No.

In the Supreme Court of the United States

KENDALL TANKERSLEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

GAIL KATHRYN JOHNSON
Johnson & Brennan, PLLC
1401 Walnut Street, Suite 201
Boulder, CO 80302
(303) 444-1885

Counsel for Petitioner

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QUESTIONS PRESENTED

1. Whether a Sentencing Guidelines departure should be subject to appellate review that is conducted prior to, and distinctly from, review of the ultimate sentence for reasonableness, a question as to which the courts of appeals are divided.

2. Whether the holding in *Williams v. United States*, 503 U.S. 193 (1992) that a sentencing court's use of an erroneous ground for departure constitutes an incorrect application of the Guidelines remains valid after *United States v. Booker*, 543 U.S. 220 (2005).

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PETITION FOR A WRIT OF CERTIORARI

Kendall Tankersley, through counsel, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-35a) is reported at 537 F.3d 1100. The sentencing decision of the district court is unreported. Transcripts of the portions of the two sentencing hearings that reflect the district court's sentencing decision are appended hereto. (App., *infra*, 36a-67a.)

JURISDICTION

The court of appeals' judgment was entered August 12, 2008. A timely petition for rehearing was denied on December 1, 2008 (App., *infra*, 68a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The following statutory and Guidelines provisions are reproduced in the appendix: 18 U.S.C. § 3553(a)(5); 18 U.S.C. § 3742(a), (b) & (f); U.S.S.G. § 5K2.0 (2000); U.S.S.G. § 3A1.4 (2000); U.S.S.G. § 5K2.15 (1989). (App., *infra*, 69a-76a.)

STATEMENT OF THE CASE

A. Background

This Court's rulings in *United States v. Booker*, 543 U.S. 220 (2005), marked a sea change in federal sentencing law and practice nationwide, eliminating the mandatory nature of the U.S. Sentencing Guidelines. After *Booker*, district courts are required to calculate the applicable Guidelines range, but have discretion to impose a sentence at variance from the Guidelines through an application of the statutory factors set forth at 18 U.S.C. § 3553(a).

In the several years since *Booker*, the U.S. Courts of Appeals for the First, Second, Third, Fourth, Fifth, Sixth, Eighth, Tenth, and Eleventh circuits have continued to review Guidelines departures as part of their determination of whether the district court correctly applied the Guidelines.[1]

The U.S. Courts of Appeals for the Seventh and Ninth Circuits, however, have ceased reviewing departures according to pre-*Booker* constraints on

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[1] *See, e.g.*, *United States v. Wallace*, 461 F.3d 15, 32-33 (1st Cir. 2006); *United States v. Selioutsky*, 409 F.3d 114, 118-19 (2d Cir. 2005); *United States v. Vargas*, 477 F.3d 94, 103 (3d Cir. 2007); *United States v. Moreland*, 437 F.3d 424, 433 (4th Cir. 2006); *United States v. Saldana*, 427 F.3d 298, 310-13 (5th Cir. 2005); *United States v. Jackson*, 408 F.3d 301, 304 (6th Cir. 2005); *United States v. Spotted Elk*, 548 F.3d 641, 669-70 (8th Cir. 2008); *United States v. Munoz-Tello*, 531 F.3d 1174, 1186 (10th Cir. 2008); *United States v. Crawford*, 407 F.3d 1174, 1178 (11th Cir. 2005).

departure authority. Not long after *Booker* was decided, the Seventh Circuit decreed that "the concept of 'departures' has been rendered obsolete in the post-*Booker* world." *United States v. Arnaout*, 431 F.3d 994, 1003 (7th Cir. 2005); *see also United States v. Johnson*, 427 F.3d 423, 426 (7th Cir. 2005). Soon thereafter, the Ninth Circuit acknowledged the circuit split and adopted the Seventh Circuit's approach. *United States v. Mohamed*, 459 F.3d 979, 987 (9th Cir. 2006). The *Mohamed* Court characterized the concept of departures as "anachronistic" and held that "any post-*Booker* decision to sentence outside of the applicable guidelines range is subject to a unitary review for reasonableness, no matter how the district court styles its sentencing decision." *Id.*

The U.S. Court of Appeals for the District of Columbia has acknowledged the circuit split but declined to choose sides. *United States v. Olivares*, 473 F.3d 1224, 1229-30 (D.C. Cir. 2006).[2]

This Court addressed post-*Booker* appellate review of federal sentences in *Rita v. United States*, 551 U.S. 338, 127 S.Ct. 2456, 2462 (2007), holding that the courts of appeals may apply a rebuttable "presumption of reasonableness to a district court sentence that reflects a proper application of the Sentencing Guidelines."

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[2] The D.C. Circuit's more recent discussion of U.S.S.G. § 4A1.3(a)(3)'s prohibition on the use of a defendant's prior arrest record as the basis for an upward departure suggests that departures are not deemed "obsolete" or "anachronistic" in that circuit. *United States v. Brown*, 516 F.3d 1047, 1053 & n.4 (D.C. Cir. 2008).

This Court then summarized post-*Booker* district court and appellate sentencing procedures in *Gall v, United States*, 128 S.Ct. 586 (2007). The Court pronounced that "[a]s a matter of nationwide administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark [for the district court's sentencing decision]." 128 S.Ct. at 596. *Gall* further explained that if the district court decides that an "outside-Guidelines sentence is warranted," it must:

> consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance. We find it uncontroversial that a major departure should be supported by a more significant justification than a minor one.

Id. at 597.[3]

With respect to appellate sentencing review, *Gall* instructed that a court of appeals:

> must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines

[3] Notwithstanding *Gall*'s use of the term "departure," the facts of that case involved a district court's exercise of its discretion under *Booker* to impose a sentence at variance from the Guidelines in accordance with the factors set forth in 18 U.S.C. § 3553(a). 128 S.Ct. at 593.

> range . . . or failing to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range.

Id.

Last year this Court reaffirmed the distinction between departures and variances in *Irizarry v. United States*, 128 S.Ct. 2198 (2008). *Irizarry* held that advance notice of a contemplated variance was not required by due process or by Rule 32(h) of the Federal Rules of Criminal Procedure, which requires advance notice of a contemplated departure. 128 S.Ct. at 2202-04. As this Court explained, "'[d]eparture' is a term of art under the Guidelines and refers only to non-Guidelines sentences imposed under the framework set out in the Guidelines." *Id.* at 2202.

B. District Court Sentencing Proceedings

Ms. Tankersley was sentenced on her plea of guilty to a three-count Information charging conspiracy, aiding and abetting attempted arson, and aiding and abetting arson. After two sentencing hearings, the district court sentenced Ms. Tankersley to 41 months of incarceration.

The jurisdiction of the district court was proper under 18 U.S.C. § 3231.

Having ruled that Ms. Tankersley's offenses did not qualify for the terrorism enhancement, U.S.S.G. § 3A1.4 (2000), the district court nonetheless applied a 12-level upward departure

under U.S.S.G. § 5K2.0 (2000) in order to create parity between Ms. Tankersley and those co-conspirators whose offenses did qualify for the terrorism enhancement.

The district court then granted a 6-level downward departure for a combination of strong mitigating circumstances presented by Ms. Tankersley's case and personal characteristics and history, including her early withdrawal from the conspiracy, her complete rehabilitation in the intervening seven years until her arrest, the genuineness of her remorse, her substantial assistance, and the district court's prediction that Ms. Tankersley would never again violate the law.

The 41-month sentence ultimately imposed by the district court represented the bottom of the resulting guideline range. However, the bottom of that range had been more than tripled by the application of the 12-level upward departure.

The district court also sentenced nine other members of the conspiracy. It was undisputed that Ms. Tankersley was one of the least culpable members of the overall conspiracy. For each of the ten co-conspirators, the district court imposed a sentence within what the district court believed to be the correctly calculated guideline range, after taking into account whether the terrorism enhancement applied and the government's motions for downward departures due to substantial assistance.

C. The Court of Appeals' Decision

Ms. Tankersley's sentencing appeal raised four distinct legal challenges to the district court's upward departure. (Appellant's Opening Brief (in the Ninth Circuit) at 26-34.) Three of these challenged the propriety of the court's decision to upwardly depart at all, while the fourth challenged the magnitude of the upward departure. (*Id.*) The court of appeals adjudicated only the first of these challenges, holding that the district court's decision to impose a 12-level upward departure as an analog to the terrorism enhancement set forth in U.S.S.G. §3A1.4 (2000), which the court had deemed inapplicable, did not render Ms. Tankersley's sentence per se unreasonable. (App., *infra*, 25a-29a.)

The court of appeals expressly declined to adjudicate the second and third challenges to whether any Guidelines departure by analogy to the terrorism enhancement was authorized under U.S.S.G. § 5K2.0:

> Tankersley also challenges the upward departure as being unwarranted under § 5K2.0 because there were no aggravating circumstances that were not adequately taken into consideration by the Sentencing Commission and because there was no evidence of harm sufficient to remove Tankersley's offense from the heartland of arson offenses. After *Booker*, the scheme of downward and upward departures has been replaced by the requirement that

> judges impose a reasonable sentence. *Mohamed*, 459 F.3d at 986. Where, as here, a district court frames its analysis in terms of a downward or upward departure, we treat the "so-called departure[ ] as an exercise of post-*Booker* discretion to sentence a defendant outside of the applicable guidelines range," and "any post-*Booker* decision to sentence outside of the applicable guidelines range is subject to a unitary review for reasonableness, no matter how the district court styles its sentencing decision." *Id.* at 987.
>
> . . .
>
> In other words, we do not need to consider whether the district court correctly applied the departure provision in § 5K2.0; rather we review the district court's deviation from the applicable guidelines range for reasonableness. *Id.* at 989.

(App., *infra*, 29a-31a (citation omitted).)

Additionally, the court of appeals implicitly declined to review Ms. Tankersley's challenge to the magnitude of the departure. The court of appeals failed to acknowledge that claim and did not even mention what Ms. Tankersley's guideline range would have been absent the departure. (App., *infra*, 1a-35a.)

The court of appeals rejected Ms. Tankersley's claim that this Court's decision in *Irizarry*, 128 S.Ct.

2198, undermined the Ninth Circuit's ruling in *Mohamed*, 459 F.3d 979. (App., *infra*, 30a-31a n.11.)

Concluding that Ms. Tankersley's 41-month sentence was reasonable, the court of appeals affirmed the district court's sentence. (App., *infra*, 31a-35a.)

REASONS FOR GRANTING THE PETITION

This case squarely presents the important and frequently recurring question of how federal appellate courts should review departures from the Sentencing Guidelines. This matter involves a threshold principle of appellate procedure that logically calls for national uniformity. A nine-to-two circuit split currently exists, however, which this Court alone can resolve.

The case raises the related question of whether the entire concept of departures has become "obsolete" or "anachronistic" post-*Booker*, as the Seventh and Ninth Circuits have respectively stated. *Arnaout*, 431 F.3d at 1003; *Mohamed*, 459 F.3d at 987. Such rhetoric affects not only appellate courts but also impacts the sentencing procedures followed by district courts. Only this Court can provide the clear guidance necessary to restore sound sentencing review to all the courts of appeals and sensible sentencing procedures to the district courts nationwide.

Moreover, the court of appeals decision violates this Court's precedent by ignoring *Williams v. United States*, 503 U.S. 193 (1992). *Williams* held that a sentencing court's use of an invalid departure

ground constitutes an incorrect application of the Guidelines, requiring remand under 18 U.S.C. § 3742(f)(1) unless deemed harmless. 503 U.S. at 200-03. The Sentencing Reform Act of 1984 made clear that a party to a criminal case is entitled to appeal an incorrect application of the Guidelines by the district court. 18 U.S.C. § 3742(a)(2) (defendant's right) & (b)(2) (government's right). This statute also set forth detailed instructions for how appellate courts are to remedy erroneous sentences. 18 U.S.C. § 3742(f). Yet the court of appeals, relying on an approach rejected by nine other circuits, declined to address two of Ms. Tankersley's challenges to the legal basis for the district court's upward departure, determining instead that it did "not need to consider whether the district court correctly applied the departure provision in § 5K2.0." (App., *infra*, 31a.) Review by this Court is warranted in order to restore meaningful appellate review of sentencing departures across all circuits.

I. A Mature Circuit Split Exists Regarding The Fundamental Question Of Whether Appellate Review Of Guidelines Departures Is Necessary.

This case presents a circuit split on a threshold matter of procedure for appellate review of federal sentences. Eleven of the courts of appeals have now weighed in. The common law of sentencing departures continues to evolve as usual in most circuits, but in the Seventh and Ninth Circuits, it has become frozen in time in the pre-*Booker* era. District courts sitting in some states have been told to ignore departure methodology,

whereas district courts in adjacent states are required to apply the departure Guidelines correctly or risk likely reversal. This situation merits the intervention of this Court at this juncture to provide uniform guidance to the lower courts.

A. Nine of the Eleven Circuits To Have Resolved This Issue Have Correctly Held That Reviewing Courts Should Continue To Apply Departure Methodology.

Most courts agree that departure Guidelines remain an integral part of federal sentencing after *Booker*. Thus, courts of appeals in nine of the ten circuits to have addressed this issue have held that appellate review of Guideline departures continues in the post-*Booker* era. *See, e.g.*, *United States v. Wallace*, 461 F.3d 15, 32-33 (1st Cir. 2006) (remanding for resentencing after finding plain error in district court's decision to upwardly depart based on valid and invalid grounds); *United States v. Selioutsky*, 409 F.3d 114, 118-19 (2d Cir. 2005) (remanding district court's downward departure for exceptional family circumstances to allow for additional fact-finding); *United States v. Vargas*, 477 F.3d 94, 103 (3d Cir. 2007) ("While it may be that the flexibility a variance affords will cause a decline in the use of traditional departures, the law still provides for departures, and we decline to find that they are obsolete or replaced."); *United States v. Moreland*, 437 F.3d 424, 433 (4th Cir. 2006) (traditional departures remain an important part of sentencing even after *Booker*); *United States v. Saldana*, 427 F.3d 298, 310-13 (5th Cir. 2005) (reviewing and affirming upward departure); *United States v. Jackson*, 408 F.3d 301, 303-05 (6th Cir.

2005) (reversing downward departure because district court's list of reasons was insufficient to support the departure); *United States v. Spotted Elk*, 548 F.3d 641, 669-70 (8th Cir. 2008) ("A departure occurs within the context of the Guidelines themselves, which prescribe that the sentencing court should depart from the Guidelines range in certain situations, as for example, when important circumstances of a particular case are not adequately taken into account by the Guidelines."); *United States v. Munoz-Tello*, 531 F.3d 1174, 1186 (10th Cir. 2008) (affirming upward departure and extent thereof with reference to pre-*Booker* case law regarding departures); *United States v. Crawford*, 407 F.3d 1174, 1178 (11th Cir. 2005) (holding that district court erred in granting downward departure for substantial assistance pursuant to U.S.S..G. § 5K.1.1 where government had not filed the motion required under that Guideline).

The reasoning of this overwhelming majority of Circuits is persuasive. One of the fundamental lessons of *Booker* is that "district courts, while not bound to apply the Guidelines, must consult these Guidelines and take them into account when sentencing." 543 U.S. at 264. Surely this refers to all of the Guidelines, including the departure Guidelines. *See also* 18 U.S.C. 3553(a)(5) (mandating that district courts consider pertinent policy statements issued by the Sentencing Commission). Indeed, the departure Guidelines have been an integral part of the Guidelines system since its inception. U.S.S.G. § 1A1.1, Pt. A, intro. comment., ¶ 4.(a) ("The Guidelines' Resolution of Major Issues" – "Departures"). Thus, in *Rita*, this Court noted that a defendant may argue "*within the*

Guidelines' framework" for a departure from the otherwise applicable Guidelines range. 551 U.S. 338, 127 S.Ct. at 2461. A mandate that district courts consult and take into account Guidelines has little force if a district court's misapplication of a departure Guideline is not subject to any direct appellate review.

As the Eleventh Circuit explained in *Crawford*, *Booker's* requirement that the district courts consult the Guidelines "at a minimum, obliges the district court to calculate *correctly* the sentencing range prescribed by the Guidelines." 407 F.3d at 1178. Referring in conclusion to both an erroneous offense level adjustment and an erroneous downward departure, the *Crawford* court held that "true consultation cannot be based on an erroneous understanding of the Guidelines." *Id.* at 1183.

This Court's recent federal sentencing decisions reiterate the importance of accurate Guidelines calculations and the formal role played by the departure Guidelines in those calculations. In *Gall*, 128 S. Ct. at 597, this Court explained that "the Guidelines should be the starting point and the initial benchmark" for the sentencing court." Thus, an appellate court reviewing a federal sentence "must first ensure the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range . . . ." *Id.* Presumably, "the Guidelines" means the complete Guidelines, and "the Guidelines range" means the final Guidelines range arrived at after application of *all* of the provisions of the Guidelines, including the departure Guidelines.

The existence of a direct circuit conflict surrounding this issue is undeniable. Acknowledging the contrasting approach followed in the Seventh and Ninth Circuits, the Third Circuit has stated, "the law still provides for departures, and we decline to find that they are obsolete or replaced." *Vargas*, 477 F.3d at 103. Similarly, the Fourth Circuit has stated:

> We note that the continuing validity of departures in post-*Booker* federal sentencing proceedings has been a subject of dispute among the circuits . . . . We believe, however, that so-called "traditional departures" – *i.e.*, those made pursuant to specific guideline provisions or case law – remain an important part of sentencing even after *Booker*.

Moreland, 437 F.3d at 433. The Eighth Circuit has "urged the district courts to consider the departure and variance questions sequentially in order to facilitate appellate review." *Spotted Elk*, 548 F.3d at 670.

B. The Minority Approach Followed In The Seventh And Ninth Circuits Is Flawed, Is Insufficiently Deferential To District Courts, And Has Created Confusion.

1. In *Mohamed*, the Ninth Circuit explained that it was "elect[ing] to review the district court's application of the guidelines only insofar as they do not involve departures." 459 F.3d at 979. There is nothing in this Court's post-*Booker*

sentencing jurisprudence that would support the minority approach reviewing the application of only some, but not all, of the Sentencing Guidelines.

To the contrary, this Court recently expressed its disagreement with an amicus for having suggested "a puzzling distinction between incorrect applications of the Sentencing Guidelines, controlled by 3742(f)(1), and erroneous departures from the Guidelines, covered by 3742(f)(2)." *Greenlaw v. United States*, 128 S.Ct. 2559, 2568 (2008) (holding that a defendant's sentence may not be increased on appeal where the government did not cross appeal the sentence). As the *Greenlaw* opinion reasoned, "We do not see why Congress would want to differentiate Guidelines decisions this way." *Id.*

Equally important, the holding and analysis in *Irizarry* emphasize the bright-line distinction between departures and variances from the Guidelines. 128 S.Ct. 2198 (holding that variances from the Guidelines do not require the advance notice required for departures). As this Court stated in *Irizarry*, "'[d]eparture' is a term of art under the Guidelines and refers only to non-Guidelines sentences imposed under the framework set out in the Guidelines." *Id.* at 2202. By contrast, the court of appeals here explained that "[a]fter *Booker*, *the scheme of downward and upward departures has been replaced* by the requirement that judges impose a reasonable sentence." (App., *infra*, 29a (citing *Mohamed*, 459 F.3d at 986) (emphasis added).) These competing views of departures are irreconcilable. Yet the court of appeals here ruled that the *Irizarry* opinion did not undermine *Mohamed* or alter the rule that the Ninth Circuit

would decline to review Guideline departures. (App., *infra*, 30a-31a, n.11.)

Thus, under the current state of the law in the Seventh and Ninth Circuits, a district court's adequately noticed but substantively erroneous departure is not subject to appellate review. By contrast, a district court's inadequately noticed departure triggers automatic reversal. The notice provisions exist to ensure that the grounds for the sentence imposed are subject to sufficient adversarial testing, with the overarching purpose of increasing the soundness of district court sentencing decisions by ensuring "that all relevant matters relating to a sentencing decision have been considered before the final sentencing determination is made." *Irizarry*, 128 S.Ct. at 2203-04. Yet the minority approach teaches sentencing courts and litigants that the propriety of a departure as such is irrelevant, as long as the ultimate sentence appears "reasonable" to the reviewing court.

Review in the Supreme Court is warranted by the confusion and ill effects that inevitably will follow if the court of appeals decision remains good law. *See United States v. Autery*, No. 07-30424, ___ F.3d ___, 2009 WL 349801, at *12 (9th Cir. Feb. 13, 2009) ("We readily concede that in this post-*Booker* era lower courts may occasionally feel a little like Hansel and Gretel, looking for the now-missing breadcrumbs that would lead us back to clarity in sentencing."). Allowing two circuits to excise the departure Guidelines from the remainder of the Guidelines subject to appellate review can only undermine "the nationwide consistency" that this Court spoke of in *Gall*. 128 S.Ct. at 596.

2. The minority approach's blurring of departures and variances also violates the general principle of appellate review that district court decisions are entitled to deference. In most circuits, if the district court imposes a sentence based on an invalid Guidelines departure, the case will be remanded so that the district court may decide, in the first instance, what sentence it would choose to impose when fully advised by what the true Guidelines range would be, given the invalidity of the departure. By contrast, the Seventh and Ninth Circuits have adopted a blanket assumption that, if the erroneous departure were reversed, the district court would nonetheless impose exactly the same sentence on remand by applying a variance instead. At best, this assumption is sheer speculation; at worst, it reflects a view that all district courts engage in result-oriented sentencing processes in the post-*Booker* era. The advisory Guidelines are meant to provide advice and guidance to a district court that is meaningful and that might influence the court's sentencing decision. The requirement of consultation with the correctly calculated Guidelines should not be dispensed with so easily.

Even with the expanded discretion afforded by *Booker*, district courts usually sentence federal criminal defendants within the correctly calculated advisory Guidelines range. As *Gall* instructs, "the Guidelines should be the starting point and the initial benchmark" for the district court's sentencing determination. 128 S.Ct. at 596. The minority approach, by failing to allow the district court to impose sentence in the first instance based on a correct application of all of the Guidelines, including

the departure Guidelines, renders this exhortation from *Gall* an empty formality.

The minority approach is also at odds with the legal principle that appellate courts should remand for resentencing if the district court's sentencing decision resulted from a misapprehension about its departure or variance authority. In such circumstances, rather than affirming any sentence that falls within the wide range of reasonableness, federal courts routinely remand for resentencing.

3. The minority approach fails to recognize that its own reasonableness review may be negatively impacted by an unreviewed, erroneous departure underlying a sentencing decision. As the Third Circuit recently summarized,

> [W]hile "the district court is free to make its own reasonable application of the § 3553(a) factors, and to reject (after due consideration) the advice of the Guidelines," *Kimbrough [v. United States]*, 128 S.Ct. [558,] 577 [(2007)] (Scalia, J., concurring), it must first duly consider the correct Guidelines. Thus, a district court's incorrect Guidelines calculation will thwart not only its ability to accomplish the analysis it is to undertake, but our reasonableness review as well.

United States v. Langford, 516 F.3d 205, 215 (3d Cir. 2008).

With the minority approach, the appellate court is necessarily affirming a hypothetical variance that has not been adequately explained by the district court. In the majority approach circuits, by contrast, the requirement that a district court adequately explain any variance from the Guidelines has been rigorously enforced. *See, e.g., United States v. Smalley*, 517 F.3d 208, 215 (3d Cir. 2008), (finding Guidelines application error and declining to affirm sentence even though district court had issued an "alternative sentence" explaining that it would have reached the same result via a variance, given the inadequate explanation for the resulting 8-month variance from the top of the correctly calculated Guidelines range).

Moreover, at least one judge in the Ninth Circuit has recently complained that "[a]buse of discretion as now applied in this circuit to the substantive review of sentences for reasonableness is nothing more than a standardless and empty formalism—it comes close to no review at all." *Autery*, 2009 WL 349801, at *13 (Tashima, J., dissenting).

4. Based on the guidance they have received from their respective courts of appeals, district courts in the Seventh and Ninth Circuits reasonably may conclude that they are to ignore Guidelines departures. However, the Sentencing Reform Act mandates that district courts consider the departure Guidelines in determining the sentence to be imposed. 18 U.S.C. § 3553(a)(5). In *United States v. Zolp*, 479 F.3d 715, 721 (9th Cir. 2007), the Ninth Circuit discussed a sentencing in which the government had moved for a substantial

assistance downward departure pursuant to U.S.S.G. § 5K1.1,, but the district court refused to consider the defendant's cooperation in calculating the advisory guideline range, instead taking it into account in applying 18 U.S.C. § 3553. Such befuddlement was approved by the Ninth Circuit, relying on *Mohamed*. *Id.* at 721-22 ("The district court engaged in the correct analysis."). Thus, the Ninth Circuit has instructed the many district courts it reviews to ignore the departure Guidelines, which all district courts are statutorily mandated to consider. Only this Court can dispel such confusion.

II. The Court Of Appeals' Decision Violates This Court's Precedent In *Williams v. United States*, 503 U.S. 193 (1992) And The Sentencing Reform Act.

The approach followed in the Seventh and Ninth Circuits violates Supreme Court precedent and the Sentencing Reform Act of 1984. Before decreeing the Guidelines advisory in *Booker*, this Court had held "that a sentencing court's use of an invalid departure ground is an incorrect application of the Guidelines." *Williams v. United States*, 503 U.S. 193, 200 (1992). *Williams* further held that 18 U.S.C. § 3742(f)(1), a part of the Sentencing Reform Act that requires remand when the district court incorrectly applies the Guidelines, therefore requires remand when a sentencing court relies upon an invalid departure ground (unless the error may be deemed harmless). *Id.* at 201-03.

The Sentencing Reform Act granted federal criminal defendants the statutory right to obtain appellate review of a sentence that was imposed in

violation of the law and/or as a result of an incorrect application of the departure Guidelines. 18 U.S.C. § 3742(a)(1) & (a)(2). The government enjoys a parallel statutory right to appeal legally erroneous sentences and Guidelines determinations. 18 U>S.C. 3742(b)(1) & (b)(2).

Booker did not purport to overrule *Williams*. Moreover, although Justice Breyer's opinion of the court (in part) excised a separate subparagraph of 18 U.S.C. § 3742, it left paragraphs (a), (b), and (f) intact. *Booker*, 543 U.S. at 260 (excising 18 U.S.C. 3742(e)). The court of appeals decision below ignored the precedent of *Williams* and the intent of Congress by expressly declining to adjudicate two of Ms. Tankersley's legal challenges as to whether the district court's 12-level upward departure was based on a legally defensible ground. (App., *infra*, 29a-31a.)

In *Mohamed*, the Ninth Circuit summarized its choice to abandon review of Guidelines departures:

> [W]e side with the Seventh Circuit and we elect to review the district court's application of the advisory sentencing guidelines only insofar as they do not involve departures. To the extent that a district court has framed its analysis in terms of an upward or downward departure, we will treat such so-called departures as an exercise of post-*Booker* discretion to sentence a defendant outside of the applicable guidelines range.

459 F.3d at 987. The Ninth Circuit decision to abandon departure review was incorrect, however, because refusing to review the departure Guidelines violates *Williams* and 18 U.S.C. § 3742(a) & (f).

The court of appeals decision violates another aspect of *Williams* as well. In *Williams*, this Court was faced with the question of the appropriate remedy when a district court has based a departure on a combination of factors, both valid and invalid. 503 U.S. at 197-98. This Court held that:

> once the court of appeals has decided that the district court misapplied the [departure] Guidelines, a remand is appropriate unless the reviewing court concludes, on the record as a whole, that the error was harmless, *i.e.*, that the error did not affect the district court's selection of the sentence imposed.

Id. at 203. The minority approach applied by the court of appeals here, however, dictates that regardless of whether a sentence may be based on an erroneous departure, the sentence must be affirmed as long as the district court *could* have imposed the same sentence with a variance under 18 U.S.C. § 3553(a)–even if there is no evidence or indication in the record that the court *would* have done so. (App., *infra*, 29a-31a.)

The *Williams* court expressly criticized such an approach as insufficiently deferential to the sentencing court. 503 U.S. at 204 ("the dissent's position requires the appellate court to consider

whether the district court *could* have based its departure on the remaining [valid] factors, not whether it *would* still have chosen so to act."). As the Court concluded in *Williams*, "it is the prerogative of the district court, not the court of appeals, to determine, in the first instance, the sentence that should be imposed in light of certain factors properly considered under the Guidelines." *Id.* at 205; *cf. United States v. Anderson*, 526 F.3d 319, 329-30 (6th Cir. 2008) (questioning whether, in light of *Gall*, an incorrect Guidelines calculation can ever be deemed harmless); *Langford*, 516 F.3d at 215 ("We submit that the improper calculation of the Guidelines range can rarely be shown not to affect the sentence imposed.").

III. This Case Squarely Presents The Issues Presented For Certiorari Review, And The Incorrectness Of The Court of Appeals' Decision Is Evident.

The court of appeals' opinion notes but fails to address three of Ms. Tankersley's challenges to the propriety of the district court's 12-level upward departure.

1. First, the district court expressly declined to adjudicate Ms. Tankersley's argument that the district court's departure failed to meet the requirements of § 5K2.0 because it was not based upon an aggravating circumstance that the Sentencing Commission had inadequately taken into consideration in promulgating the Guidelines. (App., *infra*, 29a-31a.) This argument was strong, merited appellate review, and would have required reversal of the departure. As argued in Ms.

Tankersley's Opening Brief before the court of appeals, departures under § 5K2.0 are limited to situations in which "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." U.S.S.G. § 5K2.0 (2000); *see also* Appellant's Opening Brief at 26-27.) Because the Guidelines had taken the impact of terrorism on civilian targets into account in a previous terrorism enhancement Guideline, U.S.S.G. § 5K2.15 (1989), which was later removed and replaced with U.S.S.G. § 3A1.4, this circumstance was not one that the Sentencing Commission had failed to adequately take into consideration. (Appellant's Reply Brief at 11, 14.)

2. Second, the court of appeals also expressly declined to adjudicate Ms. Tankersley's claim that the district court's upward departure was unwarranted because there was no evidence of harm resulting from Ms. Tankersley's conduct that was sufficient to remove her offenses from the heartland of arson offenses. (App., *infra*, 29a-31a.) Again, Ms. Tankersley would have prevailed, had this claim been addressed on its merits. (*See* Appellant's Opening Brief at 27-29; Appellant's Reply Brief at 18-20.) The sole feature of the completed arson that distinguished this from any other arson of comparable economic damage was the communiqué that was written and distributed by Ms. Tankersley's co-conspirators; yet the district court stated, "the 12-level departure was not based on the conduct of composing this communiqué. It was

based on the conduct of committing the arson." (App., *infra*, 42a.)

3. Third, the court of appeals opinion does not even mention Ms. Tankersley's distinct challenge to the excessive degree of the district court's upward departure. (Appellant's Opening Brief at 29-34; Appellant's Reply Brief at 21-23.) In this respect, the court of appeals decision violates the spirit if not the letter of *Gall*, which held that review for substantive reasonableness must "take into account . . . the extent of any variance from the Guidelines range." 128 S.Ct. at 597. The district court's upward departure was 12 levels, an extraordinary magnitude by any measure, including pre-*Booker* Ninth Circuit precedent. *United States v. Roston*, 168 F.3d 377, 379 (9th Cir. 1999) (stating that a departure of only 7 levels was "substantial, and should not be lightly taken"); *United States v. Nagra*, 147 F.3d 875, 884-89 (9th Cir. 1998) (reversing 6-level upward departure that was based on immigration fraud involving 180 illegal immigrants); *United States v. Mathews*, 20 F.3d 185, 188 (9th Cir. 1997 (reversing 4-level upward departure as unreasonable because it was "greatly disproportionate").

Similarly, the court of appeals failed to address Ms. Tankersley's citation to *United States v. Leahy*, 169 F.3d 433, 438 (7th Cir. 1999), a procedurally similar case in which the Seventh Circuit reversed a 10-level upward departure as excessive, on the ground that the district court's analogy to the 12-level terrorism enhancement at U.S.S.G. § 3A1.4 was unreasonable because the

defendant's conduct did not qualify for that enhancement. (Appellant's Opening Brief at 29-30.)

In addition to arguing this body of case law before the court of appeals, Ms. Tankersley also explained that the district court's 12-level upward departure had the effect here of more than *tripling* the bottom of the otherwise applicable guideline range. (Appellant's Opening Brief at 32.) She pointed out that the 12-level upward departure more than offset *all* of the mitigating offense-level adjustments and departures applied to her: 2 levels for minor role in the offense, 3 levels for acceptance of responsibility, and 6 levels for substantial assistance. (*Id.* at 33.) And she explained that the 12-level departure had an equal or greater impact than would have occurred under the Guidelines had she simultaneously been sentenced (in addition to her counts of conviction) for an additional extremely serious felony that she did not commit: burglary of a residence, while possessing a firearm, with more than minimal planning, and resulting in a loss of more than $5 million. (*Id.* at 34.)

By ignoring pre-*Booker* constraints on the allowable extent of a district court's departure, the court of appeals opinion unduly and unjustifiably restricted appellate departure review well beyond the limitations of *Mohamed*. The *Mohamed* opinion includes a lengthy paragraph of reasoned analysis of statutory and case law justifying "the degree of the district court's deviation from the advisory guidelines." 459 F.3d at 989. Here, there was no analysis of the magnitude of the upward departure whatsoever. The court of appeals opinion fails to even acknowledge that Ms. Tankersley's sentence,

absent the 12-level upward departure, likely would have been only 12 months of imprisonment rather than 41 months.[4]

Moreover, the implicit assumption by the court of appeals that the district court would have imposed the same sentence on remand even if the departure were deemed erroneous is wholly unfounded here. The district court conducted a total of twelve sentencing hearings of ten individuals in connection with this conspiracy. (Ms. Tankersley and one other co-conspirator each received a second sentencing hearing to address their claims that they had not received sufficient notice of the possibility of the upward departures under § 5K2.0.) At each and every hearing, and for each and every individual, the district court issued a sentence within the calculated Guidelines range, rather than a sentence at variance from the Guidelines. Denying the district court the opportunity to sentence Ms. Tankersley based on a *correct* application of the Guidelines, *including the § 5K2.0 departure Guideline*, is inadequately deferential to the district court. Furthermore, such a result utterly fails to "promote the perception of fair sentencing." *Gall*, 128 S. Ct. at 597.

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[4] The 12-month figure is not arrived at through a rote subtraction of 12 offense levels (which would in fact yield a bottom-of-the-Guidelines-range of only 6 months) but rather from a principled recognition that the district court's subsequent downward departure for substantial assistance may have been smaller, had the court not first erroneously inflated the applicable Guidelines range with the 12-level upward departure.

The limited appellate review exemplified by the court of appeals' opinion in this case abandons two decades of case law illuminating these complex issues in favor of a form of reasonableness review that is uninformed by institutional guidance and historical perspective and entirely lacking in discernible objective standards. This Court has repeatedly emphasized that reasonableness review should be conducted with rigor in order to avoid a return to the risks of arbitrary decision-making in federal sentencing that Congress sought to reform when it created a system of empirically based Sentencing Guidelines safeguarded by meaningful appellate review of federal sentencing decisions. This Court should grant certiorari so that it may resolve the circuit split regarding the extent to which Guidelines departures are subject to appellate review and reaffirm the principles of *Williams* and the statutory basis for appellate review of Guidelines departures.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

Gail Kathryn Johnson
Johnson & Brennan, PLLC
1401 Walnut St., Ste 201
Boulder, CO 80302
(303) 444-1885

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