perhaps the defendant and Mr. Nelson crossed paths?
> A. And that's the best way I can describe it, to me, like I said, I'm not fully equipped in explaining the whole data of the cell phones and whatnot, but it appears that the data did show, based on their text communication conversation, that the data did show that the two devices and whatnot of making -- it's hard to describe --
> Q. Sorry. Have you looked at the cell tower diagrams that have a single cell tower and then three pie wedges extended on each side?
> A. Yes, sir, I have.
> Q. And for the testimony related to the November 30th time frame, that cell site photograph would place Nelson's phone and the defendant's phone in the same pie?
> A. Like I say, I couldn't go into -- I'm not fully equipped to answer that question. Like I said, from my experience, I'm not trained into the digital world, I can only repeat what the FBI agents and whatnot, the people that are certified regarding that matter, can describe and whatnot.

Q. So you can't confirm for us today that the defendant and Mr. Nelson met on November 30th, can you?
A. I can only say what I was told by the investigators.
Q. But the investigators can't confirm that either, can they?
A. I am not -- I don't know as far as -- I can't explain the whole investigation part of the devices is what I'm trying to say.
Q. And so you can't say that the defendant and Mr. Nelson met up on the 30th because you have no proof they did, correct?
A. Based on my experience of the technology world, I can't elaborate into that world.
Q. Okay. Hypothetically, if they did meet, you couldn't confirm whether they exchanged anything or not, right?
A. My experience in that world, like I said, I don't know, like, as far as that world.
Q. But the cell site location evidence does indicate clearly that Nelson drove to Durham sometime during the afternoon of the 29th?
A. Correct.
Q. And it's your understanding that he purchased some sort of controlled substance there?
A. That is correct, yes, sir.
Q. And according to the Government's motion filed on Friday, he then traveled to the Durham area where, approximately 2:30, he obtained drugs from another source?
A. Yes, sir.
Q. And you also confirmed that with text messages, correct?
A. Yes, sir.
Q. And it was your expectation that what he, Nelson, obtained may have been heroin?
A. Yes, sir. Opiates, yes, sir.

[J.A. at 95-97.]

The Government then called Dr. Ruth Ellen Winecker to testify as a forensic toxicologist. [J.A. at 97-110.] Over trial counsel's objection that the Government had not laid any foundation concerning a chain of custody, Ms. Winecker testified that the decedent had a concentration of alprazolam with a concentration of .087 milligrams per liter in his blood, 100 nanograms of fentanyl per milliliter of blood, and morphine at a concentration of .099 milligrams per liter of blood. [J.A. at 107.] Ms. Winecker

testified that further testing confirmed that the morphine found in the decedent's blood was from heroin. [J.A. at 108.]

The Government then called William Hamilton of the Fuquay Verina Police Department as its third witness. [J.A. at 110.] Mr. Hamilton testified that he had been one of the first responders to the decedent's house in this case and then in 2018 had taken over as lead investigator after Mr. Blackwell left the department. [J.A. at 111-12.] Mr. Hamilton testified further about the cell phone data on the evening of November 30, 2016. [J.A. at 112-20.] Mr. Hamilton testified that according to the cell cite information, at or around 10:44 P.M., Mr. McKinnie's phone moved from outside the Fuquay Varina area, west of Fuquay, into the Fuquay Varina area, and into the same cell tower configuration as the phone belonging to the decedent. [J.A. at 117.]

The defense did not call any witnesses, and the trial court then heard argument on the motion for upward departure and/or variance. [J.A. at 120-125.]

The Government argument focused on Mr. McKinnie's warnings to his customers as he distributed the drug that people were overdosing, contending that Mr. McKinnie had seen the effect that the drug had on a user with his own eyes, and continued to sell it to the decedent and sold it to the decedent on the evening of November 30, 2016. [J.A. at 120-23.] "And that's what we believe killed the decedent, but that speaks volumes as to the mindset and the disregard for human life that this defendant possessed in and around this time." [J.A. at 123.]

Trial counsel for Mr. McKinnie argued that the Government's alleged chain of events was too speculative for the Government to meet its burden of proof. He stated:

> Your Honor, the Government's alleged chain of events is speculative. What we have here is testimony about how a phone that the Government attributes to this defendant was located in a certain part of Fuquay Varina at a time when Mr. Nelson's phone was also there. While there may be some reason to think that Mr. McKinnie had it, there's no proof of that, only a phone that they attribute to him was found at that location. Even assuming that Mr. McKinnie had that phone in his possession at that time, it's speculation whether Mr. Nelson and Mr. McKinnie met. There aren't any text messages or other communication after this alleged meeting to confirm that they, in fact, met or exchanged anything. Even if they met, there's no evidence they exchanged anything. I would submit is that that chain of events that the Government asked you to accept as proof of a distribution of fentanyl is insufficient, does not meet the preponderance of the evidence standard to prove that even if Mr. McKinnie delivered something to Mr. Nelson, that it was, in fact, fentanyl. So what I would submit is that chain of events is too speculative to meet the standard of proof.

[J.A. at 123-24.]

Mr. McKinnie's trial counsel then discussed the causation requirements found in Burrage v. United States, 571 U.S. 204 (2014). He argued that the death resulting from the controlled substance2 can be established either by expert testimony that the heroin was the cause of death or was a contributing factor to the death:

> But in this case, we don't have an expert that has testified as to either of those two issues. We don't have an expert that's testified that Mr. Nelson had consumed a sufficient quantity to kill him by itself and we don't have any expert testimony stating that the alleged fentanyl consumption was a, but for cause, without the consumption of fentanyl, Mr. Nelson would have survived.
> We do have testimony resulted concerning percentages, numbers, grams per units, but we don't have the expert testimony that was required in the Burrage case and, I submit, is required in this case to establish by a preponderance the causation element necessary for the upward departure or variance that the Government seeks.

[J.A. at 124-25.]

Mr. McKinnie's trial counsel then shifted into an argument on the 28 U.S.C. § 3553(a) factors in requesting a sentence with the advisory guideline range of 21 to 27 months. [J.A. at 225-26.] Mr. McKinnie declined to address the court, and the prosecutor read a victim statement prepared by the mother of the decedent. [J.A. at 127-131.] The prosecutor closed by acknowledging that Mr. McKinnie had provided information regarding his own drug trafficking activities and that of others, although the Government had not made any prosecutions as a result of his statements. [J.A. at 131-32.]

The trial judge credited the testimony of Mr. Blackwell, Dr. Winecker, and Detective Hamilton, and rejected trial counsel's argument that the Government had not met its burden of proof by a preponderance of the evidence "root and branch". [J.A. at 133-34.] The trial judge stated that Mr. McKinnie's conduct "absolutely manifested a complete disregard of human life. [J.A. at 135.] He then found that the conduct of Mr. McKinnie authorized an upward departure under both Section 5K2.1 and 2K2.21. [J.A. at 135-39.] The trial judge then announced a sentence of 120 months of imprisonment. [J.A. at 138.] Also, he announced that in the alternative, he had upwardly varied to that sentence of 120 months according to the 28 U.S.C. § 3553(a) factors. [J.A. at 139.]

At the Fourth Circuit, the undersigned argued that the trial judge erred procedurally in applying both departures and the alternative variance in light of Burrage v. United States, 571 U.S. 204 (2014) and Young v. Antonelli, 982 F.3d 914 (4th Cir. 2020). The Fourth Circuit, however, held that both of these cases are

inapposite to an upward variance based on the sentencing factors set out in 18 U.S.S.C. § 2553(a). United States v. McKinnie, 21 F.4th 283, 290 (4th Cir. 2021).

REASONS CERTIORARI SHOULD BE GRANTED

I. The Court Should Grant Certiorari to Clarify Whether its Precedent in Burrage v. United States, 571 U.S. 204 (2014) Applies to Upward Variances When a Death is Alleged to Result from a Violation of 21 U.S.C. § 841.

The death-or-injury-results enhancement of 21 U.S.C. § 841(b) "is an element that must be submitted to the jury and found beyond a reasonable doubt." Burrage v. United States, 571 U.S. 204, 210 (2014) (citing Alleyne v. United States, 570 U.S. 99, 115-16 (2013)). In Burrage, the Court held that, "at least where use of the drug distributed by the defendant is not an independently sufficient cause of the victim's death or serious bodily injury, a defendant cannot be liable under the penalty enhancement provision of 21 U.S.C. § 841(b)(1)(C) unless such use is a but-for cause of the death or injury." Id. at 218-19.

In Young v. Antonelli, the Fourth Circuit held that the Court's holding in Burrage applies to the U.S.S.G. § 2D1.1 enhancement for "death or serious bodily injury" resulting from distribution of illegal drugs. Young v. Antonelli, 982 F.3d 914, 918 (4th Cir. 2020).

In the case below, however, the Fourth Circuit held that its reasoning in Young, as well as the Court's holding in Burrage, did not apply to the consideration of variances when death is alleged to result from the distribution of the illegal drug. Specifically, the Fourth Circuit stated:

> The distinction between variances and departures matters. Even if the but-for causation standard applies to a sentencing departure under the

> Guidelines, it is not similarly required for an upward variance under § 3553(a). District courts need not commit themselves to a specific, enumerated departure when weighing the § 3553(a) factors. *United States v. Evans*, 526 F.3d 155, 164-65 (4th Cir. 2008). When considering a variance, district courts may thus consider evidence that a defendant's actions contributed to death or serious injury. This is so even if the evidence is insufficient to meet the but-for causation standard required for the "death results" enhancement under the Sentencing Guidelines, *Young*, 982 F.3d at 918-19, or for conviction of distribution resulting in death, *Burrage*, 571 U.S. at 210-19.

United States v. McKinnie, 21 F.4th 283, 290 (4th Cir. 2021). In support of this holding, the Fourth Circuit cited United States v. Heindenstrom, 946 F.3d 57, 60-61, 63-64 (2019) and United States v. Hudgens, 4 F.4th 352, 358-61 (5th Cir. 2021). McKinnie, 21 F.4th at 290-91.

In general, when determining a sentence, the district court must calculate the appropriate advisory guidelines range and consider it in conjunction with the factors set forth in 18 U.S.C. § 3553(a). Gall v. United States, 552 U.S. 38, 49 (2007). Appellate review of a sentence, "whether inside, just outside, or significantly outside the [g]uidelines range," is for abuse of discretion. Id. at 41. This Court must first "ensure that the district court committed no significant procedural error." Id. at 51. Procedural errors include "failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence--including an explanation for any deviation from the Guidelines range." Id. If the Court finds the sentence procedurally reasonable, it can then "consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard." Id.

In this case, as noted by Mr. McKinnie's trial counsel, it does not appear from the transcript that the trial court received any expert opinion at the sentencing hearing explicitly stating that the fentanyl under discussion was the actual cause of death.

> But in this case, we don't have an expert that has testified as to either of those two issues. We don't have an expert that's testified that Mr. Nelson had consumed a sufficient quantity to kill him by itself and we don't have any expert testimony stating that the alleged fentanyl consumption was a, but for cause, without the consumption of fentanyl, Mr. Nelson would have survived.

[J.A. at 124-25.] The sentencing transcript does not appear to have either of these specific opinions by the qualified expert or any other witness, making this case different from the usual findings based upon testimony by a medical examiner or expert as to the cause of death. See, e.g., United States v. Patterson, 38 F.3d 139, 144 (4th Cir. 1994) (medical examiner testifying that "in his opinion, 'the combination of Demerol [meperidine] and morphine in Tracy Sue Carroll was the direct cause of her death'"). Similarly, as the trial counsel argued, the Government's alleged chain of events was speculative and not established by testimony at a number of key points. Even assuming that Mr. McKinnie had the cell phone at the relevant time, it was speculation as to whether or not he and the decedent actually met or exchanged anything. [J.A. at 123-24.] Further, as the Fourth Circuit acknowledged but dismissed, the trial court never made the specific finding of but for causation. "The district court did not use the magic words "but-for causation." McKinnie, 21 F.4th at 291.

Finally, the trial court's findings with respect to causation of death, even to the extent it may have made them, they are not supported by any specific statement of the expert testimony at the sentencing hearing that this fentanyl was the cause of death. [J.A. at 100-13.]

Nevertheless, the Fourth Circuit held that because the trial court also announced this sentence alternatively in an upward variance under the sentencing factors set out in 18 U.S.C. § 2553(a), that the requirements of Burrage v. United States, 571 U.S. 204, 210 (2014) and Young v. Antonelli, 982 F.3d 914, 918 (4th Cir. 2020) can be avoided. McKinnie, 21 F.4th at 290. Because the Fourth Circuit held that both of these cases are inapposite to an upward variance based on the sentencing factors set out in 18 U.S.S.C. § 2553(a), their holdings are easily circumvented by a mechanical and rote recitation of alternative bases for the sentence. The Court should grant certiorari to clarify that its holding in Burrage v. United States, 571 U.S. 204, 210 (2014) does in fact apply to variant sentences as well as formal departures under the United States Sentencing Guidelines.

II. The Court Should Grant Certiorari to Address Whether Mr. McKinnie's Upward Variant Sentence is Procedurally Or Substantively Reasonable When It Is Not Supported By A Finding of Death Resulting From His Drug Sale.

When determining a sentence, the District Court must calculate the appropriate advisory guidelines range and consider it in conjunction with the factors set forth in 18 U.S.C. § 3553(a). Gall v. United States, 552 U.S. 38, 49 (2007). Appellate review of a sentence, "whether inside, just outside, or significantly outside the [g]uidelines range," is for abuse of discretion. Id. at 41. This Court must first "ensure that the district court

committed no significant procedural error." Id. at 51. If the Court finds the sentence procedurally reasonable, it can then "consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard." Id.

The factors to be considered by the District Court in determining a sentence with respect to substantive reasonableness are set out in 18 U.S.C. § 3553(a). That statute is cited above in its relevant part. The Court has held that "a sentence located within a correctly calculated guidelines range is presumptively reasonable." United States v. Abu Ali, 528 F.3d 210, 261 (4th Cir. 2008). However, "the presumption is not binding." Rita v. United States, 551 U.S. 338, 347 (2007).

[A] sentencing court has flexibility in fashioning a sentence outside of the Guidelines range." United States v. Diosdado-Star, 630 F.3d 359, 364 (4th Cir. 2011) (citing Rita v. United States, 551 U.S. 338, 356 (2007)).

In Gall, the Court held that in reviewing substantive reasonableness, the Court "may consider the extent of the deviation [from the guidelines range], but must give due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance." Gall, 552 U.S. at 51.

In this case, the trial judge's reasoning for a very substantial upward departure was not established by the preponderance of the evidence at the sentencing hearing, nor was the critical fact of causation explicitly found. The resulting sentence was unreasonably enhanced more than four times the high end of Mr. McKinnie's guideline range. These procedural defects render the sentence in this case both procedurally and substantively unreasonable, regardless of whether the trial court

would or would not have imposed the same sentence as a variance as it announced pursuant to United States v. Gomez-Jiminez, 750 F.3d 370 (4th Cir. 2014), and United States v. Hargrove, 701 F.3d 156 (4th Cir. 2012). [J.A. at 139.]

Accordingly, the Court should grant certiorari to address the reasonableness of Mr. McKinnie's sentence.

CONCLUSION

For the above stated reasons, Petitioner Mikkell McKinnie hereby requests that the Court grant a writ of Certiorari in this case, reverse the courts below, order a resentencing, and grant whatsoever other relief may be just and proper.

This the 27th day of April, 2021.

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