

No.

In the Supreme Court of the United States

KALI ALEXANDER, PETITIONER

v.

UNITED STATES OF AMERICA

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case arises out of a “stash house sting” conducted by the Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”) where ATF recruited individuals to rob a fictitious drug stash house guarded by fictitious armed guards, steal fictitious cocaine in an amount predetermined by ATF, and then prosecuted the individuals for participating in the fictitious offense. In these cases, individuals are punished for committing offenses that would not have been committed but for the conduct of the government.

The questions presented are:

1. Whether this Court should adopt the reasoning of the overwhelming majority of the Courts of Appeals and hold that sentence reductions may be based on the government’s conduct.
2. Whether the government’s conduct constitutes a sentencing consideration under 18 U.S.C. § 3553(a) that can be grounds for a variance below the advisory guideline range.
3. Whether a federal court of appeals may simply decline to decide on direct appeal, and “leave for another day,” a properly preserved, briefed, and argued legal issue the resolution of which could result in a sentence reduction.
4. Whether summary reversal and remand is appropriate.

PARTIES TO THE PROCEEDINGS BELOW

Kali Alexander was one of five defendants charged in an eleven-count indictment. The five appeals were consolidated for briefing and submission by the United States Court of Appeals for the Sixth Circuit. In addition to Mr. Alexander, the other appeals below were:

United States v. Kenneth Flowers, Sixth Circuit No. 15-3998; **Petition For Writ Of Certiorari Pending, No. 17-8370.**

United States v. Terrance Chappell, Sixth Circuit No. 15-3990; **Petition For Writ Of Certiorari Pending, No. 17-8411.**

United States v. Rasheam Nichols, Sixth Circuit No. 15-4003.

United States v. Justin Maxwell, Sixth Circuit No. 15-4038; **Petition For Writ Of Certiorari Pending, No. 17-8418.**

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OPINION BELOW

The unpublished *per curiam* opinion of the court of appeals is reproduced at App., *infra*, 2a-32a. The opinion is reported at 712 Fed. Appx. 492.

JURISDICTION

The unpublished *per curiam* opinion of the court of appeals was entered on October 24, 2017, and a timely petition for rehearing *en banc* was denied on January 3, 2018. App., *infra*, at 34a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

UNITED STATES CONSTITUTIONAL, STATUTORY AND SENTENCING GUIDELINE PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution states, in relevant part: No person shall be * * * deprived of life, liberty, or property, without due process of law * * *.

18 U.S.C. § 3553(a) states:

(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 - ...

(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. § 3661 states:

No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

U.S.S.G. § 1B1.4 states:

Information to be Used in Imposing Sentence (Selecting a Point Within the Guideline Range or Departing from the Guidelines)

In determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted, the court may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law. See 18 U.S.C. § 3661.

INTRODUCTION

This case arises out of a so-called “stash house sting” conducted by the Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”). In these cases, ATF agents recruit individuals to rob fictitious drug stash houses guarded by fictitious armed guards in order to steal fictitious cocaine in an amount predetermined by ATF with a promise to share in the stolen drugs for later resale.

Invariably in such cases the amount of drugs is sufficient to meet the requirement for a mandatory minimum sentence for conspiring to possess controlled substances with intent to distribute. In addition, because of the implicit threat of violence described by the ATF agents, the recruited individuals invariably bring firearms along, resulting in mandatory consecutive sentences under 18 U.S.C. § 924(c) for possessing the firearms in furtherance of the conspiracy to possess the fictitious drugs with intent to distribute.

There is wide diversity among the courts of appeals as to the nature of an available defense or sentencing relief based on government conduct in these stash house sting cases and, if available, the scope of the defense or relief available. However, the overwhelming majority of the Court of Appeals have recognized at least one theory of relief based on the government’s conduct.

STATEMENT

I. Background – Stash House Stings

In her concurring opinion below, Judge Stranch provided a description of the stash house sting program:

The sting that targeted these Defendants is one in a long list of nearly identical operations conducted by the ATF across the country. Brad Heath, *ATF Uses Fake Drugs, Big Bucks to Snare Suspects*, USA Today (June 28, 2013, 11:26 AM), <https://www.usatoday.com/story/news/nation/2013/06/27/atf-stash-houses-sting-usa-today-investigation/2457109/> (noting that more than 600 individuals have been prosecuted following similar “stash house stings”). Because these stings are wholly inventions of law enforcement agents, they can and do include powerful inducements to participate in one big “hit,” a hit that is conveniently large enough to qualify for mandatory minimum sentences. Obtaining the outsized reward is also made to look easy—the agent is a disgruntled insider who knows when and how to stage these “rip-and-runs” and offers to provide all needed assistance, from manpower to transportation. The unseemly nature of the Government’s activity is emphasized by its failure to achieve its declared goals of jailing dangerous criminals and making our streets safer. Evidence showing that these hurry-up set-ups achieve the stated goals was not proffered and the facts here demonstrate why: no known dangerous individuals or criminal enterprises were researched or targeted and no pre-existing drug rings or conspiracies were broken up.

Flowers, App., *infra*, at 28a. According to the lead ATF agent, he had conducted more than 100 of these operations throughout the United States.

II. The instant prosecution

This case began when ATF sent two confidential informants into the Cleveland, Ohio, area. One informant was working for money; the other was working for a sentence reduction. One of the informants approached Kali Alexander and attempted to purchase firearms, but no sale was accomplished. The informant was able to arrange the purchase of ten grams of heroin from Mr. Alexander, a heroin

addict, on another occasion. At the suggestion of the ATF agent, the informant broached the idea of a stash house robbery to Mr. Alexander.

The agent and both informants met with Mr. Alexander on the day of the heroin sale. The agent presented himself as a disgruntled drug courier who felt he was being treated unfairly and proposed the robbery of a stash house. According to the agent, the house would contain eight or nine kilograms of cocaine and would be guarded by two men, one of whom would be armed. The agent proposed that the cocaine recovered from the stash house be split with half going to the agent and the other half going to Mr. Alexander and any others who assisted in the robbery. *Flowers, App., infra*, at 3a. The plan was a fabrication – the stash house, guards, and the cocaine all were fictitious.

After several other meetings, the plans were finalized. The agent provided a car for Mr. Alexander and his co-defendants to travel to the robbery. After meeting with an informant on the day of the robbery, Mr. Alexander and the others met with the agent who went over the plans for the robbery, again telling Mr. Alexander and the others that the stash house contained eight or nine kilograms and was guarded by two men, one with a gun. Mr. Alexander and the others were armed.

Mr. Alexander and the others were arrested on the way to the robbery. *Flowers, App., infra*, at 4a. Mr. Alexander and the others were charged in an eleven-count indictment with conspiracy to possess five or more kilograms of cocaine with intent to distribute and with use or carrying firearms in connection with a drug conspiracy, as well as other charges. R. 7, Indictment.

Prior to trial, the defendants filed a joint motion seeking dismissal of the indictment based on claims that the prosecution violated their rights to due process of law and that the ten-year mandatory minimum penalty on the drug conspiracy charge violated their Eighth Amendment right against cruel and unusual punishment. R. 39. The defendants also filed a joint motion to preclude application of the sentencing enhancement based on the government's manipulation of the sentence by use of the fictitious eight or nine kilograms of cocaine. R. 42. The district court denied the motions, as well as other pre-trial motions filed by the defendants, although the motion to preclude application of the sentencing enhancement was denied with leave to present the argument at sentencing. R. 54, Memorandum Opinion and Order.

At trial, Mr. Alexander was found guilty by a jury of all charges against him. By special verdict form, the jury made a finding that the conspiracy involved five kilograms or more of cocaine. R. 76, Verdict Form.

At sentencing, Mr. Alexander objected to application of the ten-year mandatory minimum and also sought a variance, arguing that the government's conduct violated his right to due process and also constituted sentencing enhancement or sentencing entrapment because the penalty on the drug charge was based on a fictitious amount of cocaine selected by the government. The district court rejected Mr. Alexander's objections, simply stating: "[T]he Court does note that the Sixth Circuit has repeatedly noted that it has never recognized sentencing entrapment or sentencing

enhancement. Therefore, your objection is not well-taken.” R. 192 at 8, Sentencing Hearing Transcript.

Based on the amount of fictitious cocaine the government had selected, the advisory guideline range for Mr. Alexander was determined to be 151 to 188 months. Mr. Alexander was sentenced to 151 months, plus the mandatory consecutive 60 months for the firearm conviction, for a total sentence of 211 months.

III. The Appeal

On appeal, Mr. Alexander briefed and argued the issues that the district court committed error in denying the motion to dismiss for a due process violation based on outrageous government in conducting the stash house sting operation and also that the district court committed error in refusing to consider sentencing entrapment and sentencing manipulation by the government as a sentencing factor under 18 U.S.C. § 3553(a). The panel issued an unpublished *per curiam* opinion affirming the convictions and sentences of Mr. Alexander and his co-defendants. *United States v. Flowers*, 712 Fed. Appx. 492 (6th Cir. 2017).

In rejecting Mr. Alexander’s argument that the government conduct in establishing the quantity of cocaine constituted sentencing entrapment, the panel simply noted the district court’s rationale in overruling the objection was that the Sixth Circuit had not recognized sentencing entrapment or sentencing enhancement. The panel then stated: “We decline to resolve that question [whether to adopt or reject the doctrines of sentencing manipulation or sentencing entrapment] and leave it for another day.” *Flowers*, App., *infra*, at 19a-20a. The panel also rejected

arguments that the government conduct was a legitimate ground for consideration under 18 U.S.C. § 3553(a), again stating simply:

Alexander first argues that the district court should have considered sentencing entrapment when determining his sentence. This issue was briefed, and the district court heard argument at the sentencing hearing but overruled the objection because “the Sixth Circuit has repeatedly noted that it has never recognized sentencing entrapment or sentencing enhancement.” As noted, we decline to resolve those issues here and leave them for another day.

Flowers, App., *infra*, at 20a.

Petitioner sought rehearing *en banc*. Pet. For Reh’g *En Banc*. Petitioner contended that the doctrine of outrageous government conduct as a defense to a criminal charge should be recognized and not categorically rejected. Pet. For Reh’g *En Banc* at 5-6. Petitioner also contended that the concepts of sentencing entrapment and sentencing manipulation should be recognized as appropriate sentencing factors under 18 U.S.C. § 3553(a), particularly in light of this Court’s decision in *Pepper v. United States*, 562 U.S. 476, 490-91, 131 S.Ct. 1229, 1241 (2011), interpreting the breadth of 18 U.S.C. § 3661. Pet. For Reh’g *En Banc* at 8-11. Petitioner’s petition for rehearing was summarily denied. App., *infra*, at 34a.

REASONS FOR GRANTING THE PETITION

Prosecutions resulting from these sting operations have been consistently criticized by the courts, but the criticism has rarely resulted in relief being granted to the targets of the stings. For example, in a recent opinion filed in the United States District Court for the Northern District of Illinois motions to dismiss charges arising out of stash house stings based on claims of racial profiling were “reluctantly denied” because the court concluded the defendants had failed to meet the “heavy burden that

currently must be satisfied to obtain the dismissal of a federal criminal indictment.” *United States v. Brown*, __ F. Supp. 2d __, 2018 WL 1278577 at *3 (N.D.Ill., March 12, 2018). However, in its opinion, the court stated: “It is time for these false stash house cases to end and be relegated to the dark corridors of our past. To put it simply, our criminal justice system should not tolerate false stash house cases in 2018.” 2018 WL 1278577 at *1. The court noted, with thanks, that the government stated on the record that it no longer was charging individuals in that district in false stash house sting cases, however. 2018 WL 1278577 at *1 n.2.

In the instant case, there was strong criticism by a member of the panel even while concurring in the rejection of challenges to the sentences based on claims of outrageous government conduct. The government’s activity was referred to as “unseemly.” App., *infra*, at (28a) (Stranch, J., concurring). These operations resulted in “no known dangerous individuals or criminal enterprises [being] researched or targeted or no pre-existing drug rings or conspiracies [being] broken up.” *Id.* The concurring opinion concluded:

I find the concept of these “stash house sting” operations at odds with the pride we take in presenting American criminal justice as a system that treats defendants fairly and equally under the law. I am heartened that judges increasingly are objecting to these sting operations and prosecutors are responding. * * * Yet it seems we remain without an established vehicle in the law to define a dividing line between law enforcement practices that are honorable and those that are not. In the interim, these questionable schemes continue to use significant government resources and to adversely impact the poor, minorities, and those attempting to re-integrate into society. And they apparently do so with no increase in public safety and no deterrence of or adverse effect on real stash houses. These costly and concerning sting operations do not accord with the principles of our criminal justice system and I hope they will be discontinued.

App., *infra*, at (31a-32a) (Stranch, J., concurring). It is in this context that the issues presented here should be reviewed.

I. This Court Should Adopt The Rationale Expressed By The Overwhelming Majority Of The Courts Of Appeals And Recognize The Availability Of Governmental Sentencing Manipulation And/Or Sentencing Enhancement As Proper Grounds For Reducing A Sentence.

Challenges to these sting operations generally are characterized as “sentencing entrapment” or “sentencing manipulation.” Sentencing entrapment occurs when a defendant predisposed to commit a lesser crime commits a more serious offense due to government conduct. Sentencing manipulation occurs when improper government conduct results in an increased sentence. *See United States v. Turner*, 569 F.3d 637, 641 (7th Cir. 2009); *Flowers*, App., *infra*, at 19a. There is wide diversity among the courts of appeals as to the availability of a defense or sentencing relief for sentencing manipulation or sentencing entrapment based on government conduct and, if available, the scope of the defense or the scope of relief available.

The United States Court of Appeals for the Sixth Circuit is an outlier in declining to address the availability of sentence reductions based on the doctrines of sentencing manipulation or sentencing enhancement resulting from the government’s conduct in pursuing the stash house sting. Virtually every Court of Appeals that has addressed the merits of those doctrines has concluded that one or both are available. This Court should make clear that these doctrines are available.

A. Seven of the Courts of Appeals have recognized one or both of these doctrines as proper grounds for sentence reductions.

Although not all cases involving claims of sentence manipulation or sentence entrapment have resulted in sentence reductions, most of the Courts of Appeals considering the questions have at least recognized the existence of at least one of the doctrines as a legitimate ground for a reduced sentence in the proper situations. Although there may be a split among these circuits as to *which* doctrine exists, each of these seven Courts of Appeals has acknowledged the existence of at least one.

The First and Eleventh Circuits have recognized sentence manipulation as a viable ground for a reduced sentence. In fact, each of those Circuits has stated that a successful claim of sentencing manipulation may be grounds for a sentence below an otherwise applicable mandatory minimum. *United States v. Kenney*, 756 F.3d 36, 51 (1st Cir. 2014); *United States v. Ciszkowski*, 492 F.3d 1264, 1270 (11th Cir. 2007). Sentencing manipulation was seen by the First Circuit as grounds for equitable relief in imposition of a reduced sentence. *United States v. West*, 631 F.3d 563, 570 (1st Cir. 2011).

The Seventh Circuit does not recognize sentencing manipulation but does recognize sentencing entrapment as a possible basis for a sentence reduction. The Seventh Circuit explained that sentencing entrapment “occurs when the government causes a defendant initially predisposed to commit a lesser crime to commit a more serious offense.” *United States v. Turner*, 569 F.3d 637, 641 (7th Cir. 2009), citing *United States v. Garcia*, 79 F.3d 74, 75 (7th Cir. 1996).

Three Courts of Appeals recognize both concepts. The Eighth Circuit has recognized sentencing manipulation, if established, as a ground for a downward departure. That Court noted that sentencing manipulation reflects artificial inflation of the offense level by the government's actions that increases the quantity of drugs for which a defendant is held responsible and constitutes a due process violation. *United States v. Torres*, 563 F.3d 731, 734-35 (8th Cir. 2009). The Eighth Circuit also recognized that sentencing entrapment is a "viable theory for a downward departure under the Sentencing Guidelines" due to the fact that the Guidelines "have a 'terrifying capacity for escalation of a defendants sentence' as a result of government misconduct." *United States v. Searcy*, 233 F.3d 1096, 1099 (8th Cir. 2000) (citations omitted). The United States Court of Appeals for the D.C. Circuit also has recognized the viability of both sentencing entrapment and sentencing manipulation. *United States v. Mack*, 841 F.3d 514, 523-24 (D.C. Cir. 2016). Similarly, the Ninth Circuit has recognized the existence of both concepts. *United States v. Boykin*, 785 F.3d 1352, 1360-61 (9th Cir. 2015).

B. Four other Courts of Appeals have neither expressly adopted nor rejected these doctrines, although concluding that sufficient grounds for application of the doctrines did not exist in the appeals before those courts.

The Second, Third, Fourth, and Fifth Circuits have neither expressly adopted nor rejected sentencing entrapment and sentencing manipulation as grounds for sentence reductions. However, unlike the Sixth Circuit in the instant case, those Courts assumed that the doctrines existed but concluded that the facts of their cases did not support application of the doctrines. *United States v. Floyd*, 375 Fed. Appx.

88, 89-90 (2d Cir. 2010); *United States v. Washington*, 869 F.3d 193, 210-11 (3d Cir. 2017); *United States v. Sed*, 601 F.3d 224, 229 (3d Cir. 2010); *United States v. Jones*, 18 F.3d 1145, 1154-55 (4th Cir. 1994); *United States v. Tremelling*, 43 F.3d 148, 151-52 (5th Cir. 1995).

C. The Sixth Circuit’s decision to “leave for another day” the question of whether to recognize one or both of these doctrines should be rejected.

The defendants have a right to appeal their sentences. 18 U.S.C. § 3742(a). Here, the issues of sentencing entrapment and sentencing manipulation were briefed and argued in both the district court and in the court of appeals. By simply declining to resolve the questions presented on appeal rather than addressing and resolving the issues, the panel decision deprived the defendants of their right to appeal their sentences. *See Corcoran v. Levenhagen*, 58 U.S. 1, 2, 130 S.Ct. 8, 9 (2009) (it was error for court of appeals to dispose of habeas claims without explanation).

As the concurring opinion below notes, these government operations have been subject to significant criticism by the judiciary, the media, and scholarly writing. App, *infra*, at 29a-30a (Stranch, J., concurring). The concurring opinion laments, in spite of the criticism of these programs, “we remain without an established vehicle in the law to define a dividing line between law enforcement practices that are honorable and those that are not.” App, *infra*, at 32a (Stranch, J., concurring). This case, along with the petitions filed by Kali Alexander’s co-defendants,¹ presents a

¹ *Kenneth Flowers*, No. 17-8370; *Terrance Chappell*, No. 17-8411; *Justin Maxwell*, No. 17-8418.

highly suitable vehicle to resolve the questions presented and establish the proper dividing line.

II. Regardless Of Whether The Doctrines Of Sentencing Entrapment And Sentencing Manipulation Apply, Per Se, The Government Conduct In Ensnaring Defendants Through Stash House Stings Is A Relevant Sentencing Consideration.

In sentencing a defendant, the district court should follow a specific process. The court should correctly calculate the guideline range. After giving the parties an opportunity to advocate for a sentence, the court should consider all of the factors set out in 18 U.S.C. § 3553(a) to determine whether the sentence requested by a party is appropriate. *Gall v. United States*, 552 U.S. 38, 449-50, 128 S.Ct. 586, 596 (2007). The sentencing factors relevant to this matter are “the nature and circumstances of the offense” 18 U.S.C. § 3553(a)(1).

In a stash house sting case, consideration of the nature and circumstances of the offense must include review of the government’s efforts to recruit the participants and convince them to remain in the operation until the arrests are made. Whether the government conduct rises to a level to support a finding of sentencing manipulation or sentencing entrapment or not, the nature and extent of the government’s conduct should be considered by the sentencing judge and factored into the sentencing calculus.

There is a “longstanding principle that sentencing courts have broad discretion to consider various kinds of information.” *United States v. Watts*, 519 U.S. 148, 151, 117 S.Ct. 633, 635 (1997) (per curiam). That principle initially was codified at 18 U.S.C. § 3577 (1970 ed.), and later was recodified without change by Congress in the

Sentencing Reform Act of 1984 as 18 U.S.C. § 3661. That section also was expressly included in the United States Sentencing Guidelines in U.S.S.G. § 1B1.4. *See Pepper v. United States*, 562 U.S. 476, 488-89, 131 S.Ct. 1229, 1240 (2011).

The statute states: “No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.” 18 U.S.C. § 3661. The Guideline section states: “In determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted, the court may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law. See 18 U.S.C. § 3661.” U.S.S.G. § 1B1.4. In *Pepper*, this Court made clear that this statute and this Guideline section mean exactly what they say, i.e. “no limitation” means *no* limitation: “Congress could not have been clearer in directing that ‘[n]o limitation . . . be placed on the information concerning the background, character, and conduct’ of a defendant that a district court may ‘receive and consider for the purpose of imposing an appropriate sentence.’ 18 U.S.C. § 3661.” *Pepper*, 562 U.S. at 490-91, 131 S.Ct. at 1241.

This Court stated that it has “recognized that ‘the broad language of § 3661’ does not provide ‘any basis for courts to invent a blanket prohibition against considering certain types of evidence at sentencing.’” *Pepper*, 562 U.S. at 491, 131 S.Ct. at 1241 (citing *United States v. Watts*, 519 U.S. 148, 152, 117 S.Ct. 633, 635

1997)). The Court further stated: “A categorical bar on the consideration of postsentencing rehabilitation evidence would directly contravene Congress’ expressed intent in § 3661.” *Pepper*, 526 U.S. at 491, 131 S.Ct. at 1242. Similarly, a categorical bar on the consideration of the government’s conduct in this case also would “directly contravene Congress’ expressed intent in § 3661.”

As then Circuit Judge Gorsuch noted, this “Court has rejected proposal after proposal seeking to impose non-constitutional limits on the information a court may consider at sentencing.” *United States v. Smith*, 756 F.3d 1179, 1182 (10th Cir. 2014) (collecting cases). In leaving review of this issue “for another day” rather than remanding this matter for resentencing, the panel has accomplished indirectly, through inaction, what this Court has stated clearly cannot be done directly.

Even if the doctrines of sentencing manipulation and sentencing entrapment do not apply, or do not exist, the underlying facts are relevant to the sentencing process. Allowing the sentences imposed to stand without regard to the government’s conduct violates the letter and the spirit of 18 U.S.C. § 3661, U.S.S.G. § 1B1.4, and *Pepper*. Resentencing is necessary.

III. This Matter Is Appropriate For Summary Reversal And Remand.

The Sixth Circuit panel’s refusal to consider issues that had been briefed and argued in the district court and briefed and argued in the Court of Appeals is inexplicable. The panel abdicated its responsibility when it declined to resolve the properly preserved issue and simply “[left] them for another day.” In light of this Court’s precedents, summary reversal of the panel opinion and remand for resolution

of the issue is appropriate here. Alternatively, if this Court determines that summary reversal is not appropriate, the petition should be granted for the reasons set out above.

As this Court has noted, “summary reversal does not decide any new or unanswered question of law, but simply corrects a lower court’s demonstrably erroneous application of federal law.” *Maryland v. Dyson*, 527 U.S. 465, 467 n.*, 119 S.Ct. 2013, 2014 n.* (1999). Strictly speaking, the panel did not erroneously apply federal law, it failed to apply federal law. The end result, however, is that the panel decision is demonstrably erroneous.

Kali Alexander, and his co-defendants, received substantively unreasonable sentences not because their arguments were rejected on the merits, but because the merits were not reached at all. Under the circumstances, when the issue already was briefed and argued in both the district court and the court of appeals, it is difficult if not impossible to envision when “another day” will arrive. The panel decision, if allowed to stand, is the functional equivalent of a categorical prohibition on consideration of a legitimate sentencing factor.

Under the circumstances, summary reversal and remand for resentencing is necessary. In the alternative, the petition for writ of certiorari should be granted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: June 1, 2018

CERTIFICATE OF COMPLIANCE PURSUANT TO RULE 33

I hereby certify that this petition for writ of certiorari complies with the type-volume limitation set forth in Rule 33(2). This petition contains 19 pages and uses 12-point Century Schoolbook proportionally spaced type.

Respectfully submitted,

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