Supreme Court Docket No.
First Circuit Court of Appeals Docket No. 22-1202

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2023

Eliseo Vaquerano Canas
Petitioner-Appellant

v.

United States of America
Respondent-Appellee

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

PETITION FOR A WRIT OF CERTIORARI

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ISSUE PRESENTED

I. Whether the Sentencing Commission exceeded its authority when, contrary to a Congressional directive, it made the "Use of a Minor" sentencing enhancement applicable to all defendants regardless of age.

LIST OF PARTIES

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

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Eliseo Vaquerano Canas respectfully petitions this Honorable Court for a writ of certiorari to review the order of the United States Court of Appeals for the First Circuit affirming his sentence.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit, entered on August 30, 2023, appears at Appendix A to the petition and is reported at 81 F.4th 86 (1st Cir. 2023). The judgment of the district court, entered on March 21, 2022, appears at Appendix B.

JURISDICTION

The district court had jurisdiction pursuant to 18 U.S.C. § 3231. The United States Court of Appeals for the First Circuit had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Sentencing Guideline §3B1.4 provides as follows:

Using a Minor to Commit a Crime

> If the defendant used or attempted to use a person less than eighteen years of age to commit the offense or assist in avoiding detection of, or apprehension for, the offense, increase by 2 levels.

The Violent Crime Control and Law Enforcement Act of 1994, PL 103–322, September 13, 1994, 108 Stat 1796, § 14008, provides as follows:

SEC. 140008. SOLICITATION OF MINOR TO COMMIT CRIME.

> [T]he United States Sentencing Commission shall promulgate guidelines or amend existing guidelines to provide that a defendant 21 years of age or older who has been convicted of an offense shall receive an appropriate sentence enhancement if the defendant involved a minor in the commission of the offense.

STATEMENT OF THE CASE

Procedural History

On November 28, 2018, Eliseo Vaquerano Canas ("Vaquerano") was charged with conspiracy to conduct enterprise affairs through a pattern of racketeering activities, in violation of 18 U.S.C. § 1962(d). [R.A.2].

Vaquerano, along with five others, were said to be members of the street gang La Mara Salvatrucha, more commonly known as "MS-13." Id.

On October 2, 2019, the Government superseded the indictment. [R.A.7], specifying that the means and methods of the conspiracy included acts of murder. The alleged killing was of Herson Rivas—said to be committed in July of 2018 in Lynn, MA—by the six listed defendants and a juvenile, in violation of M.G.L. ch. 265, § 1 (the Massachusetts murder statute). [R.A.43-44,53].

On February 12, 2021, Vaquerano pled guilty to one count of conspiracy to conduct enterprise affairs through a pattern of racketeering activities, in violation of 18 U.S.C. § 1962(d), thus admitting his participation in the murder of Rivas. [R.A.23]. On February 7 and 8, 2022, the sentencing court held two days of hearings. [R.A.33-34]. On March 17, 2022, the court sentenced Vaquerano to 516 months imprisonment, followed by five years of supervised release. [R.A.35-36].

A notice of appeal was timely filed on March 18, 2022. [R.A.445]. The case was docketed in the First Circuit on March 25, 2022. On August 30, 2023, the First Circuit affirmed the sentence.

Statement of Facts

Background

La Mara Salvatrucha, also known as MS-13, is a transnational gang with thousands of members in the United States and internationally,

including a significant presence in El Salvador, Honduras, and Guatemala. [PSR ¶¶16, 22]. MS-13 is organized in Massachusetts and elsewhere in the form of so-called "cliques" or smaller groups that operate under the larger mantle of MS-13 and its leadership in El Salvador. [PSR ¶25; D.655, at 34]. All MS-13 cliques follow certain core principles, including that MS-13 members should attack and kill rivals and those suspected of cooperating with law enforcement. [PSR ¶¶22-25; D.655, at 33].

One of the MS-13 cliques operating in Massachusetts at the time of the charged conspiracy was the Sykos Locos Salvatrucha clique. During the relevant time period, the Sykos clique brought in several younger members, including the defendant Vaquerano, who was 17 when he joined the gang, and Maynor Maltez Romero ("Maltez"). [PSR ¶77].

The Killing of Rivas

In the early part of 2018, Vaquerano and other MS-13 members began associating with another young man, Herson Rivas. By late July, Rivas was on dangerous footing. [S.A.27]. Maltez began to complain that Rivas disrespected the group by running from fights and spending more of his time with a different MS-13 clique. Id. The members also mistakenly suspected Rivas of cooperating with the police after one of their associates was arrested. [S.A.35].

On July 28, 2018, the now 18-year-old defendant and others discussed what to do about these perceived slights. [S.A.27]. While some advocated for

punishing Rivas with a beating, and others suggested simply expelling him, Maltez, then age 17, advocated for murder. Id.

On the evening of July 30, 2018, the members picked up Rivas and drove him to a park in Lynn, MA, where they took turns stabbing him and hitting him with blunt objects. Id. Maltez, despite being the driving force behind the plot to kill Rivas, later claimed that he watched the murder but did not participate in it. Id.

On August 1, 2018, police in Peabody, MA, were notified of a firearm in a hotel room. [S.A.42]. Soon after Vaquerano, Maltez, and two other MS-13 members were arrested. Id. The police recovered a gun from a car. Id. The following day, Rivas' body was discovered. [S.A.35]. The autopsy concluded Rivas died a few days earlier from sharp force injuries as well as blunt force injuries to the head. Id. Following the attack, two large knives used in the murder were hidden in and later seized from a drop ceiling in the basement of a relative's house where Vaquerano had lived in the past. [PSR ¶113; D.655, at 36].

The Presentence Investigation Report

Probation assessed Vaquerano's base offense level at 43. [S.A.48]. It assigned him two additional points for "Use of a Minor" pursuant to U.S.S.G. §3B1.4, related to the involvement of Maltez in the murder of Rivas. Id. Vaquerano objected to the imposition of the enhancement. [S.A.80]

According to Probation, Vaquerano's plea reduced the total offense level from 45 to 42. [S.A.49]. Vaquerano had a criminal history score of zero and thus was a Criminal History Category I. [S.A.50]. The resulting Guidelines Sentencing Range was assessed at 360 months to Life. [S.A.60].

Sentencing Memo and Briefing on Contested Issues

In Vaquerano's sentencing-related pleadings, he repeated his view that he had not "used" Maltez or any other minor. [R.A.58-64; S.A.80-81]. The Government urged application of the enhancement, based not only on the use of Maltez to kill Rivas, but also in furtherance of the general RICO conspiracy. [Supp.A.3].

Sentencing Hearing on Guideline Issues

Over the course of two days, the lower court heard arguments regarding the Sentencing Guidelines. [R.A.33-34]. In addressing the use of a minor enhancement, the court stated it was already "inclined" to impose it for all the defendants under the reasonable foreseeability test. [R.A.176]. Vaquerano urged the Court not to apply §3B1.4 as he was under 21 and doing so would be contrary to Congress' intent when it instructed the Sentencing Commission to draft the enhancement. [R.A.183, 186-87].[1]

This argument was revisited the following day, with the sentencing judge ultimately finding that the Commission did not unreasonably exceed Congress' mandate. He thus ruled that §3B1.4 applied to all defendants.

[1] Counsel also offered to provide further written briefing on this issue but was rebuffed by the sentencing judge. [R.A.177].

[R.A. 165-67]. Nevertheless, early in the second day of hearings, the judge informed defense counsel that "unless something quite unforeseen to me happens, this issue […] [is] not going to make any difference in what the sentence for any defendant is." [R.A.218]. The judge reiterated this when ruling on §3B1.4, stating "I clearly don't see that it's going to make any difference in the ultimate sentence that any defendant gets." [R.A.232]. Three days later, however, the judge reversed course, issuing an order notifying the parties that they could not rely on this assurance. [R.A.34, 291].

In the end, the court ruled that the "Use of a Minor" enhancement applied, and that the Guideline range was thus 360 to life. The court sentenced Vaquerano to 516 months imprisonment, followed by five years of supervised release. [R.A.35-36]. Application of §3B1.4 significantly impacted the sentencing range. Without it, the range would have been 292-365 months, and the *high-end* of the guideline range would have been more than 150 months below the sentence ultimately imposed. [R.A.410].

STANDARD OF REVIEW

A sentence is procedurally unreasonable when the district court commits an error such as "failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the 18 U.S.C. § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence –

including an explanation for any deviation from the Guidelines range." *United States v. Díaz-Rivera*, 957 F.3d 20, 25 (1st Cir. 2020).

If the appeal specifically challenges a Guidelines application, this Court reviews "the district court's interpretation of the meaning and scope of a sentencing guideline *de novo*, while the court's factfinding is reviewed for clear error, with due deference to the court's application of the guidelines to the facts." *United States v. Corbett*, 870 F.3d 21, 31 (1st Cir. 2017).

REASONS FOR GRANTING THE WRIT

I. The Sentencing Commission Lacked Authority to Make the "Use of a Minor" Enhancement Applicable to All Defendants Regardless of Age.

The sentencing court improperly applied the use of a minor enhancement to Vaquerano. Section 3B1.4 of the Sentencing Guidelines provides for a two-point upward adjustment "if the defendant used or attempted to use a person less than eighteen years of age to commit the offense or assist in avoiding detection of, or apprehension for, the offense[.]" U.S.S.G. §3B1.4. The judge should not have assessed two points under §3B1.4 because, as Vaquerano was under the age of 21 at the time of the offense, the Guideline was invalid as applied to him.

In 1994, Congress passed the Violent Crime Control and Law Enforcement Act of 1994. 108 Stat. 1796. Congress included within it a directive that "the United States Sentencing Commission *shall* promulgate guidelines or amend existing guidelines to provide that *a defendant 21 years*

of age or older who has been convicted of an offense shall receive an appropriate sentence enhancement if the defendant involved a minor in the commission of the offense" (emphases added). Id. § 140008. The Commission responded with §3B1.4, an enhancement which applies to all defendants regardless of age.

In drafting §3B1.4 as it did, the Commission ignored a clear Congressional directive to limit application of the adjustment to those 21 and older. By instead expanding the scope of §3B1.4 to all defendants, the Sentencing Commission exceeded the authority that Congress delegated to it. This Court should grant certiorari because the Circuit Courts of Appeal which have addressed the validity of §3B1.4 have inconsistently interpreted the scope of the Sentencing Commission's authority.

A. This Court should resolve the Circuit split on whether the Commission exceeded its authority.

The United States Court of Appeals for the Sixth Circuit, in *United States v. Butler*, 207 F.3d 839 (6th Cir. 2000), held that the Sentencing Commission exceeded its authority in drafting §3B1.4. Prior to the decision in this case, four other circuit courts – the Fourth, Seventh, Eighth, and Tenth Circuits – have determined that the Sentencing Commission acted within its discretion in adopting the enhancement for all defendants. *See United States v. Murphy*, 254 F.3d 511, 513 (4th Cir. 2001); *United States v. Ramsey*, 237 F.3d 853, 855-56 (7th Cir. 2001); *United States v. Wingate*, 369 F.3d 1028,

1031-32 (8th Cir. 2004), opinion reinstated, 415 F.3d 885, 889 (8th Cir. 2005); *United States v. Kravchuk*, 335 F.3d 1147, 1158-59 (10th Cir. 2003).

Even among the circuits that upheld the enhancement, however, the justifications vary. All four have ruled that §3B1.4 is not "at odds with" the relevant Congressional directive because defendants at least twenty-one years of age will still receive the two-point adjustment. *Ramsey*, 237 F.3d at 857; *Murphy*, 254 F.3d at 513; *Kravchuk*, 335 F.3d at 1158; *Wingate*, 369 F.3d at 1031. Both the *Ramsey* and *Kravchuk* courts additionally embraced the "congressional silence" theory: that by failing to reject the Commission's final version of §3B1.4, Congress had implicitly accepted it. *Ramsey*, 237 F.3d at 857; *Kravchuk*, 335 F.3d 1158. The First Circuit joined *Ramsey* and *Kravchuck*, ruling that the Guideline was not "at odds" with the Congressional directive and, in the alternative, that Congress adopted it by declining to reject it. See *United States v. Vaquerano Canas*, 81 F.4th 86 (1st Cir. 2023).

By contrast, the United States Court of Appeals for the Sixth Circuit, in *Butler*, 207 F.3d at 849-852, held that the Sentencing Commission exceeded its authority for two reasons. First, it held that Congress's words must have meaning, and this meaning was lost when the Sentencing Commission ignored Congress's plain language. Second, it ruled that Congress's intent is gleaned from the directive's text and legislative history,

not from its silence, i.e. its failure to reject the Sentencing Commission's expanded enhancement during the review period. *Id*.

The *Butler* court concluded that "looking at the face of both the directive and the guideline, we are not convinced that the commission's interpretation of the age restriction is "sufficiently reasonable." To the contrary, the guideline's "interpretation" was a direct overruling of an explicit Congressional declaration because it eliminated the age limit, lock, stock, and barrel." *Id*. The court further ruled that "[w]e cannot conceive of a clearer example than that presented here where the Commission has so flatly ignored a clear Congressional directive." *Id*.

The Sixth Circuit also rejected the Sentencing Commission's characterization that it implemented the congressional directive in a "slightly broader form." *Id*. The Court reasoned that by "reflexively relying" on how the Sentencing Commission characterized its own proposed guideline, courts would, in effect, abandon their judicial role in deciding whether a guideline accurately reflected congressional intent. *Id*. Calling §3B1.4 "far more dramatic" than Congress's directive, the court highlighted some foreseeable consequences stemming from the elimination of an age restriction: "As this case demonstrates, without the age limit that Congress originally authorized, the guideline introduces a whole host of situations where defendants under age twenty one can receive enhancements for engaging in criminal activities

with youths of similar age, or perhaps even older than the defendants themselves." *Id.*

As the above cases show, the Circuits are split on whether the Commission exceeded its authority in promulgating §3B1.4 and on whether Congress acquiesced to this agency decision by failing to affirmatively reject it. This Court should grant certiorari to resolve this conflict.

B. The Sentencing Commission's power is limited to what Congress gives it and Congress' delegation powers are not unfettered.

The Sentencing Commission is not a legislative body. Its authority to dictate Guidelines comes from a delegation by Congress, whose power to do so is far from limitless. While Congress can assign some of its legislative responsibilities to other branches, this Court has deemed it "constitutionally sufficient [only] if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *American Power & Light Co. v. SEC,* 329 U.S. 90, 105 (1946); see also *J.W. Hampton, Jr., & Co. v. United States,* 276 U.S. 394, 409 (1928) (only if Congress "lay[s] down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, [is] such legislative action is not a forbidden delegation of legislative power.") This nondelegation doctrine is rooted in the principle of separation of powers and Article I of the Constitution, which provides that "[a]ll legislative

Powers herein granted shall be vested in a Congress of the United States." U.S. Const., Art. I, § 1; *Mistretta v. United States*, 488 U.S. 361, 371 (1989).

While it is true that the Court has not struck down a challenged statute on delegation grounds in decades, and the defendant here does not challenge the original enabling statute which gave rise to the Commission, the doctrine is important in that it frames the scope of the Commission's authority to draft new Guidelines. In other words, when determining whether the Commission exceeded its authority, the Court must bear in mind that the power to legislate rests solely with Congress and that any agency's power to make rules is not limitless.

The Court recently addressed the scope of a Congressional delegation regarding the federal sex offender registry in *Gundy v. United States*, 139 S. Ct. 2116, 2129 (2019). Four[2] judges wrote the majority opinion affirming the delegation. Two of the four, Justices Breyer and Ginsburg, are no longer on the Court.

Justice Alito concurred. But in doing so, he suggested that the Court ought to reconsider its non-delegation doctrine, which in his view has "upheld provisions that authorized agencies to adopt important rules pursuant to extraordinarily capacious standards." *Gundy*, 139 S. Ct. at 2130–31.

Chief Justice Roberts and Justices Gorsuch and Thomas dissented. Gorsuch wrote that, unlike Alito, the three dissenters "would not wait" for a

[2] Justice Kavanaugh did not participate in the decision.

full bench to reconsider the non-delegation doctrine. *Id*. at 2131. Instead, they stated that the current body of caselaw "frustrate[s] the system of government ordained by the Constitution" as it allows Congress to "announce vague aspirations and then assign others the responsibility of adopting legislation to realize its goals." *Id.* at 2133. Rejecting the current "intelligible principle' analysis, the dissenters suggested that, to determine whether a statute is an appropriate delegation of authority, the courts must consider, among other factors whether "Congress, and not the [other] Branch, [made] the policy judgments? Only then can we fairly say that a statute contains the kind of intelligible principle the Constitution demands." Id. at 2141.

While it is true that the Court has upheld the Sentencing Commission's authority to write the Guidelines, *Mistretta v. United States*, 488 U.S. 361, 377 (1989), its power is not limitless. This case offers the Court an opportunity to reign in an agency's assertion of quasi-legislative power.

C. Where Congress gives an administrative agency a clear and unambiguous directive, the courts do not owe deference to the agency's response.

While it is true that Congress has delegated to the Commission "significant discretion in formulating guidelines" for sentencing convicted federal offenders, *Mistretta*, 488 U.S. at 377, that discretion is not "unbounded" and must yield to specific directives of Congress. *United States v. LaBonte*, 520 U.S. 751, 753, 757 (1997). In determining whether a Guideline accurately reflects Congress' intent, courts must look first to the

statutory language. *Id*. If a Guideline "is at odds" with the plain language of a Congressional directive, it must give way.

Importantly, where Congress gives a clear legislative directive to an administrative agency, no deference is due to the agency's "interpretation" of the statute. Instead, discretion is only appropriate where the statute is vague or open to multiple interpretations.

For example, in *LaBonte*, 520 U.S. at 754, the Court rejected the Commission's interpretation of the phrase "offense statutory maximum" and ruled that the Guideline's definition of that term was contrary to Congress' directive. In doing so, the Court rejected a lower court ruling which deferred to the Commission's interpretation of the phrase so long as it was "plausible." *Id*. at 756. Thus, in this case, if the Court determines that Congress' directive to the Commission was unambiguous, then it owes no deference to the Commission's interpretation of that directive.

D. Section 3B1.4 is not faithful to Congress' clear, unambiguous directive for the Commission to draft a Guideline which enhances sentences for defendants over the age of 21 who use a minor to assist them in committing a crime.

The Commission's decision to promulgate the use of a minor enhancement "in broader form" than what Congress directed exceeded the scope of its authority. That Congress did not elect to reject the enhancement within the 180-day review period is not a tacit acquiescence to the Commission's proposed language.

1. The clear language of the Congressional directive limits the Commission's authority in this narrow regard, thus superseding its general statutory powers to write Guidelines.

Congress used clear, direct, unambiguous, and specific language to ensure that only defendants 21 and over received enhanced sentences under §3B1.4. The Commission unlawfully ignored this legislative command. That the Commission has the power in general to draft Guidelines does not justify its specific actions here.

The starting point in discerning congressional intent is the statutory text. *Hughes Aircraft Co. v. Jacobson,* 525 U.S. 432, 438 (1999). "[W]hen the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.,* 530 U.S. 1, 6 (2000); *Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004) (same). And, "[a]s this Court has noted time and time again, the Court is 'obliged to give effect, if possible, to every word Congress used." *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 583 U.S. 109, 128–29 (2018), *quoting Reiter v. Sonotone Corp.,* 442 U.S. 330, 339 (1979).

In 1994, Congress passed the Violent Crime Control and Law Enforcement Act of 1994. Congress included within it eight sections specific to the issue of youth violence.[3] Of relevance here, Congress directed that "the United States Sentencing Commission *shall* promulgate guidelines or amend

[3] See §§ 140001-140008, 108 Stat. at 2031-33 [Add. 13]

existing guidelines to provide that *a defendant 21 years of age or older* who has been convicted of an offense shall receive an appropriate sentence enhancement if the defendant involved a minor in the commission of the offense" (emphases added). Id. § 140008.

The Commission's response was to draft a Guideline which applied the enhancement to all defendants regardless of age. Permitting the Commission to do so fails to "give effect" to the words "shall" and "a defendant 21 years of age or older." The discretion afforded the Commission per the terms of the statute was as to the extent of the "appropriate sentence enhancement" not the decision on whether to impose one at all ("shall") or for whom ("a defendant 21 years of age or older.") Congress' specificity in the original language of the Act reflects that it simply did not intend for defendants under the age of 21 to come within the ambit of this Guideline provision. The Commission ignored this directive and its actions cannot be justified by reliance on its general power to draft Guidelines.

2. The context and the statute's legislative history demonstrates Congress' intent to limit applicability of the Use of a Minor enhancement to defendants 21 and older.

The Commission's error is further exemplified when the Congressional directive is read in context with other laws and the The Violent Crime Control and Law Enforcement Act's legislative history. Thus, to the extent that the plain language of the statute leaves any doubt as to Congress's

wishes, the legislative history of §140008 shows Congress intended the enhancement to apply *only* to those 21 or older.

The original Senate version of the provision provided for the enhancement to apply to defendants 18 years of age or older. Violent Crime Control and Law Enforcement Act of 1993, Senate amendment no. 1170, 103rd Cong., 139 CONG. REC. S15,638 (1993). This proposal – effectively covering the same scope as the final version of §3B1.4 – was rejected by the House, as both proposed House versions stated that the enhancement would apply only to defendants *21 years or older*. *See, e.g.*, 140 CONG. REC. H8772–03 (1994); 140 *Cong. Rec.* H7372–01 (1994). The final version of the provision, codified in Pub. L. 103–322, section 140008, used the House's 21 years or older formulation.

Further, discussions about the so-called "solicitation of a minor" enhancement often referenced a group of other laws providing for mandatory minimum sentences for defendants 21 years or older. Minimum sentences were discussed for defendants who sell drugs to a juvenile, buy drugs from a juvenile, use a juvenile to sell drugs, or use a juvenile to avoid detection of a drug offense. *See, e.g.*, 140 CONG. REC. S12496–01 (1994). The age limit thus seems to have been part of a coordinated plan to increase punishments for defendants who were at least 21 years old and who use minors to commit crimes.[4]

[4] *See* Tory L. Lucas, *But I'm Not Twenty-One Yet: How Section 3b1.4 of the United States Sentencing Guidelines Ignored Congress's Intent To Enhance Sentences Only For Adults At*

Additional proof that Congress meant to apply the enhancement to only those defendants who were 21 and over is that, at the time of its drafting, the Guidelines had the force of a sentencing statute. Thus, Congress recognized that a two-point Guideline increase would, in most cases, result in a corresponding sentence increase. The most likely reason that Congress debated the age restriction, eventually settling on 21, was to reach a legislative consensus on who ought to be punished more harshly and who should not. That the Commission sought to overrule this, particularly in the pre-*Booker*, mandatory Guideline context, was an overstep.

Taking the statute as a whole, reading it in context, and considering it along with the legislative history, shows that Congress intended to punish only those over 21 who use minors to commit federal offenses. The Commission's adjustment, however, rejected this legislative command and improperly applied the enhancement to all defendants. U.S.S.G. §3B1.4. [Add. 12].

E. Congress' failure to reject the Commission's proposed §3B1.4 language was not a tacit acceptance of the Commission's unlawful expansion of the enhancement's applicability.

This Court should grant certiorari to clarify that the Sixth Circuit correctly rejected the "congressional silence" theory. Congress' failure to

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Least Twenty-one Years Of Age Who Corrupt Minors By Using Them To Commit Federal Offenses--And What Federal District Courts Can Do About It, 53 S. TEX. L. REV. 205, 250-59 (2011).

reject the Sentencing Commission's language during the review period did not amount to implicit acceptance of §3B1.4.

Noting that the Supreme Court has counseled that "[n]ot every silence is pregnant" and that silence is not dispositive "when it is contrary to all other textual and contextual evidence of congressional intent," the Sixth Circuit determined that "the original twenty-one[-]year[-]old age limit is sufficiently clear to overcome an argument from silence." *Butler*, 207 F.3d at 851. Courts relying on the congressional silence theory would "wholly to abandon their role of assessing whether enacted guidelines comport with congressional intent" and amount to a failure to "hold[] the [Sentencing] Commission accountable as an agency of limited powers." *Id.* at 851. Because every proposed guideline is subject to congressional review and every enacted guideline has survived congressional rejection, blindly adhering to the congressional silence theory "would thus dictate that all enacted guidelines inherently satisfied [c]ongressional intent, and would eliminate [the judiciary's] vital role . . . of squaring the enacted guideline with the original statutory language." *Id.*

The sentencing judge here disagreed with *Butler*, saying he was persuaded that Congress' inaction amounted to "implicitly accepting the Sentencing Commission's rejection of the age limitation" which he speculated might reflect an acknowledgement that close-in-age peers can exert influence over impressionable teenagers. [R.A.261]. This reasoning, however, fails to

appreciate the degree to which the Commission strayed from Congress' mandate. Even accepting the point about peer influence, the lower court's rationale fails to recognize the differing levels of culpability between juvenile and adult offenders, including when applied to their decision on who to involve in their crimes. As counsel argued during Vaquerano's sentencing, there is an appreciable nuance between a 30-year-old plying minors with money and drugs to encourage their participation in a criminal venture, and the 18-year-old who tells his 17-year-old classmate, "join the gang, the gang is cool." [R.A.337]. Even if both share a goal of securing the minor's participation, the 18-year-old's motives and level of sophistication is palpably distinct from that of the 30-year-old.

Moreover, the *Ramsey* court's reasoning on peer-influence – which the judge here found compelling – glosses over the point that 18-to-20-year-old defendants are far more likely to be involved in crime with minors by simple fact of being closer in age than an adult defendant. For this reason, the 18-to-20-year-old defendant's sentence is far more likely to be enhanced than the adult defendant's. Not only does this run counter to what Congress apparently intended, the resulting disparity also undercuts the uniformity sought by the creation of the sentencing guidelines and is fundamentally unfair.

While the Sixth Circuit's interpretation represents the minority approach, its reasoning is most faithful to Congress' mandate and consistent

with the Courts' responsibility to ensure that the Commission respects the limits of its authority.

Conclusion

The plain language of Congress' directive, the legislative history behind the directive, and the context in which the directive was created, demonstrate that "Congress said what it meant": the age of the defendant who uses a minor to commit a federal offense matters and Congress' command to the Sentencing Commission was not superfluous verbiage.

Nevertheless, the Circuits are split as to whether the Sentencing Commission ignored this clear Congressional directive when it drafted U.S.S.G. §3B1.4 without any age limitations. In accordance with the ruling of the Sixth Circuit that the provision is invalid, the lower should not have imposed the enhancement on Vaquerano. Therefore, this Court should grant the Petition for Certiorari.

Respectfully Submitted,
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PROOF OF SERVICE

I, Jessica Hedges, do swear or declare that on this the 27th day of November, 2023, as required by Supreme Court Rule 29, I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The name and address of the person served is as follows:

Solicitor General of the United States
Department of Justice
950 Pennsylvania Avenue, N.W., Room 5616
Washington, D.C. 20530-0001

I declare under penalty of perjury that the foregoing is true and correct.
Executed on

_____
Jessica Hedges

As required by Supreme Court Rule 33.1(h), I certify that the document contains 4802 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d). I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 27, 2023

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Jessica Hedges