NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2022

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UNITED STATES OF AMERICA,

Respondent,

vs.

MARQUIS D. BROWN,

Petitioner.

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

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QUESTION PRESENTED FOR REVIEW

1. WHETHER THE DISTRICT COURT ERRED BY IMPOSING AN UNLAWFUL SENTENCE CONTRARY TO THE MANDATES OF § 3553(a) AND §3553(f)(5) WHICH PRECLUDE USE OF INFORMATION DISCLOSED THROUGH THE SAFETY VALVE PROCEDURE TO ENHANCE THE SENTENCE.

Prefix.

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

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The Petitioner, MARQUIS D. BROWN, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on August 2, 2022.

OPINION BELOW

On August 2, 2022, the Court of Appeals filed a published opinion affirming

Mr. Brown's sentence. A copy of the decision is attached to this petition as Appendix "A".[1]

JURISDICTION

On August 2, 2022, the court of appeals issued an opinion affirming the conviction and sentence. This appeal arises from the 78 month sentence imposed by the district court on October 19, 2020. Mr. Brown was charged with one count of importation of a controlled substance, in violation of 21 U.S.C. §§ 952 and 960, in the United States District Court for the Southern District of California. The district court had original jurisdiction pursuant to 18 U.S.C. § 3231. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

WHY GRANTING OF WRIT IS OF VITAL IMPORTANCE

This case arises from the sentencing after guilty plea to the simple offense of importation of a controlled substance. Mr. Brown contends that it was error to impose a 78-month sentence on a 27-year-old with no prior record, when the sentencing court used information only disclosed through the safety valve procedure as aggravating factors. The probation officer recommended far less, the defense argued for far less, and even the government recommended a lower sentence. The main aggravating facts focused on by the court was the information revealed through the safety valve proffer,

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1/ No other petitioner is involved in this petition.

and under the newly enacted 18 U.S.C. §3553 (f)(5), this information is prohibited from being used to increase the sentence.

The facts set forth in the probation report and sentencing material showed that, 1) Mr. Brown was a first time offender; 2) had recently had his first child born; 3) had expressed remorse, 4) was a low-level courier; and 5) a sentence of 42 months was similar or greater than other sentences imposed on similarly situated defendants. Despite this, the court relied heavily on the information provided through the safety valve proffer, and imposed a much higher sentence.

Congress enacted the amendment to 18 U.S.C. §3553(f) as part of the First Step Act of 2018, with the obvious intent to increase the number of sentencing reductions under the safety valve, and to not penalize a defendant who discloses incriminatory information while qualifying for the safety valve.

Here, the lower court significantly erred by holding that the information disclosed during the safety valve can be used to prejudice the defendant, just as long as the otherwise applicable sentencing guidelines call for a higher range. Moreover, the lower court further misconstrued the law to allow the sentencing court to give special weight to the sentencing guidelines, contrary to *United States v. Booker*, 543 U.S. 220 (2005), which mandates the sentencing court equally consider all the factors in §3553(a). The petition should be granted for these reasons.

STATUTORY PROVISIONS INVOLVED IN THIS CASE

18 U.S.C. § 3553:

(a) Factors to be considered in imposing a sentence - The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider -

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed -
>
> > (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
> > (B) to afford adequate deterrence to criminal conduct;
> > (C) to protect the public from further crimes of the defendant; and
> > (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.
>
> ...

(f) Limitation on Applicability of Statutory Minimums in Certain Cases.

> ...
>
> (5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and

> evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.
>
> Information disclosed by a defendant under this subsection may not be used to enhance the sentence of the defendant unless the information relates to a violent offense.

STATEMENT OF THE CASE

On January 2, 2020, the government filed a one-count Information in the United States District Court for the Southern District of California, charging Marquis Donte Brown with importation of a controlled substance, in violation of 21 U.S.C. §§ 952 and 960. [CR 18]. Mr. Brown waived time for the preliminary hearing [CR 14], waived indictment [CR 19], and did not file any substantive motions. On January 28, 2020, Mr. Brown consented to having his Rule 11 plea taken before Hon. Mag. Judge Goddard [CR 30], and Magistrate Goddard conducted Mr. Brown's change of plea hearing, and Mr. Brown pled guilty pursuant to a plea agreement. [CR 33].

The Probation Office filed Mr. Brown's PSR on March 13, 2020. [CR 38]. The defense filed Mr. Brown's Letters in Support of Sentencing on Oct 9, and October 12, 2020. [CR 48,49]. The government filed its Sentencing Summary Chart as to Mr.

Brown on October 8, 2020. [CR 47]. The Probation Office filed an Addendum to the PSR (PSR-ADD) on October 6, 2020. [CR 46].

On October 19, 2020, the district court sentenced Mr. Brown to 78 months custody, followed by a five-year term of supervised release. [CR 50]. The court did not impose a fine, but did impose a $100 special assessment. [CR 50].

On October 27, 2020, Mr. Brown filed a timely notice of appeal regarding his sentence. [CR 53.] Mr. Brown appealed, and on August 2, 2022, the Ninth Circuit Court of Appeal denied the appeal finding that the district court did not err, and that the sentence was reasonable. This petition follows.

STATEMENT OF FACTS

1. The Offense

On December 8, 2019, Mr. Brown applied for entry at the Calexico, California Port of Entry in a 2015 Dodge Durango. [PSR 3]. Mr. Brown was driving the car, and his wife and his wife's child were passengers in the car. The car was sent to secondary inspection, and a subsequent search of the vehicle revealed packages hidden in the quarter panels of the vehicle. [PSR 3]. The packages turned out to weigh approximately 30 kilograms and contained methamphetamine. [PSR 3]. Mr. Brown admitted in his plea that he knew there were controlled substances hidden in

the car. [PSR 5]. The case agent believed that the defendant was low-level courier. [PSR 4].

2. Presentence Report.

Probation filed the presentence report ("PSR") for Mr. Brown on March 13, 2020. [CR 38]. There, Probation noted Mr. Brown's acknowledgment of wrong-doing in getting involved with this offense, how he realized that he would be separated from his family, and that he should not have participated in the offense. [PSR 5].

Probation noted that Mr. Brown was a low level drug/money mule. [PSR 4]. Probation also noted that Mr. Brown had a functioning support system and warranted a downward variance. [PSR 14]. Specifically, the report noted that Mr. Brown's wife was about to have a child, and that Mr. Brown supported his stepson as well. [PSR 14]. The probation officer recommended a sentence of 42 months which was, "in line with other custodial sentences seen in this district for similarly situated defendants." [PSR 15]. This recommendation was a variance down from the advisory guideline range of 108-135 months.

3. The Parties' Recommendations.

Mr. Brown filed his Sentencing Chart on October 8, 2020. [CR 46]. While Mr. Brown agreed that the offense level and range was that as indicated by the probation report, he joined the probation officer's recommendation for a variance to 42 months,

noting that Mr. Brown was 27-year-old first time offender, he was a new father, and showed remorse. The letters filed with the court for sentencing also showed that growing up, "Marquis never got into trouble, joined gangs, or broke the rules. He had good grades and did well in school." Moreover, he is a "hard worker" and "is compassionate on others and will take the shirt off his back in a split second and give to a stranger who is in need." His step-father noted, "I can tell you that he made the biggest mistake of his life and has hurt us all including himself. He knows that too and has turned his life around." Mr. Brown's first child was born on September 30, 2020..

The government filed it sentencing summary chart on October 8, 2020, and therein noted the advisory guideline range of 108-135 months, and recommended a downward variance to a sentence of 71 months custody. [CR 47].

4. The Sentencing Hearing.

On October 19, 2020, Mr. Brown proceeded to sentencing on his guilty plea. [CR 50]. The court noted that the real issue was the difference in the recommended variance.

The parties acknowledged that through the safety valve disclosure to the government, Mr. Brown had admitted that he previously made several successful smuggling runs. The sentencing court focused on this fact, suggesting that the

downward variance recommended by the probation officer would have materially changed because of this, but the defense noted that, "probation officers routinely recommend much lesser sentences in this district, in this type of case, even when the individual admits at the time of the arrest that it was the second or third time."

The defense noted that the case agent had opined that Mr. Brown was a low-level courier. In addition, Mr. Brown apoligized for his actions, explained that he had learned his lesson, and that he was a new father.

The court questioned both parties about the facts that had been revealed during the safety valve proffer. The court then repeatedly noted the facts about prior crossings revealed during the safety valve process was an aggravating factor, and imposed a sentence of 78 months.

ARGUMENT

THE COURT SHOULD GRANT THE WRIT IN ORDER TO CLARIFY THE MEANING OF THE RECENTLY ENACTED §3553(f)(5).

Although Mr. Brown played a very limited role in the overall offense, was only 27 years old, was a first time offender, had no prior law-enforcement contacts, had admitted guilt early in the proceedings, had a work history, and showed remorse, the district court imposed a sentence of 78 months, which was double the normal sentence for similarly situated defendants, and was even higher than the government's recommendation. The ultimate result for Mr. Brown was that he received a 78-month sentence based on conduct that routinely results in a minor role reduction and a *far* lower sentence in the Southern District of California, at least in part because the sentencing court used the information provided through the safety valve as aggravating factors. This was contrary to 18 U.S.C. §3553(f)(5).

A. THE COURT SHOULD GRANT THE WRIT IN ORDER TO PROPERLY UTILIZE THE NEWLY ENACTED §3553(f)(5), AND PRECLUDE THE SENTENCING COURT FROM USING INFORMATION DISCLOSED THROUGH THE SAFETY VALVE AS AN AGGRAVATING FACTOR IN IMPOSING THE SENTENCE.

The first reason the Court should grant the writ is because the sentencing judge relied on information provided through the safety valve as aggravating factors. However, under 18 U.S.C. § 3553(f)(5), "Information disclosed by a defendant under this subsection may not be used to enhance the sentence of the defendant unless the information relates to a violent offense." Here the offense was non-violent, so the court should not have used the information disclosed under the safety valve provision to enhance the sentence.

As the panel decision noted, "Neither our circuit nor any other court has specifically interpreted enhance in this context." (Slip. Op. P. 7).

The fatal flaw with the lower court's reasoning of this issue of first impression is that it directly contradicts the intent of the First Step Act of 2018 amendment to §3553(f)(5), to increase the use of the safety valve reduction by not using information disclosed by the defendant to prejudice the defendant at sentencing. The lower court's opinion allows the sentencing court to utilize this protected information as an aggravating factor, which will lead to a higher sentence than that which would

otherwise be imposed.

In this case it is clear from the sentencing hearing that the court focused on the information disclosed during the safety valve proffer as an aggravating factor. For example, the court said, "and it guides my judgment here that he'd done in on three occasions before. " As well, the court in explaining why the probation officer recommendation was too low, "its just – it would be disingenuous exercise for me to do that here, given that we now know that he's smuggled drugs on prior occasions."

The amendment to §3553(f)(5) adding the language that information disclosed through the safety valve process should not be used to enhance the sentence, was clearly intended to facilitate full disclosure and at the same time not punish a defendant for being honest. This mandate was violated in this case, when the sentencing court used the safety valve information as an aggravating factor in determining the final sentence. This alone is a basis to remand for granting the writ.

There can be little dispute that Mr. Brown received a higher sentence because the sentencing court considered the protected information as aggravating factors. As noted by the probation officer and the defense, the sentence here was wildly out of line compared to sentences of similarly situated defendants in the district. The probation officer noted, "despite the aggravating factors in this case, the undersigned still believes a variant sentence would be appropriate in order the address the

sentencing disparities in this district while at that same time maintain respect for the law and provide just punishment." [PSR 14]. Furthermore, "the undersigned believes a variant sentence of 42 months' custody would be in line with other custodial sentences seen in this district for similarly situated defendants." [PSR 15].

A 78 month sentence for a low-level courier is over double the average sentence in the Southern District of California. The government recently asked the court in San Diego to take judicial notice of sentencing statistics showing that even when the amount of the drugs involved implicated the 10 year minimum mandatory, that normal sentences were far below that. The government noted that, "the mean and median sentences for drug trafficking crimes imposed in the Southern District of California during fiscal year 2020 were 30 months and 38 months in custody, respectively." (See, United States' Motion to Request the Court Take Judicial Notice, DKT 152, Case No 19-CR-04034-TWR; filed with this appeal)

The government in this pleading was trying to take the sting out of the cross-examination of a government cooperating witness, by showing that the fact that the cooperating witness who received 37 months, which was far less than the 10 year minimum mandatory sentence, had actually received a sentence that was a regularly imposed sentence, and was not receiving anything more than what was "within the **well-known** norm for sentences in drug trafficking cases in this District during the

same approximate time period." *Id*., at page 2 (emphasis added).

Here, by framing the issue as one of a sentence reduction, the lower court misapplies the prohibition of this newly enacted part of §3553(f)(5), and in reality allows the use of this protected information to enhance the sentence.

In an analogous situation, if the guideline range was 108 - 135 months, and the sentencing court imposed a sentence of 78 months, and the court relied on the defendant's race or gender as an aggravating factor, there would be doubt that the sentence would be reversed. The fact that the 78 month sentence was below the guideline range would be of no import.

Nothing in the probation report or sentencing pleadings justified the sentencing court imposing such a high sentence, other than the information disclosed through the safety valve procedure. Because the lower court's interpretation of this new law, without guidance from this Court, is contrary to the language and intent of this provision of the First Step Act of 2018, the Court should grant the writ.

B. THE COURT SHOULD GRANT THE WRIT TO CLARIFY THAT IN IMPOSING SENTENCE IN POST-*BOOKER* SENTENCING HEARINGS, THAT THE GUIDELINES ARE NOT GIVEN ANY SPECIAL WEIGHT OVER THE OTHER STATUTORY PROVISIONS IN 3553(a).

The decision of the Ninth Circuit is also fatally flawed because the premise of the panel decision is that use of the protected information can only be considered to enhance the sentence if the sentence results in a higher sentence than what the sentencing guidelines would otherwise call for. This is contrary to §3553(a) and to *United States v. Booker*, 543 U.S. 220 (2005). In other words, the sentencing guidelines should not receive some special weight and be the basis to determine whether the other sentencing factors were properly considered.

In *Booker*, the Supreme Court held that *Blakely v. Washington*, 542 U.S. 296 (2004) applied to federal sentencing. 543 U.S. at 243. In doing so, the Court held that the Guidelines violated a defendant's Fifth and Sixth Amendment rights because they permitted a sentencing court to increase a sentence based upon the judge's determination of a fact that was not found by the jury or admitted by the defendant. Due to the *Booker* decision, the United States Sentencing Guidelines are now advisory. *See* 543 U.S. at 245.

The remedial majority in *Booker* held that district courts must still consider the guideline range, 18 U.S.C. § 3553(a)(4)-(5), in addition to other directives set forth

in § 3553(a). Thus, under *Booker*, courts are to consider the Guidelines as *one of a number* of sentencing factors:

> Without the "mandatory provision," the Act nonetheless requires judges to take account of the Guidelines together with other sentencing goals. *See* 18 U.S.C. § 3553(a) (Supp. 2004). The Act nonetheless requires judges to consider the Guidelines "sentencing range established for . . . the applicable category of offense committed by the applicable category of defendant,"§ 3553(a)(4), the pertinent Sentencing Commission policy statements, the need to avoid unwarranted sentencing disparities, and the need to provide restitution to victims, § 3553(a)(1), (3), (5)-(7) (main ed. and Supp.2004). And the Act nonetheless requires judges to impose sentences that reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence, protect the public, and effectively provide the defendant with needed educational or vocational training and medical care. § 3553(a)(2).

Booker, 543 U.S. at 259-60.

The court is not limited to consideration of the length of the sentence alone on appeal. *United States v. Crosby*, 397 F.3d 103, 114 (2d Cir. 2005) (remanded on other grounds in *United States v. Lake,* 419 F.3d 111, 113 n. 2 (2d Cir. 2005)). Rather, courts can review the "factors evaluated and the procedures employed by the district court in reaching its sentencing determination. Thus, [a court] may conclude that a sentence is unreasonable when the district judge fails to 'consider' the applicable Guideline range or neglects to 'consider' other factors listed in 18 U.S.C. § 3553(a)." *United States v. Webb*, 403 F.3d 373, 383 (6th Cir. 2005). Moreover, the Guidelines are only one factor to be considered in weighing whether a sentence will

achieve the goals set by 18 U.S.C. § 3553(a)(2). *Kimbrough v. United States*, 552 U.S.85, 90-91(2007). The sentence is to be "individualized" to take into account the unique circumstances of the commission of the offense as well as the uniqueness of each person who stands before the court for sentencing. *Gall v. United States*, 522 U.S. 38, at 50-51 (2007).

Section 3553(a) states that a sentencing court "shall impose a sentence sufficient, *but not greater than necessary*, to comply with the purpose" set forth in § 3553(a)(2). 18 U.S.C. § 3553(a)(1) (emphasis added).

As stated in Justice Scalia's dissenting opinion in *Booker*, § 3553 "provides no order of priority among all [its] factors." *Booker,* 543 U.S. at 304-05. The overriding principle at sentencing, however, became the first sentence of section 3553(a) – that district courts impose a sentence that "is sufficient but not greater than necessary." *Id.*; *see also Kimbrough v. United States*, 552 U.S. 85, at 100-01 (2007).

By reviving the primary sentencing mandate of section 3553(a), *Booker* requires courts to impose only the minimally sufficient sentence to achieve the statutory purposes of punishment—justice, deterrence, incapacitation, and rehabilitation. 18 U.S.C. § 3553(a) ("The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in 18 U.S.C. § 3553(a)(2)"). *Booker* set forth a limit on the length and type of sentence that may

be imposed. This provision is not simply a factor to be considered in determining the appropriate sentence; it represents a cap above which the district court is statutorily prohibited from sentencing. *United States v. Foreman,* 436 F.3d 638, 643 n.1 (6th Cir. 2006) ("[A] district court's job is not to impose a 'reasonable' sentence. Rather, a district court's mandate is to impose 'a sentence sufficient but not greater than necessary, to comply with the purposes' of section 3553(a)(2).") (remanded on other grounds in *United States v. Young*, 580 F.3d 373 (6th Cir. 2009)); *see also United States v. Denardi,* 892 F.2d 269, 276-77 (3d Cir. 1989) (Becker, J., concurring in part, dissenting in part) (same). Thus, "[t]he [sentencing] judge may determine . . . that, in the particular case, a within-Guidelines sentence is 'greater than necessary' to serve the objectives of sentencing." *Kimbrough*, 552 U.S. at 85(upholding district court's sentence in a crack cocaine case which was four and a half years less than the low end of the applicable guideline range) (citation omitted). "Imposition of a sentence greater than necessary to meet [the purposes of § 3553] is therefore a violation of section 3553(a) appealable under subsection 3742(a)(1) and reversible under subsection 3742(f)(1)." *Denardi*, 892 F.2d at 276-77 (Becker, J., concurring).

Here, the lower court's opinion insulates the improper use of the protected information merely because the sentence was ultimately lower than the guideline range. The primary mandate of sentencing is to impose a sentence sufficient but not

greater than necessary, and if aggravating factors that are statutorily prohibited from being used as aggravating factors are used in any way to impose a sentence longer than is otherwise deemed necessary, then this primary mandate is violated. In the analysis of what §3553(f)(5) actually means, and how it should be applied, the court should not allow the guideline range alone to insulate the violation of the mandate of §3553(f)(5).

Because the lower court's decision was contrary to the mandates of §§ 3553(a), and 3553(f)(5), and the Ninth Circuit opinion will substantially undermine the important remedial intent of the First Step Act of 2018, Mr. Brown respectfully requests the Court grant the petition for certiorari.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that this Court grant the petition for writ of certiorari.

Respectfully submitted,

/s/ Robert L. Swain

DATED: October 27, 2022

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CERTIFICATE OF COMPLIANCE:

I, the undersigned, say:

I certify that the opening brief is proportionateley spaced, has a typeface of 14 points and is under 40 pages in compliance with Rule 33.2.

I certify under penalty of perjury that the foregoing is true and correct. Executed October 27, 2022, at San Diego, CA.

/s/ Robert L. Swain

_____

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