

No. 09-

IN THE
Supreme Court of the United States

ANTHONY CALABRESE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *United States v. Booker*, 543 U.S. 220 (2005), this Court reaffirmed that 18 U.S.C. § 3553(a) requires district courts to fashion sentences that are “sufficient, but not greater than necessary, to comply with the purposes” of sentencing. Then, in *Kimbrough v. United States*, 552 U.S. 85 (2007), this Court made clear that when Congress exercises its power to *bar* district courts from using a particular sentencing rationale, it does so by the use of unequivocal statutory language. Thus, to the extent that a mandatory term of imprisonment reasonably bears on § 3553(a) factors, a district court has discretion to take that mandatory term into account unless there is explicit legislation to the contrary.

This dispute involves 18 U.S.C. § 924(c), which dictates that a person who uses or carries a firearm during a crime of violence or a drug trafficking crime must be sentenced to a mandatory consecutive term of years. The Seventh Circuit held that the district court could not consider the effect of this mandatory term when applying the § 3553(a) factors, despite the lack of any prohibitory language in § 924(c). This holding furthers a three-way circuit split that has led to non-uniform sentencing in the many cases where § 924(c)’s mandatory minimum applies. The first question presented is:

1. Whether, in the absence of explicit statutory language to the contrary, a district judge has discretion to consider the effect of a mandatory minimum when applying the 18 U.S.C. § 3553(a) factors to reach its ultimate sentencing determination.

Consistent with this Court's precedent, both the First and Fifth Circuits have determined that the question of whether a defendant has received a fundamentally fair trial cannot be determined unless each alleged error is reviewed in light of the entire case, a "cumulative-error analysis." The Seventh Circuit in this case took a different approach; it reviewed the evidentiary holdings independently to determine if each holding, on its own, warranted reversal. The second question presented is:

2. Whether a court must consider the cumulative effects of harmless trial errors in conjunction with other prejudicial circumstances when it evaluates the fundamental fairness of a consolidated criminal trial as protected by the Due Process Clause of the United States Constitution.

PARTIES TO THE PROCEEDING

The caption to the case contains the names of all the parties to this proceeding.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Anthony Calabrese, respectfully petitions for a writ of certiorari in this case to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

OPINIONS AND ORDERS ENTERED BELOW

The Seventh Circuit's published opinion (Pet. App. 1a-30a) is reported at *United States v. Calabrese*, 572 F.3d 362 (2009). The decision of the District Court for the Northern District of Illinois imposing Mr. Calabrese's sentence is unreported. (Pet. App. 30a-42a.)

JURISDICTION

The Seventh Circuit filed its opinion on July 14, 2009. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sentencing Reform Act of 1984, 18 U.S.C. § 3553(a). Section 3553(a) provides, in relevant part:

The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider . . . (2) the need for the sentence imposed—(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal

conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

This case also involves the Gun Control Act of 1968, 18 U.S.C. § 924(c)(1). Section 924(c)(1) provides, in relevant part:

Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years. . . . Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried.

The Due Process Clause states that “[n]o person shall . . . be deprived of . . . liberty without due process of law.” U.S. CONST. amend. V.

STATEMENT

This case involves a three-way circuit split involving an issue of substantial and recurring importance—whether, in the absence of explicit statutory language to the contrary, a district court has discretion to consider the effect of a mandatory minimum when applying the 18 U.S.C. § 3553(a) factors to reach its ultimate sentencing determination.

After *United States v. Booker*, 543 U.S. 220 (2005), and its progeny, the Sentencing Guidelines are treated as merely advisory, and a district court is directed to impose a sentence “sufficient, but not greater than necessary, to comply with the purposes” of the Sentencing Reform Act. 18 U.S.C. § 3553(a). The Act’s purposes include reflecting the seriousness of the offense, promoting respect for the law, and providing just punishment, deterrence, and protection to the public. 18 U.S.C. § 3553(a)(2).

As this Court made clear in *Kimbrough v. United States*, 552 U.S. 85, 128 S. Ct. 558, 569-76 (2007), when Congress intends to *bar* district courts from using a particular sentencing rationale, it uses unequivocal terminology to do so. Thus, while Section 924(c) has no such prohibition, other statutes imposing mandatory minimums unambiguously state that the sentencing judge cannot adjust an underlying sentence by taking the mandatory minimum into consideration. *See, e.g.*, 18 U.S.C. § 1028A(b)(2) (“In determining any term of imprisonment to be imposed for the [underlying] felony . . . a court shall not in

any way reduce the term to be imposed for such crime so as to compensate for, or otherwise take into account, any separate term of imprisonment imposed or to be imposed for a violation of this section.”). Under *Booker* and *Kimbrough*, then, a district court is fully within its discretion to take a § 924(c) mandatory minimum into account when analyzing the § 3553(a) factors and establishing an ultimate sentence.

Contrary to *Booker* and *Kimbrough*, the panel here reaffirmed the Seventh Circuit’s agreement with those circuits that prohibit district courts from considering a § 924(c) mandatory minimum when fashioning an appropriate sentence under 18 U.S.C. § 3553(a), even though the plain language of § 924(c) does not contain such a bar. (Pet. App. 14a-16a.) *Accord United States v. Roberson*, 474 F.3d 432 (7th Cir. 2007); *United States v. Chavez*, 549 F.3d 119, 124 (2d Cir. 2008); *United States v. Hatcher*, 501 F.3d 931, 932 (8th Cir. 2007); and *United States v. Franklin*, 499 F.3d 578, 583-86 (6th Cir. 2007).

These decisions conflict directly with opinions of the First, Third, Fourth, Tenth, and Eleventh Circuits, which have either explicitly recognized or implicitly endorsed a district court’s wide discretion to consider any relevant factor, including a mandatory minimum, to craft a sentence that is “sufficient, but not greater than necessary, to comply with the purposes” of sentencing. *United States v. Vidal-Reyes*, 562 F.3d 43, 49 (1st Cir. 2009) (“to the extent that a mandatory term of imprisonment reasonably bears on [the § 3553(a)] factors, it remains, absent legislation to the contrary, within the sentencing court’s discretion to take it into account”); *United States v. Angelos*, 345 F. Supp. 2d 1227, 1260-61 (D. Utah

2004) (rejecting government’s argument that a district court “may not depart downward from the Guidelines simply because of the penalties imposed by the § 924(c) counts”), *aff’d*, 433 F.3d 738 (10th Cir. 2006); (*United States v. Ezell*, 417 F. Supp. 2d 667, 678 (E.D. Pa. 2006) (imposing a consecutive term of imprisonment of one day on six underlying robbery counts where § 924(c) required a 132-year term of imprisonment for six § 924(c) counts of conviction), *aff’d*, 265 F. App’x 70 (3d Cir. 2008); *United States v. Ciszkowski*, 430 F. Supp. 2d 1283, 1285-89 (M.D. Fla. 2006) (following *Angelos* and *Ezell* in holding that § 924(c) mandatory minimum may be considered in determining a guidelines sentence for other counts of conviction and in determining a reasonable sentence under § 3553(a)), *aff’d*, 492 F.3d 1264 (11th Cir. 2007); *United States v. Barton*, 442 F. Supp. 2d 301, 303-04 (W.D. Va. 2006) (following *Ciszkowski* and *Angelos*), *aff’d*, 216 F. App’x 355 (4th Cir. 2007).

Though relying on the Sixth Circuit’s decision in *Franklin*, the Seventh Circuit’s decision also conflicts with a more recent Sixth Circuit opinion, *United States v. Guthrie*, 557 F.3d 243, 253-56 (6th Cir. 2009). In *Guthrie*, the Sixth Circuit distinguished *Franklin* and applied a *third* distinct approach: that a sentencing judge may consider the impact of a mandatory minimum on a defendant’s sentence so long as the judge does not say explicitly that it is trying to “negate” the mandatory minimum.

In addition to the three-way circuit split, the Seventh Circuit’s opinion is at odds with this Court’s decision in *Kimrough*. In *Kimrough*, this Court reaffirmed that a district judge has wide latitude to make individualized sentencing determinations to assure that sentences are not greater than necessary

to achieve § 3553(a)'s purposes, *Kimbrough*, 128 S. Ct. at 575, and that if Congress intends to circumscribe that latitude, it does so with explicit statutory language, *id.* at 569-76. Under the Seventh Circuit's approach, however, district judges are limited in their analysis of § 3553(a) factors and strictly prohibited from considering a mandatory minimum, despite the absence of prohibitory language in the statute.

The importance of this recurring question, the uncertainty caused by the three-way split of authority, and the wide disparity in sentencing outcomes among the various circuits' resolution of the question presented all counsel strongly in favor of this Court's grant of this petition.

In addition to the critical sentencing issue, this case also involves a constitutional issue of substantial and recurring importance—whether courts must consider the cumulative effects of harmless trial errors in conjunction with other prejudicial circumstances when they evaluate the fundamental fairness of a consolidated criminal trial as protected by the Due Process Clause of the United States Constitution. U.S. CONST. amend. V.

The Seventh Circuit's opinion illustrates precisely why courts must weigh the cumulative prejudicial effect of individual otherwise-harmless trial errors in relation to other prejudicial circumstances which are not technically errors on their own. For example, the Seventh Circuit (1) stated that a reasonable judge could have used a transcript or at least eliminated some of the vulgarities rather than allowing the Government to play for the jury a prejudicial audiotape of Mr. Calabrese and a Government informant (Pet. App. 12a-13a); (2) conceded that the

Government's multiple plea-deal witnesses "had their share of credibility issues" (Pet. App. 6a); and (3) concluded that a prophylactic jury instruction was sufficient to prevent unwarranted "spill-over" among the three separate crimes that the Government prosecuted against Mr. Calabrese simultaneously (Pet. App. 11a-12a). But rather than address the cumulative effect of these issues on Mr. Calabrese's right to a fair trial, the Seventh Circuit compartmentalized them. The broad application of this principle and the different approaches among the circuits likewise counsels in favor of this Court's grant of the petition.

I. Facts Relevant to Petition

In 2001, three armed robberies took place in the greater Chicago area. Almost five years after these three unrelated robberies, the Government indicted Appellant Anthony Calabrese, accusing him of participating in the robberies and using a gun.

Except for the accusation that Mr. Calabrese was involved in all three of the robberies, the Government presented almost no evidence that the three crimes had anything in common. By trying all of the crimes at once, the Government's case benefited from the ability to paint Mr. Calabrese as someone who associated with a long list of felons, all willing to tell various stories about him in exchange for very favorable pleas, or no charge at all. Had any one of the robberies been severed into its own trial, the jury for any one robbery would not have heard from many of these witnesses, since almost all were unrelated. Cumulatively, however, the Government benefitted from three rulings that were prejudicial to Mr. Calabrese—the improper spill-over effect of the

consolidated trials, the playing of a highly prejudicial audiotape, and the parade of felons testifying in exchange for extremely generous plea deals.

II. Proceedings Below

Mr. Calabrese was convicted in 2008 of three counts of robbery under 18 U.S.C. §§ 1951 and 1952, and on three counts of possessing, or causing to be possessed, a firearm in furtherance of a crime, under 18 U.S.C. § 924(c)(1)(A)(ii) and (2). At the sentencing hearing, the district judge stated that she sentenced Mr. Calabrese to a term above the statutory minimum of 57 years on the firearm counts—to an additional 16 years and 9 months for the robbery counts—because she felt compelled to do so, citing the Seventh Circuit’s rule that a judge may not consider a mandatory minimum when formulating the underlying sentence. Significantly, the judge stated that she would have imposed a lesser sentence if she were able to consider the impact of the § 924(c) mandatory minimum:

In sentencing you, the Court looks to the factors in Section 3553, as I am directed to. This case is somewhat unique because I must sentence you, by law, to at least 57 years because of the statutory mandatory minimum on the gun charges. I do not have any discretion over that. That is something that I must tag on to run consecutive to any sentence that the Court imposes.

In sentencing you, Mr. Calabrese, I also read *Roberson*, the Seventh Circuit case, that I must consider the robberies at issue here independent of the 924(c) add-ons.

And I will be, for the record, Mr. Hunter, the first to tell you for purposes of appeal that if I am wrong in that reading, then this case should come back for resentencing because *I would do it differently if I am wrong in that reading.*

* * *

I do believe that the Guideline range is too high. And I cannot help but be influenced somewhat by the 57 years that are added on to the sentence, for the reasons I've just articulated.

But, nonetheless, I am bound by the Seventh Circuit [in Roberson], and I must sentence you on the underlying crimes independently.

(Pet. App. 45a-46a, 47a (emphasis added).)

Mr. Calabrese appealed, and the Seventh Circuit rejected his request to abrogate *Roberson*. (Pet. App. 14a-16a.) The panel insisted that shaving even “a single month off of the sentence for the underlying offense would thwart Congress’ will” (Pet. App. 14a-15a), even though Congress in enacting § 924(c) never barred district judges from considering the mandatory minimum when analyzing the §3553(a) factors. The panel did not address the decisions of the Third, Fourth, or Sixth Circuits, though the panel did acknowledge that its decision could

“possibly” be different than those of the First, Tenth, and Eleventh Circuits.¹

What the panel failed to recognize is that § 3553(a) *requires* a district court to give at least some consideration to the total time a defendant will spend in prison. Allowing a district court to consider a mandatory minimum does not negate the minimum, but rather recognizes the reality that a district court cannot determine an appropriate sentence for a defendant convicted on multiple counts simply by adding together what would be an appropriate sentence for each count. If Congress does not want that result, it can prohibit a judge from taking a mandatory minimum into account when analyzing § 3553(a). As noted above, Congress has done just that in other contexts. *See, e.g.*, 18 U.S.C. § 1028A(b)(2) (“a court shall not in any way reduce the term . . . so as to compensate for, or otherwise take into account, any separate term of imprisonment imposed or to be imposed for a violation of this section”). But Congress has chosen *not* to articulate an explicit prohibition in § 924(c).

The panel erred in a second way by addressing each error and questionable trial ruling individually rather than cumulatively. First, the panel addressed the district court’s decision not to sever the three trials, and determined that, “if there was some

¹ The panel tried to distinguish the First Circuit decision, *Vidal-Reyes*, as turning on the fact that the acts resulting in the mandatory minimum were not a predicate act of the underlying offense. But the panel ignored the First Circuit’s broad reasoning, which is in direct conflict and irreconcilable with that of the Seventh Circuit.

improper ‘spill-over effect,’ it was harmless error.” (Pet. App. 12a.) Second, the panel decided that even though the district court’s decision to “[l]et[] the jury hear the sounds of the beating, as opposed to providing a transcript, might . . . have been over the top,” the decision did not constitute an abuse of discretion. (*Id.* at 13a.) Third, the panel found that despite the testimony of the Government’s plea deal witnesses, whom the Court determined “had their share of credibility issues,” Mr. Calabrese did not meet his burden of showing that their testimony was physically impossible. (*Id.* at 6a, 14a.) After considering each issue individually, the panel affirmed Mr. Calabrese’s conviction.

The wording of the panel’s opinion illustrates exactly how Mr. Calabrese was unfairly prejudiced by the accumulation of errors and inferences at trial. As the panel admitted, “[a]long the way the jury heard tales of violence that made Calabrese look like Tommy DeVito [a famous mobster played by Joe Pesci in the movie *Goodfellas*] come back to life.” (*Id.* at 3a.) The panel also remarked that the cumulative evidence, as presented, “read like a Nicholas Pileggi/Martin Scorsese screenplay.” (*Id.* at 2a.) The panel itself drew such a strong parallel between Mr. Calabrese’s “saga” and popular American mobster films that it included two footnotes to illustrate how much Mr. Calabrese’s collective story reminded the panel of the popular movie *Goodfellas*. (*Id.* at 3a n.2, 4a n.3.) But the panel did not contemplate the high probability that the jury made the exact same “mobster” inference based on the improper spillover effect, the prejudicial audiotape, and the Government’s parade of ten testifying felons. Its opinion did not discuss whether the jurors were unfairly

prejudiced by the spill-over evidence that the Court said accumulated like “scene[s] right out of *Goodfellas*.” (*Id.* at 4a n.3.) The opinion noted how this accumulation “overwhelmingly portrayed [Mr.] Calabrese as a ruthless crook constantly on the prowl for new scores.” (*Id.* at 6a.) But, because the panel decided that Mr. Calabrese could not prove that any one factor was reversible on its own, it affirmed Mr. Calabrese’s convictions.

REASONS FOR GRANTING THE PETITION

I. The Seventh Circuit’s opinion has furthered a three-way circuit split regarding whether a district court is barred from considering the imposition of a mandatory minimum when fashioning a sentence under 18 U.S.C. § 3553(a).

A. The Seventh Circuit’s ruling directly conflicts with the decisions of other circuits.

In reaching its decision in this case, the panel reaffirmed the Seventh Circuit rule articulated in *United States v. Roberson*. In *Roberson*, the defendant pleaded guilty to bank robbery and to brandishing a firearm in a crime of violence. 474 F.3d at 433. The recommended sentence under the Guidelines for the robbery was 46 months. *Id.* Under § 924(c), the statutory minimum for brandishing a firearm in a crime of violence is a sentence of 84 months that must run consecutively with the sentence for the underlying offense. *Id.* The *Roberson* judge determined that the resulting 130-month sentence would be “contrary to the purposes of sentencing under § 3553,” and he reduced the underlying sentence to

assure that the overall sentence was reasonable. *Id.* at 444. The Seventh Circuit reversed, holding that “to use the presence of a section 924(c)(1) add-on to reduce the defendant’s sentence for the underlying crime would be inconsistent with Congress’s determination to fix a minimum sentence for using a firearm in a crime of violence.” *Id.* at 436.

In its decision, the *Roberson* court acknowledged the tension between § 924(c) and § 3553(a). Under § 3553(a), courts are required to impose a sentence “sufficient, but not greater than necessary, to comply with the purposes” of sentencing. The United States Sentencing Guidelines published by the U.S. Sentencing Commission are designed to “reflect a rough approximation of sentences that might achieve § 3553(a)’s objectives.” *Rita v. United States*, 551 U.S. 338, 350, 127 S. Ct. 2456, 2465 (2007).

Under the *Roberson* standard, a district judge must first determine an appropriate sentence for the underlying crime before tacking on the mandatory consecutive term of years § 924(c) requires. In other words, the judge must ignore a mandatory minimum required by a § 924(c) firearms conviction when sentencing on the underlying crime—even when the required result is an excessively long total sentence.

The Second and Eighth Circuits have followed the Seventh Circuit’s lead and likewise bar district judges from considering mandatory minimums when determining whether a sentence is sufficient to meet § 3553(a)’s purposes. *United States v. Chavez*, 549 F.3d 119, 124, 135 (2d Cir. 2008); *United States v. Hatcher*, 501 F.3d 931, 932 (8th Cir. 2007).

1. Rulings in the First, Third, Fourth, Tenth, and Eleventh Circuits are irreconcilably in conflict with the Seventh Circuit’s decisions in *Roberson* and this case.

In contrast, the First, Third, Tenth, and Eleventh Circuits have all allowed a district judge to take a mandatory minimum into account when determining a total punishment that is “sufficient, but not greater than necessary, to comply with the purposes” of sentencing under 18 U.S.C. § 3553(a). *United States v. Vidal-Reyes*, 562 F.3d 43, 49 (1st Cir. 2009); *United States v. Angelos*, 345 F. Supp. 2d 1227 (D. Utah 2004), *aff’d*, 433 F.3d 738, 743 (10th Cir. 2006) (affirming the sentence without comment on this issue); *United States v. Ciszkowski*, 492 F.3d 1264, 1271 (11th Cir. 2007) (same); *see also United States v. Ezell*, 417 F. Supp. 2d 667, 678 (E.D. Pa. 2006), *aff’d*, 265 F. App’x 70 (3d Cir. 2008); *United States v. Barton*, 442 F. Supp. 2d 301, 303-04 (W.D. Va. 2006), *aff’d*, 216 F. App’x 355 (4th Cir. 2007).

The substantial § 924(c) sentences in the cases from the Tenth and Eleventh Circuits are similar to the one here. In *Ciszkowski*, the court imposed a 30-year mandatory minimum sentence on a murder-for-hire conviction and ran it concurrently with other lesser sentences. 492 F.3d at 1268. In *Angelos*, the court imposed a 55-year mandatory minimum sentence on § 924(c) gun convictions, plus one day for three drug trafficking convictions, 433 F.3d at 743, where the Guidelines called for 78 to 97 months. 345 F. Supp. 2d at 1260. The district judge in that case said:

Without the Guidelines, the court is free to make its own determination of what is an appropriate sentence for these thirteen offenses. In making that determination, the court consults the Guidelines as instructive but not binding. If the sentence on these thirteen counts was the only sentence that Mr. Angelos would serve, a sentence of about 78-97 months might well be appropriate. *But the court cannot ignore the reality that Mr. Angelos will also be sentenced to 55 years on the § 924(c) counts, far in excess of what is just punishment for all of his crimes.* In light of this 55-year sentence, and having considered all of the relevant factors listed in the Sentencing Reform Act, the court will impose a sentence of one day in prison for all offenses other than the § 924(c) counts. Lest anyone think that this is a “soft” sentence, in combination with the § 924(c) counts, the result is that Mr. Angelos will not walk outside of prison until after he reaches the age of 70.

Id. (emphasis added).

In *Vidal-Reyes*, 562 F.3d 43, 49 (1st Cir. 2009), the First Circuit held that a sentencing court could consider *all* relevant circumstances, including the applicable mandatory minimum, to assure that a defendant’s sentence was “sufficient, but not greater than necessary, to comply with the purposes” of sentencing. *Vidal-Reyes* concerned the mandatory two-year minimum provided for identity theft in 18 U.S.C. § 1028A. At sentencing, the court adopted the presentence report recommendation of 15 months on the three counts and tacked on the consecutive two-year minimum on the fourth count. Just as in the

instant case, the *Vidal-Reyes* judge commented, on the record, that she desired to impose a lower sentence but felt precluded from doing so under § 1028A. *Id.* at 47-48.

On appeal, the First Circuit reversed the district court's sentence and held that a district judge has discretion to consider the effect of a mandatory minimum when fashioning a reasonable sentence. *Id.* at 56.

Vidal-Reyes built upon the First Circuit's decision in *United States v. Rodriguez*, 527 F.3d 221 (1st Cir. 2008), which held that, after this Court's decision in *Kimbrough*, district courts have wide discretion to fashion sentences "sufficient, but not greater than necessary, to comply with the purposes" of sentencing.

Despite the Seventh Circuit's attempt to write off these other results as merely "possibly different," it is clear that each decision is irreconcilable with the Seventh Circuit's opinion in this matter. While the Seventh Circuit forbids district courts from considering the effect of a mandatory minimum in determining a reasonable sentence, the First, Third, Fourth, Tenth, and Eleventh Circuits take a conflicting view. Each of these circuits recognizes that barring a district judge from considering a relevant sentencing factor does not allow the sentencing judge to fashion a sentence that is sufficient but not greater than necessary to achieve the purposes of § 3553(a).

2. The Seventh Circuit’s opinion is also in direct conflict with the Sixth Circuit’s decision in *United States v. Guthrie*.

The Seventh Circuit’s opinion further conflicts with the Sixth Circuit’s decision in *United States v. Guthrie*, which allows a district judge to consider mandatory minimums when fashioning an appropriate sentence, but only if the judge does not state on the record that a lower underlying sentence is being used.

In *Guthrie*, the Sixth Circuit determined that a district court may reduce the sentence for an underlying count to fashion an appropriate total sentence but may *not* reduce an underlying sentence if the only purpose is to negate the mandatory add-on. *Guthrie*, 557 F.3d at 254-56. The defendant was convicted of three counts related to car-jacking, with a minimum Guidelines sentence of 30 years, and one count of discharging a firearm during a crime of violence, with a minimum sentence of 10 years. *Id.* at 247. The district court sentenced the defendant to only 25 years after determining that the aggregate sentence that would result after the mandatory add-on would not be consistent with the sentencing factors listed in § 3553. The Sixth Circuit upheld the sentence and noted that “after explicitly considering the correct Guidelines range in light of the § 3553(a) factors, the district court found the total advisory sentence of 40 years to be too long.” *Id.* at 256.

In its decision, the Sixth Circuit distinguished its earlier decision, *United States v. Franklin*, 499 F.3d 578 (6th Cir. 2009), in which the Circuit had struck down a district court’s decision to reduce an underlying sentence. The distinction between the two cases

turned on whether the court reduced the underlying sentence because the aggregate sentence is too large, which the Sixth Circuit apparently allows, or the court reduced the underlying sentence in order “to negate the mandatory minimum sentence for use of a firearm during a crime of violence,” which the Sixth Circuit apparently does not allow. *Guthrie*, 557 F.3d at 255.

B. The Seventh Circuit’s decision is in direct conflict with this Court’s decision in *Kimbrough*.

This Court has recognized that a district court judge is uniquely situated to evaluate the reasonableness of a defendant’s sentence. Accordingly, a judge is given wide discretion to consider all relevant factors when fashioning a sentence. *Kimbrough*, 128 S. Ct. at 574. Moreover, under *Kimbrough*, when a sentencing statute is silent, district courts are not required to “[draw] meaning from silence . . . for Congress has shown that it knows how to direct sentencing practices in express terms.” *Kimbrough*, 128 S. Ct. at 571.

In *Kimbrough*, the Government argued that the Anti-Drug Abuse Act of 1986, 100 Stat. 3207, “implicitly,” but not expressly, required courts to apply a specified sentencing formula or it would be “logically incoherent” with the statute. *Id.* at 570. This Court rejected that argument, holding that, with sentencing issues, “[d]rawing meaning from silence is particularly inappropriate . . . for Congress has shown that it knows how to direct sentencing practices in express terms.” *Id.* at 571. The same logic applies here. If Congress wanted courts to apply the § 3553 factors only to the underlying sentence, not the

aggregate sentence, it would have made that mandate explicit in the statute. For example, in the identity-theft statute at issue in *Vidal-Reyes*, Congress explicitly directed that the sentencing court “shall not in any way reduce the term to be imposed” for the underlying crime “to compensate for” the additional penalty for identity theft. 18 U.S.C. § 1028A; see *Vidal-Reyes*, 562 F.3d at 49. In contrast, there is nothing in § 924(c)’s plain language that prohibits a court from weighing the § 924(c) mandatory minimum when analyzing the § 3553(a) factors and setting the underlying sentence.

Directing courts to ignore a mandatory minimum when fashioning a sentence will result in unreasonable sentences. In this case, for example, the judge determined that she was compelled to sentence Mr. Calabrese to a total sentence that was greater than necessary, in direct contradiction to § 3553. Given that Mr. Calabrese’s co-defendants received dramatically lower sentences, Mr. Calabrese’s sentence fails to meet § 3553’s requirement for a sentence to appropriately reflect the seriousness of the offense, promote respect for the law, and provide a just punishment.

A district judge’s adjustment of an underlying sentence based on a mandatory minimum does not thwart Congressional intent that a “mandatory” minimum not be reduced. That is because the adjustment is to the underlying sentence, not the mandatory minimum. And if Congress does not want the district judge to have the power to adjust the underlying sentence based on the mandatory minimum, it need only say so, as it did in 18 U.S.C. § 1028A(b)(2) (“a court shall not in any way reduce the term . . . so as to compensate for, or otherwise take into account,

any separate term of imprisonment imposed or to be imposed for a violation of this section”). The Second, Seventh, and Eighth Circuits’ approach treats § 1028A’s explicit language as mere surplusage. In contrast, the approach taken by the First, Third, Fourth, Tenth, and Eleventh Circuits vindicates Congressional intent because it gives meaning to all the words in § 924(c) and § 1028A(b)(2) as well as to the discretion Congress vested in district judges through § 3553(a).

C. This case is ideally situated for review as the district judge stated that she would sentence Mr. Calabrese to a shorter sentence if not bound by *Roberson*.

The issue presented in this petition requires immediate review, not only to provide guidance to sentencing courts, but also to assure that future defendants are not deprived of their right to a reasonable sentence. Mr. Calabrese’s case is uniquely situated for such review, because the district judge has already stated on the record that she would sentence Mr. Calabrese to a lesser underlying sentence if she was not shackled by the Seventh Circuit’s decision in *Roberson*.

Moreover, the facts of this case demonstrate why the *Roberson* rule should be revisited: the sentence in this case does not promote respect for the law, nor just punishment, as 18 U.S.C. § 3553(a) requires, particularly when Mr. Calabrese’s sentence is compared to other defendants who received very lenient sentences because of the deals they struck.

D. Resolution of this conflict is necessary to restore uniformity in sentencing.

The question of whether a district judge may consider a mandatory minimum when analyzing § 3553(a)'s factors and setting the underlying sentence is an issue raised in thousands of cases across the United States. Under the current circuit split, defendants face vastly different sentences based solely on the jurisdiction where the charges were brought. This disparity is contrary to this Court's commitment in *Booker* to bring uniformity to sentencing. 552 U.S. at 223.

In Mr. Calabrese's case, he was not lucky enough to live in Utah or Pennsylvania, or even in Michigan. Unfortunately, he was sentenced in Illinois, and his sentence reflects the harsh and unique interpretation of 18 U.S.C. § 924(c) employed by the Seventh Circuit, an interpretation that is flatly at odds with the discretion that Congress gave to district judges in enacting § 3553(a) and with the fact that § 924(c)'s plain text contains no prohibition barring a district judge from considering § 924(c)'s mandatory minimum when conducting a § 3553(a) analysis. This Court should grant the petition and reverse.

II. The Seventh Circuit's opinion separately conflicts with This Court's interpretation of the cumulative error doctrine.

In addition to the three-way split regarding sentencing, this case also involves a constitutional issue of substantial importance—whether a court must consider the cumulative effects of harmless trial errors in conjunction with other prejudicial circumstances when it evaluates whether a defendant

enjoyed a fundamentally free trial as protected by the Due Process Clause of the United States Constitution. U.S. CONST. amend. V.

A. The Seventh Circuit’s decision ignored the clear prejudice that arose from the trial court’s multiple evidentiary errors.

The Seventh Circuit panel opinion demonstrates exactly why courts must weigh the cumulative prejudicial effect of individual otherwise-harmless trial errors in relation to other prejudicial circumstances that are not technically errors on their own. The opinion completely ignores the severe prejudice that accumulated from each evidentiary decision. The panel acknowledged that Mr. Calabrese’s arguments had some merit, yet it still dismissed each argument standing on its own in the name of judicial efficiency.

Both on appeal and during trial, Mr. Calabrese argued that allowing the jury to hear an audiotape of him severely beating and threatening a government informant was unfairly prejudicial under Federal Rule of Evidence 403. Mr. Calabrese reasoned that the unfair prejudice resulting from the graphic depiction of violence and vulgar language outweighed any of the tape’s probative value. FED. R. EVID. 403. The panel acknowledged that “a reasonable judge could have decided to use a transcript instead, or even to eliminate some of the vulgarities,” but it nonetheless ultimately concluded that the trial court did not abuse its discretion. (Pet. App. 13a.) Officially, the panel held that the audiotape was relevant to “suggest[] consciousness of guilt.” (*Id.* at 12a.) But the panel admitted that the tape’s real purpose could

have been to illustrate to the jury, “just how violent [Mr. Calabrese] was.” (*Id.* at 13a.)

Mr. Calabrese also argued that the district court erred in admitting the testimony of ten felonious witnesses, each of whom testified after reaching a deal with federal prosecutors. (Pet. App. 13a-14a.) The panel was forced to acknowledge that the Government’s plea-deal witnesses “had their share of credibility issues.” (*Id.* at 6a.) But the panel held that because Mr. Calabrese did not prove their testimony “physically impossible,” the panel would not consider the prejudicial effects of that testimony as it affected all three trials. (*Id.* at 14a.)

Finally, when the panel reviewed the trial court’s severance motion for abuse of discretion, it only considered the prejudicial effects of the “other crimes and bad acts” that improperly “spill[ed]-over” from trial to trial under Federal Rule of Evidence 404(b). (Pet. App. 11a-12a.) It held that this “spill-over effect’ was harmless error,” because “there is nothing to indicate the jury ignored [the trial court’s] command” to consider each count and the evidence relating to it separately. (*Id.* at 12a.) But the Court did not address how this spill-over effect amplified the prejudicial effects of the audiotape and the piling on of less-than-credible witnesses testifying against Mr. Calabrese.

B. The Seventh Circuit’s opinion directly conflicts with this Court’s due-process decisions.

In *Kotteakos v. United States*, 328 U.S. 750 (1946), this Court addressed the delicate balance that it seeks to maintain between judicial efficiency and the individual protections afforded to American

citizens in criminal trials. Under the harmless error doctrine, “[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.” FED. R. CRIM. P. 52(a). Giving guidance to this principle, the *Kotteakos* Court said, “if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected.” *Kotteakos*, 328 U.S. at 765. “[I]t is the essence of the harmless error doctrine that a judgment may stand only when there is no ‘reasonable possibility that the [practice] complained of might have contributed to the conviction.’” *United States v. Hastings*, 461 U.S. 499, 506 (1983) (quoting *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963)).

Justice and fundamental fairness require that harmless-error analysis not take place in a vacuum. A single otherwise “harmless error” can quickly become reversible error depending on the circumstances of the case.

C. The Seventh Circuit’s opinion directly conflicts with the First and Fifth Circuits’ adoption of the “cumulative-error analysis.”

Following this Court’s directives in *Kotteakos*, the Tenth Circuit Court of Appeals has determined that the effect of multiple errors must be considered together and noted:

[a] cumulative-error analysis . . . *aggregates all the errors* that individually have been found to be harmless, and

therefore not reversible, and its analyses *whether their cumulative effect* on the outcome of the trial is such that collectively they can no longer be determined to be harmless The harmlessness of cumulative error is determined by conducting the same inquiry as for individual error—courts look to see whether the defendant’s substantial rights were affected.

United States v. Rivera, 900 F.2d 1462, 1470 (10th Cir. 1990) (emphasis added).

The Fifth Circuit has followed suit and recognized the potential constitutional harm when error and other circumstances combine to amplify the effects of unfair prejudice. *See United States v. Diharce-Estrada*, 526 F.2d 637, 640-42 (5th Cir. 1976). In *Diharce-Estrada*, the court recognized that sometimes “harmful effects of the atmosphere” are capable of prejudicing a defendant, and held that, “[b]ased upon the combination of errors and prejudicial circumstances,” the defendant did not receive a fair trial. *Id.*

In *Taylor v. Kentucky*, 436 U.S. 478, 488 n.15, this Court stated that the cumulative effect of otherwise-harmless trial errors can combine with other prejudicial non-errors and “extraneous, negative circumstance[s]” to collectively deprive a criminal defendant of a fundamentally fair trial. *Id.*

The panel’s holding in this case flies in the face of the decisions rendered by the First and Fifth Circuits and this Court. One by one, the panel

examined the “spill-over effect,” the “over the top” decision to play the audiotape for the jury, and the ten felonious witnesses whose shaky testimony accumulated to paint Mr. Calabrese as a bad man. (Pet. App. 12a-13.) If the district judge considered these issues cumulatively, the result might have been very different.

D. Resolution of this circuit split is necessary to protect defendants’ due process rights to a fair trial.

The panel’s characterization of Mr. Calabrese as a “mobster” right out of a Martin Scorsese film illustrates why courts must consider the cumulative effect of erroneous evidentiary rulings and prejudicial “closer call[s].” (Pet. App. 13a.) In situations such as this, when the threat of unfair prejudice is so blatant, “[t]he naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction.” *Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring).

Therefore, this Court should grant the petition to decide whether a district court must consider the cumulative effects of harmless trial errors in conjunction with other prejudicial circumstances when it evaluates the fundamental fairness of a consolidated criminal trial as protected by the Due Process Clause of the United States Constitution.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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