No. _____

# In The
# Supreme Court of the United States

JOVAN RIVERA RODRIGUEZ,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

On Petition For A Writ Of Certiorari To The United States Court of Appeals for the Eleventh Circuit

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

In *United States v. Booker*, 543 U.S. 220, 260-262 (2005), this Court invalidated 18 U.S.C. § 3553(b)(1), a provision that made the Sentencing Guidelines mandatory. In the aftermath of *Booker*, sentencing courts had to follow the "broad command" of the parsimony clause of 18 U.S.C. § 3553(a), which requires the imposition of a sentence that is "sufficient, but not greater than necessary" to fulfill the purposes of justice, deterrence, protection, and rehabilitation. *See Dean v. United States*, 581 U.S. 62, 66 (2017). Following that clause is a list of sentencing factors that courts must consider in sentencing a defendant. *See* 18 U.S.C. § 3553(a).

Yet, even after *Booker*, the vestiges of the mandatory guideline regime continue to infect federal sentencing through the restrictive application of 18 U.S.C. § 3553(e). Indeed, most federal circuit courts, like the Eleventh Circuit below, interpret § 3553(e) to *prohibit* a district court from considering the parsimony clause or the 18 U.S.C. § 3553 factors in imposing a sentence below the minimum mandatory in cases involving a defendant's cooperation. Under this conception, a court's task in crafting a sentence below a minimum mandatory begins and ends with a judicial assessment of the defendant's cooperation – nothing more and nothing less.

The question presented is whether 18 U.S.C. § 3553(e) bars a district court from considering § 3553(a)'s parsimony clause and sentencing factors in imposing a sentence below a minimum mandatory?

## PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner Jovan Rivera Rodriguez was the Defendant-Appellee in the court below. Respondent, the United States of America, was the Plaintiff-Appellant in that appeal. Petitioner is not a corporation. No party is a parent or publicly held company owning 10% or more of any corporation's stock.

## STATEMENT OF RELATED PROCEEDINGS

- *United States v. Jovan Rivera Rodriguez*, Case No. 6:22-cr-204, U.S. District Court for the Middle District of Florida. Judgment Entered on Aug. 9, 2023.
- *United States v. Jovan Rivera Rodriguez*, Case No. 23-12977, U.S. Court of Appeals for the Eleventh Circuit. Opinion issued Dec. 2, 2025.

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## PETITION FOR WRIT OF CERTIORARI

Petitioner Jovan Rodriguez Rivera respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

## DECISIONS BELOW

The United States District Court for the Middle District of Florida sentenced Mr. Rivera to a sixty-month term of incarceration. App. 15a. The Eleventh Circuit Court of Appeals reversed that sentence in a published decision reported at 160 F.4th 1193 and reproduced at App. 1a-13a.

## STATEMENT OF JURISDICTION

The Eleventh Circuit issued its decision and opinion on December 2, 2025. App. 1. This Court has jurisdiction over this timely petition. 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 3353(e) provides:

> Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

The remainder of the statute is reproduced in the Appendix at App. 20a.

Pursuant to 18 U.S.C. § 3661, "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."

**STATEMENT OF THE CASE**

A federal grand jury indicted Jovan Rivera Rodriguez ("Rivera") and Karen Altagracia Perez ("Perez") with conspiracy to distribute and possession with intent to distribute fentanyl. App. 2a. Based on the quantity of drugs involved, both defendants faced 10-year mandatory sentences. *See id.*; *see also* 21 U.S.C. § 841(b)(1)(A). The Presentence Report (PSR) calculated Rivera's offense level as 30 with a criminal history category of I. Doc. 195 at ¶¶ 67, 71. However, because of his mandatory penalty, the guideline range became 120 to 121 months.

The government filed a motion for substantial assistance requesting a two-level reduction pursuant to USSG §5K1.1 and 18 U.S.C. § 3553(e). App. 4a. The court granted that request. Consequently, Rivera's recalculated offense level was reduced to 28, and this yielded a recommended range of 78-97 months of imprisonment. The government argued that this range was mandatory since § 3353(e) barred the court from considering § 3553(a). *See id.*

The district court disagreed. It concluded that it had discretion to conduct an analysis of the § 3553(a) sentencing factors to arrive at a sentence sufficient but not

greater than necessary to effectuate the goals of sentencing. It exercised that discretion and imposed a 60-month prison sentence. App. 5a.

The government appealed to the Eleventh Circuit Court of Appeals, which reversed that decision. In doing so, the Eleventh Court concluded that "Section 3553(e) does not grant district courts authority to sentence a defendant below a statutory minimum based on non-assistance factors." App. 6a. In reaching this conclusion, the Eleventh Circuit looked to the "text" and "structure" of the statutory provision. *Id.*

Regarding the statutory text, the court maintained that subsection (e) permits courts "to impose a sentence below [the] level established by statute" but does not allow courts to impose any sentence they wish. *Id.* (citing 18 U.S.C.§ 3553(e)). Furthermore, subsection (e) states why departures from the mandatory are permitted, that is, to reflect a defendant's substantial assistance. *Id.* (citing *United States v. Winebarger*, 664 F.3d 388, 392 (3d Cir. 2011)). Thus, the Eleventh Circuit opined that any further reduction for non-assistance factors would exceed the sentencing court's authority. *Id.* (citing *United States v. Williams*, 474 F.3d 1130, 1132 (8th Cir. 2007)).

Concerning the context of the statute, the court asserted that the statute paired subsection (e) with subsection (f) – the safety valve provision. The court noted that subsection (f) expressly allowed a court to sentence a defendant without regard

to any statutory minimum sentence. App. 7a (citing 18 U.S.C. § 3553(f)). The Eleventh Circuit reasoned that the language of subsection (f) allowed courts to consider the § 3553(a) factors. *Id.*

In contrast, subsection (e) retained a reference to the minimum mandatory. *Id.* (citing *United States v. Ahlers*, 305 F.3d 54, 59 (1st Cir. 2002)). Thus, in the view of the Eleventh Circuit, subsection (e) only permitted a "specific" and "circumscribed" departure. *Id.* (quoting *Ahlers*, 305 F.3d at 59). After citing its own precedent, the Eleventh Circuit noted that the other circuits agreed with its interpretation. App. 7a-8a (citing *Ahlers*, 305 F.3d at 55; *United States v. Richardson*, 521 F.3d 149, 159 (2d Cir. 2008); *Winebarger*, 664 F.3d at 392–93; *United States v. Spinks*, 770 F.3d 285, 287 (4th Cir. 2014); *United States v. Desselle*, 450 F.3d 179, 182 (5th Cir. 2006); *United States v. Williams*, 687 F.3d 283, 286 (6th Cir. 2012); *United States v. Johnson*, 580 F.3d 666, 672 (7th Cir. 2009); *Williams*, 474 F.3d at 1131–32; *United States v. Lee*, 725 F.3d 1159, 1168 (9th Cir. 2013); *United States v. A.B.*, 529 F.3d 1275, 1285 (10th Cir. 2008).

In a concurring opinion, Judge Abudu agreed that the text and Eleventh Circuit precedent established that § 3553(e) only permits a reduction below the minimum mandatory for substantial assistance. App. 10a-11a. In this way, § 3553(e) reset the floor of the mandatory penalty. App. 11a. Nevertheless, she wrote

"separately to highlight broader concerns about how this framework operates in practice." App. 10a.

Judge Abudu observed that the current framework created a "one-directional" sentencing regime in which the § 3553(a) factors could be considered to vary upward but not downward. App. 11a. Such asymmetry in sentencing warranted reflection. *Id*. Although USSG § 1B1.1 required courts to always consider the § 3553(a) factors last in imposing the sentence, they could only be used in the § 3553(e) context to impose higher sentences:

> This restriction means that defendants with markedly different levels of culpability, personal histories, or prospects for rehabilitation may nonetheless receive identical sentences, or the defendant who played a greater role may receive a lower sentence, based entirely on the assistance rendered, the prosecutor's willingness to bring a motion, and how the district court measures such assistance.

App. 12a.

Judge Adubu observed that reducing the discretion of the district court "heightens the risk of unwarranted disparities among defendants whose circumstances are materially different." App. 13a. And, as a "matter of public policy, and perhaps due process, a sentencing framework that allows wide discretion to increase one's sentence while barring comparable discretion for downward departures warrants revaluation." *Id*.

## REASONS FOR GRANTING THE WRIT

This Court should accept certiorari in this case to uphold fundamental principles of federal sentencing and to vanquish the last vestiges of an unconstitutional mandatory guideline regime. Without this Court's intervention, the Eleventh Circuit will continue to ignore this Court's precedent, as well as § 3553(a)'s parsimony clause and sentencing factors, in favor of a mandatory guideline regime in sentencings that involve substantial assistance motions brought under § 3553(e).

There is a "long" and "durable" tradition that sentencing judges enjoy "discretion in the sort of information they may consider" at an initial sentencing proceeding. *Dean*, 581 U.S. at 66. "It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue." *Koon v. United States,* 518 U.S. 81, 98 (1996).

To conduct an individualized assessment, the Sentencing Reform Act provides that "[n]o 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. This right is fundamental to our sentencing process.

In imposing sentence, a federal judge "may appropriately conduct an inquiry

broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." *United States v. Tucker*, 404 U.S. 443, 446 (1972); *see also Concepcion v. United States,* 597 U.S. 481, 482 (2022) (stating that federal sentencing history has been characterized by an unbroken tradition of judicial discretion regarding the type of information courts may consider during sentencing hearings). As contemplated by this Court, a district court's ability to consider all relevant information at sentencing is critical to its ability to fashion a just sentence. *See Pepper v. United States*, 562 U.S. 476, 488 (2011) ("Permitting sentencing courts to consider the widest possible breadth of information about a defendant ensures that the punishment will suit not merely the offense but the individual defendant").

Against this backdrop, Congress passed legislation that led to the creation of federal sentencing guidelines in 1984. *See* The Sentencing Reform Act of 1984 (Chapter II of the Comprehensive Crime Control Act of 1984; P.L. 98-473). As part of the legislation, Congress also promulgated 18 U.S.C. § 3553, which is now the predominant criterion for the sentencing of every federal criminal defendant.

The statute provides a list of factors that a court must consider in imposing sentence. *See* 18 U.S.C. § 3553(a)(1-7); *Dean*, 581 U.S. at 67. These factors are preceded by the statute's parsimony clause. *Id*. The parsimony clause is a "broad command that instructs courts to 'impose a sentence sufficient, but not greater than necessary, to comply with' the four identified purposes of sentencing: just

punishment, deterrence, protection of the public, and rehabilitation." *Dean*, 581 U.S. at 67 (citing *Pepper*, 562 U.S. at 487-890); *see* also 18 U.S.C. § 3553(a). Section 3553(a) then directs a sentencing court to consider "the nature and circumstances of the offense and the history and characteristics of the defendant," as well as "the need for the sentence imposed" to serve the four overarching aims of sentencing. *Dean*, 581 at 67 (citing §§ 3553(a)(1), (2)(A)–(D)).

Despite the "long" and "durable" tradition described above, the Eleventh Circuit, as well as other circuits, continue to perpetuate a lingering and insidious aspect of federal sentencing that not only disregards this Court's precedent, but also abandons the fundamental provisions of 18 U.S.C. § 3553(a) by prohibiting a district court from engaging in an individualized sentencing assessment. This is evident in the Eleventh Circuit's decision below.

The Eleventh Circuit cited the statutory text but its interpretation conflicts with several principles of statutory interpretation. As an initial matter, courts must interpret criminal statutes in a manner consistent with ordinary English usage. *Flores–Figueroa v. United States,* 556 U.S. 646, 650–652 (2009). Thus, courts look for the meaning of the law "that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris* [the body of the law]." *See Chisom v. Roemer*, 501 U.S. 380 (1991) (Scalia, J., dissenting).

Furthermore, courts also look to the statutory provision within its statutory context. *Freeman v. Quicken Loans, Inc.*, 566 U.S. 624, 632 (2012). In such an analysis, courts can consider statutory declarations of purpose. *See United States v. Turkette*, 452 U.S. 576, 589 (1981). It can also interpret the term or provision in light of the full statutory context. *See*, *e.g.*, *Yates v. United States*, 574 U.S. 528 (2015) ("A fish is no doubt an object that is tangible . . . But it would cut [18 U.S.C.] § 1519 loose from its financial fraud mooring to hold that it encompasses any and all objects . . .").

A plain reading of § 3553(a) demonstrates that the statutory provision includes two mandatory aspects. First, the statute requires courts to "impose a sentence sufficient, but not greater than necessary, to comply with" the factors set forth in § 3553(a)(2). *Id*. Moreover, the statute states that in imposing such a sentence, the court is obligated to consider the individual § 3553(a) factors. *Id*. Significantly, these mandatory obligations are stated in the first two lines of the statute. Thus, § 3553(e) must be read alongside these mandatory principles, which are designed to accomplish just sentencing.

Consistent with these provisions, § 3553(e) provides that "[u]pon the filing of the motion by the Government, the court shall have the authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation and prosecution of another person who has committed an offense." 18 U.S.C. § 3553(e). Subsection (e) further

provides that "the court shall impose a sentence pursuant to the guidelines promogulated by the United States Sentencing Commission . . ." *Id.*

The reference to substantial assistance in subsection (e) addresses the type of motion that needs to be filed by the Government stated in the subsection's first clause. This seems obvious. Indeed, a contrary interpretation would mean that any Government motion would suffice to defeat the mandatory penalty. Thus, the explicit limitation on judicial autonomy in § 3553(e) is found in the requirement that a district court only has authority to depart from the minimum mandatory *upon the filing of a Government motion*, and that motion must be predicated on substantial assistance.

Furthermore, subsection (e)'s phrase "a level established by statute as minimum" refers to the initial mandatory penalty. It does not assert that the guideline that results after the substantial assistance reduction becomes the new mandatory penalty. To be sure, this interpretation would constitute a return to the mandatory guideline regime in which § 3553(a) was a statutory nicety. Such a conception would also allow the sentencing judge to set the minimum mandatory based on his own judicial fact-finding. *Cf. Alleyne v. United States*, 570 U.S. 99 (2013) ("Because mandatory minimum sentences increase the penalty for a crime, any fact that increases the mandatory minimum is an 'element' that must be submitted to the jury").

More importantly, nothing in subsection (e) suggests that the court is relieved of complying with the "overarching provision" of § 3553(a) "instructing district courts 'to impose a sentence sufficient, but not greater than necessary' to accomplish the goals of sentencing." *See*, *e.g.*, *Kimbrough v. United States*, 552 U.S. 85, 101 (2007). The Eleventh Circuit's position that a court cannot consider any other § 3553(a) factor after it grants a motion cases under § 3553(e) is antagonistic to the mandatory language of § 3553(a), which enumerates factors that the sentencing court "shall consider." § 3553(a). A contrary interpretation not only defeats the purpose of the statute but also renders § 3553(a) inoperative or superfluous.

Courts should decline to interpret a statutory provision that would render another part of the statute inoperative or superfluous. *See*, *e.g.*, *Colautti v. Franklin*, 439 U.S. 379, 392 (1979); *Yates*, 574 U.S. at 543 (resisting a statutory reading that would superfluous an entire provision passed in proximity as part of the same Act"). Instead, "provisions of a text should be interpreted in a way that renders them compatible." *Hylton v. U.S. Att'y Gen.*, 992 F.3d 1154, 1160 (11th Cir. 2021) (quoting Scalia & Garner, Reading Law § 55, at 331).

Prior to *Booker*, § 3553(a) did not authorize a court to depart from the mandatory sentencing range provided by the Sentencing Guidelines. Instead, subsection (a) merely provided directions to sentencing courts for assigning sentences *within* the Guidelines range. In effect, the sentencing factors were

subordinate to the mandatory guidelines. And the broad command of the parsimony clause was satisfied by mandatory guideline range as colored by the § 3553 sentencing factors.

In adopting a restrictive application of subsection (e), the Eleventh and the other numbered circuits consistently interpret it through the lens of a mandatory guideline regime. Thus, these courts assert that the sentencing § 3553(a) factors are still relevant to determine where a defendant falls within the recalculated guideline range after a departure for substantial assistance. *See*, *e.g.*, *Richardson*, 521 F.3d at 159 ("In arriving at a final sentence, of course, the district court may consider other factors in determining whether to grant the full extent of the departure permitted by § 3553(e)").

This resurrects the *pre-Booker* approach in which the § 3553(a) factors were only relevant to the determination of a sentence within a fixed guideline range. While the lower courts hold that the § 3553(a) factors cannot support a sentence below the fixed guideline set by a cooperation departure, they conclude that the sentencing factors can always be used to support a sentence above the new mandatory guideline range. As Judge Abudu observed, this creates a disturbing asymmetry in the use of the § 3553(a) factors. App. 12a-13a. Fundamental principles of due process should prohibit this sort of one-way ratchet, which permits individualized considerations, but only when those considerations work against a criminal defendant and in favor

of the government.

Such an approach is also inconsistent with the sentencing guidelines themselves. The text of § 3553(e) clearly mandates that that a defendant's sentence must be imposed in "accordance with the guidelines," which raises a significant concern involving USSG §1B1.1. This guideline provision requires courts in imposing a sentence to consider the § 3553(a) factors **after** calculating the advisory guideline range. *See* USSG §1B1.1(c) ("The Court shall then consider the applicable factors in 18 U.S.C. § 3553(a) taken as whole").

This provision does not direct courts to consider these factors to determine a defendant's sentence within the applicable guideline range. Nor does it instruct the courts to only use said factors to raise a defendant's sentence. Nevertheless, the circuit's court opinion accomplishes exactly that, marking a return to a mandatory guideline regime in cases where a criminal defendant has provided substantial assistance.

Turning to the Eleventh Circuit's structural argument involving the "pairing" of § 3553(e) and § 3553(f), the court failed to consider that these statutory provisions were enacted along with the mandatory guidelines. While subsection (e) allows a departure below the guidelines for cooperation, subsection (f) permits the court "to impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory

minimum sentence." 18 U.S.C. § 3553(f). Thus, like subsection (e), subsection (f) was moored to the sentencing guidelines and its mandate under §1B1.1 that a court had to consider the § 3553(a) factors after the guideline range is calculated.

In comparing the respective subsections in support of its holding, the Eleventh Circuit ignored that both provisions were enacted at a time when the latter was mandatory. In the realm of mandatory guidelines, the § 3553(a) factors could never be used to reduce a sentence below the mandatory guideline level. In such a framework, what differentiated subsection (e) from subsection (f) was their respective starting points for guideline reductions.

For a § 3553(e) substantial assistance, the lowest possible starting guideline level for a cooperation reduction started at the guideline offense level which incorporated the years of imprisonment associated with the mandatory penalty. *See* USSG §5G1.1(b). This was so even if a defendant's guidelines were lower than that mandatory penalty. *See id*. Thus, any guideline reductions, such as acceptance of responsibility or minor role, could only bring the sentence down to the guideline level that had the range of years set by the mandatory penalty and no more. Conversely, because § 3553(f) eliminated the mandatory penalty, guideline reductions could bring the offense level below the mandatory penalty. Simply put, if a defendant's guideline level was below the mandatory penalty that was his offense level.

Despite the differences in subsections (e) and (f), they shared one significant thing in common. Before *Booker*, both provisions did not allow for a consideration of the § 3553(a) factors or the parsimony clause to reduce the sentence further from the guideline offense level. The assertion that the interplay between the two sections proves that Congress in enacting § 3553(e), prohibited the consideration of non-assistance factors is nonsensical since both provisions operated in the same way in a mandatory guideline regime. Both subsections foreclosed a consideration of § 3553(a) beyond the resulting guideline range. In the post-*Booker* world, the Eleventh Circuit interprets the subsections differently, despite their pairing in holding subsection (f) requires a court's consideration of § 3553(a) in imposing a sentence while subsection (e) does not. And in the post-*Booker* world, where the clear text of the subsections requires the imposition of the sentence pursuant to guidelines, the Eleventh Circuit interprets the subsections disparately – subsection (f) adheres to the requirements of USSG §1B1.1, while subsection (e) does not,

Turning to the differences in the text of the subsections, as previously noted, the limitation on the court's authority in § 3553(e) stems from a condition precedent – the filing of a substantial assistance motion by the Government. If the Government does not file such a motion, the court is bound by the minimum mandatory. Thus, the court's authority is limited or rather non-existent until and unless the Government files a motion.

In contrast, § 3553(f) does not contain such a limitation through the prerequisite of a substantial assistance motion. Unlike § 3553(e), the court, rather than the prosecutor, is empowered to make the determination concerning safety-valve, relief under § 3553(f). Thus, there is no limitation on his ability to sentence below the statutory minimum. Indeed, he does not confront a limitation on his authority in the statutory prerequisite of a substantial assistance motion necessary for a § 3553(e) reduction.

Against this backdrop, harmonizing § 3553(e) and § 3553(f) is a relatively easy task. To be sure, the "limitation" referenced in § 3553(e) means that that a court is prevented from acting unless the Government files a motion. Similarly, the term "limitation" contained in § 3553(f) means that the minimum mandatory is obligatory, unless the court makes certain finding under the statute. This construct based on an interpretation of the statutes undermines the Government's belief that a judge has no discretion to consider the § 3553(a) factors after granting a substantial assistance departure under § 3553(e). Such a broad restriction is not present in the statute's text. Furthermore, the Government's perspective goes far beyond the meaning of the term "limitation" in the statute.

It would be strange, to say the least, to hold that a sentencing court is categorically prohibited from considering any other factors under the sentencing statutes, including 18 U.S.C. § 3553(a) and 18 U.S.C. § 3661, in determining whether

a further variance is appropriate. This Court should decline the Eleventh Circuit's invitation to do so here.

The Eleventh Circuit's interpretation of § 3553 not only disregards the mandatory requirements of § 3553(a) but it also facilitates the potential imposition of sentences that are hostile to the § 3553(a) factors. Indeed, if a district court must disregard the § 3553(a) factors after granting a § 3553(e) departure, then it could be forced to impose a sentence that does not result in just punishment or promote respect for the law. *See* 18 U.S.C. § 3553(a)(2)(A).

Shackled by such disregard, a court could likewise be forced to impose a sentence that ignores a defendant's low risk of recidivism. *See* 18 U.S.C. §§ 3553(a)(2)(C); *see also Pepper,* 62 U.S. at 492 (concluding that the likelihood that the defendant "will engage in future criminal conduct [is] a central factor that district courts must assess when imposing sentence"). The court would also have to ignore a defendant's significant medical needs. *See* 18 U.S.C. § 3553(a)(2)(D). And the court could not consider a defendant's history and characteristics and thus the unique circumstances that sometime mitigate his crime and punishment. *See* 18 U.S.C. § 3553(a)(1). Nor could it consider the defendant's lesser culpability or diminished mental state. *See id*.

It is perhaps in error to say that the district court is completely foreclosed from considering the § 3553(a) factors. Under the Eleventh Circuit's precedent, a

sentencing court can always consider them to vary upward. Such a one-directional approach underscores the irrationality and unfairness of the current application of § 3553(e). Notably, the statement that the factors can be considered vary upward or to place the defendant's sentence in the resulting circumscribed guideline range after a § 3553 departure echoes the vernacular of pre-*Booker* courts. *See*, *e.g*, *United States v. Banks*, 130 F.3d 621, 624 (4th Cir. 1997) ("Section § 3553(a) does not authorize a district court to depart from the sentencing range provided by the Sentencing Guidelines. Rather, § 3553(a) provides directions to sentencing courts for assigning sentences *within* the Guidelines' range").

This' interpretation is also irreconcilable with the traditional understanding of the federal sentencing process. A sentencing process that reflected a uniform and constant tradition "to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue." *Koons*, 518 U.S. at 113. And it would prevent federal judges from considering the wide breadth of information in sentencing a defendant. *See Pepper*, 562 U.S. at 488. This framework is not only antagonistic to this Court's precedent but also is contrary to 18 U.S.C. § 3661, which states that no limitation shall be placed on information concerning the background, character, and conduct of a person convicted of a federal offense.

The resulting consequences of the circuit courts circumscribed sentencing process under § 3553(e) are significant. As Judge Abudu recognized, the approach magnifies sentencing disparities in contravention of § 3553(a)(6), thereby undermining the "evenhandedness and neutrality" that are the "distinguishing marks of any principled system of justice." *Koon*, 518 U.S. at 113. Such disparity arises from the wide discrepancies in the degree or extent of substantial assistance departures that are awarded across the various federal circuits. *See* USSC, *The Use of Federal Rule of Criminal Procedure 35(b)* (Jan. 2016).

According to the United States Sentencing Commission, from 2009 to 2104, the extent of departures under USSG §5K1.1 in the District of Columbia and Second Circuits were 77.7% and 73.5% respectively. *See id*. at Table A-1. Conversely, during this same time span, the extent of the § 5K1.1 reductions in the Eleventh Circuits was 45.4%. *See id*. Thus, it creates a sentencing regime where judges, based on their own fact-finding, are setting different minimum mandatories due to their individualized and disparate assessments of substantial assistance in imposing sentences that differ across the circuits in kind and degree.

Further demonstrating the injustice of the framework, the current and restrictive application of § 3553(e) not only causes unavoidable disparities in sentences among the circuits courts but also unjust uniformities. As noted in the concurring opinion, the lower court's approach to § 3553(e) "means that defendants

with markedly different levels of culpability, personal histories, or prospects for rehabilitation may nonetheless receive identical sentences, or the defendant who played a greater role may receive a lower sentence . . .” App. 12a.

The perversity of this approach is evident from this very case, where Mr. Rivera served as a “minor participant” in a “conspiracy involving large quantities of fentanyl.” App. 13a. The district court found he “had provided assistance, and it sought to impose sentences that accounted not only for that cooperation” but also for his “limited culpability and other statutory factors.” Judge Abudu opined that in “many other sentencing circumstances, we trust district courts with that discretion. However, in the current framework, that is not allowed under Section 3553(e).” In other words, the sentencing guidelines will remain mandatory in cases of substantial assistance arising under § 3553(e) unless this Court intercedes.

## CONCLUSION

This Court changed the landscape of federal sentencing by affirming the discretion of district court judges to assess a broad swath of information. The unwavering goal was to achieve an individualized sentencing process which considered the defendant as an individual whose unique circumstances and characteristics could magnify or mitigate the crime and punishment to ensue. Such a conception, though firmly rooted in constitutional and legal tradition, was necessarily inconsistent with the false security offered by the mandatory sentencing guidelines.

This Court's precedent, as seen in *Booker* and *Gall*, may have changed the world for many, but not all. Indeed, Mr. Rivera's case reflects a return to a mandatory sentencing regime. Under such a regime, individualized sentencing is lost and statutory provisions are ignored as district courts are limited in their consideration of complete and relevant information. Without the guardrails of this Court's precedent and the federal sentencing statutes, the resulting sentencing process continues to perpetuate disparate and unjust results,

But in the end, that is always how injustice occurs. It arises not by the impact of cataclysmic decisions, but the erosion of precedent along the margins -- quietly, but incrementally, consistently, but insidiously -- until the precedent we look to is but a hollow man. So, this is the way *Booker* and *Gall* end, not with a bang but a whimper. *See* T.S. Elliot, *Poems*; *The Hollow Men* (Faber & Gwyer 1925).

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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