

No. 17-9219

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*

**REPLY BRIEF IN SUPPORT OF
PETITION FOR A WRIT OF CERTIORARI**

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Introduction

Petitioner Kali Alexander was one of five defendants charged with, and convicted of, controlled substance and firearms offenses arising out of a “stash house sting” in Cleveland, Ohio. The government does not dispute that the offenses of conviction would not have occurred but for its plan to locate a person or persons who would rise to the bait of possibly hundreds of thousands of dollars and agree to participate in a fictitious crime.

ARGUMENT

I. The Court should grant this petition to consider the validity of stash house stings as legitimate investigative and prosecutorial tactics.

In its Brief in Opposition the government defends the use of stash house stings. However, the wide-ranging criticism of the use of warrants this Court’s review of this practice.

Although ultimately “reluctantly” denying motions to dismiss indictments arising out of stash house stings, Chief Judge Rubên Castillo of the United States District Court for the Northern District of Illinois, a former member of the United States Sentencing Commission, stated that such cases “have served to undermine legitimate law enforcement efforts in this country.” *United States v. Brown*, 299 F.Supp. 3d 976, 983 (N.D. Ill. 2018). Comparing the racial makeup of stash house sting defendants to the racial makeup of the adult population of his district, Chief Judge Castillo wrote:

It is undisputed that between 2006 and 2013, the defendants charged in this District in the ATF false stash house cases were 78.7 black, 9.6

percent Hispanic, and 11.7 percent white. During this same period, the District's adult population was approximately 18 percent black, 11 percent Hispanic, and 63 percent white. These numbers generate great disrespect for law enforcement efforts. Disrespect for the law simply cannot be tolerated during these difficult times. 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.

299 F.Supp.3d at 983-84 (footnote omitted). Chief Judge Castillo acknowledged the risks faced by law enforcement and the perceived benefit of using stash house stings as a means of recovering firearms from “the violent streets of our District,” but went on:

However, to paraphrase Supreme Court Justice Louis Brandeis, to declare that in the administration of the criminal law “the end justifies the means” is to declare that the government may violate fundamental principles of common fairness to secure the conviction of an alleged criminal. See *Olmstead v. United States*, 277 U.S. 438, 485, 48 S.Ct. 564, 72 L.Ed. 944 (1928) (Brandeis, J., dissenting). That is not where our criminal law should be in 2018. Our society simply cannot accept a “win at all costs” mentality in the delicate world of criminal law enforcement, which is ultimately dependent on proactive citizen involvement.

299 F.Supp. 3d at 984 (footnote omitted).

Apparently, the government acknowledged the problems presented in the Illinois cases. Chief Judge Castillo indicated in the footnote: “Counsel for the government represented during oral arguments in this case that, thankfully, the government is no longer charging individuals in false stash house cases in this District.” 299 F.Supp. 3d at 94, n.2 (citation to record omitted).

Chief Judge Castillo went on to cite numerous other courts that strongly criticized the use of stash house stings. 299 F.Supp. 3d at 985, 986. Among the criticism cited by Chief Judge Castillo was criticism of the use of stash house stings

summarized in the concurring opinion below. App. at 29a-30a (Stranch, J., concurring). As Judge Stranch noted, criticism has come from the media and legal scholars, as well as from the judiciary. However, as Judge Stranch opined, the criminal justice system “remain[s] 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. at 32a (Stranch, J., concurring). This petition, as well as the petitions submitted by Kali Alexander’s co-defendants,¹ provides the opportunity for this Court to address this issue and define the line “between law enforcement practices that are honorable and those that are not.” The petition should be granted.

II. Summary reversal and remand for resentencing is necessary to allow the district court to consider Kali Alexander’s request for a variance based on the government’s conduct.

The government justifies the use of stash house stings as being a weapon against “a nationwide increase of robberies of ‘drug stash houses’ in residential neighborhoods.” (Brief In Opposition at 3). However, the instant record fails to show that stash house robberies or home invasions were a problem in the Cleveland area during the time in question here. Certainly, and although Kali Alexander had prior convictions for robberies, there is nothing to suggest that he was predisposed to commit a stash house robbery, or even contemplated such conduct, before the government informant and the agent broached the subject and tempted him with a large score.

¹ *Chappell v. United States*, No. 17-8411; *Maxwell v. United States*, No. 17-8418; *Flowers v. United States*, No. 17-8370.

Even assuming that a general criminal predisposition existed, there is nothing to show that there was a specific predisposition to commit the “offense” suggested by the government. There is no dispute that the offenses at issue here would not have been committed but for the government’s conduct. If, as the government argues, the circumstances of this case do not support a due process claim or a sentencing departure, the circumstances still are legitimate considerations under 18 U.S.C. § 3553(a).

Kali Alexander challenged his sentence in the court below on the ground that the district court failed to consider the government’s conduct in the context of 18 U.S.C. § 3553(a). *United States v. Alexander*, Sixth Circuit No. 15-3991, Brief of Defendant-Appellant Kali Alexander at 40-49. The government’s arguments in opposition here focus on and respond only to claims of outrageous government conduct as due process violations, as grounds for avoiding application of mandatory minimum sentences, or otherwise as grounds for departures from advisory guideline ranges. (Brief in Opposition at 9-20). The government focuses on the due process/departure aspect of these cases but does not address the argument that the circumstances of this case present grounds for a variance from the advisory guideline range.

Neither the court below, nor the government in its Brief in Opposition, addressed this issue with regard to Kali Alexander. In light of this Court’s decisions on the scope of information a sentencing court may consider, relief should be granted

by this Court for a determination of whether a variance should have been granted when Kali Alexander was sentenced.

The government argues that the Sixth Circuit did address and resolve the issue of whether sentencing entrapment or sentencing manipulation constitute valid defenses, because the Sixth Circuit referred to its prior decision in *United States v. Hammadi*, 737 F.3d 1043 (6th Cir. 2013). (Brief in Opposition at 19-20). That reference to *Hammadi* does not support the government's position, however.

First, had the court below intended to rely on *Hammadi*, it likely would have explicitly stated the same reasoning as *Hammadi*, i.e., that even if those grounds for departure were available the facts of this case would not support a departure. *See Hammadi*, 737 F.3d at 1048-50. Here, the panel simply cited *Hammadi* but failed to explain how and why its reasoning applied. App. at 19a-20a.

Second, and more significantly, *Hammadi* addressed claims that a *departure* should have been granted based on claims of outrageous government conduct. 737 F.3d at 1044, 1047-50. As is discussed below, there is a clear distinction between a departure and a variance. Among the issues Kali Alexander raises here is the failure of the courts below to address his request for a *variance* based on the government's conduct. The government does not respond to that issue.

Kali Alexander received a 151-month sentence on the drug charge – at the low end of the 151 to 188-month advisory guidelines range. That range was based on his being held responsible for more than 5 kilograms of cocaine, a finding based on the agent's decision to induce participation in the fictitious robbery by representing that

“8 or 9 kilograms” was present. Even if rejection of the due process/departure arguments was not error, this Court’s cases required consideration of a variance that could have reduced the sentence on the drug charge from 151 months to as low as the statutory mandatory minimum of 120 months and the total sentence to as low as 180 months – a reduction of almost three years. The 18 U.S.C. § 3553(a) factors apply to aggregate prison terms for multiple counts of conviction. *Dean v. United States*, 137 S.Ct. 1170, 1175-76 (2017). A variance based on the government’s conduct is a legitimate factor in determining the total sentence.

As this Court has made clear, there is a significant distinction between a departure and a variance. *Irizarry v. United States*, 553 U.S. 708, 128 S.Ct. 2198 (2008). Federal Rule of Criminal Procedure 32(h) requires a sentencing court to give notice to the parties that is it contemplating a departure from the applicable guideline range based on a ground not identified by a party or in the presentence report. The question presented in *Irizarry* was whether Rule 32(h) “applies to every sentence that is a variance from the recommended Federal Sentencing Guidelines range even though not considered a ‘departure’ as that term as used when Rule 32(h) was promulgated.” *Irizarry*, 553 U.S. at 709, 128 S.Ct. at 2200. The Court stated that Rule 32(h) “does not apply to 18 U.S.C. § 3553 variances by its terms. ‘Departure’ is a term of art under the Guidelines and refers only to non-Guidelines sentences imposed under the framework set out in the Guidelines.” *Irizarry*, 553 U.S. at 714, 128 S.Ct. at 2202. The Court later distinguished variances from departures by noting that, in light of *Gall v. United States*, 552 U.S. 38, 49, 128 S.Ct.586, 596-97 (2007),

“there is no longer a limit comparable to the one at issue in *Burns* [*v. United States*, 501 U.S. 129, 111 S.Ct. 2182 (1991)] on the variances from the Guidelines ranges that a district court may find justified under the sentencing factors set forth in 18 U.S.C. § 3553(a) (2000 ed. and Supp. V).” *Irizarry*, 553 U.S. at 715, 128 S.Ct. at 2202-2203.

This Court in *Irizarry* concluded by expressing its “confidence in the ability of district judges and counsel . . . to make sure that all relevant matters relating to a sentencing decision have been considered before the final sentencing determination is made.” 553 U.S. at 716, 128 S.Ct. at 2203-2204. That confidence was not deserved in this case because Kali Alexander’s request for a variance on this ground was not addressed.

This Court’s decisions on the scope of information a district court may consider in determining the appropriate sentence make clear that that scope is quite broad. 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). Congress, the United States Sentencing Commission, and this Court have made clear that this discretion is, in fact, very broad.

As Petitioner previously noted (Petition at 14-16), this doctrine 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).

In *Pepper*, this Court stressed the broad scope of the evidence on which a sentencing court may rely, stating that a categorical bar on any evidence contradicts Congressional intent. *Pepper*, 562 U.S. at 491, 131 S.Ct. at 1241, 1242, (cited in *Dean*, *supra*, 137 S.Ct. at 1175). Practically speaking, the Sixth Circuit’s refusal to address the issue of the government conduct creates such a categorical bar on this information. The denial of the petition would leave that bar in place.

This Court recently addressed the proper application of plain error review in the sentencing context. *Rosales-Mireles v. United States*, 138 S.Ct. 1897 (2018). One consideration in determining whether an appellate court should exercise its discretion and correct plain error is committed at sentencing is whether the error “establishes a reasonable probability that a defendant will spend more time in prison than ‘necessary’ to fulfill the purposes of incarceration.” *Rosales-Mireles*, 138 S.Ct. at 1907, citing *Molina-Martinez v. United States*, 136 S.Ct. 1338, 1345 (2016). Noting the significance of additional jail time, both to the incarcerated individual and to society, this Court stated:

The possibility of additional jail time thus warrants serious consideration in a determination whether to exercise discretion under Rule 52(b). It is crucial in maintaining public perception of fairness and integrity in the justice system that courts exhibit regard for fundamental rights and respect for prisoners “as people.”

Rosales-Mireles, 138 S.Ct. at 1907. The failure to consider the full range of evidence pertaining “the nature and circumstances of the offense and the history and characteristics of the defendant,” 18 U.S.C. § 3553(a)(1), creates no less possibility of additional jail time than a miscalculation of the Guidelines range. Here, plain error

review was not applied because this issue was preserved in the district court. Even had plain error review been applied, correction of such a failure is no less crucial to maintaining the public perception of fairness and integrity in the justice system. This is particularly true in the instant context where the government conduct has been subject to such intense criticism by the judiciary, the media, and legal scholars.

Granting this petition, vacation of the judgment, and remand to allow the district court to consider the government's conduct in the context of a variance under 18 U.S.C. § 3553 is appropriate.

CONCLUSION

For these reasons, as well as for the reasons set out in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

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Dated: August 8, 2018

CERTIFICATE OF COMPLIANCE PURSUANT TO RULE 33.2

I hereby certify that this Reply Brief complies with the type-volume limitation set forth in Rule 33.2. This petition contains 9 pages and uses 12-point Century Schoolbook proportionally spaced type.

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