

No. 23-6131

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IN THE SUPREME COURT OF THE UNITED STATES

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ELISEO VAQUERANO CANAS, PETITIONER

v.

UNITED STATES OF AMERICA

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ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether the United States Sentencing Commission exceeded its statutory authority when it promulgated Sentencing Guidelines § 3B1.4, which provides an enhanced sentence for a defendant (regardless of age) who uses a minor to commit an offense.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (D. Mass):

United States v. Vaquerano, No. 18-CR-10450 (Mar. 21, 2022)

United States Court of Appeals (1st Cir.):

Vaquerano v. United States, No. 22-1202 (Aug. 30, 2023)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A19) is reported at 81 F.4th 86.

JURISDICTION

The judgment of the court of appeals was entered on August 30, 2023. The petition for a writ of certiorari was filed on November 27, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the District of Massachusetts, petitioner was convicted of

conspiring to conduct enterprise affairs through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(d). Judgment 1. He was sentenced to 43 years of imprisonment, to be followed by five years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. A1-A19.

1. Petitioner was a member of La Mara Salvatrucha, commonly known as MS-13. Gov't C.A. Br. 2. MS-13 is a transnational gang, headquartered in El Salvador, that is organized into smaller groups called "cliques." Id. at 3-4. Petitioner belonged to the Sykos clique of MS-13, which operated in Massachusetts. Id. at 5. The gang's core principles encourage members to kill rival gang members and individuals suspected of cooperating with law enforcement. Id. at 4.

Among his other MS-13 activities, petitioner participated in his clique's murder of Herson Rivas, a member of the clique, for suspected disloyalty. Gov't C.A. Br. 8. Members of the clique took Rivas to a park, where they attacked him with knives. Id. at 8-9. Petitioner personally stabbed Rivas with a machete. Id. at 9. After the discovery of Rivas's body, an autopsy confirmed that his death had been the result of homicide and that he had suffered at least 32 significant sharp force trauma wounds to his head and body. Ibid. Petitioner was 18 years old at the time of the murder. Pet. 4; see Gov't C.A. Br. 6-8 (recounting other racketeering acts).

2. A federal grand jury in the District of Massachusetts indicted petitioner for conspiring to conduct enterprise affairs through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(d). First Superseding Indictment 1-6. Petitioner pleaded guilty. Judgment 1.

The Probation Office calculated a guidelines range of 360 months to life imprisonment. Presentence Investigation Report (PSR) ¶ 214. That calculation included a two-level enhancement under Sentencing Guidelines § 3B1.4, which provides for an enhancement 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." PSR ¶ 154.

Petitioner objected to the minor-use enhancement on multiple grounds, including that the United States Sentencing Commission (Commission) had exceeded its authority by promulgating an enhancement applicable to defendants under 21 years of age. See, e.g., C.A. App. 177, 186-187. The district court overruled the objection. Id. at 251-252; see id. at 260-261. And the court subsequently sentenced petitioner to 516 months of imprisonment, to be followed by 60 months of supervised release. Id. at 410-411.

3. The court of appeals affirmed. Pet. App. A1-A19. Among other things, the court of appeals upheld the district court's

application of the enhancement for the use of a minor under Section 3B1.4. Pet. App. A8-A14.

On appeal, petitioner again raised the argument that the Commission exceeded its authority by including defendants under 21 years of age within the scope of Section 3B1.4. See Pet. App. A8. He pointed, in particular, to the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796, which directed the Commission to "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." Pet. App. A9 (quoting § 140008(a), 108 Stat. 2033). The court of appeals rejected his argument.

The court of appeals explained that the Commission had adopted Section 3B1.4 under its general authority to promulgate sentencing guidelines, rather than under Congress's 1994 directive. Pet. App. A10-A12 (discussing 28 U.S.C. 994). And it observed that Section 3B1.4 does not conflict with the 1994 directive, which requires that defendants 21 years of age and older be subject to an enhancement, but does not prohibit enhancements for defendants under 21 years of age. Id. at A12-A13. As corroboration for that reading, the court noted that the Commission had submitted the proposed enhancement to Congress and, although Congress had

overruled other proposed enhancements submitted at the same time, it had left Section 3B1.4 intact. Pet. App. A13-A14.

#### ARGUMENT

Petitioner renews his claim (Pet. 15-22) that the Sentencing Commission exceeded its authority in including defendants under the age of 21 within the scope of Sentencing Guidelines § 3B1.4. The court of appeals' decision was correct, and any narrow conflict in the circuits does not warrant this Court's review. This Court has denied review in previous cases presenting the same question. See Ramirez v. United States, 543 U.S. 1189 (2005) (No. 04-7369); Kravchuk v. United States, 540 U.S. 941 (2003) (No. 03-5415); Ramsey v. United States, 534 U.S. 831 (2001) (No. 00-9546). The same result is warranted here.

1. Congress has conferred on the Commission the power to "promulgate and distribute" guidelines "for use of a sentencing court in determining the sentence to be imposed in a criminal case." 28 U.S.C. 994(a)(1). In adopting guidelines, the Commission must, to the extent relevant, account for "the circumstances under which the offense was committed which \* \* \* aggravate the seriousness of the offense." 28 U.S.C. 994(c)(2). The Commission "enjoys significant discretion in formulating guidelines." Mistretta v. United States, 488 U.S. 361, 377 (1989). Unless the Commission violates the Constitution or promulgates a guideline "at odds with [a statute's] plain language," United



States v. LaBonte, 520 U.S. 751, 757 (1997), its guidelines will be upheld.

In the Violent Crime Control and Law Enforcement Act of 1994, Congress instructed the Commission "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." § 140008(a), 108 Stat. 2033. As required, Sentencing Guidelines § 3B1.4 provides that defendants who are 21 or older will receive an enhancement for involving a minor in the offense.

The Commission, however, also applied the enhancement to defendants who are younger than 21. In other words, as the Commission has explained, Section 3B1.4 "implements the directive in Section 140008 of the Violent Crime Control and Law Enforcement Act of 1994 \* \* \* in a slightly broader form." Amendments to the Sentencing Guidelines for United States Courts, 60 Fed. Reg. 25,074, 25,086 (May 10, 1995). The guideline is accordingly not "at odds" with Congress's directive; "because Congress did not direct that only defendants over age 21 receive the sentence enhancement, it actually did not require the Commission to limit the application of section 3B1.4 to defendants of a certain age." United States v. Murphy, 254 F.3d 511, 513 (4th Cir.), cert. dismissed, 534 U.S. 1073 (2001). Thus, "the Commission was within its discretion to broaden the category of defendants eligible for

the sentence enhancement" pursuant to its background powers to promulgate the guidelines. Ibid.

Petitioner is incorrect when he asserts (Pet. 14-15) that United States v. LaBonte casts doubt on the Commission's authority to go beyond Congress's directive. In LaBonte, this Court described 28 U.S.C. 994(h) as imposing a "specific requirement[]" on the Commission, namely, ensuring that certain recidivist felons over the age of 17 are sentenced at or near the statutory maximum for their offenses. 520 U.S. at 753. This Court held that the Commission had failed to comply with that requirement because, under Sentencing Guidelines § 4B1.1 as interpreted by Amendment 506, some of the congressionally specified recidivist felons were not sentenced at or near the statutory maximum applicable to them. See id. at 757-762. Nothing in LaBonte suggests that the Commission would have exceeded its authority if it had promulgated a guideline that complied with the specific mandate of Section 994(h) but also ensured that other classes of defendants (say, career offenders who committed serious offenses other than those specified in Section 994(h)) were sentenced at or near the relevant statutory maximum.

2. As petitioner acknowledges (Pet. 9-10), the decision below is consistent with the decisions of most of the other courts of appeals to have addressed the question presented. See United States v. Ramirez, 376 F.3d 785, 786-787 (8th Cir. 2004), cert.

denied, 543 U.S. 1189 (2005); Murphy, 254 F.3d at 513 (4th Cir.); United States v. Ramsey, 237 F.3d 853, 855-858 (7th Cir.), cert. denied, 534 U.S. 831 (2001); United States v. Kravchuk, 335 F.3d 1147, 1158-1159 (10th Cir.), cert. denied, 540 U.S. 941 (2003).

Petitioner argues (Pet. 10-12) that the decision below conflicts with United States v. Butler, 207 F.3d 839 (6th Cir. 2000). But the outlier interpretation of a single circuit court nearly 25 years ago does not justify this Court's review, particularly where petitioner fails to show that the disputed enhancement plays a significant role in a substantial number of sentences. Cf. C.A. App. 336 (district judge, after "retract[ing] [his] statement that use of a minor \* \* \* would not be material to anybody's sentencing," nevertheless acknowledging that "I'm not saying it's going to make a difference in this particular case").

Moreover, this Court ordinarily does not resolve disagreements among the courts of appeals about Guidelines issues, because the Commission can amend the Guidelines to eliminate the conflict. See Braxton v. United States, 500 U.S. 344, 347-349 (1991). That is true even when a defendant challenges the Commission's authority to promulgate a particular guideline. For example, in 28 U.S.C. 994(h), Congress directed the Commission to specify a sentence at or near the maximum for certain career offenders, but did not include drug conspiracies in its list of qualifying offenses. The courts of appeals divided over whether

Sentencing Guidelines § 4B1.2, which (as interpreted) included drug conspiracies for purposes of career-offender sentencing, was supported by that grant of authority. Compare, e.g., United States v. Bellazerius, 24 F.3d 698, 700-703 (5th Cir.), cert. denied, 513 U.S. 954 (1994), with United States v. Mendoza-Figueroa, 65 F.3d 691, 694 (8th Cir. 1995) (en banc), cert. denied, 516 U.S. 1125 (1996). The Commission resolved the conflict by amending its commentary to explain that the Commission had promulgated the guideline under both its general powers and the congressional directive. See United States v. Lightbourn, 115 F.3d 291, 293 (5th Cir. 1997) (observing that "[t]he amendment to the sentencing guidelines \* \* \* effectively eliminates the concerns of the Bellazerius Court").

As that example illustrates, should the limited disagreement between the circuits in this case deepen or cause practical problems, the Commission could respond in a similar fashion. Furthermore, the significance of any disagreement over the validity of Section 3B1.4 is additionally reduced because the Guidelines are advisory rather than mandatory. See Booker v. United States, 543 U.S. 220 (2005). Although a sentencing court must still calculate the applicable guidelines range, it is required to consider both the Guidelines and other factors in 18 U.S.C. 3553(a), including the defendant's history and characteristics, in deciding on the ultimate sentence. Thus,

regardless of whether petitioner is correct about the question presented, a sentencing court would have discretion to impose a reasonable sentence taking account of a defendant's use of a minor in the offense, even when the defendant was below the age of 21 at the time of the offense. And in this particular case, the district court's explanation for its sentence highlighted that petitioner had "energetically recruited other teenagers to join the gang." C.A. App. 415.

#### CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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