NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

TERRINDEZ XSIDRICK BRYANT, ***Petitioner*****,**

v.

UNITED STATES OF AMERICA, ***Respondent*****.**

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

Wesley P. Page
Federal Public Defender

Jonathan D. Byrne
Appellate Counsel
Counsel of Record

David R. Bungard
Assistant Federal Public Defender
Office of the Federal Public Defender
Southern District of West Virginia
300 Virginia Street, East, Room 3400
Charleston, West Virginia 25301
304/347-3350
jonathan_byrne@fd.org

Counsel for Petitioner

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I. QUESTION PRESENTED FOR REVIEW

In *Kimbrough v. United States*, 552 U.S. 85 (2007), this Court held that a district court had the authority, at sentencing, to reject the advice of the Sentencing Guidelines if the district court had policy disagreements with the construction of the Guideline that provided that advice. In the wake of *Kimbrough*, district courts throughout the United States have used that authority to disregard the advice of the Sentencing Guidelines related to the disparate treatment of pure methamphetamine (also called "ice") and methamphetamine mixtures.

In this case, Petitioner argued that the district court should do the same and impose a variance sentence below that called for by the Guidelines. The district court declined to do so, not because it concluded Bryant's argument lacked merit but because it concluded that courts that had accepted that argument were "basically arbitrarily changing what the guidelines are" and "if the perceived unfairness is to be corrected, it's up to Congress and the Sentencing Commission to do so." The issue presented in this Petition is whether a sentence imposed on such a basis, and essentially treating Sentencing Guidelines as mandatory, in violation of this Court's decisions in *Kimbrough* and *United States v. Booker*, 543 U.S. 220 (2005), is unreasonable.

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- *United States v. Bryant*, ___ F. App'x ___, 2022 WL 17750684 (4th Cir. 2022), U.S. Court of Appeals for the Fourth Circuit. Judgment entered on December 19, 2022.

V. OPINIONS BELOW

The opinion of the Fourth Circuit for which this Petition seeks review is unpublished and is attached to this Petition as Appendix A. The issue presented in this Petition was ruled upon by the district court orally at sentencing. The relevant portion of the sentencing transcript is attached to this Petition as Appendix B. The final judgment order of the district court is unreported and is attached to this Petition as Appendix C.

VI. JURISDICTION

This Petition seeks review of a judgment of the United States Court of Appeals for the Fourth Circuit entered on December 19, 2022. No petition for rehearing was filed. This Petition is filed within 90 days of the date the court's entry of its judgment. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1254 and Rules 13.1 and 13.3 of this Court.

VII. STATUTES AND REGULATIONS INVOLVED

The issue in this Petition requires interpretation and application of 18 U.S.C. § 3553, which provides, in pertinent 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—

(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—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

VIII. STATEMENT OF THE CASE

A. Federal Jurisdiction

On September 17, 2019, an indictment was returned in the Southern District of West Virginia charging Terrindez Xsidrick Bryant with possession of methamphetamine with intent to distribute it, in violation of 21 U.S.C. § 841(a)(1). J.A. 6.[1] On December 10, 2019, a superseding indictment was returned charging Bryant with distribution of five or more grams of methamphetamine, also in violation of 21 U.S.C. § 841(a)(1). J.A. 7. Because that charge constitutes an offense against the United States, the district court had original jurisdiction pursuant to 18 U.S.C. § 3231. This is an appeal from the final judgment and sentence imposed after Bryant pleaded guilty to the indictment. J.A. 8-11. A Judgment and Commitment Order was entered on August 26, 2021. J.A. 97-103. Bryant filed a timely notice of appeal on the same day. J.A. 104. The United States Court of Appeals for the Fourth Circuit had jurisdiction pursuant to 18 U.S.C. § 3742 and 28 U.S.C. § 1291.

B. Facts Pertinent to the Issue Presented

This case arises from a single purchase of methamphetamine, followed by a seizure of additional methamphetamine, from Bryant. Ultimately, there was no issue related to the calculation of the advisory Guideline range based on the amount of drugs involved in the offense. Rather, Bryant argued that the district court should

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[1] "J.A." refers to the Joint Appendix that was filed with the Fourth Circuit in this appeal.

impose a sentence below that range and reject the advice of the Guidelines in this case. The reasons the district court gave for rejecting that argument are the basis for this Petition.

1. Bryant is charged with, and pleads guilty to, distribution of methamphetamine.

In June 2019, a West Virginia State Police informant told investigators he could purchase methamphetamine from Bryant. J.A. 108. Investigators arranged for the informant to make a controlled purchase from Bryant at a residence in Logan County. After that transaction, Bryant and the informant got into a car and drove away. Police stopped the car and recovered prerecorded buy money from Bryant. They then returned to the residence, where officers seized a total of 28.02 grams of methamphetamine. J.A. 109.

As a result of the controlled buy and the search, Bryant was eventually charged with distribution of more than five grams of methamphetamine. J.A. 6. He pleaded guilty to that offense without a plea agreement. J.A. 7, 108. Following his guilty plea, a Presentence Investigation Report ("PSR") was prepared to assist the district court at sentencing. J.A. 106-138.

2. Bryant argues that the district court should reject the advice of the Guidelines and impose a sentence below the advisory Guideline range.

The PSR reported that the methamphetamine seized from the residence had been tested and found to be 87% pure. As a result, Bryant was attributed 28.02 grams of actual methamphetamine. J.A. 109. The probation officer also recommended that

another 11.72 grams of actual methamphetamine be attributed to Bryant based on additional cash (beyond the prerecorded buy money) seized from him, for a total of 39.74 grams of actual methamphetamine. J.A. 110. That relevant conduct produced a base offense level of 28. The only recommended adjustment was a three-level reduction for acceptance of responsibility. J.A. 111. With a final offense level of 25 and Criminal History Category V, Bryant's recommended advisory Guideline range was 100 to 125 months in prison. J.A. 111, 116, 125.

Bryant made multiple objections to the recommendations in the PSR.[2] As relevant to this Petition, Bryant objected to treating the methamphetamine attributed to him as actual methamphetamine, rather than a methamphetamine mixture, because the "Guidelines' use of a 10:1 ratio for the conversion of amounts of actual methamphetamine has become outdated." J.A. 133. That is because "higher purity methamphetamine is prevalent in today's drug culture" and therefore the 10-to-1 ratio "should no longer be considered as an accurate reflection of the culpability of defendants in those methamphetamine cases." *Ibid.* Bryant noted that judges around the country, including three in the Southern District of West Virginia, had rejected the current Guidelines when imposing sentences in methamphetamine cases. J.A. 133-134. Bryant argued that without applying the 10-to-1 ratio, the 28.02 grams of methamphetamine properly attributed to him[3] would produce a base offense

[2] The Government did not have any objections relevant to this appeal. J.A. 73-77, 131-132.
[3] Bryant also objected to the attribution of any methamphetamine to him based on conversion of cash seized from him. J.A. 132-133. The district court sustained that objection at sentencing. J.A. 84-85.

level of 18, a final offense level of 15, and a Guideline range of 37 to 46 months (although he was subject to a mandatory minimum sentence of 60 months). J.A. 124, 136. Bryant reiterated that argument in a memorandum filed prior to sentencing. J.A. 15-16.

3. The district court imposes a sentence within the advisory Guideline range after concluding that any inequities in the applicable Guideline had to be fixed by Congress or the Sentencing Commission.

Sentencing for Bryant occurred on August 16, 2021. J.A. 70-96. The district court sustained Bryant's objection to the relevant conduct calculation, attributing only 28.02 grams to Bryant based on the drugs seized the night of the controlled purchase, producing a base offense level of 26. J.A. 84-85.

Bryant expanded on his argument that the district court should reject the 10-to-1 ratio found in the Guidelines. He noted that the ratio comes from the statutory ratio used by Congress and not "from any empirical study or anything like that." J.A. 78. In addition, "this type of ratio no longer reflects the culpability of someone like Mr. Bryant who was not involved in the production of meth, who was just basically a distributor." J.A. 79. This was not a case, as they "were initially prosecuted back in the 2000s," where people were "making it themselves in their houses" and "they ended up burning their houses down because they didn't get it right." *Ibid.* Due to legal limitations on the purchase of pseudoephedrine, the ability to produce methamphetamine in that manner is severely limited. *Ibid.* As a result, "meth is being imported today from labs outside the country" which has "brought the price

point down to where [actual methamphetamine] is no longer the expensive product that it was, and it's cheaper for people to buy it being imported than trying to make it themselves." J.A. 79-80. Bryant also argued that the "decision to test for meth purity is arbitrary and it varies case to case" depending on where the drugs are sent for testing. J.A. 80.

Before hearing from the Government, the district court stated, in relation to an earlier resolved objection, that while the district court was "going to follow the decisions of my brother judges" on that issue, "I hesitate to follow them on this point" because "they're basically arbitrarily changing what the guidelines are." J.A. 83. The Government argued in favor of the Guidelines as applied, that Bryant had not been "victimized or treated unfairly due to the disparity" and instead it was "really the communities at large that have been more victimized by more pure meth that's been coming in from out of state." J.A. 84.

The district court denied Bryant's objection "based on the 10:1 calculation." J.A. 85. It "respectfully disagree[d] with my brother judges on the role of the court in situations like this" and that "if the perceived unfairness is to be corrected, it's up to Congress and the Sentencing Commission to do so." *Ibid*. The district court went on to explain that "I have a problem with courts changing it arbitrarily by their judicial decisions" and "this would amount to an arbitrary judicial amendment of the guidelines." *Ibid*. If "the guidelines are to be amended, Congress and the Sentencing Commission ought to be the ones to do so." J.A. 85-86. While Bryant's argument was made as an objection, the district court stated that it "would deny any motion for a

downward variance here," although "the point here is mitigating and should be given serious consideration in selection of the point within the guidelines where the defendant is to be sentenced." J.A. 86.

Based on its resolution of the objections, the district court calculated Bryant's advisory Guideline range to be 84 to 105 months in prison. J.A. 87. It imposed a sentence of 84 month in prison, to be followed by a four-year term of supervised release. J.A. 92.

4. The Fourth Circuit affirms Bryant's sentence.

Bryant appealed his sentence to the Fourth Circuit Court of Appeals. In his brief, Bryant argued that his sentence was procedurally unreasonable because the district court had refused to engage with his argument on the disparate treatment of methamphetamine in the Guidelines "because of concerns about the court's institutional role at sentencing, concluding that any disparity had to be fixed by the Sentencing Commission or Congress." Bryant Brief, 2021 WL 5564902 at *7. The Fourth Circuit affirmed Bryant's sentence in an unpublished opinion. *United States v. Bryant*, ___ F. App'x ___, 2022 WL 17750684 (4th Cir. 2022). The court held that while the district court had "not[ed] its belief that Congress or the Sentencing Commission should be the entities making these official judgments, the court recognized its authority to deviate from the Guidelines based on this discrepancy by acknowledging that its brother courts had done so." *Id.* at *2. In reaching its conclusion, the court held, "the district court did not indicate that it believed the Guidelines were mandatory but rather that granting a variance on the proffered basis

was not warranted." *Ibid.* The court also noted that the district court considered Bryant's arguments "as 'at least a mitigating factor' for determining 'where [Bryant] should be sentenced within the [G]uidelines.'" *Ibid.* Ultimately, the court concluded that "the court made clear it had listened to and considered Bryant's arguments, but ultimately weighed them differently than he urged." *Ibid.*

IX. REASONS FOR GRANTING THE WRIT

The writ should be granted to determine whether a sentence imposed after a district court states it is not the proper forum for addressing flawed Guidelines, and essentially treating Sentencing Guidelines as mandatory, in violation of this Court's decisions in *Kimbrough v. United States*, 552 U.S. 85 (2007), and *United States v. Booker*, 543 U.S. 220 (2005), is unreasonable.

In *United States v. Booker*, 543 U.S. 220 (2005), this Court remedied the Sixth Amendment issues inherent in the mandatory application of the Sentencing Guidelines by making the Guidelines advisory. In addition, this Court held that any sentence imposed should be reviewed to determine whether it is unreasonable. Further, this Court has held that district courts may reject the advice of the Guidelines if they are fundamentally flawed. *Kimbrough v. United States*, 552 U.S. 85 (2007). In this case, the district court stated that such flaws must be fixed by Congress or the Sentencing Commission, not individual judges when imposing sentence. Whether such a statement, followed by the imposition of a within-the-Guideline-range sentence, results in an unreasonable sentence because it treats the Guidelines as effectively mandatory, is an important question of federal law this Court should resolve. *See* Rules of the Supreme Court 10(c).

A. The sentencing range under the Guidelines as calculated by the district court is not mandatory.

In *Blakely v. Washington*, 542 U.S. 296 (2004), this Court held that Washington state's sentencing guideline scheme violated the Sixth Amendment and the Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). A year later, in *United States v. Booker*, 543 U.S. 220 (2005), this Court held that there was no substantive distinction between the Guidelines and the Washington scheme struck down in *Blakely* and that the Guidelines as applied violated the Sixth Amendment. *Ibid*. at 233. Specifically, this Court held that 18 U.S.C. § 3553(b)(1), which makes the Guidelines mandatory, was "incompatible with today's constitutional holding." *Ibid*. Rather than declare the entire Guideline sentencing scheme void, this Court excised the mandatory language from the statute. "So modified," this Court concluded, "the Federal Sentencing Act, see Sentencing Reform Act of 1984, as amended, 18 U.S.C. § 3551 *et seq.*, 28 U.S.C. § 991 *et seq.*, makes the Guidelines effectively advisory." *Ibid*.

After the removal of the "mandatory" provision of § 3553, sentencing judges are still required to "take account of the Guidelines together with other sentencing goals." *Id*. at 259. Therefore, the "district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing." *Id*. at 264. In order to ensure some degree of nationwide consistency, "the Guidelines should be the starting point and the initial benchmark." *Gall v. United States*, 552 U.S. 38, 49 (2007). They are "not the only consideration, however."

Ibid. If the district court decides that a sentence outside of the Guideline range is appropriate, it must "consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance." *Id*. at 50.

A district court may also reject the advice of the Guidelines altogether. In *Kimbrough v. United States*, 552 U.S. 85 (2007), the district court varied from the advisory Guideline range produced by the 100-to-1 ratio between crack and powder cocaine, finding that a sentence within that range was too severe and "exemplified the 'disproportionate and unjust effect that crack cocaine guidelines have in sentencing.'" *Id*. at 93. The Fourth Circuit vacated the sentence, concluding that such a sentence was *per se* unreasonable when it was "based on a disagreement with the sentencing disparity for crack and powder cocaine offenses." *Ibid*. This Court reversed, holding that a sentence based on such a categorical rejection of a particular Guideline was reasonable, noting that the Government conceded that "as a general matter, 'courts may vary [from the Guidelines ranges] solely on policy considerations, including disagreements with the Guidelines.'" *Id*. at 101, quoting from the Government's brief. Since *Kimbrough*, district courts have utilized this authority to reject Guidelines on policy based reasons in cases involving multiple Guidelines. *See, e.g., United States v. Corner*, 598 F.3d 411, 414, fn. (7th Cir. 2010)(concluding that district courts can vary from the career offender Guideline on policy grounds and recognizing similar holdings from other Circuits); *United States v. Dorvee*, 616 F.3d 174 (2d Cir. 2010)(same with regard to child pornography Guidelines); *United States*

v. Ibarra-Sandoval, 265 F. Supp. 3d 1249, 1257 (D.N.M. 2017)(rejecting methamphetamine Guidelines due to purity-based disparity).

Nonetheless, in the wake of *Booker* and its immediate progeny, some district courts did not readily embrace their newfound discretion. In *United States v. Raby*, 575 F.3d 376 (4th Cir. 2009), the district court imposed a Guideline sentence in a child pornography case. In doing so, it explained at sentencing that because this Court would presume any sentence within the advisory Guideline range to be reasonable "then what's happening is that the circuit courts are making these things unconstitutionally mandatory. We're retreating completely to the pre-*Booker*/*Blakeley*/*Apprendi* line of cases." *Id*. at 378. The district court concluded that "I think this reasonableness business and presumptive reasonableness business that they put down is binding" and "I don't pretend to understand this argument about trial judges having a different obligation." *Id*. at 380. The court vacated Raby's sentence because "the district court's misunderstanding" of the presumption of reasonableness on appeal caused it to "mistakenly believe[] that its discretion to consider the § 3553(a) factors and to impose an individualized non-Guidelines sentence was constrained." *Id*. at 382.

Even after *Kimbrough* some courts missed the message that the Guidelines are completely advisory. In *United States v. Martinovich*, 810 F.3d 232 (4th Cir. 2016), the district court stated that "I will follow the Guidelines only because I have to. I find that they're not discretionary, they're mandatory." *Id*. at 238. Specifically, the district court explained that the Guidelines "have become more than guides" and

"more than advisory" because it is "reversible error if you don't follow them or give a good reason why you're not following them." *Id*. at 243. The district court also stated that "I don't agree with them. I think they're absolutely ridiculous, but I'm going to consider them." *Id* at 243-244. As the court put it, "[a]lthough the district court at times alluded to the fact that it had discretion, at the same time it bemoaned that such discretion was highly disfavored." *Id*. at 244. As a result, the court vacated the sentence because "treating the Guidelines range as mandatory is a significant procedural error." *Ibid*. (cleaned up).

B. Bryant made a nonfrivolous argument for a lesser sentence based on the flaws inherent in the application of the Guidelines related to methamphetamine.

Bryant made a particular argument for a sentence below the advisory Guideline range, based on the flaws inherent to the Guidelines involving methamphetamine. J.A. 15-16, 78-80, 133-136. He argued that the disparate treatment of actual methamphetamine and methamphetamine mixtures was not based on any rational basis and was "outdated" because "higher purity methamphetamine is prevalent in today's drug culture." J.A. 133. The disparity is based on a Congressional directive and not "any empirical study" and "no longer reflects the culpability of someone . . . who was not involved in the production of meth, who was just basically a distributor." J.A. 78, 79. Bryant also argued that whether the ratio comes into play at sentencing varies based solely on which laboratory does the testing, making the "decision to test for meth purity . . . arbitrary." J.A. 80. Bryant

argued for a mandatory minimum sentence of 60 months in prison, above the 37 to 46 month Guideline range that would apply if the methamphetamine attributed to him was treated as a mixture, rather than actual methamphetamine. J.A. 21, 136.

That argument is not frivolous, as numerous sentencing judges have recognized the flaws in the methamphetamine Guideline and declined to apply it. In *United States v. Hayes*, 948 F. Supp. 2d 1009 (N.D. Iowa 2013), the defendant pleaded guilty to possession of 35 grams or more of actual methamphetamine. *Id.* at 1011. At sentencing, he argued for a downward variance, that the court "should not rely on U.S.S.G. § 2D1.1(c)(5) and the PSR's weight of 38.1 grams of actual methamphetamine . . . because the Commission strayed from its institutional role in crafting § 2D1.1(c)(5) and the Guidelines fail to promote the sentences goals of 18 U.S.C. § 3553(a)." *Id.* at 1012. After reviewing the genesis of the methamphetamine Guideline, the court analogized its creation to those addressing crack cocaine, concluding that "[a]s with the crack cocaine Guidelines, the Sentencing Commission strayed from its institutional role with the methamphetamine Guidelines." *Id.* at 1022. The court went on to conclude that "the Guidelines were crafted by Congressional directive and not precise analysis and empirical research" and "are entitled to less deference than those Guidelines that were based on the Commission's exercise of institutional expertise and empirical analysis." *Id.* at 1027.[4] Finally, the

[4] Among other things, the court credited an observation by one commentator that methamphetamine is the only drug punished more severely based on purity under the Guidelines. *Hayes*, 938 F. Supp. 2d at 1025.

court concluded that "[c]hanges in the drug trade have resulted in larger drug quantities, making the large quantity indicator of responsibility ineffective." *Ibid.*

That court went further in *United States v. Nawanna*, 321 F. Supp. 3d 943, 950-51 (N.D. Iowa 2018), recognizing that there is no empirical basis for the 10-to-1 ratio between actual methamphetamine and a methamphetamine mixture. Even the Government conceded the point. *Id.* at 950. The court noted that, according to the DEA's 2018 National Drug Threat Assessment,[5] methamphetamine sampled through the second half of 2017 averaged 96.9% pure. Because virtually all methamphetamine is substantially pure, the premise set forth in U.S.S.G. § 2D1.1 cmt. n.27(C) that "a defendant [who] is in possession of unusually pure narcotics may indicate a prominent role in the criminal enterprise and proximity to the source of drugs" is outmoded and deserves no deference. *Id.* at 951-52. The "Commission's emphasis on an outdated assumption about methamphetamine purity as a proxy for culpability can lead to perverse sentencing outcomes." *Id.* at 952. The court agreed with another court which concluded that "[d]ue to increases in the average purity of methamphetamine sold today, purity is no longer an accurate indicator of a defendant's culpability or role in a drug enterprise." *Id.* at 954, quoting *United States v. Hartle*, 2017 WL 2608221 at *1 (D. Idaho 2017). As another court put it, "the Commission's assumption regarding the connection between methamphetamine purity and criminal role is divorced from reality." *Ibarra-Sandoval*, 265 F. Supp. 3d

[5] Available at https://www.dea.gov/sites/default/files/2018-11/DIR-032-18%202018%20NDTA%20final%20low%20resolution.pdf (last visited March 16, 2023).

at 1250. Other courts have agreed and varied from the advisory Guideline range on this basis. *See United States v. Moreno*, 2019 WL 3557889 at *3 (W.D. Va. 2019) (collecting cases). As Bryant pointed out, at least three judges in the Southern District of West Virginia have explicitly embraced the argument that the purity-driven disparity between methamphetamine mixture and actual methamphetamine is flawed. *See United States v. Hodges*, 3:18-cr-00028, Dkt. No. 20 at 2-5 (S.D. W. Va.); *United States v. Green*, 2:18-cr-00101, Dkt. No. 44 at 23-24 (S.D. W. Va.); *United States v. Rogers*, 2:19-cr-00009, Dkt. No. 39 at 26 (S.D. W. Va.).

Beyond the fundamental irrationality of the methamphetamine Guideline, courts have recognized that the decision to test methamphetamine for purity is one "that can be completely arbitrary." *United States v. Ferguson*, 2018 WL 3682509 at *4 (D. Minn. 2018). That "potentially leads to a perverse game of beat the clock, whereby an accused may try to plead guilty and get sentenced before lab results come back." *Ibid.* Such a race occurred in *United States v. Edgell*, 914 F.3d 281 (4th Cir. 2019), where the defendant pleaded guilty pursuant to a plea agreement based on methamphetamine mixture, which the Government breached after lab testing showed that actual methamphetamine was involved. A "lab technician's work speed should not determine the number of years a person spends behind bars." *Fergusson*, 2018 WL 3682509 at *4; *see also*, *Moreno*, 2019 WL 3557889 at *4; *Ibarra-Sandoval*, 265 F. Supp. 2d at 1256 (noting that "drugs are not tested in all cases"); *Hartle*, 2017 WL 2608221 at *3 (the "reasons why testing is or is not performed in any case are completely arbitrary").

Finally, courts have recognized that the Guidelines punish actual methamphetamine more severely than other drugs, without any rational basis for doing so. In *United States v. Harry*, 313 F. Supp. 3d 969, 973 (N.D. Iowa 2018), the court posed a hypothetical where a defendant is punished for 500 grams of heroin versus 500 grams of 95% pure methamphetamine. All else equal, the actual methamphetamine offender would face a guideline range that is nearly double that of the heroin offender. *Ibid*. The court asked if actual "methamphetamine [is] more than twice as potent, dangerous, destructive, or addictive than heroin?," ultimately concluding that "I am aware of no objective evidence – from the United States Sentencing Commission or otherwise – supporting such a proposition." *Ibid*.

C. The district court rejected Bryant's argument because it concluded it was not the proper venue in which to address flaws in the Guidelines.

Presented with this case for a lesser sentence, the district court did not engage with it on the merits. That is, the district court did not deny Bryant's request because it concluded there was no disparity in the treatment of different kinds of methamphetamine or that such a disparity was justified or even that the individual characteristics of Bryant's offense and background made a sentence within the advisory Guideline range appropriate. Rather, it denied Bryant's request based on the district court's conceptions of its role in the sentencing process. In doing so, the district court effectively made the Guidelines mandatory.

The district court's ruling on this issue came after the resolution of a Government objection arguing that Bryant should be classified as a career offender

based on language in the Guideline commentary. The district court overruled the Government's objection, noting that two other judges in the Southern District of West Virginia had already concluded that such commentary-based offenses could not be career offender predicates. J.A. 75-77; *see United States v. Cooper*, 410 F. Supp. 3d 769 (S.D. W. Va. 2019); *United States v. Bond*, 418 F. Supp. 3d 121 (S.D. W. Va. 2019). Later, during the parties' argument on the methamphetamine disparity issue, the district court interjected that while on the career offender objection it was "going to follow the decisions of my brother judges," on the disparity issue "I hesitate to follow them at this point" because "they're basically arbitrarily changing what the guidelines are." J.A. 83.

The district court returned to that point when it rejected Bryant's argument for a lesser sentence. It stated that it "respectfully disagree[s] with my brother judges ***on the role of the court in situations like this***." J.A. 85 (emphasis added). Further, the district court explained that "if the perceived unfairness is to be corrected, it's up to Congress and the Sentencing Commission to do so." *Ibid*. "I have a problem," the district court continued, "with courts changing it arbitrarily by their judicial decisions." *Ibid*. Such a decision "would amount to an arbitrary judicial amendment to the guidelines." *Ibid*. The district court repeated that if "the guidelines are to be amended, Congress and the Sentencing Commission ought to be the ones to do so." J.A. 85-86. The district court further indicated its commitment to imposing a sentence within the Guideline range by explaining that "the point here is mitigating and should be given serious consideration ***in selection of the point within the***

guidelines where the defendant is to be sentenced." J.A. 86 (emphasis added). In other words, there appeared to be at least some merit to Bryant's argument for a sentence below the advisory Guideline range, but the district court did not think its role was to impose such a sentence without guidance from the Sentencing Commission or Congress. That decision effectively made the Guidelines mandatory in Bryant's case.

Furthermore, the district court's failure to engage with Bryant's argument on the merits also impairs the ability of the Sentencing Commission (or Congress) to fix the disparity in the future. "The Commission's work is ongoing." *Rita v. United States*, 551 U.S. 338, 350 (2007). Both the applicable statutes "and the Guidelines themselves foresee continuous evolution helped by the sentencing courts and the courts of appeals in that process." *Ibid*. As one district court explained in rejecting the methamphetamine Guideline's advice, "the Court today notes its policy disagreement with the methamphetamine Guidelines in the hopes that its discussion can help the Guidelines 'constructively evolve over time, as both Congress and the Commission foresaw.'" *Ibarra-Sandoval*, 265 F. Supp. 3d at 1257, *quoting Rita*, 551 U.S. at 358. By concluding that district courts should not reject the advice of the Guidelines on policy grounds, that such issues must be corrected by the Commission itself, the district court in this case has failed to participate in the dialog necessary to make those corrections happen.

Bryant's case is far different from a prior case raising similar concerns involving the same district court judge. In *United States v. Bowling*, 654 F. App'x 127

(4th Cir. 2016), the defendant argued that his sentence for possession of child pornography was unreasonable because "the district court allegedly treated the Sentencing Guidelines as mandatory, resulting in unwarranted sentencing disparities." *Ibid*. In that case, the district court had rejected a challenge to the child pornography Guidelines similar to the one Bryant made to the methamphetamine Guidelines – that they were inherently flawed and that courts around the country, including in the Southern District of West Virginia, had rejected them. Bowling Brief, 2016 WL 335375 at *13-*19. This Court ultimately rejected Bowling's argument on appeal that the Guidelines had been treated as mandatory because the "district court stated it was 'not bound by' the Guidelines." *Bowling*, 654 F. App'x at 127. The district court made no similar declaration here – that it could grant Bryant's request for a lesser sentence by rejecting the Guidelines on a policy basis, but was choosing not to do so.

The Fourth Circuit was incorrect in concluding otherwise, pointing to the district court's recognition that other judges in the Southern District of West Virginia had varied on such grounds. *Bryant*, 2022 WL 17750684 at *2. The Fourth Circuit overlooked that after recognizing what other courts had done, the district court in this case did not just decide the argument made by Bryant was insufficient, but that it was, in essence, being made in the improper forum. The district court did not reject Bryant's argument because it concluded it was without merit. It did not conclude that treating higher purity methamphetamine more harshly than the less pure variety was the correct way to judge culpability in such cases. Rather, it concluded that it

was not the district court's role to address such issues, leaving them to Congress or the Sentencing Commission. The district court, therefore, did not decline to exercise discretion under *Kimbrough*, but effectively concluded that *Kimbrough* was wrongly decided.

X. CONCLUSION

For the reasons stated, the Supreme Court should grant certiorari in this case.

Respectfully submitted,

TERRINDEZ XSIDRICK BRYANT

By Counsel

WESLEY P. PAGE
FEDERAL PUBLIC DEFENDER

Jonathan D. Byrne
Appellate Counsel
Counsel of Record

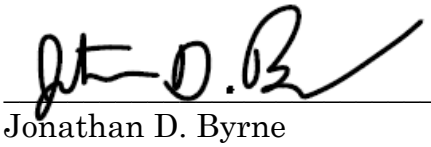
David R. Bungard
Assistant Federal Public Defender

PROOF OF SERVICE

I do hereby certify that on this date, as required by Supreme Court Rule 29, I have served the within **MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS** and **PETITION FOR A WRIT OF CERTIORARI** on counsel for Respondent by depositing an envelope containing the above documents in the United States mail and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within three calendar days, properly addressed as follows:

Solicitor General of the United States
Room 5614, Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

EXECUTED on this 17th day of March, 2023.



Jonathan D. Byrne
Appellate Counsel
Office of the Federal Public Defender
Southern District of West Virginia
Counsel for Petitioner