

No. _____

In the
Supreme Court of the United States

VERNELL MOORE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether both the District Court and Sixth Circuit erred in determining that the District Court was entitled to apply the 10:1 enhancement for methamphetamine (actual) recognized in U.S.S.G. §2D1.1 when the policy bases underlying the enhancement have eroded to the point that the continued *ad hoc* application of the enhancement by district courts continues to create a deluge of unwarranted and arbitrary sentence disparities in derogation of the intent of the Sentencing Guidelines and the concept of proportionality of punishment inherent in the Eight Amendment of the United States Constitution.

LIST OF PARTIES

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

RELATED CASES

United States v. Moore, Case No.: 1:20-cr-00070-11, United States District

Court for the Eastern District of Tennessee, at Chattanooga. Judgment entered on July 24, 2023. (Appx. B-1 to B-7).

United States v. Moore, Case No. 23-5674, United States Court of Appeals for the Sixth Circuit. Judgment entered on July 3, 2024. (Appx. A-1 to A-6). Petition for Rehearing En Banc denied on August 16, 2024. (Appx. C-1).

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OPINIONS BELOW

The opinion issued below by the Sixth Circuit Court of Appeals on September July 3, 2024 is unreported and only a Westlaw citation is currently available. See United States v. Moore, No. 23-5674, 2024 WL 3289642 (6th Cir. Jul. 3, 2024).

JURISDICTIONAL STATEMENT

This petition for writ of certiorari stems from a criminal prosecution brought before the United States District Court for the Eastern District of Tennessee at Chattanooga (the “District Court”) against Petitioner, Vernell Moore (“Moore”). Moore. The District Court exercised jurisdiction pursuant to 18 U.S.C. section 3231 and Fed. R. Crim. P. 18. Judgment was entered against Moore by the District Court on July 24, 2023.

A Notice of Appeal was filed timely by Moore on July 27, 2023. As such, the Sixth Circuit Court of Appeals (the “Sixth Circuit”) had jurisdiction of the appeal from the District Court pursuant to 28 U.S.C. section 1291. On July 3, 2024, Sixth Circuit issued its opinion affirming the conviction. A Petition for Rehearing En Banc was timely filed by Moore and the Sixth Circuit denied the petition by Order entered August 16, 2024.

Pursuant to 28 U.S.C. section 1254, Moore now petitions this Honorable Court for a writ of certiorari for purposes of review of the opinion issued by the Sixth Circuit. The instant Petition for a Writ of Certiorari is being filed within 90 days of denial of

the Petition for Rehearing En Banc pursuant to 28 U.S.C. section 2101(c) and Supreme Court Rule 13.3. Accordingly, this Honorable Court has jurisdiction to consider Moore's Petition for a Writ of Certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S.C.A. Const. Amendment VIII: Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

18 U.S.C. section 3553(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); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements 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);

(5) any pertinent policy statement--

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments

made to such policy statement 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); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

18 U.S.C. section 3553(b): Application of guidelines in imposing a sentence.-

(1) In general.--Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing

guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

21 U.S.C. section 841(a)(1): Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally--

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance . . .

21 U.S.C. section 841(b)(1)(C): In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillary J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18 or \$1,000,000 if the defendant is an individual or \$5,000,000 if the defendant is other than an

individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18 or \$2,000,000 if the defendant is an individual or \$10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of Title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

21 U.S.C. section 846: Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

STATEMENT OF THE CASE

On October 23, 2020, the government filed a Criminal Complaint solely against James J. Martin (“Martin”) alleging that Martin had committed a violation of 18 U.S.C. section 922(g). (Comp., R. 1, Page ID # 1). A lengthy series of additional complaints and superseding indictments followed adding thirteen (13) co-defendants and alleging that Martin was the center of a drug distribution conspiracy involving a number of illegal substances. (See Third Super. Indict., R. 132; Page ID # 705). On June 22, 2021, Moore was named as a co-defendant in a Third Superseding Indictment. (See id.). One count of the indictment (Count 4) charged that Martin, Moore and a third co-defendant, Derek Jackson (“Jackson”), along with unnamed others, “did combine, conspire, confederate and agree to knowingly, intentionally, and without authority distribute 50 grams or more of methamphetamine (actual), a Schedule II controlled substance in violation of Title 21, United States Code, sections 846, 841(a)(1), and 841(b)(1)(A).” (Id. at Page ID # 707). Moore was not alleged to have played any role in the remainder of the alleged conspiracy. (See id.).

On August 1, 2022, Moore entered into a Plea Agreement in which he agreed to “plead guilty to the following lesser included offense of Count 4 in the Third Superseding indictment: conspiracy to distribute a mixture and substance containing a detectable amount of methamphetamine in violation of Title 21, United States Code, sections 846, 841(a)(1), and 841(b)(1)(C).” (Plea Agmt, R. 409, Page ID # 3117).

The District Court conducted a sentencing hearing for Moore on July 12, 2024. After addressing a number of objections to the final version of Moore's Presentence Investigation Report ("PSR"), the District Court determined that 3.0 kilograms of methamphetamine should be attributed to Moore. (See Transcript, R. 679, p. 10:14 – 17; Page ID # 6527). Moore did not object to this amount of methamphetamine being attributed to him but did strenuously object to the application of the 10:1 methamphetamine actual/mixture ratio used to determine his Base Offense Level under §2D1.1 of the Sentencing Guidelines (the "Guidelines"). After hearing argument on the matter, the District Court denied Moore's objection and found that Moore's Guideline range should be determined with reference to 3.0 kilograms of methamphetamine (actual) as opposed to 3.0 kilograms of methamphetamine mixture or substance. (See Transcript, R. 679, p. 23:8 – 25:12; Page ID # 6542).

After appropriate adjustments based on Moore's other objections, the District Court found that Moore's total offense level was 31. (See Transcript, R. 678, p. 23:8 – 26:2; Page ID # 6540 – 43). With a total offense level of 31 and a criminal history category of I, the District Court found that the proper Guideline range attributable to Moore was 108 to 135 months. (See Transcript, R. 679, p. 25:18 – 23, Page ID # 6541; Statement of Reasons, R. 666; Page ID # 6360 - 63). Relying upon this Guideline range, the District Court sentenced Moore to 108 months of incarceration and 3 years of

supervised release. (See Transcript, R. 679, 55:25 – 56:6 Page ID # 6572 - 73; Judgment, R. 665; Page ID # 6353 - 6359). Had the District Court granted Moore's objection and refused to apply the 10:1 ratio, Moore's total offense level would have been 27 and his criminal history category would have been I, resulting in a sentencing range of 70 to 87 months (roughly thirty-six percent (36%) less than the range determined by the District Court based upon the 10:1 ratio). See U.S.S.G. §2D1.1(c)(4).

Moore objected to the District Court's sentence on the grounds of procedural and substantive reasonableness. (Transcript, R. 679, p. 59:5 – 59:8; Page ID # 6576).

The District Court entered its Judgment on July 24, 2023. (Judgment, R. 665, Page ID # 6353 – 59). A Notice of Appeal was filed timely by Moore on July 27, 2023. (Notice of Appeal, R. 667, Page ID # 6364 – 65).

A panel of the Sixth Circuit affirmed the Judgment of the District Court on July 3, 2024 in an unpublished opinion. U.S. v. Moore, No. 23-5674, 2024 WL 3289642 (6th Cir. Jul. 3 2024). A Petition for Rehearing En Banc was timely filed and the Sixth Circuit denied that Petition by order entered August 16, 2024.

Pursuant to 28 U.S.C. section 1254, Moore is now petitioning this Court for a writ of certiorari for purposes of review of the opinion issued by the Sixth Circuit. The instant petition for a writ of certiorari is being filed within 90 days of denial of the Petition for Rehearing En Banc pursuant to 28 U.S.C. section 2101(c) and Supreme Court Rule 13.3.

REASONS FOR GRANTING THE PETITION

This petition concerns a matter of great national significance and precedential value. Continued reliance by district courts across the United States upon the 10:1 sentence enhancement based on the purity of methamphetamine, as codified at U.S.S.G. §2D1.1 (Drug Quantity Table), is resulting in substantively unreasonable, inequitable, and arbitrary sentences throughout the country for defendants such as Moore who are low-level defendants in drug conspiracy cases. Low-level defendants in drug conspiracy cases involving methamphetamine are being systematically and disproportionately punished for their crimes, as if they were kingpins or ringleaders of the conspiracy, based on outdated and mistaken presumptions built into U.S.S.G. §2D1.1 that have been empirically disproven and can no longer stand as a basis for the harsh sentences being doled out to these defendants. These sentences are in derogation of both the stated intent of the Guidelines and the concept of proportionality embodied in the Eight Amendment. As the policy bases for the enhancement have eroded, the sentences are now based more on happenstance and judicial whim than they are on empirical data. Further, they are disproportionately affecting low-level minority defendants. Circuit courts that have recognized the issue have attempted to address it by merely advising the sentencing courts that they may, but are not required to, disregard the methamphetamine (actual) 10:1 enhancement adopted by U.S.S.G. §2D1.1. However, Moore respectfully states that these circuit court opinions do not go far enough in addressing the issues created by the application

of the Guidelines, as currently written, as they still unfairly and improperly place the burden on the defendant to convince the district court at sentencing that an express Guideline provision does not apply. Under this approach, the defendant is most often tilting at windmills, especially in more conservative districts and circuits. Finally, the inertia of the Sentencing Commission on this issue should not be taken as support for the continued application of this enhancement or as a reason for this Court not to take an active role in righting this continuing injustice and avoid the inherent Eighth Amendment issues inherent in this approach.

A. The Purity Distinction Set Forth in the Sentencing Guidelines is Arbitrary and Not Based on Any Type of Empirical Analysis.

The lack of empirical justification for the harsher treatment of higher-purity methamphetamine is a compelling reason that the 10:1 enhancement should be disregarded. In Kimbrough v. U.S., 552 U.S. 85, 109 (2007), this Court acknowledged that the Sentencing Commission plays an important institutional role in that “[i]t has the capacity courts lack to “base its determinations on empirical data and national experience, guided by a professional staff with appropriate expertise.”” However, in the instance of higher purity methamphetamine the Guidelines are not the result of the Commission’s reliance on empirical studies and data. See Kimbrough, 552 U.S. at 96. Instead, the methamphetamine purity distinction currently recognized in the Guidelines arose merely as a result of the adoption by Congress of the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 4181 (1986) (the “Act”). In the Act, Congress

set the weight quantity of methamphetamine mixture triggering each mandatory minimum at ten times the quantity of the pure methamphetamine triggering that same statutory minimum penalty. Instead of engaging in any empirical analysis or surveying national experience, the Commission simply chose to key the Guidelines to the statutory minimum sentences that Congress established for those crimes. See Gall v. United States, 552 U.S. 38, 46 n.2 (2007); United States v. Celestin, No. 21-125, 2023 WL 2018004, at **3-5 (E.D. La. Feb. 15, 2023); U.S. Sentencing Commission, Methamphetamine Final Report (Nov. 1999), available at Appx. E¹ and https://www.ussc.gov/sites/default/files/pdf/research/working-group-reports/drugs/199911_Meth_Report.pdf. There was absolutely no statutory basis in the Anti-Drug Abuse Act of 1986, Pub. L. 99-570, 100 Stat. 3207 for the imposition of this 10:1 enhancement. In fact, this Court thoroughly addressed this issue in Kimbrough, 552 U.S. at 101 (finding “[t]he statute, by its terms, mandates only maximum and minimum sentences ... The statute says nothing about the appropriate sentences within these brackets.”).

This undisciplined approach to setting the methamphetamine guideline ranges based on non-empirical standards has resulted in ranges that are recognized by courts to be arbitrary, excessive and not at all similar to other drug guidelines despite

¹ Moore has included full copies or excerpts (where appropriate due to length) of various publications referenced herein in the Appendix hereto. Cites to such materials shall be “Appx. ___” herein. With such items, Moore has also provided a URL address for each item so that it may be located on the internet as well.

the fact that all guidelines are intended (according to the Commission itself) to be representative of a “heartland” or “a set of typical cases embodying the conduct that each guideline describes.” See United States v. Diaz, No. 11-821-2, 2013 WL 322243, at *8 (E.D.N.Y. Jan. 28, 2013) (quoting U.S.S.G §1A4.13 (1987) (1987)). As found by the district court in United States v. Santillanes, No. 07-619 (D.N.M. Sept. 19, 2009), there is simply

...no empirical data or study to suggest that actual purity [of methamphetamine] should be punished more severely by an arbitrary [sentence] increase... in this case or at the higher level. It seems to be black box science, as best I can determine. I probably would not allow it under *Daubert*, based on what I know at present. It seems to be contrary to any empirical evidence, and really undermines Section 3553(a), as it does create an unwarranted disparity. It seems to me that this is not even a rough approximation to comply with 3553, and is not really based on any consultation or criminal justice goals or data.

United States v. Pereda, No. 18-cr-228, 2019 WL 463027, at *4 (D. Colo. Feb. 6, 2019) (citing transcript of sentencing hearing). The ultimate question that arises is why this Court should allow federal district courts to give any credence whatsoever to the 10:1 enhancement when it has been shown to be fatally flawed in the first instance and inherently inconsistent with the very raison d'être of the Commission? Simply stated, detailed analysis of the enhancement shows that Court should not.

B. The Purity of Methamphetamine is Not a Reliable Indicator of the Culpability of a Defendant.

At the time of adoption of the methamphetamine guidelines, the Sentencing Commission considered drug purity extremely relevant because “possession of

unusually pure narcotics may indicate a prominent role in the relevant part criminal enterprise and proximity to the source of the drugs.” See U.S.S.G. §2D1.1 cmt. 9. However, more recent studies have shown that the average purity of all methamphetamine in the United States is greater than 90 percent—and has been since 2011. See U.S. Dept. of Justice, Drug Enforcement Admin., 2017 National Drug Threat Assessment pp. 67-70 (Oct. 2017), excerpts available at Appx. G and full publication at https://www.dea.gov/sites/default/files/2018-07/DIR-040-17_2017-NDTA.pdf). As aptly stated by the court in United States v. Robinson, No. 3:21-CR-14-CWR-FKB-2, 2022 WL 17904534, at * 1 (S.D. Miss. Dec. 23, 2022):

The Guidelines use drug purity as a proxy for culpability. But national experience confirms that is no longer true for methamphetamine. The DEA data show that most methamphetamine confiscated today is “pure” regardless of whether the defendant is a kingpin or low-level addict...

Accordingly, reliance upon this Guideline “establishes a ‘false uniformity’ by allowing quantity of drugs to mask all other factors.” See Robinson, 2002 WL 17904534, at * 3 (citing United States v. Cabrera, 567 F. Supp.2d 271, 271 (D. Mass. 2008)). In so doing, the actual role of the defendant and his/her individual culpability with respect to the criminal enterprise at hand plays an ancillary role in the sentencing process.

Recognizing the issues inherent in the continued application of the 10:1 enhancement, an ever-evolving number of courts have held that the basis for distinguishing between methamphetamine (mixture) and methamphetamine (actual) is no longer valid and should be entirely disregarded by the sentencing court. See,

e.g., United States v. Celestin, No. 21-125, 2023 WL 2018004 (E.D. La. Feb. 15, 2023); United States v. Havel, No. 4:21-CR-3075, 2023 WL 1930686 (D. Neb. Feb. 10, 2023); United States v. Robinson, No. 3:21-CR-14-CWR-FKB-2, 2022 WL 17904534 (S.D. Miss. Dec. 23, 2022); United States v. Carillo, 440 F. Supp. 3d 1148 (E.D. Ca. 2020); United States v. Johnson, 379 F. Supp. 3d 1213 (M.D. Ala. 2019); United States v. Moreno, 583 F. Supp. 3d 739 (W.D. Va. 2019); United States v. Bean, 371 F. Supp. 3d 46 (D.N.H. 2019); United States v. Pereda, No. 18-cr-228, 2019 WL 463027 (D. Colo. Feb. 6, 2019); United States v. Hoover, No. 4:17-CR-327-BLW, 2018 WL 5924500 (D. Idaho Nov. 13, 2018); United States v. Ferguson, No. CR17-204 (JRT/BRT), 2018 WL 3682509 (D. Minn. Aug. 2, 2018); United States v. Saldana, No. 1:17-cr-271-1, 2018 U.S. Dist. LEXIS 110790 (W.D. Mich. July 3, 2018); United States v. Nawanna, 321 F. Supp. 3d 943, 955 (N.D. Iowa 2018); United States v. Ibarra-Sandoval, 265 F. Supp. 3d 1249 (D.N.M. 2017); United States v. Hartle, No. 4:16-cr-00233-BLW, 2017 WL 2608221, at *1 (D. Idaho Jun. 15, 2017); United States v. Jennings, No. 4:16-cr-00048-BLW, 2017 WL 2609038 (D. Idaho Jun. 16, 2017); United States v. Hayes, 948 F. Supp. 2d 1009 (N.D. Iowa 2013); United States v. Ortega, No. 90-400, 2010 WL 1994870 (D. Neb. May 17, 2010). Moore respectfully submits that this Court should similarly find that such distinction should be disregarded by district courts in the sentencing of individuals involved in the distribution of methamphetamine in any capacity as application of the distinction is no longer supported by real world facts.

C. Continued Adherence to the Methamphetamine Guidelines Is Resulting in Disparate, Arbitrary and Excessive Sentences.

Courts that have disregarded the distinction between pure methamphetamine and a mixture of methamphetamine have largely done so because the “unfounded sentencing disparity results in defendants accused of crimes involving methamphetamine being incarcerated for substantially longer than defendants who have engaged in almost indistinguishable conduct, albeit with other drugs.” Pereda, 2019 WL 463027, at *5. Recently published data from the Sentencing Commission confirms the conclusion of the *Pereda* Court. To this very end, the 2022 Annual Report and Sourcebook of Federal Sentencing Statistics indicates that the average methamphetamine sentence is, by a considerable margin, longer than the average sentence for any other drug and is 24 months longer than the average sentence for the next-closest drug, crack cocaine. See U.S. Sentencing Commission, 2022 Annual Report and Sourcebook of Federal Sentencing Statistics, Fig. D-3, at 124 (Mar. 2023), excerpts available at Appx. F and full publication at <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2022/2022-Annual-Report-and-Sourcebook.pdf>. For the four drugs listed other than methamphetamine and marijuana, however, the highest and lowest average sentences are much more tightly clustered, separated by only 5 months. (Id.) This disparity became more pronounced in 2018 when the sentencing

gap between methamphetamine and other drugs, including heroin and fentanyl, significantly widened. (See id., R. 559-1, Figure D-5, at 126.

Further, empirical data also shows that the application of §2D.1.1 negatively impacts both Black and Latino defendants at significantly higher rates than it does similarly-situated white defendants. To this end, a rough comparison of sentencing statistics published by the Sentencing Commission for 2023 to Census Data published by U.S. Census Bureau suggests that Black individuals comprised 27.7% of the defendants sentenced under §2D1.1 in 2023 while comprising approximately 13.7% of the United States population. Latino individuals comprised 43.6% of the defendants sentenced while comprising only 19.5% of the United States population. Compare U.S. Sentencing Commission, 2023 Sourcebook of Federal Sentencing Statistics table D-2 (2023), excerpts available at Appx. K and full publication at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2023/2023_Sourcebook.pdf with U.S. Census Bureau, QuickFacts: United States (last visited November 10, 2024), available at Appx. J and at <https://www.census.gov/quickfacts/fact/table/US/PST045222>. Conversely, white individuals comprised 25.7% of the defendants sentenced under §2D.1.1 while comprising approximately 58.4% of the United States population. There can be little doubt that these numbers are highly skewed to the disadvantage of minorities charged with crimes involving methamphetamine.

D. The Dangers of Methamphetamine relative to Other Drugs Appear to Be Misunderstood and Overstated.

While there seems to be a prevailing assumption among the federal judiciary that the danger of methamphetamine, especially pure methamphetamine, warrants some degree of disparity in sentencing, empirical evidence actually suggests that pure methamphetamine is not any more dangerous than many of the other major drug types. See United States v. Bean, 371 F. Supp. 3d 46, 54 (D.N.H. 2019); United States v. Harry, 313 F. Supp. 3d 969, 973 n.6 (N.D. Iowa 2018); United States v. Hayes, 948 F. Supp. 2d 1009, 1026 (N.D. Iowa 2013) (“[M]any drug abuse experts contend that methamphetamine is not the most harmful drug.”); see also Paul J. Hofer, Ranking Drug Harms for Sentencing Policy (SSRN Scholarly Paper No. ID 2612654), Rochester, NY: Social Science Research Network (May 31, 2015), pp. 10-17, available at Appx. H and at SSRN: <https://ssrn.com/abstract=2612654> (examining drug harm studies and finding that methamphetamine actually falls behind other substances in all categories); David J. Nutt et. al., Drug Harms In The UK: A Multicriteria Decision Analysis, 376 Lancet 1558, 1560-61 & Figs. 2, 3, 4 (Nov. 6 2010), available at Appx. I (finding that methamphetamine’s overall harmfulness ranks behind that of alcohol, heroin, and crack cocaine).

E. This Case Presents an Excellent Opportunity for the Court to Address this Important Issue.

This case presents an excellent opportunity for addressing this issue. The facts are straightforward. In his Plea Agreement, Moore admitted that one occasion he was acting as courier with respect to a package addressed to a specific address. (Plea Agmnt., R. 409, ¶4(f), Page ID# 3119 (Appx. D-2 to D-3)). Martin had instructed Moore to pick up the package at the address and deliver it to Martin.” (See id.). Moore admitted that he knew the package contained “some controlled substance” although Moore never admitted that he knew that the package contained pure methamphetamine. (See id.). For his part, Moore never obtained the actual package because law enforcement seized it. (See id.).

In sentencing Moore, the District Court never found (or even suggested) that Moore was a high-level manager or kingpin in the alleged conspiracy. The District Court intimated only that it felt like Moore’s “involvement with this conspiracy is a little bit more than perhaps is being argue” because of Moore’s use of the term “mats” in his conversations with Martin. (See Transcript, R. 679, 39:9 – 40:4, Page ID# 6556). To be clear, Moore consistently denied that he was aware that any of the “mats” that he was referencing contained *methamphetamine* and/or that he was himself referencing *methamphetamine* in these conversations. As pointed out in his pre-hearing filings, Moore and the government simply disagreed as to meaning of the term “mat” or “mats” as used by various persons in this conspiracy. See Mot.

Variance, R. 559, p. 3, Page ID# 4721; see also Transcript, R. 679, 40:9 – 42:16, Page ID# 6556 – 6559). As further discussed at Moore’s sentencing hearing, from Moore’s perspective, the term “mat” had a number of meanings, including marijuana or even money, and was not necessarily restricted to methamphetamine. (Transcript, R. 679, 40:8 - 42:19; Page ID# 6557 - 59). Overall, it seems to have been used more as a unit of measure than of substance. In fact, use of this term to mean substances other than methamphetamine is supported by the fact that Moore’s PSR indicates that, with respect to another co-defendant, law enforcement believed the term to describe a quantity of *counterfeit fentanyl pills*. (See Second Revised PSR, R. 648, ¶ 108, Page ID# 6127).

In the end Moore’s limited role in the alleged conspiracy and his individual characteristics played almost no role in his sentencing. A review of the sentencing hearing transcript reveals that the District Court relied almost entirely on the amount and purity of the methamphetamine allocated to Moore in sentencing Moore to impose a severe 108-month sentence when Moore (1) had only **one-point criminal history** (stemming from a prior marijuana possession conviction) (see Transcript, R. 679, 48:8 – 49:4, Page ID#: 6565 - 66); (2) had never been involved in any gang activity whatsoever (see id.); (3) had worked and supported himself historically (see id.); (4) had worked himself up to a 32nd Degree Mason at his community Mason Lodge and had engaged in civic improvement projects as part of

this work (see Letter of Bria Sibley, R. 559-2, Page ID# 4732; Letter of LaToya Smith, R. 559-3, Page ID# 4733 – 34; Letter of Lakita Douglas, R. 559-4, Page ID# 4735); and (5) had successfully remained on supervised release for a period of over a year by the time of his sentencing hearing due in part to his serious health conditions (see Transcript, R. 679, 27:7 – 16, Page ID# 6544). Rather than a hardened criminal, letters of acquaintances submitted to the District Court describe a “caring, loving and compassionate individual,” a “great father figure,” a “hardworking man” and a man who “help[s] feed the homeless on Sundays.” (See id.)

In lieu of these mitigating factors, the District Court seemed laser-focused and motivated primarily by the fact that the substance attributed to Moore was high purity methamphetamine and therefore warranted a significantly harsher sentence because of the alleged societal harm created by high purity methamphetamine -- regardless of Moore’s specific role in the alleged conspiracy and his personal characteristics.

Respectfully, the importance assigned to the purity of methamphetamine by the present Guidelines (and by the District Court in extension) simply was not justified for someone like Moore who was not shown to have either knowledge or control of the level of purity of the methamphetamine in issue. See, e.g., United States v. Hayes, 948 F.Supp.2d 1009, 1016-17 (N.D. Iowa 2013) (observing that problems with outdated purity assumptions are “heightened when the offender was

merely a courier or mule who has no knowledge of the purity of the methamphetamine he or she is transporting”); United States v. Ortega, No. 90-400, 2010 WL 1994870 (D. Neb. May 17, 2010) (recognizing that purity-based penalties “illogically skew[] sentences for ‘average’ defendants to the upper end of the sentencing spectrum, blurring the distinctions between high and low level distributors in a hierarchy”).

The facts of this case are a textbook example of how the continued adherence to the distinction between methamphetamine (actual) and methamphetamine mixture and substance (and its resulting 10:1 sentence enhancement) unfairly drives sentencing in the vast majority of methamphetamine cases and would provide this Court with an excellent opportunity to address this issue.

F. The Present System of Allowing the District Court to Deviate from the Guidelines in its Discretion is Not Consistent with the Policies of Uniformity in Sentencing Undergirding the Guidelines.

In the Sixth Circuit, various panels of the court have considered the continued reliance on this 10:1 ratio by district courts. See, e.g., United States v. Allen, 93 F.4th 350, 359 (6th Cir. 2024); United States v. Garza, No. 22-3354, 2023 WL 3868652, at *2 (6th Cir. June 7, 2023); United States v. Kennedy, 65 F.4th 314 (6th Cir. 2023), United States v. Mosley, 53 F.4th 947, 965 (6th Cir. 2022); United States v. Johnson, 812 Fed. Appx. 329, 334 – 35 (6th Cir. 2020); United States v. Alonzo, 811 Fed. Appx. 301, 305-06 (6th Cir. 2020). These opinions effectively find that the district court may,

but is not required to, deviate from the methamphetamine guidelines so long as the district court acknowledges that it has the discretion to disregard the 10:1 ratio in sentencing. As long as the district court recognizes this discretion and hears the argument of the Defendant, the district court's decision to apply the 10:1 ratio then becomes sacrosanct on appeal.

Moore respectfully submits that the overarching problem with this approach is that it continues to place false significance on the 10:1 ratio by requiring a criminal defendant to disprove the continued applicability of the 10:1 ratio to the district court's particular satisfaction. It does this while carrying forward on appeal a presumption of reasonableness of any within-the-guidelines sentence imposed by the district court. See Allen, 93 F.4th at 359. So, as long as the District Court stays within the Guideline range assigned by the current methamphetamine guidelines, its sentence carries an imprimatur of correctness upon appeal notwithstanding the demonstrated arbitrary and capricious underpinnings that resulted in that particular sentence in the first instance. It appears to matter little to the appellate courts that the end result of the imposition of such an imprimatur is that low-level offenders, like Moore, are now routinely receiving sentences originally intended for kingpins. Given the deference given to the range established in the Guidelines (despite a demonstrated lack of underpinning), challenging a Guideline-based sentence on appeal is the functional equivalent of tilting at windmills.

In light of the erosion of the original justifications for the 10:1 enhancement ratio, continued blind adherence to the 10:1 enhancement ratio results in sentences based on little more than inertia.² The 10:1 enhancement ratio has taken on significance among federal courts merely because it still exists – not because its existence has ever been shown to be empirically warranted. This has resulted in the application of a sentencing enhancement grounded only in the concept of *ipse dixit* and a sentencing process where the much harsher-than-warranted Guidelines is

² The District Court, for instance, ostensibly based its denial of Mr. Moore’s objection on (1) an understanding that (a) disparate treatment of methamphetamine (actual) versus methamphetamine mixture and substance was somehow mandated or encouraged by Congress through the enactment of Anti-Drug Abuse Act of 1986, Pub. L. 99-570, 100 Stat. 3207, (the “Act”) and the ratios utilized by Congress therein in establishing maximum and minimum sentences for various illegal drugs (see Transcript, R. 679, 19:13 – 19-16; Page ID# 6536); and (2) a belief that the inactivity of the Sentencing Commission on this issue essentially equated to a continuing policy statement on this issue. However, the District Court’s reasoning was critically flawed in this regard First, the notion that the Act somehow mandated disparity in sentence lengths was completely dispelled by this Court in Kimbrough v. U.S., 552 U.S. 85, 101 (2007) (finding “[t]he statute, by its terms, mandates only maximum and minimum sentences ... The statute says nothing about the appropriate sentences within these brackets.”). Second, the inactivity of the Sentencing Commission on this issue is, in fairness, not a viable reason for adherence to the existing Guidelines. On or about August 5, 2022, the Sentencing Commission announced that it had “a voting quorum for the first time in more than three years.” See United States v. Rodriguez-Mendez, 65 F.4th 1000, 1001 (8th Cir. 2023); U. S. Sentencing Commission, Press Release Commission Regains a Quorum for the First Time in Three Years, Enabling it to Amend Federal Sentencing Guidelines, Issue Sentencing Policy (Aug. 5, 2022), available at Appx. L and <https://www.ussc.gov/about/news/press-releases/august-5-2022>.

being arbitrarily applied based upon stratification and anecdote rather than upon empirical data and national experience.

By allowing district courts to continue to rely upon outdated and arbitrary guidelines in determining appropriate sentences for drug distribution crimes involving methamphetamine, Moore respectfully submits that this Honorable Court is unwittingly committing a great disservice to large numbers of criminal defendants who have been subjected to disparate and arbitrary sentences under the existing methamphetamine guidelines in derogation of the concept of proportionality extant in the Eighth Amendment.³ Accordingly, Moore respectfully requests that this Honorable Court take a more active role in reducing the opportunity for a substantively unreasonable sentence to result from continued adherence to now-baseless distinctions that serve to punish low-level offenders like Moore based on happenstance rather than actual personal culpability.

CONCLUSION

³ As recognized by this Court in Solem v. Helm, 463 U.S. 277, 284-85 (1983), the principle that “a punishment shall be proportionate to the crime is deeply rooted and frequently repeated in common-law jurisprudence.” This principle of proportionality was later adopted in the Eighth Amendment. Id. A court’s proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions. Id. at 292. The continued application of the 10:1 enhancement for pure methamphetamine skewers all three of these components in manner that is unsupported by actual empirical data to the detriment of the lower-level actor like Moore.

For the foregoing reasons, a writ of certiorari should be granted by the Court.

Respectfully submitted,

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