Docket No:

UNITED STATES SUPREME COURT

UNITED STATES,
Plaintiff-Respondent,

v.

CODY MERCURE,
Defendant-Petitioner.

On Petition for Writ of Certiorari
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE QUESTIONS PRESENTED

I. Did the sentence of three hundred months violate the grossly disproportionate protection afforded by the unusual sentence prohibition under the Eighth Amendment because United States Sentencing guideline 2G2.2 was not the product of the institutional role of the United States Sentencing Commission?

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JURISDICTIONAL STATEMENT

Review on Petition for Writ of Certiorari. The Defendant makes this petition based on the jurisdiction conferred by Article III Section 1 of the United States Constitution, 28 U.S.C. § 1254(1), and Rule 10 of the Supreme Court Rules. The Decision in the United States Court of Appeals for the First Circuit deals with an important federal question and conflicts with other decisions of the Supreme Court of the United States. This Petition is timely as the deadline was enlarged by the Court having been filed within 90 Days of United States Court of Appeals for the First Circuit's Opinion docketed on June 11, 2024.

Appellate Jurisdiction. The Defendant takes this appeal as of right in a criminal prosecution under 28 U.S.C. § 1291 and the jurisdiction established by Federal Rule of Appellate Procedure 4. Pursuant to Fed. R. App. P. 4(b), the notice of appeal must be filed in the District Court within 14 days after entry of the order or judgment appealed. The notice of appeal in this matter was timely filed on May 2, 2023.

Original Jurisdiction. District Courts of the United States have original jurisdiction of all offenses against the laws of the United States. See 18 U.S.C. § 3231. The indictment in this matter resulted in convictions of Mr. Mercure for violations of 18 U.S.C. § 2251 and 18 U.S.C. § 2252A.

PROVISIONS OF LAW

U.S. Constitution Amend. VIII.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT OF FACTS

On April 25, 2023, Unites States District Judge Leo T. Sorokin sentenced Cody Mercure to 300 months of imprisonment for violating 18 U.S.C. §2251 and 18 U.S.C. § 2252A. Appendix *hereinafter* A at 1. The Docket Entries contain no entry of a written prosecution version of the offense that was agreed to or otherwise submitted. A at 9-10. Mr. Mercure's Attorney made no objections to the factual basis of the plea as presented at the Rule 11 hearing. A at 27. The Docket Entries contain no entry of any written objections to the Pre-sentence Report. A at 9-12. Mr. Mercure's Attorney made no objections at the sentencing but argued for the fifteen-year mandatory minimum sentence required for 18 U.S.C. §2251. A at 47. The District Court did not resolve any objections raised by Mr. Mercure's Attorney at sentencing. A at 27-28. Judge Sorokin pointed out that Mr. Mercure's Attorney filed a psychosexual evaluation report of Mr. Mercure. A at 25. Three hundred months is twenty-five years, which is a five-year variant sentence in this case from the Guideline Range which is the statutory maximum. A at 57.

On February 19th of 2021, the defendant, Cody Mercure, sexually abused an 18-month-old toddler, Minor A, who was known to him and was in his care at a residence in Massachusetts, and video recorded the abuse using his smartphone, which had been transported in interstate or foreign commerce. The videos were uploaded to his Google photos account on February 19th, 2021, and April 3rd, 2021, again, traveling in interstate commerce. A at 82-83.

In early April of 2021, Google submitted multiple cyber tipline reports to the National Center for Missing and Exploited Children related to images of child sexual abuse found in Mr. Mercure's Google account. Following local law enforcement's investigation of the cyber tips, on April 7th of 2021, Mr. Mercure was arrested in Massachusetts on state charges. Two phones

belonging to him, a Moto G Stylus and a TCL REVVL 4+, were seized and later searched pursuant to a warrant. After being advised of his Miranda rights, Mr. Mercure consented to an interview. He admitted to taking video on his cell phone, depicting himself sexually abusing Minor A, the child in his care, who was just over 18 months old at the time. He admitted to recording himself touching Minor A with his fingers, putting his mouth on her vagina, and rubbing his penis against her vagina. Mr. Mercure also told investigators that he believed this video was saved on his phone. Two videos matching the description of the abuse of Minor A were located within the Keepsafe application, an encrypted application on his Moto G Stylus phone, and they were also located in his Google account. The video files contained GPS information in the metadata, which indicate that the videos were taken in Massachusetts, on February 19th, 2021. A at 83-84

The two clips of Mr. Mercure sexual abusing the victim were described in the pre-sentence report. The first clip was a fifty-four second video depicting the victim lying nude on a light-colored tile floor. The victim is nude from the chest down with a blue pacifier in her mouth, wearing gray and white footed pajamas that had been partially removed. The video further depicted Mr. Mercure placing his mouth on the victim's vagina and placing his penis on the victim's vagina. The second clip was a twenty second video of the victim lying nude from the chest down on a light-colored floor with a blue pacifier in her mouth, wearing gray and white footed pajamas that had been partially removed. This video depicts Mr. Mercure manipulating the victim's vagina with his finger and again placing his mouth on the victim's vagina. The first fifty-four second video clip was uploaded to Mr. Mercure's Google account on April 3, 2021. The second twenty second video clip was February 19, 2021. The Government had no evidence

that these two particular videos were distributed in any way even though they had done a forensic evaluation to determine if those videos had been distributed..

The Pre-sentence Report also described additional images of child sexual abuse found in Mr. Mercure's Google account of the victim that displayed the victim's vagina. These three additional images of child sexual abuse were uploaded on December 29, 2021 and February 19, 2021. The Government had no evidence that these three particular images were distributed in any way even though they had done a forensic evaluation to determine if those images had been distributed. SA at 6.

Mr. Mercure also admitted to obtaining images of child sexual abuse from dark web Internet forums and to posting files containing images of child sexual abuse through such forums. Agents located over 100 images and videos depicting child sexual abuse stored on one of the phones. The Telegram messaging application was installed on his phone. A Telegram chat log documents a chat with another user, in which Mr. Mercure sent and received, over the internet, videos depicting child sexual abuse. Agents determined that of approximately 22 files, whose exchange was detailed in that log, approximately 17 are videos depicting child sexual abuse. Of those, Mr. Mercure sent 14 and received three. Mr. Mercure sent at least one of these files on January 16, 2021, a date on which he was in the District of Massachusetts. A at 84.

The Presentence Report described some of these images of child sexual abuse. There was a two minute and thirty-nine second video of a prepubescent female victim lying on a bed trying to escape while an adult female tries to insert an object into the victim's vagina and then the adult physically restrains the victim to digitally penetrate the victim's anus. There was a one minute and eight second video of an adult male inserting his penis into the mouth of a female

child. In addition to these videos, Mr. Mercure' search history queries for images of child sexual abuse on October 23, 2020, January 2, 2021, and February 28, 2021.

At sentencing the District Court recognized that he had the Pre-sentence Report, the Government's Sentencing Memorandum, the Defendant's Sentencing Memorandum, and the report of Mr. Mercure's evaluation. A at 24-25. The Court made a single correction to the pre-sentence report on its own but resolved no other issue because no other issues had been raised. A at 27. Trial Counsel did not file objections to the Pre-sentence Report. A at 10-12. Trial Counsel made no challenge to U.S.S.G. 2G2.2. A at 45-49.

The Court applied the U.S.S.G. 2G2.2. Mr. Mercure has two counts of conviction, and therefore, two, as they say, groups under the sentencing guidelines. The first count, sexual exploitation of children, is the first guideline group. It results in a base offense level of 32; a four-point enhancement because it involved a minor who had not attained the age of 12; a two-point enhancement because it involved the commission of a sexual act or sexual content; a further four-point enhancement because the offense involved material that portrays an infant or toddler; a two-point enhancement after that because the defendant was a parent, relative, or legal guardian of the minor involved in the offense. All of that leads to an adjusted offense level of group one of 44. Count 2 is distribution of child pornography. It is a base offense level of 22; a two-point enhancement for involving a prepubescent minor, or minor under the age of 12; 8 a two-point enhancement for knowingly engaging in distribution; four-point enhancement if it involved material that portrays either sadistic or masochistic conduct or other depiction of violence or sexual abuse or exploitation of an infant or toddler; a two-point enhancement for the use of a computer or interactive computer service; and a five-point enhancement based on the

number of images, which has to do with also how videos are converted into a number of images and so forth. All of that for group two leads to an adjusted offense level of 37. Under the grouping rules, as you both know, you take the higher offense level, add a certain amount. Under the circumstances here, one offense level and then disregard the lower offense level. The calculations lead to a level 45. A three-point reduction for acceptance was applied, to a final offense level of 42. Mr. Mercure had two criminal history points, which puts him in criminal history category II. Resulting in a guideline sentencing range of 360 to 600 months; five years to life of supervised release; a $50,000 to $500,000 fine, if he can afford to pay a fine; a mandatory special assessment of -- totaling $200; and a mandatory, if not indigent, special assessments under the AVAA Act, up to $35,000 for Count 2, and under the JVTA Act for up to $5,000 -- or $5,000, not up to five, for Counts 1 and 2, again, if not indigent. And then there's the mandatory minimums. The mandatory minimums are 15 years on Count 1, five years on Count 2, and five -- minimum five years of supervised release. A at 28-30.

The District Court sentenced Mr. Mercure to 300 months or twenty-five-years which is five years less than the statutory maximum. A at 58. The District Court reasoned that this sentence was necessary to protect society, that treatment was not likely to succeed, and that Mr. Mercure's victim should be free from interference until after she is twenty-one years old. A at 55-57. Although Trial Counsel did not object to the sentence, he requested a 15 years sentence for Mr. Mercure during his presentation. A at 47. The Government had requested the statutory maximum. A at 34. The Court never recognized that the statutory maximum was the Guideline Range in this case. A at 29. Mr. Mercure filed a notice of appeal because of his sentence. A at 12.

ARGUMENT

I. This is an important federal question regarding the use of United States Sentencing guideline 2G2.2 and the length of sentences caused by its application.

The twenty-five-year sentence imposed on Mr. Mercure violated the Eighth Amendment prohibition against cruel and unusual punishment. The Eighth Amendment provides, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII (West 2024). The Court has applied cruel and unusual principles to noncapital sentences since at least 1910. See *Weems v. United States*, 217 U.S. 349 (1910). The Court still recognizes a limited proportionality limitation on sentences that do not involve the death penalty See *Ewing v. California*, 538 U.S. 11 (2008). While there is no case that applies cruel and unusual principles that invalidates any United States Sentencing Guideline, Mr. Mercure asserts that the District Court's use of U.S.S.G 2G2.2 violates the narrow principle of proportionality protection of the Eighth Amendment as applied to his case.

Under its ordinary meaning, Mr. Mercure asserts that the twenty-five-year sentence imposed on him was unusual. The Court has established that it is the ordinary meaning of unusual that is included in the Eighth Amendment's protection:

> Wrenched out of its common-law context, and applied to the actions of a legislature, the word "unusual" could hardly mean "contrary to law." But it continued to mean (as it continues to mean today) "such as [does not] occu[r] in ordinary practice," Webster's American Dictionary (1828), "[s]uch as is [not] in common use," Webster's Second International Dictionary 2807 (1954). According to its terms, then, by forbidding "cruel and unusual punishments," see Stanford v. Kentucky, 492 U.S. 361, 378, 109 S.Ct. 2969, 2979, 106 L.Ed.2d 306 (1989) (plurality opinion); In re Kemmler, supra, 136 U.S., at 446–447, 10 S.Ct., at 933, the Clause disables the Legislature from authorizing particular forms or "modes" of punishment—specifically, cruel methods of punishment that are not regularly or customarily employed. E.g., Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 464, 67 S.Ct. 374, 376, 91 L.Ed. 422 (1947) (plurality opinion); In re Kemmler,

> supra, 136 U.S., at 446–447, 10 S.Ct., at 933. See also United States v. Collins, 25 F.Cas. 545 (No. 14,836) (CC R.I.1854) (Curtis, J.).

Harmelin v. Michigan, 501 U.S. 957, 976 (1991). While *Harmelin* created controversy and a series of further opinions, the Court has not discouraged the usage of the ordinary meaning of unusual. The ordinary meaning of unusual is a useful characterization to the extent that the First Circuit has expressed an opinion in *Stone* of the usual application of U.S.S.G. 2G2.2. Mr. Mercure asserts that the measure of usual is the First Circuit's coda articulated in *United States v. Stone,* 575 F.3d 83, 97 (2009) or a sentence that is a "somewhat lower sentence" than seventeen years. Just because a sentence is reasonable under Sixth Amendment analysis does not mean it passes the limited proportionality principle under the Eighth Amendment.

Stone is the measure of reasonableness in the First Circuit. While it is not a direct analog of Mr. Mercure's relevant conduct, *Stone's* reasoning is significant:

> We add a coda. Sentencing is primarily the prerogative of the district court, and the sentence imposed in this case is within permissible limits. There is no error of law and no abuse of discretion. That said—and mindful that we have faithfully applied the applicable standards of review—we wish to express our view that the sentencing guidelines at issue are in our judgment harsher than necessary. As described in the body of this opinion, first-offender sentences of this duration are usually reserved for crimes of violence and the like. Were we collectively sitting as the district court, we would have used our Kimbrough power to impose a somewhat lower sentence.

Stone, at 97. *Stone* rejected many of the arguments made on behalf of Mr. Mercure. The difference and distinguishing factor is the twenty five year sentence imposed on Mr. Mercure. Stone specifically identifies the lack of actual sexual abuse as a factor in that case. Here, Mr. Mercure's production of images of child sexual abuse perpetrated by him form the basis of one of the counts of conviction. Mr. Mercure asserts that his commission of acts of sexual abuse should

not justify the length of the sentence imposed.

The Court has affirmed the existence of the narrow proportionality principle that must be applied under the Eighth Amendment and that principle still applies now to the kind of noncapital sentence imposed on Mr. Mercure. The Court stabilized the standard despite the controversy after Harmelin:

> The Eighth Amendment, which forbids cruel and unusual punishments, contains a "narrow proportionality principle" that "applies to noncapital sentences." Harmelin v. Michigan, 501 U.S. 957, 996-997, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991) (KENNEDY, J., concurring in part and concurring in judgment); cf. Weems v. United States, 217 U.S. 349, 371, 30 S.Ct. 544, 54 L.Ed. 793 (1910); Robinson v. California, 370 U.S. 660, 667, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962) (applying the Eighth Amendment to the States via the Fourteenth Amendment). We have most recently addressed the proportionality principle as applied to terms of years in a series of cases beginning with Rummel v. Estelle, supra.

Ewing, 538 U.S. at 21. *Ewing* resolved the tension created between *Rummell v. Estelle*, 445 U.S. 263 (1980) and *Solem v. Helm*, 462 U.S. 277 (1983) that addressed similar recidivist statutes but came out with opposite results. *Solem* suggests factors that should be used on the narrow proportionality analysis that ultimately did not address the difference and was criticized for its lack of guidance on how the standard should be applied. *Ewing* adopted Justice Kennedy's standard from the concurrence in part and concurrence in the result in *Harmelin*.

The Court promulgated the gross proportionality protection under the Eighth Amendment in 2003 with its holding in *Ewing*. Gross disproportionality under the Eighth Amendment prevents the legislature from authorizing certain sentences:

> Justice KENNEDY, joined by two other Members of the Court, concurred in part and concurred in the judgment. Justice KENNEDY specifically recognized that "[t]he Eighth Amendment proportionality principle also applies to noncapital sentences." Id., at 997, 111 S.Ct. 2680. He then identified four principles of proportionality review-"the primacy of the legislature, the variety of legitimate penological schemes, the nature of our federal system, and the requirement that

> proportionality review be guided by objective factors"-that "inform the final one: The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime." Id., at 1001, 111 S.Ct. 2680 (citing Solem, supra, at 288, 103 S.Ct. 3001). Justice KENNEDY's concurrence also stated that Solem "did not mandate" comparative analysis "within and between jurisdictions." 501 U.S., at 1004-1005, 111 S.Ct. 2680.

Ewing, at 24. U.S.S.G § 2G2.2 has been widely criticized by the District Courts and the Circuits of the Court of Appeals because of the harsh results of applying the guideline. Ultimately the theory of punishment under 18 U.S.C. §2251 and 18 U.S.C. § 2252A is based on destroying the market forces that create and distribute images of child sexual abuse and not the perpetration of the abuse itself. Sentencing Mr. Mercure to twenty-five years based on U.S.S.G. § 2G2.2 is grossly disproportionate.

While the abuse depicted in the images is heinous, abhorrent, and worthy of very significant punishment, community loathing is not enough for Eighth Amendment purposes. This Court requires the judiciary to make this decision:

> As we have said in other Eighth Amendment cases, objective evidence of contemporary values as it relates to punishment for child rape is entitled to great weight, but it does not end our inquiry. "[T]he Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." Coker, supra, at 597, 97 S.Ct. 2861 (plurality opinion); see also Roper, supra, at 563, 125 S.Ct. 1183; Enmund, supra, at 797, 102 S.Ct. 3368 ("[I]t is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty"). We turn, then, to the resolution of the question before us, which is informed by our precedents and our own understanding of the Constitution and the rights it secures.

Kennedy v. Louisiana, 554 U.S. 407, 434 (2008). Then Chief Judge Bataillon of the District of Nebraska concluded that 2G2.2 was not developed under the empirical approach, but was promulgated, for the most part, in response to statutory directives and that the Commission itself acknowledges that the frequent requests to amend the guidelines makes it difficult to gauge their

effectiveness in *United States v. Baird*, 580 F.Supp.2d 889, 893–94 (D.Neb.2008). Then Chief Judge Pratt in *United States v. Johnson*, 588 F.Supp.2d 997, 1003–04 & n. 4 (N.D.Iowa 2008): "the Court has been unable to locate any particular rationale for them beyond the general revulsion that is associated with child exploitation-related offenses." Judge Lynn Adelman filed a sentencing memorandum that in part that found the Guideline to be illogical in *United States v. Hanson*, 561 F.Supp.2d 1004 (E.D.Wis.2008) (quoting Troy Stabenow, Deconstructing the Myth of Careful Study: A Primer on the Flawed Progression of the Child Pornography Guidelines (July 3, 2008) 23–24.). While these criticisms were in the context of justifying the exercise of authority under *Kimbrough* and not aimed towards the Eighth Amendment analysis, there appears no reason not to consider the criticism in the context of the Eighth Amendment's prohibition of unusual punishment.

Because application of 2G2.2 in Mr. Mercure's case is unusual as that term is defined in *Harmelin*, this Court should analyze the guideline under the *Ewing* Standard. Here, the sentence is not the product of a legislative primacy even though it is within the statutory limits for sentences under 18 U.S.C. §2251 and 18 U.S.C. § 2252A. Nor are sentences at the high end of the statutory range empirically justified strictly under the facts that lead to conviction under 18 U.S.C. §2251 and 18 U.S.C. § 2252A. Mr. Mercure asserts that the nature of the federal system is limited by the first ten Amendments and that use of his dangerousness to justify a twenty-five year sentence requires some amount of Sixth Amendment protection: the Guidelines infringe this protection through the use of relevant conduct when applying 2G2.2 to justify sentences at the high end of the statutory maximum, and Trial Counsel's failure to provide effective assistance by filing the psychosexual evaluation. And finally, the sentence at the high end of the guideline is not justified

by objective factors. Mr. Mercure asserts that the twenty-five years sentence imposed on him violates the protection afforded to him under the Eighth Amendment.

II. The United States Court of Appeals for the First Circuit has applied a standard that is inconsistent with this Court's requirements for recognizing policy disagreements with the United States Sentencing Guidelines.

When The United States Sentencing Guidelines were mandatory, sentences were imposed in violation of the Sixth Amendment right to jury determination. Post United States v. Booker, the United States Sentencing Guidelines are no longer mandatory:

> We answer the question of remedy by finding the provision of the federal sentencing statute that makes the Guidelines mandatory incompatible with today's constitutional holding. We conclude that this provision must be severed and excised, as must one other statutory section which depends upon the Guidelines' mandatory nature. So modified, the Federal Sentencing Act, see Sentencing Reform Act of 1984, as amended makes the Guidelines effectively advisory.

United States v. Booker, 543 U.S. 220, 245 (2005). As part of its Sixth Amendment remedy, the Supreme Court also imposed a reasonableness standard for the review of sentences imposed after Booker. While it would take *Rita v. United States*, 1551 U.S. 338, (2007), *Gall v. United States*, 552 U.S. 38, (2007), and *Kimbrough v. United States*, 552 U.S. 85, (2007) to define the contours of the reasonableness standard of review, the net result is a significantly expanded sentencing discretion. In this case, Mr. Mercure's sentence is substantively unreasonable because the District Court was confined to a deviation based on a guideline that requires sentence lengths that are routinely toward the statutory maximum without adequate justification.

The notion of an expended discretion for how the guidelines should be applied was an active issue with the United States Supreme Court through 2007. Under current law, sentencing judges cannot stop with the idea that the guidelines determine the sentence that should be imposed:

> 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 that the Guidelines range is reasonable. See [Rita v. United States]. He must make an individualized assessment based on the facts presented. If he decides that an outside Guidelines sentence is warranted, he must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance. We find it uncontroversial that a major departure should be supported by a more significant justification than a minor one. 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 v. United States, 552 U.S. 38, 49-50, (2007) (quoting *Rita v. United States*, 551 U.S. 338, (2007)). In this case, the District Court engaged in the analysis described by *Rita* and reiterated in *Gall* while sentencing Mr. Mercure. Specifically, the District Court questioned the Government's assertion that the appropriate sentence in this case was the maximum but declined to sentence within the mean. The problem with U.S.S.G. § 2G2.2 seems to be the enhancements required by Congress.

The reasonableness standard has been interpreted to include discretion to disregard sentencing policy that was set by Congress. In particular, the Supreme Court authorized sentences below the guidelines for serious recidivist:

> For example, Congress has specifically required the Sentencing Commission to set Guidelines sentences for serious recidivist offenders "at or near" the statutory maximum. 28 U.S.C. § 994(h). See also §994(i) ("The Commission shall assure that the guidelines specify a sentence to a substantial term of imprisonment" for specified categories of offenders.)

Kimbrough v. United States, 552 U.S. 85, 103, (2007). The Supreme Court's recognition of the flaw of the seemingly 'default" maximum sentences was in response to the Government's assertion, in that case, that the one to one hundred ratio for cocaine base and cocaine powder

sentences was excepted from the Sixth Amendment remedy provided in Booker because it was a congressional policy set by the passage of mandatory minimums. Although this Court did not specifically address the effect of sentencing policy set by Congress, the implication of *Kimbrough* is that the District Court need not be restricted by any specific guideline range.

The sentencing discretion solution breaks down with U.S.S.G 2G2.2 because the subject matter is so heinous and its offenders so reprehensible. *Kimbrough* provides a solution to this problem:

> The crack cocaine Guidelines, however, present no occasion for elaborative discussion of this matter because those Guidelines do not exemplify the Commission's exercise of its characteristic institutional role. In formulating Guidelines ranges for crack cocaine offenses, as we earlier noted, the Commission looked to the mandatory minimum sentences set in the 1986 Act, and did not take account of "empirical data and national experience." See *Pruitt,* 502 F.3d, at 1171 McConnell, J., concurring). Indeed, the Commission itself has reported that the crack/powder disparity produces disproportionately harsh sanctions, *i.e.,* sentences for crack cocaine offenses "greater than necessary" in light of the purposes of sentencing set forth in § 3553(a). See *supra,* at 568. Given all this, it would not be an abuse of discretion for a district court to conclude when sentencing a particular defendant that the crack/powder disparity yields a sentence "greater than necessary" to achieve § 3553(a)'s purposes, even in a mine-run case.

Id., at 109-10. The principle articulated in *Kimbro*ugh is perhaps even more consistent with the Eighth Amendment protection asserted in this case. The criticism of 2G2.2 overwhelmingly points at Congress's involvement with the guideline and empirical data that does not support its current application. Like the crack cocaine powder cocaine disparity, this Court should resolve the sentencing problem inherently embodied by U.S.S.G § 2G2.2

III. The United States Supreme Court should grant the Petition for a Writ of Certiorari to resolve the significant policy issues that surround U.S.S.G § 2G2.2.

In 1984, Congress responded to concerns about sentencing disparities by creating a national Commission that would develop sentencing policies applicable to all federal judges. In 1987, the Commission launched the first guidelines manual, cautioning that the experiment with coordinated federal sentencing is an "evolutionary" one. *See* 1987 Guidelines Manual, *supra*, at Pt. A, § 1.2. Federal sentencing was transformed by *Booker*, which made the Guidelines advisory and required appeals courts to review the "reasonable- ness" of sentences imposed. 543 U.S. at 260-62. The power to clarify its own precedents also lies with this Court and not with the Commission. *See State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (stressing that the reconsideration of precedent "is this Court's prerogative alone"); *Agostini v. Felton*, 521 U.S. 203, 238 (1997) (asserting that precedent remains binding "unless and until this Court reinterpret[s] the binding precedent.").

Here, the conflicts concern two precedents from this Court: the authority of district courts to vary under *Kimbrough*, and the implementation of reasonableness review under *Gall*. This case therefore presents questions about interpreting statutes and this Court's precedents that this Court is uniquely suited to resolve; it does not implicate routine conflicts about guideline provisions that the Commission could resolve. *See Braxton v. United States*, 500 U.S. 344, 348 (1991) (suggesting that the Commission, not the Court, should be the primary actor in resolving conflicting interpretations of the guidelines).

The Commission does not have the authority to change the congressional directives that supply the contents of the child pornography guidelines. Its authority is limited to developing guidelines within the legislative lines drawn by Congress. *See Mistretta v. United States*, 488 U.S. 361, 412 (1989) (recognizing that Congress provided "significant statutory direction" to the

Commission). Even then, the Commission can only propose guideline amendments that Congress approves or rejects. *See id.* at 393-94 ("[T]he Commission is fully accountable to Congress, which can revoke or amend any or all of the Guidelines as it sees fit either. By resolving this conflicts, the Court can ensure that the process used by district courts and appellate courts across the country is consistent and in that respect promote the goal of greater uniformity that lies at the heart of the grand experiment in federal sentencing.

CONCLUSION

The Supreme Court should review the conclusion of the Court of Appeals for the First Circuit and grant this petition for writ of certiorari.

Dated at Portland, Maine this 3rd day of September, 2024.

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