

NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2022

ROBERT McKENNA

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

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

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEAL
FOR THE FIRST CIRCUIT

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December 27, 2022

QUESTIONS PRESENTED

The First Circuit Court of Appeals held pursuant to 1st Cir. R. 27.0(c), that the sentence defendant Robert McKenna received was both procedurally and substantively reasonable because the Maine District Court had “linked appellant’s extensive 30-year criminal history to the goals of sentencing, namely, deterrence and protection of the public from further criminal conduct on the part of the appellant.” United States v. McKenna, No. 20-2178, (Sept. 28, 2022, 1st Cir. 2022) (“McKenna”). The First Circuit reasoned that the Maine District Court’s explanation was “adequate for purposes of [18 USC] § 3553(c)(1),” and that the district “court sufficiently considered the 18 USC § 3553(a) factors.” Id. Additionally, the First Circuit concluded that the district court had not abused its discretion “because the district court provided a ‘plausible sentencing rationale and reached a defensible result’” by merely stating a need “to protect the public from the defendant.” Id. citing United States v. Gomera-Rodriguez, 952 F.3d 15, 20 (1st Cir. 2020). See Appendix A.

The questions presented are:

- I. Whether it was procedurally and substantively reasonable for the sentencing court to a) recite statutory sentencing rationale by rote recitation without adequate explanation and without adequate correlation with Mr. McKenna’s individual characteristics; b) misapprehend the defense presentation at sentencing; and c) steer the government away from a low sentencing recommendation.

- II. Whether Robert McKenna's request to have the First Circuit review his appeal absent summary dismissal was appropriately addressed using an "abuse of discretion" standard.

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- A. It is an important question of Constitutional law that statutory sentencing criteria should be specifically correlated with the specific facts of a criminal defendant's case. Gall v. United States, 552 U.S. 38, 50, 128 S.Ct. 586,

¹ LIST OF PARTIES: All parties appear in the caption of the case on the cover page.

L.Ed.2d 445 (2007) (mandating individualization of criminal sentences). See also Kimbrough v. United States, 128 S.Ct. 558 (2007)(district judge must correlate facts of defendant’s case in array of factors for consideration at sentencing).

The Court of Appeals erred by failing to address Mr. McKenna’s argument that rote recitation of statutory sentencing criteria without adequate correlation with Mr. McKenna’s individual characteristics induced the sentencing court to over-value severe punishment over the unique circumstances presented by Mr. McKenna at sentencing. Failure to engage in correlation caused the district court not to waiver from a pre-sentencing focus on severe punishment.

The Court of Appeals Erred in failing to find an abuse of discretion where the sentencing court blatantly ignored the unique circumstances presented by Mr, McKenna.

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PETITION FOR WRIT OF CERTIORARI
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ROBERT McKENNA respectfully petitions this Court for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the First Circuit dated September 28, 2022, affirming the government's request in the brief for summary disposition.

OPINION BELOW

The opinion of the United States Court of Appeals for the First Circuit in

United States v. Robert McKenna, No. 20-2178 (1st Cir. Sept. 28, 2022)

appears at Appendix A to this petition (hereinafter cited “A-1”). The United States District Court for the District of Maine Sentencing Transcript appears at Appendix B to this petition (hereinafter cited “A-3”). Defendant’s Sentencing Memorandum Appears at Appendix C (hereinafter “A-34”).

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The judgment of the Court of Appeals was entered on September 28, 2022. This Petition is filed within ninety (90) days after entry of judgment. *See* Supreme Court Rule 13.1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The district court had jurisdiction pursuant to 18 U.S.C. § 3231 and the court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part:

[N]or shall any state deprive any person of life, liberty, or property, without due process of law[.]

B. 18 U.S.C. § 3553(a) Sentencing Factors

Section 3553(a) provides the following considerations for the sentencing court to consider:

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed
 - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
 - (B) to afford adequate deterrence to criminal conduct;
 - (C) to protect the public from further crimes of the defendant; and
 - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- (3) the kinds of sentences available;
- (4) the kinds of sentence and the sentencing range established for...(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines[;]
- (5) any pertinent policy statement[;]
- (6) the need to avoid any unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
- (7) the need to provide restitution to any victims of the offense.

18 U.S.C. § 3553(a).

STATEMENT

1. Introduction

On September 28, 2022, the First Circuit allowed the government's request stated in their Brief for summary disposition and affirmed the judgment of the Maine District Court. United States v. McKenna, No. 20-2178 (1st Cir. Sept. 28, 2022) (hereinafter "McKenna"). At the First Circuit, Mr. Robert McKenna had set forth three separate reasons stating why the court's sentence was greater than necessary for this single act of distribution with a very low converted drug weight, as well as for an inadequate sentencing explanation. These three reasons were: a) a

rote recitation of sentencing rationale without adequate correlation to the facts of this case; b) the sentencing court's misapprehension of the defense presentation at sentencing; and c) the court's pre-hearing determination of sentence as demonstrated by the court's overt attempt to steer the government away from the sentencing recommendation the government expressed first.

In Brief for Appellee, the government requested summary disposition pursuant to First Circuit Local Rule 27.0(c).

In his Reply Brief, appellant noted that mere intonation of boilerplate references to some parts of 18 U.S.C. § 3553(a) should not immunize Federal sentencing courts from circuit court appellate review, even where both the defense and the prosecution at the sentencing hearing had identified the "seriousness of the offense" as written in 18 U.S.C. § 3553(a)(1) and (2). Both the defense and prosecution made note of Robert McKenna's single act of distribution involving a low drug weight. Initially the prosecution stated that "it would not be unreasonable for the Court to conclude that a sentence within or near to the range established by 2D1.2 is sufficient for the purposes of reflecting the seriousness of this offense and afford adequate general deterrence to the criminal conduct." Sent. Tr. at A-14 (emphasis added). After questioning by the Maine District Court Judge, the government at sentencing agreed that the career offender sentencing

range was also an appropriate range for the court's review.

2. The First Circuit's decision in *McKenna*

Before the First Circuit, Mr. McKenna had argued that a series of decisions made by the Maine District Court Judge at sentencing rendered the resultant sentence both procedurally and substantively unreasonable. Each of these three decisions, argued Mr. McKenna, were consistent with the sentencing judge's script of remarks he had prepared pre-sentence hearing which called for a harsh sentence pursuant to the career offender guidelines. The sentencing hearing was conducted via zoom. During the hearing the sentencing judge began a series of remarks which were interrupted by a glitch in the zoom electronic process. *Id.* at A-25-A-26. When zoom was restored, the sentencing judge started reading again from "near the top" of his prepared remarks, repeating much of what he had previously stated before the zoom interruption. *Id.* at A-27. On appeal, Mr. McKenna identified three problematic issues before the First Circuit arguing that the net result was for the Maine District Court to have inadequately correlated statutory sentencing criteria to the facts of his case. Mr. McKenna argued that this led to the Maine District Court Judge's imposition of a sentence pursuant to the career offender guidelines, as opposed to the § 2D1.2 guidelines initially presented by the

government. The three problematic issues were: a) rote recitation of statutory sentencing criteria by the court; b) the sentencing court's misapprehension of the defense presentation; and c) the Maine District Court's dissatisfaction with the government's initial recommendation as demonstrated by the court's inquiry of the government.

2a. Rote Recitation of Statutory Sentencing Criteria

The Maine District Court relied on rote recitation of statutory sentencing criteria instead of a case-specific application of those factors. The Court stated:

As I indicated to Mr. Heimbach, by definition the career offender status carries with it a much heavier penalty. It does that presumably, ostensibly, and commonsensically for a policy reason, which I am only inclined to seriously squint at and doubt and deviate from if I think there are factors supporting that. The factors here, such as promotion for respect for the law and to provide just punishment for the offense and to afford adequate, specific, and general deterrence, and maybe chief among all the factors to protect the public from further crimes by the defendant, are all taken into account to suggest to me that a sentence nearer the career offender range is warranted and that the sentence is sufficient but not greater than necessary to correspond to the need for the sentence.

I am, based on the Government's recommendations, going to impose a slight variant sentence, and I'm going to do that for all of the reasons that have been stated on the record I'm not at all convinced that this necessarily represents a turning point in Mr. McKenna's life, although I earnestly and sincerely hope that it does and that it will. My main reason for supporting a slight variant sentence is for the other reasons that have been expressed on the record.

I also acknowledge all of the other slight mitigating factors regarding Mr. McKenna's personal history and characteristics that have been well advanced by Mr. Maddox and which are reflected fulsomely in the presentence report.

Id. at A-28-A-29.

The Maine District Court stated that it rested its sentence on references to 18 U.S.C. § 3553(a)(2)(A), (B) and (C). The Court recited both "promotion for respect for the law" and to "provide just punishment for the offense," as well as to afford adequate, specific, and general deterrence, and "protection of the public from further crimes by the defendant." Id. at 30. Based on this generic recitation of statutory criteria, therefore, the Court imposed a "slight" downward variant sentence of 135 months. Id. at A-30. Before this Court, petitioner argues that this recitation is inadequate. Before the First Circuit, petitioner had pointed to First Circuit precedent stated in United States v. Rivera-Berrios, a sentencing court must do more. The First Circuit wrote:

...the district court referenced "the seriousness of the offense," the need to "promote[] respect for the law" and protect[] the public from further crimes by [the appellant]," and the importance of "deterrence and punishment." These concerns, too, are generic, they apply to any defendant in any machine gun possession case. Unmoored from any individual characteristics of either the offender or the offense of conviction – and the district court constructed no such mooring – they cannot serve as building blocks for an upward variance.

United States v. Rivera-Berrios, 968 F.3d 130, 137 (1st Cir. 2020). The fact that

the sentence in Rivera-Berrios was an upward variant sentence might serve to distinguish that case from Mr. McKenna's case, which involved a "slight" downward variance from a career offender guideline as well as an upward variance from a non-career offender guideline. Yet, in both cases, the sentencing court's recitation was unmoored from the offender and the offense of conviction, and, consequently, should not be allowed to serve as a building block for a harsh sentence.

The quality of reasoning employed by the Maine District Court parallels the quality of judgment the First Circuit found lacking in United States v. Carrasquillo-Sanchez, 9 F. 4th 56, 57 (1st Cir. 2021) (sentence vacated on plain error review where court failed to provide case-specific explanation for sentence beyond an explanation that "necessarily had already [been] taken into account in its calculation of the GSR"). In this case, a case-specific employment was not undertaken except to determine that a single act of distribution of a small amount of drug, apparently, was inconsequential. The Maine District Court did mention, just before the zoom connection went out, however, that Mr. McKenna had become part of a "morbid marketplace that's causing the death and dysfunction to many hundreds of thousands {sic} of Mainers and many score more around the country." Id. at A-26. While this assessment is mathematically at odds with Maine's

demographics, it also directly resounds of the “general problem of crime” unlinked to the defendant’s conduct mentioned and discounted by the First Circuit in

Carassquillo. Id. at 58. The First Circuit stated:

As we explained in Ortiz-Rodriguez, “‘the section 3553(a) factors must be assessed in case-specific terms,’ and a sentencing court’s ‘appraisal of community-based considerations does not relieve its obligation to ground its sentencing determination in individual factors related to the offender and the offense.’”

Id. at 60-61 *citing* Ortiz-Rodriguez, 789 F.3d 15, 19-20 (1st Cir. 2015) (internal citations omitted).

2b. Misapprehension of the Defense Presentation at Sentencing

The Maine District Court misapprehended the defense argument. The defense position was that Mr. McKenna had utilized his stay during pretrial detention at the Somerset County Jail not only to understand his life course better, but also to appreciate the benefits a federal term of probation could afford him by way of guidance and support. Mr. McKenna saw this sentencing as an opportunity to develop a new approach to his life with the guidance of the United States Department of Probation. At one point defense counsel stated that what Mr. McKenna “in essence is asking for is a second chance.” The defense stated:

...what Mr. McKenna in essence is asking for is a second chance. This is reflected in his acceptance of responsibility, his obviating a need for the United States Attorney’s Office to prepare for trial, to interview witnesses,

to prepare witnesses, to answer motions to suppress and various other pretrial motions.

Id. at 20.

The unfortunate use of the word “second” before the word “chance” by defense counsel induced the Maine District Court to misapprehend the defense position. Instead of viewing this sentencing as an opportunity for Mr. McKenna to utilize federal guidance in combination with Mr. McKenna’s fresh perspective on his life course, the Court reacted as though the defense was implying that Mr. McKenna had been only offered one previous opportunity by court systems in the past to change his life. The Maine District Court stated just after the zoom connection was restored:

...I think the 3553(a) factors on balance militate toward a sentence much closer to the career offender range than not. Specifically I note that the 80 some prior criminal convictions which involve a range of criminal offenses demonstrate to me a nearly dutiful failure to be able to comply with the law. I reject the idea that this sentencing hearing should represent a watershed moment in which Mr. McKenna is given a, quote unquote, second chance.

I am aware that the probation office in the state courts often try to provide support and services. I would have thought and do believe that any second chances or insight as to what has caused Mr. McKenna’s flouting of the criminal code to the extent it’s related to his relationship with his nonbiological father or any other relationships or whatever its origin was would have been realized 10, 15, 20, 30, 40 convictions ago. I don’t think this event stands as a watershed moment in which that insight is first realized. So I reject that contention in its entirety.

See Appendix B at A-27.

The real focus of the defense was that Mr. McKenna had accepted responsibility for a profligate life and had been completely honest with the probation officer during her preparation of her report and that he had kept nothing hidden. Instead, the Maine District Court seemed to suggest that Mr. McKenna was engaging in a form of subterfuge whereby he was failing to accept responsibility for his actions.

2c Maine District Court Dissatisfaction with Government Recommendation

The Maine District Court demonstrated its dissatisfaction with the government's presentation at sentencing by steering the government away from a low sentencing recommendation.

Before announcing its reasoning, the Maine District Court had asked the government to reflect on its equitable evaluation and confirm the Court's pre-sentencing analysis that this case represented a "paradigmatic career offender" case, and not a case where the equities lay in assessing a sentence closer to the non-career offender guidelines. The Court asked the government even though there was a "dramatic difference" between the career offender designation and "noncareer offender designation, [which] combined with what the Government points out was a single transaction and a fairly modest drug weight," doesn't Mr.

McKenna's "criminal history suggest this is the paradigmatic career offender who has not abated for so much as a breath in somewhere around 30 years?" Id. at A-22-A-23. The Maine District Court Judge implored of the government, "the sentencing commission has a career offender guideline for a reason....Isn't Mr. McKenna the textbook example of the career offender?" Id. at 23.

The government thereupon responded by agreeing with the Maine District Court Judge's assessment. Id. The Assistant United States Attorney, noting criminal history category VI under either calculation, stated

...my reflection on the 3553(a) factors before was merely an indication that the Court could find that something below the career offender guideline is appropriate, but the Government is not suggesting that the career offender guideline itself is inappropriate or that it does not reflect the defendant has a significant criminal history that calls for a greater sentence than someone who does not have that history, who does not have those two prior convictions.

Id. at A-24. The government change in emphasis showed that they understood the Maine District Court Judge's intent in asking the questions put to them. The Court was now in a more secure position to justify a harsh sentence.

3a. Procedural Reasonableness ~ Perception of Fair Sentencing

In addition to the foregoing, petitioner based his circuit court argument on First Circuit analysis of the Supreme Court decision in Gall v. United States, 552 U.S. 38, 50, 128 S.Ct. 586, L.Ed.2d 445 (2007). With respect to procedural

reasonableness, petitioner stated that the First Circuit has annunciated the following general paradigm of analysis:

...18 U.S.C. § 3553(c)...obligates a sentencing court to 'adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing,' Gall v. United States, 552 U.S. 38, 50, 128 S.Ct. 586, L.Ed.2d 445 (2007).....[T]he sentencing court need only identify the main factors behind its decision.....The court need not be precise to the point of pedantry....[While] a sentencing court may have a duty to explain why it chose a particular sentence, it has no corollary duty to explain why it eschewed other suggested sentences.

United States v. Vargas-Garcia, 794 F.3d 162, 166 (1st Cir. 2015).

Petitioner had stated that a sentencing court may run afoul of procedural reasonableness in the following circumstances: if the district court failed to calculate or improperly calculated the guideline range, treated the Guidelines as mandatory, failed to consider § 3553(a) factors, selected a sentence on clearly erroneous facts, or failed to adequately explain the chosen sentence. United States v. Hernandez-Maldonado, 793 F.3d 223, 227 (1st Cir. 2015)(internal citations and quotation marks omitted).

Before the First Circuit, Mr. McKenna had stated that the Maine District Court had run afoul of procedural reasonableness by failing to adequately explain the chosen sentence in view of defendant's non-frivolous exculpating and mitigating factors, which included his mental and physical challenges.

3b. Adequacy of Explanation

Petitioner also had drawn the First Circuit's attention to their precedent addressing "adequacy of explanation." Petitioner noted that in United States v. Cirilo-Munoz, the First Circuit commented on the requirement of an adequate explanation by the district court in imposing a particular sentence. The First Circuit wrote

Under 18 U.S.C. § 3553(c), the sentencing judge is required to state the reasons for imposing a particular sentence "in open court" at the time of sentencing....The district court's explanation of the sentence serves dual purposes. First, the explanation is an essential prerequisite to our appellate review of the sentence....The sentencing judge should set forth enough to satisfy the appellate court that he has considered the parties' arguments and has a reasoned basis for exercising his own legal decision-making authority....Second, such an explanation furthers the weighty goals of transparency and credibility for the justice system.

United States v. Cirilo-Munoz, 504 F.3d 106, 131-132, (1st Cir. 2007).

The First Circuit opinion in Cirilo-Munoz followed soon after the United States Supreme Court decided Rita in which the defendant had sought a lower than guidelines range sentence based upon "his physical condition, likely vulnerability in prison, and military experience." Rita v. United States, 551 U.S. 338, 127 S.Ct. 2456, 168 L.Ed.2d 203 (2007). In deciding the question whether the district court had properly analyzed relevant sentencing factors, Justice Breyer wrote

[t]he sentencing judge should set forth enough to satisfy the appellate court that he has considered the parties' arguments and has a reasoned basis for exercising his own legal decisionmaking authority....Where the

defendant or prosecutor presents nonfrivolous reasons for imposing a different sentence, however, the judge will normally go further and explain why he has rejected those arguments.

Id. at 356-357. Justice Breyer's observation that "[w]here the defendant or prosecutor presents nonfrivolous reasons for imposing a different sentence," has particular application to the sentence meted out to Robert McKenna. In this case both the prosecutor and the defendant presented nonfrivolous reasons for imposing a different sentence. Judge Walker specifically mentioned the single transaction of a small quantity of drug, but only to ignore it in his sentencing calculation.

Mr. McKenna posits that his argument for a below career offender sentence was not based on frivolous reasoning, and that the district court did not explain adequately their reasons for rejecting this argument. The Defendant and the prosecutor had argued that Mr. McKenna's §3553(a) factors supported an upper end of the noncareer offender guideline calculation.

4. Substantive Reasonableness

The interplay between procedural reasonableness and substantive reasonable is not always easy to discern: facts which might cause an appellate court to reverse a district court sentencing decision based on procedural reasonableness may be the same to occasion reversal based on substantive reasonable. With respect to substantive reasonableness, the First Circuit has stated:

When reviewing a challenge to the substantive reasonableness of a sentence, substantial deference is due to the sentencing court's discretion....Fidelity to this deferential standard requires that a challenge based on substantive reasonableness must comprise more than a thinly disguised attempt by the defendant to substitute his judgment for that of the sentencing court....In the last analysis, a challenge to the substantive reasonableness of a sentence turns on whether the sentencing court has offered a plausible rationale for the sentence and whether the sentence itself represents a defensible result.

Vargas-Garcia, supra at 166 (citations omitted).

Before the First Circuit, Robert McKenna had contended that he was not attempting to substitute his judgment for that of the Maine District Court. Instead, he posited that where a sentencing court endeavors to base a sentence upon the defendant's criminal history and the underlying conviction, it was procedurally and substantively unreasonable to fail to take into consideration defendant's heartfelt insight into his life history, his stated admission that he was offering an explanation and not a justification, and his genuine remorse and observation that provided with the guidance offered by the Federal Department of Probation he could put himself into a position to regain what he had lost – a loving family.

The United States Supreme Court in Rita v. United States, stated:

The sentencing judge should set forth enough to satisfy the appellate court that he has considered the parties' arguments and has a reasoned basis for exercising his own legal decisionmaking authority.

Rita, supra at 356. Likewise, Mr. McKenna argued that the Maine District Court

had not articulated a reasoned basis for exercising his own legal decision-making authority beyond generic boilerplate references to the sentencing statute and a reference to community based criteria which the Maine District Court Judge had labeled a “morbid marketplace.” Mr. McKenna had argued that the procedural problems he mentioned had led to substantive problems undermining the substantive reasonableness of the sentence. The Maine District Court Judge only gave cursory reasons for the chosen sentence, with reasons which had not adequately addressed the concerns raised by Mr. McKenna.

REASONS FOR GRANTING THE WRIT

- A. It is an important question of Constitutional law that statutory sentencing criteria should be specifically correlated with the specific facts of a criminal defendant’s case. Gall v. United States, 552 U.S. 38, 50, 128 S.Ct. 586, L.Ed.2d 445 (2007) (mandating individualization of criminal sentences). See also Kimbrough v. United States, 128 S.Ct. 558 (2007)(district judge must correlate facts of defendant’s case in array of factors for consideration at sentencing).

The Court of Appeals erred by failing to address Mr. McKenna’s argument that rote recitation of sentencing statutory criteria without adequate correlation with Mr. McKenna’s individual characteristics induced the sentencing court to over-value severe punishment over the unique circumstances presented by Mr. McKenna at sentencing. Failure to engage in correlation caused the district court not to waiver from a pre-sentencing focus on severe punishment.

The Court of Appeals Erred in failing to find an abuse of discretion where the sentencing court blatantly ignored the unique circumstances presented by Mr, McKenna.

- A. It is an important question of Constitutional law that statutory sentencing criteria should be specifically correlated with the specific facts of a criminal defendant's case. Gall v. United States, 552 U.S. 38, 50, 128 S.Ct. 586, L.Ed.2d 445 (2007) (mandating individualization of criminal sentences). See also Kimbrough v. United States, 128 S.Ct. 558 (2007)(district judge must correlate facts of defendant's case in array of factors for consideration at sentencing).

The Court of Appeals erred by failing to address Mr. McKenna's argument that rote recitation of sentencing statutory criteria without adequate correlation with Mr. McKenna's individual characteristics induced the sentencing court to over-value severe punishment over the unique circumstances presented by Mr. McKenna at sentencing. Failure to engage in correlation caused the district court not to waiver from a pre-sentencing focus on severe punishment.

The Court of Appeals Erred in failing to find an abuse of discretion where the sentencing court blatantly ignored the unique circumstances presented by Mr, McKenna.

Mr. McKenna had argued before the First Circuit that the sentence under discussion lacked procedural reasonableness because the sentencing rationale was insufficient. He stated that a sentencing court may run afoul of procedural reasonableness if the district court failed to adequately explain the chosen sentence. United States v. Contreras-Delgado, 913 F.3d 232, 238 (1st Cir. 2019)(internal citations and quotation marks omitted).

- A1 Gall v. United States, 552 U.S. 38, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007)

The United States Supreme Court in Gall has explained the process a

sentencing court should employ in all sentencing decisions as follows:

...[A] district court should begin all sentencing proceedings by correctly calculating the applicable Guideline range. As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark. The Guidelines are not the only consideration, however. Accordingly, after giving both parties an opportunity to argue for whatever sentence they deem appropriate, the district judge should then consider all of the §3553(a) factors to determine whether they support the sentence requested by a party. In so doing, he may not presume the Guidelines range is reasonable. He must make an individualized assessment based on the facts presented....After settling on the appropriate sentence, he must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing.

Gall, supra. (Internal citations omitted). See also Kimbrough v. United States, 128 S.Ct. 558 (2007)(district judge must include Guidelines range in array of factors for consideration at sentencing).

Petitioner had argued that it had been plain error for the sentencing court to forsake the opportunity to individualize a criminal sentence by specifically correlating the statutory sentencing criteria with the facts of his case.

A2. Plain Error in the First Circuit

While the plain error standard may be a high hurdle for an appellant to clear, the jurisprudence of the First Circuit, as represented by the following three cases, demonstrated that Petitioner had attained this goal.

First, and most on point, in United States v. Mangual-Garcia, the First Circuit wrote that where a sentencing court failed to explain a basis for its chosen sentence, it was plain error where “the district court merely recited that it had considered the factors it was required to consider under 18 U.S.C. §3553(a).” and “did not specifically identify some discrete aspect of the defendant’s behavior and link that aspect to the goals of sentencing.” United States v. Mangual-Garcia, 505 F. 3d 1, 15 (1st Cir. 2007). The First Circuit stated that where the sentencing court “failed to consider a significant proper factor,” such as the 2D1.1 sentencing range, associated with the “seriousness of the offense,” there exists a reasonable probability that the district court would have imposed a more favorable sentence, had the significant proper factor been considered. Here, the Maine District Court’s failure to link the single act of distribution of a small quantity of controlled substance, and the resultant harsh juxtaposition between the 2D1.1 sentencing range with the career offender range, in combination with a truer explication of Mr. McKenna’s criminal history probably would have resulted in a more favorable sentence.

Second, in United States v. Montero-Montero, the First Circuit stated that where the district court failed to coherently explain its upward variant sentence, and failed to identify the main factors driving its sentencing determination, the

district court committed clear and obvious error that may well have affected appellant's substantial rights. United States v. Montero-Montero, 817 F.3d 35, 37-38 (1st Cir. 2016). In Montero-Montero, the First Circuit stated that

the record offers very few clues as to what was in the sentencing court's mind....[and] we are reluctant to guess at what the court was thinking....[There must be a] "[m]eaningful explanation" for a "harsh sentence....The district court's failure to make anything resembling an adequate explanation of the appellant's variant sentence was a clear and obvious error, especially given the Brobdingnagian extent of the variance. That error may well have affected the appellant's substantial rights. In such circumstances, it would cast a shadow over the courts' reputation for fairness to enforce the sentence blindly.

Id. at 38. Likewise, the Brobdingnagian difference between the career offender range and the 2D1.1 range sub judice, and the lack of an explanation by the sentencing court for its chosen sentence, in view of all of the questions surrounding intonation of Mr. McKenna's criminal history, casts a shadow over the Maine District Courts' reputation for fairness.

Finally, in United States v. Rodriguez, the First Circuit stated that just because plain error exists, reversal may not be warranted if appellant did not identify any factor that would make it likely that he would have received a different sentence on remand. United States v. Rodriguez, 731 F.3d 20, 28 (1st Cir. 2013). The First Circuit stated that the "district court's rote recitation...[of] relevant § 3553(a) factors, without any attempt to link them to defendant's conduct

or goals of sentencing, was clear and obvious error, but reversal [was] unwarranted where defendant did not identify specific facts showing reasonable probability of a different sentence on remand.” *Id.* at 27 *citing* Mangual-Garcia, *supra* at 15-16. In Rodriguez, the First Circuit noted that the district court had mentioned “[a]t various points throughout the sentencing hearings,” six of the § 3553(a) criteria including “the need for the sentence to reflect the seriousness of the offense.” *Id.* at 27. Therefore, the district court’s error was clear and obvious, but did not warrant reversal because appellant had not identified any factor that would make it likely that he would receive a different sentence on remand. *Id.* at 28. Unlike Rodriguez, however, Mr. McKenna stated that the Maine District Court Judge’s failure to mention the “significant proper factors” of “seriousness of the offense,” as well as the need to consider “the nature and circumstances of the offense,” in combination with the Brobdingnagianly harsh difference between the two relevant sentencing ranges, is sufficient to warrant reversal.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted.

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