No. 22-_____

IN THE
SUPREME COURT OF THE UNITED STATES

JESSE RONDALE BAILEY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

When evaluating whether a sentence imposed within the applicable guideline range avoids unwarranted sentencing disparities under 18 U.S.C. § 3553(a)(6), may a court categorically refuse to consider empirical evidence showing that other judges impose sentences below the guideline range in the vast majority of cases in which the guideline applies, or showing that the guideline itself embodies structural disparities?

PARTIES TO THE PROCEEDINGS

All parties appear in the caption of the case on the cover page.

RELATED PROCEEDINGS

(1) *United States v. Bailey*, No. 3:06-cr-00145, District Court for the Eastern District of Tennessee. Judgment entered November 24, 2008.

(2) *United States v. Bailey*, No. 3:06-cr-00145, District Court for the Eastern District of Tennessee. Order denying motion for imposition of a reduced sentence under section 404 of the First Step Act, entered March 30, 2020.

(3) *United States v. Bailey*, No. No. 20-5384, U.S. Court of Appeals for the Sixth Circuit. Order affirming denial of motion for imposition of a reduced sentence under section 404 of the First Step Act, entered November 6, 2020.

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Petitioner Jesse Rondale Bailey respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Courts of Appeals for the Sixth Circuit.

OPINIONS BELOW

The published decision of the United States Court of Appeals for the Sixth Circuit affirming the district court's denial of Mr. Bailey's motion for a sentence reduction under section 404 of the First Step Act appears at pages 1a to 11a of the appendix to this petition and is reported at 27 F.4th 1210 (6th Cir. 2022). The order of the district court denying the First Step Act motion appears at pages 12a to 13a

of the appendix.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The court of appeals' order affirming the district court's order denying the sentence reduction was entered on March 8, 2022. Pet. App. 1a. This petition is timely filed under Supreme Court Rule 13.1, as extended by Order of May 31, 2022.

STATUTORY PROVISIONS INVOLVED

Section 404 of the First Step Act of 2018, Pub. L. No. 115-391, codified at 21 U.S.C. § 841 note, provides:

> (a) DEFINITION OF COVERED OFFENSE.—In this section, the term "covered offense" means a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010 (Public Law 111-220; 124 Stat. 2372), that was committed before August 3, 2010.
>
> (b) DEFENDANTS PREVIOUSLY SENTENCED.—A court that imposed a sentence for a covered offense may, on motion of the defendant, the Director of the Bureau of Prisons, the attorney for the Government, or the court, impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 (Public Law 111-220; 124 Stat. 2372) were in effect at the time the covered offense was committed.
>
> (c) LIMITATIONS.—No court shall entertain a motion made under this section to reduce a sentence if the sentence was previously imposed or previously reduced in accordance with the amendments made by sections 2 and 3 of the Fair Sentencing Act of 2010 (Public Law 111-220; 124 Stat. 2372) or if a previous motion made under this section to reduce the sentence was, after the date of enactment of this Act, denied after a complete review of the motion on the merits. Nothing in this section shall be construed to require a court to reduce any sentence pursuant to this section.

Section 3553(a) of title 18 provides, in relevant 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—
>
> * * *
>
> (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct[.]

STATEMENT OF THE CASE

Overview. When the district court denied Jesse Bailey's motion for imposition of a reduced sentence under section 404 of the First Step Act, he had served nearly fourteen years of a 360-month career offender sentence imposed in 2008 for a drug trafficking offense involving 212.4 grams of crack and 125.3 grams of powder cocaine. While in custody, he had maintained a spotless disciplinary record and completed drug education. Also during that time, society's views of his crack offense had radically shifted, reflected not only in Congress's passage of the First Step Act of 2018 to retroactively lower his statutory penalty range, but also by a dramatically increasing judicial trend away from imposing career offender sentences in similar cases, as shown by the U.S. Sentencing Commission's national sentencing data.

The First Step Act of 2018 opened the door for the district court to impose a reduced sentence in Mr. Bailey's case in light of prevailing norms, which under the instruction of 18 U.S.C. § 3553(a)(6) includes consideration of the sentencing practices of courts nationwide in similar cases. In denying him a reduction, the district court relied solely on the fact that he is classified as a career offender, without considering the disparity that a career offender sentence itself creates, or even mentioning the

governing factors in 18 U.S.C. § 3553(a). As an empirical matter, the sentence left undisturbed represents an outlier and anomaly in today's federal sentencing scheme, one that the Sentencing Commission itself recognizes recommends sentences greater than necessary in a great many, if not most, cases. Yet, when Mr. Bailey relied on the Sentencing Commission's data to argue on appeal that his career offender sentence is substantively unreasonable because it creates rather than avoids unwarranted sentencing disparities, the Sixth Circuit refused to engage with the issue, insisting according to its longstanding rule—and despite manifest evidence to the contrary—that the guideline sentence necessarily avoids unwarranted disparities.

The question presented here is recurring, affecting many individuals subject to guideline sentences and prevented from making meaningful evidence-based arguments when the guideline sentence itself creates unwarranted disparities. The Court should grant the petition and reverse.

Background.

Petitioner Jesse Bailey was sentenced to thirty years' imprisonment for federal drug offenses in 2008, at a time when the law surrounding the advisory nature of the career offender guideline still constrained judges from varying from it, and two years before the passage of the Fair Sentencing Act.

1. In 2007, Mr. Bailey was convicted after a jury trial of conspiracy to distribute and possess with the intent to distribute 5 kilograms or more of powder cocaine and 50 grams or more of cocaine base, in violation of 21 U.S.C. § 846,

841(b)(1)(A) (Count 1); distribution of powder cocaine, in violation of 21 U.S.C. § 841(a), (b)(1)(C) (Count 2); two counts of distribution of over 50 grams of crack cocaine, in violation of 21 U.S.C. § 841(a), (b)(1)(A) (Counts 3 and 4); and one count of distribution of more than 5 grams of crack cocaine, in violation of 21 U.S.C. § 841(a), (b)(1)(B) (Count 5). As relevant here, Mr. Bailey would have faced a mandatory minimum sentence of ten years for his crack convictions in Counts 1, 3, and 4 (with a statutory maximum of life), except that the government filed a notice of its intent under 21 U.S.C. § 851 to rely on his prior Tennessee felony drug offense (for possessing cocaine for resale) to enhance his statutory penalty range. As a result, Mr. Bailey's mandatory minimum was increased to 20 years. 21 U.S.C. § 841(b)(1)(A) (2006).

Mr. Bailey was sentenced in 2008. At the time, the base offense level for a person convicted under § 841(a) for an offense involving 212.4 grams of crack and 125.3 grams of powder cocaine (the total amount involved in the offense) was ordinarily 32. (PSR ¶ 22, 27.) *See* U.S.S.G. § 2D1.1(c)(3) & cmt. (n.10(D)) (Supp. 2008). In Criminal History Category VI, Mr. Bailey's guideline range under the ordinary drug guideline would have been 210 to 262 months, which due to the twenty-year mandatory minimum would have been an effective range of 240 to 262 months. U.S.S.G. ch. 5, pt. A (Sentencing Table) (OL 32/CHC VI). However, due to his prior state felony drug conviction—the same one the government relied on in its § 851 notice—and a conviction for facilitation to commit second degree murder incurred when he was 21 years old, he was deemed a career offender under U.S.S.G. § 4B1.1.

(PSR ¶¶ 28, 37, 38.) The career offender guideline overrode the ordinary drug offense level of 32 and instead tied the offense level to the statutory maximum for the offense of conviction, which was the maximum of life. *See* U.S.S.G. § 4B1.1. The result in Mr. Bailey's case was an enhanced career offender offense level of 37, which was also his total offense level because he went to trial. U.S.S.G. § 4B1.1(b)(A) (2008). (*See* PSR ¶¶ 29-30.)[1] The career offender designation increased his guideline range from 240 to 262 months to 360 months to life—an increase of ten years at the bottom. (PSR ¶ 70.)

At sentencing held on November 24, 2008, before the Honorable Thomas W. Phillips, Mr. Bailey asked the district court to vary downward from the career offender range to the ordinary drug range on the ground that his ordinary drug range, already enhanced by way of his Criminal History Category VI, was sufficient to serve sentencing purposes. Pet. App. 21a-22a (original sentencing transcript)

The government in response (Pet. App. 28a-29a) invoked the Sixth Circuit's then-recent decision in *United States v. Funk*, 534 F.3d 552 (6th Cir. 2008), in which the court reversed for the second time a district court's decision to vary downward from the career offender guideline on the ground that the range it recommends is "excessive and unreasonable" and instead impose a sentence within the ordinary drug guideline range. *Id.* at 529-30. In that case, on remand from this Court in light of *Gall v. United States*, 552 U.S. 38 (2007), and *Kimbrough v. United States*, 552 U.S. 85 (2007), the Sixth Circuit concluded that the downward variance resulted in a

[1] Because he was already in Criminal History Category VI, the career offender designation increased only his offense level. (PSR ¶ 42.)

substantively unreasonable sentence. In the process, the Sixth Circuit sent a strong message to district courts that any downward variance from the career offender range, especially a policy-based disagreement, would be subject to close appellate scrutiny and reversal as substantively unreasonable. *Id.* at 527, 530.

The Sixth Circuit reasoned that the career offender guideline is unlike the 100-to-1 powder-to-crack ratio formerly incorporated into the crack guidelines, from which district courts may categorically vary downward without abusing their discretion or triggering close scrutiny on appeal, as this Court held in *Kimbrough*, 552 U.S. at 109-10. Rather, because the career offender guideline implements a congressional directive, 28 U.S.C. § 994(h), the court held that the rationale of *Kimbrough* does not apply. *Funk*, 534 F.3d at 528. The Sixth Circuit therefore announced it would review downward variances from the career offender guideline "with a little more skepticism" and "with a little more favor towards" the career offender guideline range. *Id.* at 529-30. And it ruled that because "the sentencing judge sought to impose his own policy determination" about the career offender guideline as it applied to Funk's prior marijuana conviction, and "to supplant that of the Sentencing Commission (and Congress)," its explanation was "improper." *Id.* at 530.

At Mr. Bailey's sentencing, held just a few months after *Funk* was decided, the district court said it was "very much familiar with this [*Funk*] opinion," denied Mr. Bailey's motion for a variance from the career offender range, and imposed a sentence of 360 months, the bottom of the range. Pet. App. 34a, 40a. The court

explained at the hearing that it hoped Mr. Bailey would obtain his GED and complete drug education. Pet. App. 44a.

2. Beginning just a few weeks after Mr. Bailey was sentenced, the judicial treatment of the career offender guideline underwent a marked shift. First, the Sixth Circuit granted rehearing in *Funk*, vacating its rule announcing closer review of downward variance from the career offender range. *See United States v. Funk*, No. 05-3708, 2008 U.S. App. LEXIS 27700 (6th Cir. Dec. 18, 2008). Then, after supplemental briefing, the government moved to voluntarily dismiss its appeal in *Funk*, which the Sixth Circuit granted, leaving its earlier decision vacated. *United States v. Funk*, 560 F.3d 619 (6th Cir. 2009).

The next year, in *United States v. Michael*, 576 F.3d 323, 327 (6th Cir. 2009), the Sixth Circuit held (as has ever other circuit) that a district court may disagree with and vary from the career offender range in a drug case, on the ground that the harsh sentences it recommends are greater than necessary to serve sentencing purposes in the ordinary case—congressional directive notwithstanding. *Id.* at 327-28 (explaining that, as *Booker* and its progeny make clear, "a directive that the Commission specify a particular Guidelines range is not a mandate that sentencing courts stay within it").

Over the next decade, the rate at which courts imposed sentences below the career offender range steadily increased, so that by 2020—the year when the district court considered Mr. Bailey's First Step Act motion—judges were imposing sentences within the guideline range for just 19.6% of all those deemed career offenders. U.S.

Sent'g Comm'n, *Quick Facts – Career Offenders FY2019*, at 2 (2020). Virtually all the rest—approximately 78.9%—were sentenced below the range. *Id.*[2] The Sentencing Commission also reported that while the Guidelines' influence has stabilized in virtually every other context, the average gap between the recommended career offender range and the sentence imposed was continuing to widen. *See* U.S. Sent'g Comm'n, *The Influence of the Guidelines on Federal Sentencing – Federal Sentencing Outcomes*, 2005-2017, at 7, 54-58 (Dec. 2020) (describing "a continuing decline in the [career offender] guideline's influence, as reflected by the steady increase in the difference between the average guideline minimum and the average sentence imposed in career offender cases"). The Commission traced the waning influence of the career offender guideline to its 2016 report to Congress on the career offender guideline, in which it described the high rates of below-range sentences in career offender cases and provided data showing the guideline's categorical overstatement of the risk of reoffending. *Id.* at 60 ("The data also suggests that courts appear to be relying on the findings in the Commission's report[]to Congress regarding the . . . career offender guideline[] to support variances"). (*See* Part I.B, *infra*.)

3. The treatment of crack offenses also underwent a marked shift. On August 3, 2010, Congress enacted the Fair Sentencing Act of 2010. *See* Pub. L. No. 111-220, § 2, 124 Stat. 2372 (2010). The Fair Sentencing Act modified the statutory

[2] Unfortunately, the Commission does not clearly report the total percentage of above-range sentences for all career offenders, but the reported data show that approximately 18 people out of all those deemed career offenders in fiscal year 2020, or 1.5%—were sentenced above the range. *Quick Facts – Career Offenders FY2019*, *supra*, at 1-2.

penalties for crack offenses in light of the longstanding and widespread recognition that the 100:1 quantity ratio underlying the statutory ranges for crack cocaine under the Anti-Drug Abuse Act of 1986 resulted in penalties that were far too harsh and had a disparate impact on African-Americans. *See Kimbrough*, 552 U.S. at 97-99; *Dorsey v. United States*, 567 U.S. 260, 268-69 (2012). Section 2 of the Act increased the amount of crack necessary to support the statutory ranges for convictions under § 841(b)(1)(A) from 50 grams to 280 grams, and for convictions under § 841(b)(1)(B) from 5 grams to 28 grams. *See* Pub. L. No. 111-220, § 2, 124 Stat. 2372 (2010); *Terry v. United States*, 141 S. Ct. 1858, 1863 (2021). These changes effectively reduced the 100:1 statutory ratio to 18:1, which in turn modified the corresponding guideline career offender ranges.

As passed, however, the Act's changed penalty triggers did not apply retroactively to those sentenced before the Act's passage, like Mr. Bailey. *Dorsey*, 567 U.S. at 281. Had they applied retroactively, Mr. Bailey's penalty range for an offense involving 212.4 grams of crack and 125.3 grams of powder would have been reduced to 5 to 40 years under 21 U.S.C. § 841(b)(1)(B), enhanced to 10 years to life due to the § 851 notice.

4. Meanwhile, the Sentencing Commission retroactively amended the base offense levels in the drug guideline at U.S.S.G. § 2D1.1 to reflect the new 18:1 powder-to-crack ratio. *See* U.S.S.G. § 2D1.1(c) (Supp. 2010). Under this amendment (and a second 2014 amendment to all the drug guidelines, likewise retroactive),[3] Mr. Bailey's

[3] *See* U.S.S.G. App. C, amend. 782 (2014); U.S.S.G. § 1B1.10(d).

base offense level for 212.4 grams of crack and 125.3 grams of powder under the drug guideline today is 28. U.S.S.G. § 2D1.1(c)(6) cmt. (n.(8)(D) (2020). In Criminal History Category VI, Mr. Bailey's otherwise applicable drug guideline range is 140 to 175 months. As a result, his 360-month career-offender sentence reflects a far more severe increase from the otherwise applicable guideline range. The difference between the bottom of the ordinary drug range and the career offender range was ten years in 2008; today the difference is a whopping 220 months, over *eighteen years*.

5. In December 2018, Congress passed the First Step Act to make sections 2 and 3 of the Fair Sentencing Act retroactive to offenders sentenced before its enactment, like Mr. Bailey. *See* Pub. L. No. 115-391, § 404, 132 Stat. 5194 (2018) (codified at 21 U.S.C. § 841 note) ["FSA"]. Under § 404 of the First Step Act, a person is eligible for retroactive application of the Fair Sentencing Act if he was sentenced for a "covered offense," defined as a "violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010 [] that was committed before August 3, 2010." FSA § 404(a). The Act allows "[a] court that imposed a sentence for a covered offense" to "impose a reduced sentence as if Sections 2 and 3 of the Fair Sentencing Act of 2010 (Public Law 111-220; 124 Stat. 2372) were in effect at the time the covered offense was committed." FSA § 404(b). While courts are not required to reduce any sentence pursuant to § 404, they may deny a motion only "after a complete review of the motion on the merits." FSA § 404(c).

Together, these provisions tie eligibility to the offense of conviction while entrusting sentencing courts to exercise their traditional discretion by determining whether the sentencing factors under 18 U.S.C. § 3553(a) still support the original sentence or instead warrant a reduction, and to adequately explain their reasoning. *Concepcion v. United States*, 142 S. Ct. 2389, 2396, 2402 (2022); *e.g.*, *United States v. Boulding*, 960 F.3d 774, 782-84 (6th Cir. 2020). As part of that review, just as at an original sentencing, district courts are to consider the probative information relevant to the § 3553(a) analysis the parties bring to its attention. *Concepcion*, 142 S. Ct. at 2403-05; *Boulding*, 960 F.3d at 782-84. Because Congress placed no limits on what information a court may consider in the exercise of its discretion, courts of appeals may not create bright-line rules that prevent consideration of relevant information. *Concepcion*, 142 S. Ct. at 2401-02.

6. On February 22, 2019, Mr. Bailey filed a *pro se* motion for a sentence reduction under section 404 of the First Step Act and 18 U.S.C. § 3782(c)(1)(B), which was later supplemented by appointed counsel. (*Pro Se* Motion for Reduction, R. 139; Motion for Imposition of Reduced Sentence, R. 140.) By this time, his case had been reassigned to a different judge, the Honorable Thomas K. Varlan. Mr. Bailey correctly asserted eligibility based on the fact that he was convicted and sentenced under § 841(b)(1)(A), which applied in 2008 to offenses involving 50 or more grams of crack, while under the Fair Sentencing Act, the same amount of crack triggers the penalty range under 21 U.S.C. § 841(b)(1)(B) (2019). (Motion, R. 140.) *Terry*, 141 S. Ct. at 1863. As a result, Mr. Bailey's statutory range officially changed from 20 years to life

to 10 years to life. Because his statutory maximum remains life, however, his career offender range remains 360 months to life. U.S.S.G. § 4B1.1(b)(1) (2018).

Mr. Bailey sought a downward variance from his career offender range. Through counsel and his own filings, Mr. Bailey noted his advancing age, then 44 years old, and that he had served 150 months in custody with a spotless disciplinary record. (Motion, R. 140.) He noted that he had completed drug education classes and other classes. He provided his institutional Progress Report, which showed that he had completed his GED and completed drug education. He also cited empirical data showing that the risk of reoffending "plummet[s] as age increases," and finding that the "deterrent value of long sentences is minimal." (Motion, R. 139, at 8-9 & nn. 12-13 (citing Nat'l Res. Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* 143-45, 345 (2014).) He also invoked his rehabilitation and good conduct, and traced the changing societal perceptions of draconian crack laws. (*Id.* at 6-7, 12.)

The government did not dispute that Mr. Bailey is eligible for a First Step Act reduction or that the court could vary downward from the current career offender range of 360 months to life. (Gov't Response, R. 141.) However, it urged the court to decline to exercise its discretion to reduce his sentence for the sole reason that "his guideline range remains unchanged." (*Id.* at 5.) The government otherwise "ha[d] no specific information to present in opposition to a sentence reduction." (*Id.*)

The district court denied the motion in a form order. As its reason, the court said:

> While the Court commends defendant for his incident/discipline-free history and completion of drug education classes, the Court does not find that defendant's conduct while incarcerated provides a sufficient basis for reducing defendant's sentence considering his categorization as a career offender and the fact that defendant's sentence already reflects a term of imprisonment at the low-end of the guideline range.

Pet. App. 12a.

7. Mr. Bailey appealed. He argued that the district court abused its discretion when it relied entirely on the fact that he was sentenced in 2008 at the bottom of the career offender range, without saying that it considered the factors under 18 U.S.C. § 3553(a), without addressing Mr. Bailey's empirically supported arguments that a reduction would be sufficient to serve the sentencing purposes of recidivism and deterrence, and without any explanation tied to sentencing purposes under § 3553.

Mr. Bailey emphasized in particular that when judges decline to follow the career offender guideline in 80 percent of cases in which it applies, and overwhelmingly in favor of lower sentences, a guideline sentence can no longer be fairly presumed to avoid unwarranted sentencing disparities. 18 U.S.C. § 3553(a)(6). Instead, a guideline sentence in those circumstances should be presumed to *create* unwarranted disparities absent some reason tied to other sentencing factors under § 3553(a). Because no such reasons exist in Mr. Bailey's case, he argued that the career offender sentence left intact is substantively unreasonable.

The Sixth Circuit affirmed. In a published decision, the court specifically rejected Mr. Bailey's argument that his intact career offender sentence is more fairly

presumed to create rather than avoid unwarranted sentencing disparities. The court reasoned:

> Within-Guidelines sentences such as Bailey's help reduce disparities, not create them. Indeed, this is "[t]he point of the [G]uidelines[.]" *United States v. Swafford*, 639 F.3d 265, 270 (6th Cir. 2011). Although Bailey presumably wants a below-Guidelines sentence, such a claim is "an unconventional ground for challenging a within-[G]uidelines sentence." *Id.* (emphasis in original). And arbitrarily picking and choosing sentences to push below the recommendations of the Guidelines would create a different sort of disparity, one we choose to avoid.

Pet. App. 6a-7a; *id.* at 10a (Gilman, J., concurring) ("The Guidelines themselves are meant to help maintain national uniformity in sentences, so '"by initially and correctly determining what [Bailey]'s advisory Guidelines range would be, the [district] court necessarily took account of the national uniformity concern embodied in § 3553(a)(6)"' (quoting *United States v. Houston*, 529 F.3d 743, 752 (6th Cir. 2008)).

REASONS FOR GRANTING THE PETITION

I. The lower courts improperly refuse to address certain evidence-based arguments that a guideline sentence may in fact create rather than avoid unwarranted sentencing disparities, contrary to 18 U.S.C. § 3553(a)(6).

In the First Step Act context, as at an original sentencing, "the only limitations on a court's discretion to consider any relevant materials at an initial sentencing or in modifying that sentence are those set forth by Congress in a statute or by the Constitution." *Concepcion v. United States*, 142 S. Ct. 2389, 2400 (2022). This governing principle is not new, but can be traced back to the origins of the current sentencing system. *Id.* at 2395-96, 2400. Despite this long and durable history, the lower courts have created a bright-line rule of non-reviewability about certain

sentencing disparity arguments—even when those arguments are demonstrably relevant to the § 3553(a)(6) inquiry and even when they are true as a matter of fact. The lower courts' rule is deeply embedded, intractable, and affects a large many criminal defendants who can show with the Sentencing Commission's own reports that the guideline range is more likely to create rather than avoid unwarranted sentencing disparities. This Court's intervention is needed.

A. This Court's decisions make clear that evidence of actual unwarranted disparity may in fact overcome any presumption that the guideline range already accounts for the need to avoid unwarranted disparity.

One of the factors a sentencing court must consider is "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6). In two cases decided on the same day in 2007, this Court addressed the role of § 3553(a)(6) in the advisory Guideline system, and in both cases upheld a district court's decision to impose a sentence below the applicable guideline range.

In *Gall v. United States*, 552 U.S. 38 (2007), the Court upheld the district court's decision to grant a downward variance in a drug case to 36 months' probation when the guideline range was 30 to 37 months' imprisonment. In evaluating the district court's consideration of the § 3553(a) factors, this Court found sufficient the district court's consideration of the need to avoid unwarranted sentencing disparities under § 3553(a)(6). It reasoned generally that because "avoidance of unwarranted disparities was clearly considered by the Sentencing Commission when setting the Guidelines ranges," when a judge has "correctly calculated and carefully reviewed the

Guidelines range, he necessarily gave significant weight and consideration to the need to avoid unwarranted disparities." *Id.* at 54. But that presumed consideration did not preclude the district court from considering actual evidence relevant to the case at hand. The Court also described with approval the fact that the district judge there specifically addressed the need to avoid unwarranted sentencing disparities and also the need to avoid unwarranted *similarities* as it related to Gall's co-conspirators. *Id.* at 54-55.

In *Kimbrough v. United States*, 552 U.S. 85 (2007), this Court held that it was not an abuse of discretion for the district court to categorically reject the 100-to-1 ratio built into the crack guidelines when the Sentencing Commission itself had reported that it did not serve sentencing purposes under § 3553(a) and had a disparate impact on African-Americans. *Id.* at 109-110. Regarding the need to avoid unwarranted disparities in particular, the government had argued (among other things) that "if district courts are permitted to vary from the Guidelines based on their disagreement with the crack/powder disparity, 'defendants with identical real conduct will receive markedly different sentences, depending on nothing more than the particular judge drawn for sentencing.'" *Id.* at 107 (quoting U.S. Br. at 40). The Court acknowledged the risk of differences in outcomes its holding entailed, and acknowledged that "it is unquestioned that uniformity remains an important goal of sentencing." *Id.* But the Court reminded that when it rendered the Guidelines advisory in *Booker*, "some departures from uniformity were a necessary cost of the remedy we adopted." *Id.* at 108 (citing *United States v. Booker*, 543 U.S. 220, 263

(2005)). Moreover, these difference would advance the theory of the advisory system, under which "advisory Guidelines combined with appellate review for reasonableness and ongoing revision of the Guidelines in response to sentencing practices will help to 'avoid excessive sentencing disparities.'" *Id.* (quoting *Booker*, 543 U.S., at 264).

Ultimately, the Court explained, under the "instruction" of § 3553(a)(6), district courts are required to consider what other judges are doing and how a guideline itself may create unwarranted disparities:

> [D]istrict courts *must* take account of sentencing practices in other courts and the 'cliffs' resulting from the statutory mandatory minimum sentences. To reach an appropriate sentence, these disparities *must* be weighed against the other § 3553(a) factors and *any unwarranted disparity created by the crack/powder ratio itself*.

Id. (emphasis added). While "[t]hese measures will not eliminate variations between district courts," they are the best way to ensure that judges are free to grant variances from the guidelines when warranted, which in turn will inform the Guidelines' evolutionary process as envisioned by Congress in passing the Sentencing Reform Act of 1984 and as finally allowed to function unhindered in the post-*Booker* advisory system. *Rita v. United States*, 551 U.S. 338, 350 (2007); *United States v. Rivera*, 994 F.2d 942, 949-50 (1st Cir. 1993) (Breyer, C.J.).[4]

[4] As a historical matter, the theory of the guidelines was not fulfilled in the mandatory system, under which departures were forbidden or discouraged (especially after the PROTECT Act), resulting in a system that squashed the crucial feedback loop. When this Court rendered the guidelines advisory in *Booker*, the dialogue reopened, allowing judges to impose sentences outside the guideline range in light of all the purposes and factors under § 3553(a) and to explain their rationale, which the Commission can (and has) used to make better guidelines. *See* Kate Stith & Amy Baron-Evans, Booker *Rules*, 160 U. Pa. L. Rev. 1631, 1636-81 (2012) (explaining how

Together, the Court's decisions in *Gall* and *Kimbrough* make clear that a sentence below the guideline range can just as well fully account for the need to avoid unwarranted disparities under § 3553(a)(6), so long as the district court calculated and reviewed the guideline range. The decisions make clear that a sentencing judge *must* take account of the sentencing practices in other courts across the nation, which will help to avoid unwarranted disparities because it will result in sentences more like what other judges are imposing and also because the Commission will revise the guidelines "in response to sentencing practices." The decisions make clear that a given guideline may itself create unwarranted disparities, either because it incorporates an unwarranted disparity (such as the 100-to-1 ratio) or has a disparate impact. And they make clear that if judges exercise their fully discretionary power in the advisory guideline system, including granting informed, policy-based variances from problematic guidelines, differences and similarities in outcomes will (and should) occur independent of the guideline range, and will do so until the Commission revises and improves the guideline based on judicial feedback and "advancement in knowledge of human behavior as it relates to the criminal justice process." 28 U.S.C. § 991(b)(1)(C).

In other words, taking such evidence into account will function to advance rather than undermines the working theory of the advisory Guidelines system. Importantly, neither *Gall* nor *Kimbrough* suggested that no matter the evidence or

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Booker has proven to be the best "fix" for the mandatory system's most intractable problems, including unwarranted disparity).

changed circumstances, and no matter the guideline or its known failings, a district court that imposes a within-range sentence has necessarily and always fulfilled its duty to consider § 3553(a)(6) simply by correctly calculating that range.

B. The Sixth Circuit is wrong to persist in applying a categorical presumption that a career offender sentence necessarily avoids unwarranted disparity, when that presumption is demonstrably untrue.

The Sixth Circuit has created a functional rule of non-reviewability for disparity arguments in the context of within-range sentences, the effect of which is most stark when it comes to career offender sentences under U.S.S.C. § 4B1.1. In reviewing such sentences, the Sixth Circuit adheres to a blindered view of § 3553(a)(6) that ignores judicial practice, on-the-ground reality, the reasoning of *Gall* and *Kimbrough*, and the animating theory of the advisory system. Instead of instructing sentencing judges to consider what other judges are actually doing in similar cases—as this Court said they "must" when evaluating the need to avoid unwarranted sentencing disparities—the Sixth Circuit requires them (and reviewing panels) to uncritically and always presume that the district court has fully accounted for the need to avoid disparity simply by calculating the guideline range. Pet. App. 6a-7a.[5]

[5] Relatedly, the Sixth Circuit has also announced that sentencing judges need not consider *at all* existing Sentencing Commission data showing what other judges are doing in similar case, regardless of § 3553(a)(6) and regardless if that data show that a guideline sentence would be unlike the majority of sentences imposed. *See United States v. Hymes*, 19 F.4th 928, 935, 937 (6th Cir. 2021) (explaining that it has never "required a district court to consult the Sentencing Commission's collected data before issuing a sentence," and in any event, the advisory guideline range already addresses "the statutory purpose of combatting disparity"); *id.* ("[W]hen a district court imposes a within-Guidelines or below-Guidelines sentence, such disparities are ordinarily accounted for."); Pet. App. 10a (Gilman, J., concurring).

The Sixth Circuit persists in this approach to within-range sentences no matter the evidence or circumstances—invoking it to summarily reject arguments even when judges do not follow a given guideline in the large majority of cases in which it applies, and even when the Sentencing Commission itself recognizes that the guideline does a poor job of serving sentencing purposes in mine-run cases.[6]

The career offender guideline perfectly illustrates the problem with blindly treating the guideline range itself as the beginning and end of the § 3553(a)(6) inquiry whenever a judge imposes a within-guideline sentence. In 2016, several years after Mr. Bailey was sentenced, the Sentencing Commission reported to Congress that courts were declining to follow the career offender guideline in the large majority of "mixed category" *c*ases like Mr. Bailey's, which comprise over sixty percent of career offender cases. *See* U.S. Sent'g Comm'n, *Report to the Congress: Career Offender Sentencing Enhancements* 27, 28 fig.8 (2016) ["2016 Career Offender Report"] (describing the "mixed category" as "encompassing all . . . career offenders who have either a drug trafficking or violent instant offense of conviction and any combination

[6] The Sixth Circuit does not necessarily apply this rule of nonreviewability when it comes to non-guideline sentences. In some cases, the court has considered national sentencing data when reviewing sentences *outside* the guideline range. For example, in *United States v. Boucher*, 937 F.3d 702 (6th Cir. 2019), it held that a sentence below the guideline range in an assault case was substantively unreasonable (on the government's appeal) based in part on national sentencing data showing that sentences for assault are generally much higher. *Id.* at 713; *see also United States v. Perez-Rodriguez*, 960 F.3d 748, 757-58 (6th Cir. 2020) (relying in part on sentencing data to reverse an above-range sentence as substantively unreasonable). More recently, however, the court has clarified that its suggestion in those cases that sentencing data should be considered in the disparity inquiry was merely "hortatory" and does not change the court's first-line rule of nonreviewability of data-based disparity arguments for within-range sentences. *Hymes*, 19 F.4th at 935-36.

of violent and/or drug trafficking prior offenses").[7] For offenders in this large "mixed category," the rate of within-range sentences was less than one-quarter (23.5 percent), with judges sentencing below the range in 75.8 percent of cases. *Id.* at 35 fig.15. And the average below-range sentence reflected a significant reduction, at 29.6 percent below the career offender guideline minimum. *Id.* at 34 fig.13.[8]

Four years later, when Mr. Bailey moved for a sentence reduction in light of prevailing norms, in 2020, the career offender guideline was even less influential. In fiscal year 2020, career offenders as a whole were sentenced within the career offender guideline range in just 19.6% of all those deemed career offenders, and that includes those whose status depended entirely on crimes of violence. U.S. Sent'g Comm'n, *Quick Facts – Career Offenders FY2019*, at 2 (2020). Virtually all the rest received below-range sentences, and by a significant reduction. *See id.* So whether on the defendant's request, the government's request, or the court's own initiative, these below-range sentences vividly showed that the career offender guideline is greater than necessary in the mine-run career offender case.[9]

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[7] Available at https://www.ussc.gov/research/congressional-reports/2016-report-congress-career-offender-enhancements (last visited August 4, 2022).

[8] "Drug trafficking only" offenders (having no violent convictions at all) were similarly sentenced within the range in only 22.5% of cases, while their average non-government-sponsored reduction was 32.7% below the career offender guideline minimum. 2016 Career Offender Report, *supra*, at 34 fig.13, 35.

[9] The rate of within-guideline sentences remains exceedingly low, most recently reported at 19.7%. *See* U.S. Sent'g Comm'n, *Quick Facts – Career Offenders FY2021*, at 2 (2022).

Also in the 2016 Career Offender report, the Commission provided information to Congress showing that those like Mr. Bailey who are classified as career offenders do not reoffend at a rate greater than those sentenced under the ordinary drug guideline. Specifically, the Commission reported that career offenders with a mixed criminal history of both drug and violent offenses, like Mr. Bailey, who reentered the community in 2004 through 2006 were rearrested at an average rate of 69.4%. *See* 2016 Career Offender Report, *supra*, at 40 & fig.19. Importantly, based on the same recidivism study, the Commission reported elsewhere that drug offenders in Criminal History Category VI, like Mr. Bailey, *already* have a rate of rearrest of 77.1%. U.S. Sent'g Comm'n, *Recidivism Among Federal Drug Trafficking Offenders* 14, 17 (2017). In other words, the data strongly support the conclusion that the longer range automatically produced by the career offender guideline does not better reflect Mr. Bailey's risk of reoffending, or better advance the purpose of protecting the public. Rather, the punishment it recommends overstates his risk of reoffending, and by *eighteen years*—embodying an unwarranted disparity between him and those whose risk of reoffending is not different from his.

The Commission has not yet revised the career offender guideline to reflect current sentencing practices or current knowledge regarding recidivism as it relates to this largest cohort of drug-trafficking career offenders. It has up to now deferred to Congress, believing itself hamstrung by the directive at § 944(h) and recommending that Congress remove entirely from § 994(h)'s coverage those offenders whose status depends solely on current and prior drug trafficking offenses

and also suggesting that penalties might reasonably be lowered in some graduated form for drug trafficking offenders with predicate crimes of violence. 2016 Career Offender Report, *supra*, at 8, 43 ("[T]he sentencing outcomes for offenders in the mixed pathway may also support Congressional consideration of a more graduated approach for these career offenders."). In the meantime, the Commission has done some needed surgery to the guideline, such as when it deleted the residual clause and eliminated burglary as a predicate offense in 2016. But the guideline still recommends sentencing ranges far greater than necessary in most cases in which it applies, as shown by its own reports of national sentencing practices and its recidivism data showing that the guideline does not better predict reoffending than the ordinary criminal history category.

Indeed, as noted, the career offender guideline today is one of the least influential guidelines of all, with the difference between the average guideline minimum and the average below-range sentence imposed continuing to widen—a situation that will not change until the guideline is amended. *See* U.S. Sent'g Comm'n, *The Influence of the Guidelines*, *supra*, at 55, 58 (where judicial discretion can be assessed, "the percentage difference began widening during the Gall Period and continued to increase into the Post-Report Period and . . . does not appear to be slowing"); *Quick Facts – Career Offenders FY2021*, *supra*, at 1 (reporting 19.7% rate of within-range sentences).

The reality, then, is that the career offender guideline does not exemplify the Commission's "characteristic institutional role" or the theory of the advisory

guideline system. *Kimbrough*, 552 U.S. at 109-10. When, as now, judges impose below-range sentences in 80 percent of career offender cases, a sentence within the career offender range is the truly unusual sentence. It is *unlike* most sentences imposed in cases involving similar offenses and similar histories, and categorically overstates the risk a person will reoffend. Until the career offender guideline is amended to better reflect current knowledge and judicial practice, the only proper solution in the advisory system is for judges to consider that knowledge and practice when considering the need to avoid unwarranted disparities, as the Court in *Kimbrough* made clear. 552 U.S. at 96-100, 109-10 (holding that courts are free to disregard the guideline, regardless of congressional action, based on Commission reports).[10]

The Sixth Circuit, however, refuses to acknowledge the reality that a guideline sentence may in fact be more likely than not to create unwarranted disparities, such as when the guideline is not followed in large majority of cases or when empirical data reveal that it categorically embodies unwarranted disparities when it comes to risk of reoffending. Its willful blindness is so deeply embedded that it will refuse to consider evidence of unwarranted disparity "even if [it] is true" that a defendant's

[10] In truth, the career offender guideline has from its inception operated as a harsh and categorical enhancement that fails to serve sentencing purposes in numerous respects, including by incorporating unwarranted disparities and overstating the risk of reoffending, especially for drug offenders. *See, e.g.*, *United States v. Newhouse*, 919 F. Supp. 2d 955, 967-81 (N.D. Iowa 2013) (chronicling the history and development of the career offender guideline and identifying its failure to serve sentencing purposes in numerous respects). The advisory guideline system finally freed judges from its harsh constraints, allowing them to impose sentences that better serve sentencing purposes in the mine-run case.

within-guideline sentence is higher than those of similarly situated defendants. *United States v. Page*, No. 21-5730/5731, 2022 U.S. App. LEXIS 15288, at *8-9 (6th Cir. June 1, 2022); *see also, e.g.*, *United States v. Pope*, No. 21-1054, 2022 U.S. App. LEXIS 15852, at *14 (6th Cir. June 8, 2022) ("[T]o the extent the [2016 Career Offender Report] purportedly shows, as Pope urges, that his within-Guidelines sentence creates 'unwarranted sentence disparities,' § 3553(a)(6) customarily 'is "an improper vehicle" for challenging a within-Guidelines sentence." (quoting *Hymes*, 19 F.4th at 937)).

The Sixth Circuit's strangled view of § 3553(a)(6)—operating as a functional rule of non-reviewability—improperly prevents criminal defendants from making relevant arguments based on manifestly relevant information and current reality, and interferes with full consideration of all the § 3553(a) factors. *Concepcion*, 142 S. Ct. at 2400-02.

C. Other circuits similarly rebuff evidence-based inquiries when evaluating § 3553(a)(6) in the context of within-range sentences.

Other circuits similarly persist in the view that the guideline range itself necessarily avoids unwarranted disparities, no matter its manifest lack of influence, failure to serve sentencing purposes in most cases in which it applies, or the presence of unexplained differences between similarly situated offenders. The Second Circuit, for example, continues to reject disparity arguments when the given guideline is not followed in the majority of cases, repeating without critical analysis that its "concern about unwarranted disparities is at a minimum when a sentence is within the Guidelines range." *United States v. MacCallum*, 821 F. App'x 11, 14 (2d Cir. 2020)

(regarding the fraud guideline at § 2B1.1) (citing *United States v. Irving*, 554 F.3d 64, 76 (2d Cir. 2009)).

The Seventh Circuit waved away a claim of unwarranted disparity when a judge denied First Step Act motions for two defendants serving within-range sentences while another judge granted First Step Act motion for their co-conspirators, repeating uncritically that "a within-Guidelines sentence necessarily accounts for the need to avoid unwarranted disparities." *United States v. Clay*, __ F.4th __, 2022 WL 2965670, at *4 (7th Cir. July 27, 2022) (Nos. 21-3002, 21-3003) (citing *Gall*, 552 U.S. at 54); *see also United States v. Shamah*, 624 F.3d 449, 460 (7th Cir. 2010) ("A within-guidelines sentence necessarily gives weight and consideration to avoiding unwarranted sentencing disparities."); *United States v. Shrake*, 515 F.3d 743, 748 (7th Cir. 2008) (Easterbrook, J.) ("[I]t is pointless for a defendant whose own sentence is within the Guidelines" to claim that his sentence creates unwarranted disparities, "for the ranges are themselves designed to treat similar offenders similarly." (citation omitted)).

The Tenth Circuit recognizes that § 3553(a)(6), "[o]n its face, . . . *requires* a district court to take into account only disparities *nationwide* among defendants with similar records and Guideline calculations," *United States v. Martinez*, 610 F.3d 1216, 1228 (10th Cir. 2010) (internal quotation marks omitted) (first emphasis added), but gives this facial reading no meaningful force when it comes to within-range sentences. It, too, will summarily reject a claim that a sentence is substantively unreasonable in light of nationwide data showing a given guideline is not followed in most cases in

favor of lower sentences, invoking instead the unexamined mantra that "'a sentence within a Guideline range necessarily complies with § 3553(a)(6).'" *United States v. Razo Sicairos*, 678 F. App'x 774, 776 (10th Cir. 2017) (regarding the methamphetamine guideline) (quoting *United States v. Franklin*, 785 F.3d 1365, 1371 (10th Cir. 2015) (regarding the guideline for distribution of child pornography)). The court's rationale, articulated in *Franklin*, is that "[n]either the Supreme Court nor our court has ever suggested that use of the guidelines can create a nationwide disparity in sentences involving similarly situated offenders." *Id.* at 1371. However, in *Kimbrough* this Court suggested just that. *Kimbrough*, 552 U.S. at 108.

The only circuit that has come close to relying on national sentencing data as relevant and useful to conclude that a within-range sentence is substantively unreasonable due to unwarranted disparity is the Fourth Circuit. In *United States v. Freeman*, 992 F.3d 268, 279 (4th Cir. 2021), a panel of that court took judicial notice of and relied on national sentencing data showing that the defendant's sentence for opioid distribution was far greater than the average sentences for all those convicted of opioid-related crimes involving similar quantities, with the average including those with more serious records and whose offenses involved weapons (unlike the defendant). *Id.* at 279-80.

Judge Quattlebaum dissented, expressing as "perhaps most concerning," that the majority's holding "seems to require district courts to conduct their own quantitative inquiries to supplant the data-driven studies that underlie the Sentencing Guidelines." *Id.* at 282 (Quattlebaum, J., dissenting). Judge Quattlebaum

opined that the judiciary should not be deploying its own statistical analyses, but should instead defer generally to the Commission's presumed use of statistical analyses in its "institutional role" as described in *Kimbrough*, which is "to 'base its determinations on empirical data and national experience, guided by a professional staff with appropriate expertise.'" *Id.* at 289 (quoting *Kimbrough*, 552 U.S. at 108-09). Because the defendant's sentence "was at the lowest end of the Guidelines range," Judge Quattlebaum reasoned, her sentence "is not only presumed reasonable, it is also hardly likely to create a significant disparity because it is at the lowest point in the Guidelines range."[11]

The Fourth Circuit's holding in *Freeman* on disparity was short-lived, however, as the full Fourth Circuit granted *en banc* rehearing and ultimately decided the case on a different ground, without addressing the disparity issue. *United States v. Freeman*, 24 F.4th 320, 332 (4th Cir. 2022) (*en banc*). With that, and as described above, the lower courts remain in willful ignorance of the evidence-based reality that a guideline sentence may in fact create or embody unwarranted disparity. While some have considered sentencing data as grounds for reversing as substantively unreasonable sentences *outside* the guideline range, they abandon data and evidence when it comes to within-range sentences. Instead, they categorically and uncritically

[11] At the same time, Judge Quattlebaum acknowledged that statistics used with "extreme care" could support reversal in some cases, citing the Fourth Circuit's reversal of a *below-range* sentence on the government's appeal, in *United States v. Zuk*, 874 F.3d 398 (4th Cir. 2017). In *Zuk*, the court held that a "substantial" disparity, as shown by Commission sentencing data (not by the guideline range itself), served as grounds for finding the below-range sentence substantively unreasonable. *Id.* at 412.

deny defendants judicial consideration of evidence highly relevant to a § 3553(a) factor. Their special and inflexible view of § 3553(a)(6) as it relates to guideline sentences has no source in any statute or in the Constitution, and interferes with the guideline feedback process by which judicial practice is a functional measure for avoiding unwarranted sentencing disparities.

Until this Court steps in, the lower courts will persist in wrongly cutting off evidence-based inquiries under § 3553(a)(6) in the context of within-range sentences.

II. This case presents an excellent vehicle to resolve this important and recurring question.

This case presents an excellent vehicle to resolve this important and recurring question. Jesse Bailey was originally sentenced at a time when judges in the Sixth Circuit had been instructed that any variance from a career offender sentence would be subject to heightened scrutiny and likely reversal, virtually ensuring he would be sentenced within the range without full consideration of the § 3553(a) factors. By the time he filed his First Step Act motion for renewed consideration of his career offender sentence, sentencing judges free from such constraints sentenced hardly 20 percent of those technically deemed career offenders within the guideline range, with virtually all the rest receiving reductions. During that same period, Mr. Bailey has engaged in successful rehabilitative efforts and conducted himself commendably. As he stood before the district court in 2020, Mr. Bailey's 360-month career offender sentence had become the highly unusual sentence, one that the Commission's own studies show categorically overstates his risk of reoffending.

Under these circumstances, the chances that the eighteen-year career-offender enhancement in Mr. Bailey's case reflects true unwarranted disparity are quite real, raising a serious, evidence-based question whether his guideline sentence creates rather than avoids unwarranted sentencing disparities. This same question is implicated in every First Step Act motion involving a career offender sentence, and it is implicated every time a person is sentenced within the career offender range today—which typically occurs in over 200 cases each fiscal year. *See Quick Facts – Career Offenders FY2021*, *supra*, at 1.

Finally, Mr. Bailey at sentencing and in his First Step Act motion argued that the career offender range was longer than necessary to serve sentencing purposes, and the panel majority below directly addressed his disparity arguments on the merits, holding that actual evidence made available by the U.S. Sentencing Commission cannot overcome the presumption that the guideline range itself automatically, always, and necessarily accounts for the need to avoid sentencing disparities.

This issue is cleanly presented here. It will not resolve itself. The Court's intervention is needed.

CONCLUSION

The petition for a writ of certiorari should be granted.

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