No. _____

IN THE

Supreme Court of the United States

JIMMY RAY VALENTINE,

Petitioner,

v.

UNITED STATES,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In order to ensure due process, sentencing courts must estimate "relevant conduct" conservatively under U.S.S.G. §§ 1B1.3 and 2D1.1, adopting "lower end" estimates when there is a range of quantities and the evidence does not clearly point to a specific amount. *United States v. Medford*, 194 F.3d 419, 424 (3d Cir. 1999) (Alito, J.). In this case, however, the Sixth Circuit did just the opposite. Faced with an uncertain range of quantities, the Sixth Circuit uncritically affirmed a high drug-quantity estimate that far exceeded the lower end of the range. The question presented is:

> Whether due process requires sentencing judges to estimate drug quantities conservatively, adopting lower-end estimates when the evidence is uncertain.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Jimmy Ray Valentine respectfully submits this petition for a writ of certiorari.

OPINIONS

The opinion of the Court of Appeals for the Sixth Circuit (Pet.App. 2a–13a) is reported at 553 F. App'x. 591.

JURISDICTION

The Sixth Circuit entered judgment on February, 3, 2014, and denied rehearing on March 13, 2014. Mr. Valentine applied for an extension of time to file a petition for a writ of certiorari on May 29, 2014, (No. 13A1192), which Justice Kagan granted on June 2, 2014, extending the time to file until July 11, 2014. Jurisdiction to review the judgment rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The appendix reproduces relevant statutes and Sentencing Guidelines, including 18 U.S.C. § 3582 and U.S.S.G. § 1B1.3.

STATEMENT OF THE CASE

Consistent with due process, the First, Second, Third, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits all hold that sentencing judges must estimate drug quantity under U.S.S.G. §§ 1B1.3 and 2D1.1 conservatively, adopting lower-end estimates when there is no physical evidence of the amount of drugs involved in a conspiracy. In the decision below, the Sixth Circuit departed from that approach. Instead, joining a different circuit in a rote, perfunctory exercise, it affirmed an exponential increase in Mr. Valentine's drug-quantity responsibility, even though that increase was imposed (1) thirteen years after Mr. Valentine's original sentencing, (2) with virtually no physical evidence to support it, (3) without "the benefit of hearing and observing the witnesses in the first instance," (4) in contravention of the original sentencing judge's credibility findings, and (5) based "only . . . on [a] written record" of self-interested witness testimony, each of whom had an incentive to inflate the conduct of their co-conspirators to obtain lenient sentences for themselves. *See* Pet.App. 27a.

That decision warrants this Court's review. Not only does the panel's opinion cement an 8:2 split among the circuits, but it also raises an important, recurring question of federal law.

A. Legal Framework

1. At sentencing, a defendant's "relevant conduct" determines his or her base offense level, which in turn establishes the guidelines range under which the defendant will likely be sentenced. *See* U.S.S.G. § 1B1.3. In drug-conspiracy cases, "relevant conduct" includes "all reasonably foreseeable acts

and omissions of others in furtherance of the jointly undertaken criminal activity." *Id.* § 1.B1.3(a)(1)(B). Thus, a drug-conspiracy defendant is responsible for "all quantities" of drugs "with which he was directly involved," and "all reasonably foreseeable quantities" that "were within the scope of the criminal activity that he jointly undertook." *Id.* comment. (n.2).

Where the Government has not seized or proven a specific amount of drugs, the Guidelines set forth the appropriate course of review. Namely, sentencing courts should "approximate" the individual's drug-quantity responsibility. *Id.* § 2D1.1, comment. (n.5). But although courts may consider a broad range of evidence in making that determination, they are not free to decide the matter untethered to the margins of error inherent in such an estimation. *Id.* § 6A1.3(a). Rather, sentencing courts may consider only that evidence having "sufficient indicia of reliability to support its probable accuracy." *Id.* Further, sentencing courts must resolve drug-quantity "disputes . . . with care," holding defendants responsible only for those amounts proven by "a preponderance of the evidence." *Id.* comment. In the Sentencing Commission's view, such constraints are necessary to ensure that drug-quantity estimations "meet due process requirements." *Id.*

a. In accordance with those limitations—and this Court's precedent—all federal circuit courts hold that due process requires drug quantities estimated under § 1B1.3 to be proven by at least a preponderance of the evidence. *See United States v. Grubbs*, 585 F.3d 793, 802 & n.5 (4th Cir. 2009) (citing cases); *see also United States v. Watts*, 519 U.S. 148, 156–57 & n.2 (1997) (per curiam). Under

that standard, drug-quantity estimates satisfy due process only when they are more likely than not the actual amount of drugs attributable to the defendant. *See In re Winship*, 397 U.S. 358, 371–72 (1970) (Harlan, J., concurring) (explicating the preponderance standard). In other words, drug-quantity estimates must be at least "50+% probable" to pass constitutional muster. *See, e.g.*, *United States v. Gigante*, 94 F.3d 53, 55–56 (2d Cir. 1996) (internal quotation marks omitted) ("The preponderance standard is no more than a tie-breaker dictating that when the evidence on an issue is evenly balanced, the party with the burden of proof loses.").

b. Yet in sentencing drug conspirators, the circuit courts are divided. Eight circuits hold that district judges must estimate drug quantities conservatively and adopt lower-range estimates when the evidence does not provide a specific quantity. *See United States v. Battle*, 706 F.3d 1313, 1319–21 (10th Cir. 2013). Two other courts, however, the Fourth and Sixth Circuits, hold otherwise. Those courts instead permit sentencing judges to extrapolate upper-range drug-quantity estimates. *See, e.g.*, *United States v. Valentine*, 553 F. App'x 591 (6th Cir. 2014) (Pet.App. 2a–13a); *United States v. Kiulin*, 360 F.3d 456, 460–61 (4th Cir. 2004). Indeed, despite the Guidelines' instruction to resolve such disputes "with care," § 6A1.3 comment., the Fourth and Sixth Circuits do not require sentencing courts to estimate drug quantities conservatively under any circumstances. This petition addresses that split of authority.

2. The split of authority, although present in original sentencing proceedings, is readily apparent in cases arising under 18 U.S.C. § 3582(c)(2). Section 3582(c)(2) governs sentence reductions of already sentenced defendants, and was designed "to remedy systemic injustice" by reducing "sentences that would not have been imposed but for a since-rejected, excessive range." *Freeman v. United States*, 131 S. Ct. 2685, 2690, 2695 (2011) (plurality op.).

a. A "prime example" of the type of "unwarranted disparity" that § 3582(c)(2) remedies are those sentences imposed under the previous crack-cocaine guidelines. *Id.* at 2694. Described as an "urgent and compelling" problem, the 100:1 disparity between crack- and powder-cocaine sentences "significantly undermine[d] the various congressional objectives set forth in the Sentencing Reform Act" of 1984 (SRA), particularly its intent to increase uniformity in federal sentencing. *Id.* (internal quotation marks and citations omitted); *Kimbrough v. United States*, 552 U.S. 85, 99–100 (2007). By "adjust[ing] sentences imposed pursuant to" the overly severe Guidelines ranges, § 3582(c)(2) furthers the SRA's twin goals of ensuring fairness and rectifying unwarranted disparities. *Freeman*, 131 S. Ct. at 2694.

b. Section 3582(c)(2) motions are adjudicated in two steps. *Dillon v. United States*, 560 U.S. 817, 819, 826–27 (2010). *First*, the court determines whether the sentence would have been lower had the amended guideline "been in effect at the time the defendant was sentenced." § 1B1.10(b)(1). *Second*, the court performs an "individualized assessment," *Gall v. United States*, 552 U.S. 38, 50 (2007), to

decide whether 18 U.S.C. § 3553(a) and its factors warrant a sentence reduction, *see Dillon*, 560 U.S. at 826–27; *see also* 18 U.S.C. § 3553(a) (among other considerations, courts looks to the characteristics of the offense and "the need to avoid unwarranted sentence disparities"). At the first step, therefore, when adjudicating § 3582(c)(2) motions for individuals convicted of drug conspiracy, courts must confront the individual's drug-quantity responsibility to determine whether the guideline amendment on quantity could affect the individual's sentence. If so, the court considers the second step and thus whether a lower sentence should be imposed, to accomplish the goal of § 3582(c)(2) of reducing sentences that are "greater than necessary." *See Dillon*, 560 U.S. at 826–27 (citing § 3553(a)). If, however, the court determines that the amended guideline does not affect the individual's sentence—*e.g.*, because the court newly attributes a higher drug quantity to the individual—a reduction under § 3582(c)(2) cannot apply. This petition squarely presents the legal test governing that issue.

B. Factual Background And Procedural History.

At 51 years of age, Jimmy Ray Valentine has spent nearly one third of his life in prison for a single, first-time conspiracy conviction. The length of Mr. Valentine's incarceration, however, was not the inevitable consequence of a jury's verdict. Rather, Mr. Valentine's 292-month sentence rests on a single drug-quantity estimate made by his sentencing judge under an old sentencing regime—and increased exponentially by a different judge thirteen years later.

1. Mr. Valentine's Trial And Sentencing.

Mr. Valentine was arrested and indicted in 1999 in the Western District of Michigan for conspiracy to distribute crack cocaine and other controlled substances in violation of 21 U.S.C. §§ 841(a) & 846. Pet.App. 87a–89a. No amount of drugs was specified in the indictment, and at most only 0.13 kilograms of crack cocaine was seized. *See id.*; *see also* Presentence Report, at 8–9, 13–14, Case No. 00-1615 (W.D. Mich. 2000).

Judge Richard A. Enslen presided over Mr. Valentine's trial and sentencing, both of which took place in 2000, now nearly fifteen years ago. Rather than presenting direct evidence, the Government's case relied almost exclusively on the testimony of cooperating witnesses who testified in exchange for plea deals and lenient sentencing recommendations. Although the Government alleged a vast, productive conspiracy, only two of its witnesses—Jerry Lee Butler and Yusef Phillips—made any reference to large drugs quantities. Pet.App. 106a–113a. And with respect to Mr. Valentine, Butler testified only that he sold crack cocaine to him approximately three to five times. The first sale involved only eight to ten ounces, while the other sales involved 1 to 2.5 kilograms per sale. Butler also testified that he sold crack cocaine to a different individual approximately twenty times—each sale involving 1.5 to 3 kilograms—and offered that another individual could have coordinated those sales. *See id.* 107a–111a.

The jury found Mr. Valentine and others guilty of conspiracy. But the jury did not attribute any

particular amount of drugs to any defendant. Nor did it find the conspiracy as a whole responsible for any particular drug quantity. *Id.* 95a–100a. Instead, the court determined each defendant's drug-quantity responsibility.

At sentencing, then-presiding Judge Enslen was unsure of the amount of drugs attributable to Mr. Valentine. Not only did he express "serious misgivings" about the Government's proffered estimates, *id.* 104a, but Judge Enslen also expressly discredited the testimony of many of the Government's witnesses, noting that they appeared untruthful and that their quantity figures "may well be inflated." *Id.* 115a, 118a–119a. Ultimately, Judge Enslen credited only Jerry Lee Butler's testimony regarding "three to five" sales, each involving between "one to two kilos" per sale. *Id.* 76a.

Accordingly, Judge Enslen found only that Mr. Valentine was responsible for "at least 1.5 kilograms." *Id.* 77a. At that time in 2000, 1.5 kilograms was the quantity threshold for the highest base-offense level applicable to crack-cocaine offenses. In Judge Enslen's view, given "the absence of any significant amount of drugs or money found on" him, *id.* 119a, Mr. Valentine could not have been responsible for an amount significantly above 1.5 kilograms, *see id.* 76a–78a. And Judge Enslen particularly rejected the Government's lofty assertions of 50 to 60 kilos. *Id.*

Based on the then-mandatory Sentencing Guidelines, Mr. Valentine nonetheless faced a sentencing range of 292 to 365 months' imprisonment. Judge Enslen reluctantly imposed the lowest point in that range, remarking: "Do I think

[the crack-cocaine guidelines are] fair, no. Do I have anything to say about it, no." *Id.* 75a. "Ask your Congressman," Judge Enslen lamented, "I live with the same law." *Id.* 74a.

2. Mr. Valentine's Motions For Sentence Reduction Under 18 U.S.C. § 3582(c).

a. To remedy the unfairness observed by Judge Enslen and others, the Sentencing Commission in 2007 and 2010 amended the guideline ranges for crack-cocaine sentences.[1] *See* U.S.S.G. Amend. 706 & 750. Reducing the "disproportionately harsh" 100:1 disparity, *Kimbrough*, 552 U.S. at 110, Amendment 706 in 2007 increased the quantity threshold for crack-cocaine sentences from 1.5 to 4.5 kilograms, *see* U.S.S.G. Amend. 706. In 2010, Amendment 750 further increased the quantity threshold from 4.5 to 8.4 kilograms. *See* U.S.S.G. Amend. 750. Subsequently, to allow individuals like Mr. Valentine to benefit from these revisions, the Commission made each amendment retroactive. *See* U.S.S.G. Amend. 711 (effective March 3, 2008); *see also* U.S.S.G. Amend. 759 (effective Nov. 1, 2011).

b. As an intended beneficiary of the Commission's amendments, Mr. Valentine sought a sentence reduction under 18 U.S.C. § 3582(c)(2). Based first on Amendment 706, Mr. Valentine explained that he was eligible for a reduction, since his original drug-quantity estimate did not exceed

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[1] In 2014, the Commission proposed new amendments to the crack-cocaine guidelines, which—absent congressional disapproval—will again increase the threshold, from 8.4 to 25.2 kilograms. *See* U.S. Sentencing Comm'n, *Notice of Proposed Amendments to Sentencing Guidelines for U.S. Courts*, 79 Fed. Reg. 25,996, 26,001 (May 6, 2014).

the amended 4.5-kilogram threshold. *See* Pet.App. 17a–18a. Because Judge Enslen had since retired, Mr. Valentine's motion was assigned to a new judge, Judge Robert J. Jonker.

After careful review, Judge Jonker granted Mr. Valentine's motion. *Id.* 14a–23a. *First*, Mr. Valentine was eligible as a matter of law for a sentence reduction, because he was not responsible for more than 4.5 kilograms of crack cocaine based on Judge Enslen's original "low end threshold" estimate of 1.5 kilograms. *Id.* 18a–22a. *Second*, Judge Jonker found "no basis on this record to exercise discretion against [Mr.] Valentine." *Id.* 23a. As Judge Jonker reasoned, Mr. Valentine was clearly an intended beneficiary of the Commission's Amendment, as he had no prior drug convictions and was a model inmate. *Id.* 22a–23a. Accordingly, Judge Jonker exercised his discretion and granted Mr. Valentine's motion, reducing his sentence from 292 months to 235 months. *Id.*

3. The Sixth Circuit's Reversal And The District Court's Exponential Drug-Quantity Increase.

a. The Government appealed, and the Sixth Circuit reversed Judge Jonker's order granting Mr. Valentine's motion. *Id.* 32a–51a. Contrary to both Judge Enslen's and Judge Jonker's factual findings, the Sixth Circuit concluded that Judge Enslen's 1.5-kilogram finding was *not* "a low-end threshold" and that Judge Jonker had authority to make "supplemental findings of a higher quantity." *Id.* 49a.

b. By the time the case returned to Judge Jonker on remand, Amendment 750 had been adopted and made retroactive, raising the highest

threshold from 4.5 to 8.4 kilograms. Addressing Mr. Valentine's motions under both Amendments 706 and 750 together, Judge Jonker acknowledged that the record "support[ed] a variety of different quantity findings"—many of which would have entitled Mr. Valentine to a sentence reduction. *Id.* 27a. But given the appellate court's admonitions, Judge Jonker considered himself "required by the Mandate of the Sixth Circuit" to make "new factual findings" of a quantity higher than 1.5 kilograms. *Id.* And so he did. Having only a thirteen-year-old record to review, and without "the benefit of hearing and observing the witnesses in the first instance," Judge Jonker increased Mr. Valentine's drug-quantity responsibility from 1.5 to the new threshold of 8.4 kilograms. *Id.* 27a, 28a–30a. Mr. Valentine appealed.

4. The Sixth Circuit's Decision Below.

This time, the Sixth Circuit affirmed. Judge Jonker's new, exponential drug-quantity increase was not erroneous, the court concluded, because it was not completely unsupported by the thirteen-year-old written transcript. *Id.* 2a–10a. In so holding, the Sixth Circuit made clear that, even if the evidence does not establish a specific quantity, the sentencing court was not required to adopt a lower-range estimate. *Id.* 7a–10a. Rather, because 8.4 kilograms was not "the 'theoretical maximum amount' of drugs" that could conceivably have been found, Judge Jonker committed no error. *Id.* 9a.

The Sixth Circuit subsequently denied Mr. Valentine's petition for rehearing en banc. *Id.* 1a. Mr. Valentine now petitions this Court for a writ of certiorari.

REASONS FOR GRANTING THE PETITION

This Court should grant Mr. Valentine's petition for a writ of certiorari. *First*, the Sixth Circuit's decision deepens an already deep circuit split by rejecting the conservative, low-end presumption when estimating drug quantities under U.S.S.G. §§ 1B1.3 and 2D1.1. *Second*, the approach adopted by the Sixth Circuit contravenes this Court's precedent and perpetuates unwarranted sentencing disparities. *Third*, Mr. Valentine's case presents a timely and far-reaching question of law on which lower courts need immediate guidance.

I. THE SIXTH CIRCUIT'S DECISION FURTHER ENTRENCHES A CIRCUIT SPLIT.

The Sixth Circuit's decision directly conflicts with the law of the First, Second, Third, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits. [2] Unlike the Sixth Circuit, these courts essentially agree with then-Judge Alito's directive that "courts generally should adopt . . . lower end" estimates unless the evidence clearly points to a higher quantity. *United States v. Medford*, 194 F.3d 419, 424 (3d Cir. 1999) (Alito, J.); *see also United States v. Reyes*, 930 F.2d 310, 314–16 & n.7 (3d Cir. 1991)

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[2] *See, e.g.*, *United States v. Culps*, 300 F.3d 1069, 1076–82 & nn.4–5 (9th Cir. 2002); *United States v. Boyd*, 289 F.3d 1254, 1255–60 (10th Cir. 2002); *United States v. Rivera-Maldonado*, 194 F.3d 224, 233–34 (1st Cir. 1999); *United States v. Zapata*, 139 F.3d 1355, 1359 (11th Cir. 1998) (per curiam); *United States v. Shonubi (II)*, 998 F.2d 84, 89–90 (2d Cir. 1993); *United States v. Miele*, 989 F.2d 659, 666–68 (3d Cir. 1993); *United States v. Simmons*, 964 F.2d 763, 774–78 (8th Cir. 1992) *United States v. Duarte*, 950 F.2d 1255, 1261–66 (7th Cir. 1991).

(Alito, J.). The Sixth Circuit's rejection of that broadly accepted legal principle warrants this Court's review.

A. The Majority of Circuits Have Adopted A Conservative, Low-End Presumption for Drug-Quantity Estimates when the Evidence is Unclear.

This Court has made clear—both before and after the SRA—that "the sentencing process . . . must satisfy the requirements of the Due Process Clause." *See Gardner v. Florida*, 430 U.S. 349, 358 (1977) (plurality op.); *see also United States v. Booker*, 543 U.S. 220 (2005); *Apprendi v. New Jersey*, 530 U.S. 466 (2000). At a minimum, due process requires sentencing-related decisions to be based on "a scrupulous and diligent search for truth"—not "careless" or "materially false" "assumptions." *Townsend v. Burke*, 334 U.S. 736, 741 (1948). Indeed, judges must "assure[] reviewing courts (and the public) that the sentencing process is a reasoned process," *Rita v. United States*, 551 U.S. 338, 357 (2007), and not simply "a game of chance," *United States v. Grayson*, 438 U.S. 41, 53 (1978), *superseded on other grounds by statute but reaffirmed in United States v. Dunnigan*, 507 U.S. 87 (1993). The Sentencing Commission codified these "due process requirements" in U.S.S.G. § 6A1.3 and its commentary, instructing sentencing courts to resolve drug-quantity "disputes . . . with care" and hold defendants responsible only for those quantities proven by "a preponderance of the evidence." U.S.S.G. § 6A1.3 comment.

Accordingly, the majority of federal circuits hold that due process requires lower range drug-quantity

estimates when the evidence is unclear or *a specific quantity is not indicated in the record*. *See e.g.*, *United States v. Henderson*, 58 F.3d 1145, 1152 (7th Cir. 1995). Recognizing that drug quantity can have a "marked impact" on sentencing, *United States v. Lawrence*, 47 F.3d 1559, 1567–69 (11th Cir. 1995), these courts require sentencing judges to estimate drug quantities conservatively, adopting the lowest plausible estimate when "uncertainty exists," *United States v. Candelaria-Silva*, 714 F.3d 651, 658 (1st Cir. 2013) (internal quotation marks omitted). As the Second Circuit put it, this conservative, low-end presumption is constitutionally required, as "unduly speculative" drug-quantity estimates "violate[] the commitment to due process." *See United States v. Perrone*, 936 F.2d 1403, 1419 (2d Cir. 1991).

1. The Tenth Circuit's recent decision in *United States v. Battle*, 706 F.3d 1313 (2013), exemplifies the conservative approach and illustrates how this low-end presumption operates in practice. In that case, Shawn Battle, an inmate who was sentenced based on at least 1.5 kilograms of crack cocaine, sought a sentence reduction under § 3582(c)(2). *Id.* at 1315–16. The district court rejected Battle's argument that he should be resentenced "based on the [originally estimated] 1.5 kilograms figure." *Id.* Instead, the court combined the quantities allegedly distributed by Battle's co-conspirators—1.6 and 1.8 kilograms—and newly estimated that Battle "was responsible for 3.4 kilograms of crack." *Id.*

The Tenth Circuit reversed. *Id.* at 1314. Although the court acknowledged that Battle "was responsible for somewhere between 1.8 and 3.4 kilograms," the district court's rote combination

of co-conspirator testimony was insufficiently conservative and thus "clearly in error." *Id.* at 1316, 1320. "[G]iven the complete absence of evidence of drug quantity within that range," the Tenth Circuit reasoned that the "preponderance of the evidence standard" could not support "any quantity above 1.8 kilograms." *Id.* at 1320–21. Accordingly, because the evidence established only a range of possible quantities, the district court's failure to adopt a lower-end estimate constituted reversible legal error. *Id.*

2. The First Circuit also adheres to this approach. In *United States v. Sepulveda*, for example, the First Circuit vacated a drug-quantity estimate extrapolated from the "sweeping generalities" of a cooperating government-witness's testimony. 15 F.3d 1161, 1197 (1st Cir. 1993). The witness testified that (1) the defendant participated in 10 to 15 drug purchases, and (2) the smallest amount of drugs purchased was around 113 grams and the largest amount roughly 1 kilogram. *Id.* From this, the district court estimated that the defendant (1) must have made 12 trips (roughly the average of 10 and 15), and (2) that each trip must have involved a purchase of 556 grams (roughly the average of 110 grams and 1 kilogram). *Id.* at 1197–98. Altogether, the court attributed to the defendant 6.68 kilograms—12 trips multiplied by 556 grams. *Id.*

This methodology was legally erroneous. *Id.* The First Circuit reasoned that "an assumed average number of trips multiplied by an assumed average quantity . . . per trip" does not establish any quantity by "a preponderance of the evidence." *Id.* at 1197,

1199. Rather, the "preponderance standard" must be informed by the "reality" that "relatively small quantitative differences may produce markedly different periods of" incarceration. *Id.* at 1198. As a result, appellate "[c]ourts must sedulously enforce that quantum-of-proof rule," and require district courts to "base their findings on reliable information and, where uncertainty reigns," to adopt lower-end estimates. *Id.* (internal quotation marks omitted).

3. The Ninth Circuit's precedent further demonstrates this approach. *See, e.g.*, *United States v. Scheele*, 231 F.3d 492 (9th Cir. 2000). In *Scheele*, the Ninth Circuit vacated a district court's drug-quantity estimate of 3,040.98 kilograms. *Id.* at 498–500. Although the Ninth Circuit described that estimate as "fair and even-handed," it also observed that this estimate was only 40 kilograms above "the amount that would have led to a significantly lower sentencing range." *Id.* Because the district court did not "consider the margin of error before finally fixing" its estimate, the Ninth Circuit found legal error. *Id.* Emphasizing the "serious due process concerns" raised by sentences predicated on "necessarily imprecise" estimates, the Ninth Circuit held that, "[i]f taking the margin of error into account" and adopting a lower-end estimate "would reduce the defendant's base offense level," the district court "*must* do so." *Id.* at 497–99 (emphasis added).

4. At least five other circuits follow this conservative, low-end presumption in order to ensure due process at sentencing.

a. The Second Circuit, for example, follows this approach in applying "a rigorous standard

concerning the quality of evidence" needed to prove a drug-quantity estimate at sentencing. *United States v. Shonubi (Shonubi IV)*, 103 F.3d 1085, 1090 (2d Cir. 1997). When "only speculation links" the defendant "to any [amount] of drugs beyond" the lowest plausible threshold, the Second Circuit holds that no higher quantity is provable "by a preponderance of the evidence." *United States v. Shonubi (Shonubi III)*, 998 F.2d 84, 90 (2d Cir. 1993). Instead, estimates must be based on "evidence that points specifically to a drug quantity for which the defendant is responsible"—not statistical evidence of "other defendants' crimes" or non-quantitative evidence of defendants' "demeanor" or "character." *Shonubi IV*, 103 F.3d at 1091. Absent such specific, quantitative evidence, the Second Circuit requires sentencing judges to adopt the lowest plausible quantity. *Shonubi III*, 998 F.2d at 90.

b. The Third Circuit holds likewise. *See, e.g.*, *United States v. Miele*, 989 F.2d 659, 668 (3d Cir. 1993) (holding that "a specific drug quantity finding" cannot be based solely on the vague allegation that the defendant's "drug activity was substantial"). In *United States v. Reyes*, for instance, then-Judge Alito reasoned that because drug-quantity estimates "substantially affect[] the length of [a] sentence," district judges must provide more than simply "a brief explanation of the basis for [their] findings." 930 F.2d at 314–15. Rather, they must clearly demonstrate the evidentiary "link[]" between a heightened drug-quantity estimate and "the conspiracy for which [the defendant] was convicted." *Id.* at 314–15 & n.7. For that reason, *Reyes* held that a "conspiracy's . . . duration" standing "alone clearly

cannot support" a specific drug-quantity estimate without additional quantitative evidence. *Id.* at 315.

Indeed, the Third Circuit follows this approach for estimates in general, whether drug cases or not. In *Medford*, the Third Circuit vacated a sentencing estimate of the amount of loss in a theft case because the district court "selected the middle value of the high and low estimates" "as opposed to selecting the low end of the range." 194 F.3d at 424 (Alito, J.).

c. The Seventh Circuit similarly requires "conservative approximations" and prohibits sentencing courts from "choos[ing] a random number simply because [they] believe[] more drugs [a]re involved than the [evidence] indicate[s]." *Henderson*, 58 F.3d at 1151–52. The Seventh Circuit thus compels district judges to "t[ake] pains to err on the side of *underestimation*" when approximating drug quantities. *United States v. Acevedo*, 28 F.3d 686, 690 (7th Cir. 1994) (emphasis added). As Judge Easterbrook noted, such considerations are necessary to prevent the Guidelines from becoming "an engine of disproportion." *United States v. Eschman*, 227 F.3d 886, 892–93 (7th Cir. 2000) (Easterbrook, J., concurring).

d. In accord, Eighth Circuit precedent requires sentencing courts to adopt lower range estimates when a specific number is not available. *United States v. Lawrence*, 915 F.2d 402, 408–09 (8th Cir. 1990). In the Eighth Circuit's view, although the conservative, low-end estimate rule may result in "underestimation," such a result "is nonetheless constitutionally required." *Id.* (internal quotation marks omitted). Unless the court can justifiably conclude that "the defendant is more likely than not

actually responsible for" the estimated quantity, *United States v. Williams*, 109 F.3d 502, 509 (8th Cir. 1997) (internal quotation marks omitted), the estimate "does not comport with the requirements of the due process clause," *Lawrence*, 915 F.2d at 409.

e. Likewise, the Eleventh Circuit requires that drug-quantity estimates be "fair, accurate, and conservative." *United States v. Zapata*, 139 F.3d 1355, 1359 (11th Cir. 1998) (per curiam). Following that rule, the Eleventh Circuit has vacated higher-end estimates that were "round[ed] up" without "legal or factual support," *id.*, as well as those not supported by "reliable and specific evidence," *Lawrence*, 47 F.3d at 1569. As that court put it, "the preponderance standard is not toothless." *Id.* at 1566. Particularly "where the quantity of drugs attributed to a defendant can have a marked impact on the length of his sentence," "judicial skepticism" is necessary to "ensure . . . that the Government carrie[s] its burden of proof." *Id.* at 1567–68 (internal quotation marks omitted); *see also United States v. Badru*, 97 F.3d 1471, 1477 & n.3 (D.C. Cir. 1996) (appearing to align itself with these courts by noting in dicta that "caution should properly be exercised in the [drug-quantity] attribution area").

B. The Sixth Circuit, Like the Fourth Circuit, Eschews the Conservative, Low-End Presumption Even When The Evidence Is Unclear.

1. In recent years, the Sixth Circuit has departed from this conservative approach grounded in due process. *See, e.g.*, *United States v. Jeross*, 521 F.3d 562, 571–72 (6th Cir. 2008) (affirming a drug-quantity estimate based on speculative co-

conspirator testimony and allegations of mere capacity to traffic drugs—despite compelling evidence that the defendant was responsible for a lower amount); *see also United States v. Sadler*, 750 F.3d 585, 594–95 (6th Cir. 2014) (affirming "aggregated" drug-quantity estimates based on an unspecified quantum of evidence and without examining the sentencing court's methodology); *United States v. Johnson*, 732 F.3d 577, 582–83 (6th Cir. 2013) (affirming a district court's decision—which more than doubled a drug-quantity estimate based on the allegations of an admittedly biased government witness—because the court viewed evidentiary and due-process requirements as a "low hurdle" (internal quotation marks omitted)).[3]

Mr. Valentine's case illustrates the extent to which the Sixth Circuit has rejected the low-end presumption, even in cases where the record affords no specific quantity to attribute to the defendant. *See, e.g.*, *United States v. Valentine*, 694 F.3d 665, 674–75 (6th Cir. 2012) (Pet.App. 49a) (vacating Judge Jonker's first drug-quantity estimate *solely because* it represented the "low-end threshold"). For

[3] Although some courts discussed in Part I.A. have cited early Sixth Circuit precedent in support of a "cautio[us]" approach to drug-quantity estimation, *see United States v. Walton*, 908 F.2d 1289, 1302 (6th Cir. 1990), the Sixth Circuit's more recent cases—including this one—reveal that the Sixth Circuit no longer follows that approach, *see, e.g.*, *Jeross*, 521 F.3d at 571 (concluding that the "district court appropriately exercised caution" in estimating a drug quantity simply because it did not attribute to the defendant the highest possible quantity of drugs); *see also id.* at 588 (Merritt, J., dissenting) (criticizing the majority for carelessly "ratcheting up" the defendant's "sentence based upon multiple, disputed judge-found facts regarding quantity").

example, other courts have rejected the simplistic aggregation of co-conspirator allegations, *see Battle*, 706 F.3d at 1320, and found a 40-kilogram margin of error impermissible when it resulted in two additional years of imprisonment, *Scheele*, 231 F.3d at 499–500. But here, the Sixth Circuit affirmed nearly *five* additional years in prison for Mr. Valentine based on an almost tenfold increase from the original sentencing judge's finding, Pet.App. 7a–10a—and did so through the rote combination of equivocal and indeterminate co-conspirator testimony, *cf. Sepulveda*, 15 F.3d at 1197 (prohibiting such extrapolation). Additionally, whereas circuits applying the low-end presumption require sentencing judges to adopt "the lowest amounts to which [the witnesses] testified," *see United States v. Carl*, 593 F.3d 115, 123 (1st Cir. 2010), the Sixth Circuit affirmed Judge Jonker's estimate simply because it was not "the 'theoretical maximum amount'" that could be estimated, *see* Pet.App. 9a. And in affirming a maximum estimate, the Sixth Circuit's decision here ignores a basic truth that other courts recognize: district judges may not bridge a "gap in proof" through "the pyramiding of inferences." *Sepulveda*, 15 F.3d at 1198, 1999.

Put simply, the Sixth Circuit's decision in Mr. Valentine's case cannot be squared with those applying the conservative, low-end presumption. Because nothing in the record—or indeed, in common experience—supports Judge Jonker's "far reaching" assumptions, the Sixth Circuit's decision affirming such speculation squarely contradicts the approach taken by the majority of circuits. *Cf., e.g.*, *United States v. Johnson*, 185 F.3d 765, 768–69 (7th Cir. 1999) (holding that sentencing courts may not simply

"pull a number out of thin air" or rely on "[n]ebulous eyeballing" (internal quotation marks omitted)). Even if the court below had purported to estimate "cautious[ly]," Pet.App. 5a, the inconsistencies between its opinion and those of other circuits are unmistakable. *See, e.g.*, *United States v. Welch*, 15 F.3d 1202, 1215 (1st Cir. 1993) ("Where the sentencing court relies *solely* on the rough drug quantity estimates of a lay witness, expressed in terms of a *range*, rote averaging is an insufficiently reliable basis for a supportable drug quantity finding.").

2. Like the Sixth Circuit, the Fourth Circuit has also departed from the conservative, low-end estimate presumption. *See Kiulin*, 360 F.3d at 461 (holding that, regardless of evidentiary uncertainty, "a district court need not 'err,' on the side of caution or otherwise").

In *Kiulin*, the Fourth Circuit affirmed a drug-quantity estimate based in large part on the "drug equivalent" of nearly $68,000 in cash. *Id.* Accepting a probation officer's assertion that each dose of the defendant's drug was worth $20, the district court estimated the defendant's drug-quantity responsibility by converting the seized cash into separate dosage units. *Id.* at 461–62. And, despite empirical evidence that the defendant's drug was worth far less than $20 per dose, the Fourth Circuit affirmed. *Id.* The Fourth Circuit held that—regardless of whether the $20-per-dose estimate exceeded actual street value, and regardless of whether that error substantially increased the defendant's sentence—the district court's estimate

was *a* permissible view of the equivocal evidence, and therefore should be upheld. *See id.*

In so holding, however, the Fourth Circuit—like the Sixth Circuit here—did not consider any "margin of error" in the district court's estimate. *Cf. Scheele*, 231 F.3d at 498–500. Nor did it consider the estimate's impact on the defendant's sentence. *Cf. Sepulveda*, 15 F.3d at 1197–99; *cf. also Lawrence*, 47 F.3d at 1569. Nor did the Fourth Circuit appreciate the need for "underestimation" in the interest of "due process." *Cf. Lawrence*, 915 F.2d at 409; *cf. also Acevedo*, 28 F.3d at 690.

Instead, the Fourth Circuit expressly repudiated those principles. 360 F.3d at 461. Referring to the low-end presumption as a mere "prophylactic measure," the *Kiulin* court saw no due-process issue with district courts "making [drug-quantity] findings unsupported by a preponderance of the evidence." *Id.* Rather, because "sentencing courts are bound to abide by the mandates of the guidelines," the Fourth Circuit wrote, any improper estimation of drug quantity under § 1B1.3 was harmless simply because it is "subject to [appellate] review."[4] *Id.*

* * *

In sum, at least eight federal appellate courts apply a conservative, low-end presumption, while two federal circuit courts reject that reasoned approach. No further percolation is needed. After more than a decade of division, and given the depth

[4] Because *Kiulin* rested on the then-mandatory nature of the Sentencing Guidelines, *Booker*, 543 U.S. 220, substantially undermines the Fourth Circuit's justification for rejecting the conservative presumption.

of the split, this Court's intervention is needed to resolve the due-process problems inherent in drug quantities estimated without clear evidence. Because the Sixth Circuit's decision here deepens that circuit split, this Court should grant Mr. Valentine's petition for writ of a certiorari.

II. THIS COURT SHOULD ADOPT THE CONSERVATIVE, LOW-END PRESUMPTION AND REJECT THE SIXTH CIRCUIT'S APPROACH.

This Court should make clear that the rule already in place in most circuits comports with law and policy, whereas the Fourth and Sixth Circuits' approach does not, for at least two reasons: (1) the conservative low-end presumption follows logically from this Court's decisions, and (2) it reduces unwarranted sentencing disparities by estimating drug quantities pursuant to a more deliberative, reasoned approach.

A. The Conservative, Low-End Estimate Approach Comports With This Court's Due-Process Precedent—The Sixth Circuit's Approach Does Not.

The low-end estimate rule is a direct outgrowth of this Court's due-process decisions, while the Sixth Circuit's approach directly contravenes that body of law. At its core, due process protects "individual[s] against arbitrary action of government." *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 845–46 (1998). Even purely discretionary decisions, therefore, must "proceed[] upon inquiry," rather than mere "[a]rbitrary power." *Hurtado v. California*, 110 U.S. 516, 535–36 (1884).

Given the "critical nature of sentencing," *Mempa v. Rhay*, 389 U.S. 128, 134 & n.3 (1967), this Court has long applied these foundational principles when reviewing sentencing-related judgments, *see Hurtado*, 110 U.S. at 537 (stressing that "[n]o individual or body of men has" the "power to commit any person to prison" arbitrarily); *cf. Bd. of Pardons v. Allen*, 482 U.S. 369, 373 n.3 (1987) ("At stake in the parole-release decision is a return to freedom, albeit conditional freedom; liberty from bodily restraint is at the heart of the liberty protected by the Due Process Clause."). As early as 1894, the Court made clear that "[t]he law of our country takes care, or should take care, that not the weight of a judge's finger shall fall upon any one, except as specifically authorized." *In re Bonner*, 151 U.S. 242, 259 (1894). Building on similar logic, this Court has held that due process, at a minimum, requires that sentencing must reflect "a scrupulous and diligent search for truth." *Townsend*, 334 U.S. at 741. Reaffirming as much in the restitution context, this Court recently made clear again that due process protects liberty and property from arbitrary deprivations premised on nothing more than "a decisionmaker's caprice." *Cf. Paroline v. United States*, 134 S. Ct. 1710, 1729 (2014) (internal quotation marks omitted).

1. The conservative approach effectuates these due-process prohibitions on "arbitrary distinction[s]," *Chapman v. United States*, 500 U.S. 453, 465 (1991), by demanding that sentencing courts "carefully scrutinize the government's proof" and adopt lower-end estimates when the evidence is unclear, *United States v. Paulino*, 996 F.2d 1541, 1545 (3d Cir. 1993). After all, uncertain evidence enables district courts

to "do [no]thing more than pick an arbitrary number"—"[a]nd arbitrary is not good enough for the criminal law." *Cf. Paroline*, 134 S. Ct. at 1730 (Roberts, C.J., dissenting). Particularly in the context of drug conspiracies, abstracted or conjectural estimations too easily resemble "a game of chance," *Grayson*, 438 U.S. at 53, rather than "a scrupulous and diligent search for truth," *Townsend*, 334 U.S. at 741.

Thus, in the same way this Court requires sentencing judges to offer at least some "reason or justification for" their decision "beyond the naked power to impose it," *North Carolina v. Pearce*, 395 U.S. 711, 726 (1969), *overruled in part on other grounds by Alabama v. Smith*, 490 U.S. 794 (1989), so too does the low-end presumption require "special care . . . to ensure that" estimates "are predicated on reliable information," and that courts adopt lower-range findings "where significant uncertainty exists," *United States v. Rivera-Maldonado*, 194 F.3d 224, 233 (1st Cir. 1999) (internal quotation marks and citations omitted). In this way, those courts applying a careful approach respect the necessary corollary of sentencing courts' duty to "assure[] reviewing courts (and the public) that the sentencing process is a *reasoned* process" rather than an unreflective exertion of authority. *See Rita*, 551 U.S. at 357 (emphasis added).

2. By contrast, the Fourth and Sixth Circuits contravene this Court's due-process precedent. Rather than vigilantly guard against arbitrary impositions of punishment, *Hurtado*, 110 U.S. at 537, those courts effectively hold that drug-quantity estimates are presumptively constitutional and

presumptively correct so long as they are not "the 'theoretical maximum amount' of drugs" that could be estimated, *see* Pet.App. 9a. But by refusing to examine "whether the evidence" underlying a drug estimate "cross[es] the constitutional threshold," the minority approach runs afoul of this Court's decisions. *Cf. Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 511 (1984).

Indeed, the lesson to be drawn from the Fourth and Sixth Circuits' approach is that, unless drug-quantity estimates are conservative, they will necessarily be *conjectural*—and conjectural estimates do not comport with due process, the preponderance standard, or the Sentencing Guidelines, *see* U.S.S.G. § 6A1.3 comment. (instructing courts to resolve "disputes . . . with care"). In rejecting the low-end presumption, therefore, the Fourth and Sixth Circuits not only fail to exercise the "careful scrutiny" that this Court "has always" required in reviewing "criminal cases," *Dorszynski v. United States*, 418 U.S. 424, 443 (1974) (internal quotation marks omitted), but they also fail to protect individuals against the kind of "arbitrary action" that this Court has repeatedly emphasized violates the core of due process, *Lewis*, 523 U.S. at 845–46.

B. The Conservative, Low-End Estimate Approach Prevents Unwarranted Sentencing Disparities—The Sixth Circuit's Approach Does Not.

1. Unlike the Fourth and Sixth Circuits' approach, the conservative, low-end presumption furthers the SRA's mission of reducing unwarranted sentencing disparities. By requiring careful

estimation of drug quantities, that approach "tends to unify precedent and stabilize the law," and thereby "helps to assure the uniform general treatment of similarly situated persons." *Cf. Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 436 (2001) (quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 587 (1996) (Breyer, J., concurring)). Because there is "no rational basis" for selecting a higher drug-quantity estimate over a lower one when the evidence is uncertain, *Sepulveda*, 15 F.3d at 1198, this inquiry facilitates consistent, rational drug-quantity estimates, and ensures that those estimates "comport with the requirements of the due process clause," *Lawrence*, 915 F.2d at 409 (internal quotation marks omitted).

2. The Sixth Circuit's approach, on the other hand, produces exactly the opposite outcome. Its imprimatur of mechanistic sentencing estimates devolves into a "policy of sweeping deference" that permits due process "to turn on whether different trial judges draw general conclusions that the facts are sufficient" to hold individuals responsible for an estimated amount of drugs. *Cf. Ornelas v. United States*, 517 U.S. 690, 697 (1996) (internal quotation marks omitted). The "varied results" produced by that approach are "inconsistent" not only with "the idea of a unitary system of law," *id.*, but also with the SRA's goal of reducing unwarranted sentencing disparities, *see Kimbrough*, 552 U.S. at 99–100. Thus, by leaving estimation to the "intuitions" and "instincts" of district judges, the Sixth Circuit's approach enables disparate, unfair sentences while at the same time "undermin[ing] the requirement that every criminal defendant receive due process of

law." *Cf. Paroline*, 134 S. Ct. at 1734 (Roberts, C.J., dissenting).

III. THIS CASE PRESENTS A TIMELY AND FAR-REACHING QUESTION OF FEDERAL LAW ON WHICH LOWER COURTS NEED IMMEDIATE GUIDANCE.

1. The Commission's amendments to the crack-cocaine guidelines in 2007, 2010, and, most recently, in 2014 indicate that this pressing issue is not going away. As occurred in Mr. Valentine's case, most sentence-reduction proceedings take place years after the original trial, are attended by stale records, and often involve newly assigned judges who never observed the critical witnesses or evidence in person. Without a conservative, low-end approach to estimation, § 3582(c) movants stand little chance of receiving the "care[ful]," non-arbitrary review that the Sentencing Guidelines and this Court's due-process precedent require. *See* U.S.S.G. § 6A1.3 comment. (instructing sentencing courts to resolve "disputes . . . with care"); *see also Lewis*, 523 U.S. at 845–46 (prohibiting "arbitrary action of government" under the Due Process Clause). This Court, therefore, should grant Mr. Valentine's petition for a writ of certiorari and ensure that sentence-reduction proceedings under §3582(c) are appropriately constitutional and conservative in their estimation of drug quantities.

2. Mr. Valentine's case is a stark reminder that lower courts need guidance in carrying out Congress's and the Sentencing Commission's goals in the § 3582(c)(2) context. As noted, Congress's purpose in enacting § 3582(c)(2) was "to remedy systemic injustice[s]." *Freeman*, 131 S. Ct. at 2695.

Similarly, the Commission's purpose in repeatedly amending the crack-cocaine guidelines has been to rectify decades of excessive and racially disparate sentences. *See Kimbrough*, 552 U.S. at 99–100.

But the lower courts' decisions here not only fail to advance those critical policy goals, they fatally thwart them. By exponentially increasing a thirteen-year-old drug-quantity estimate—and thereby denying § 3582(c)(2) relief—those courts ensured that Mr. Valentine will "linger in prison pursuant to [a] sentence[] that would not have been imposed but for a since-rejected, excessive range." *Freeman*, 131 S. Ct. at 2690, 2695. Indeed, originally sentenced in violation of the Fifth and Sixth Amendments, [5] Mr. Valentine's sentence is 52 months longer than the 20-year statutory maximum applicable to drug offenses for which no quantity is proven. *See* 21 U.S.C. § 841(b)(1)(C). Worse yet, with no quantity found by the jury, the verdict exposed him to a sentencing range of only 10 to 16 months' imprisonment. *See* U.S.S.G. Manual § 2D1.1(c)(14) & ch. 5, pt. A (Sentencing Table) (1998). But because he was sentenced under the pre-*Apprendi* and pre-*Booker* regime, Mr. Valentine's drug-quantity estimate required a sentence of *292 months*.

And now, without reliable evidentiary support, the lower courts have denied Mr. Valentine the relief that Congress provided in § 3582(c), and that the Sentencing Commission provided in its amendments to the crack guidelines. This case, therefore, perfectly

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[5] *See, e.g.*, *Valentine v. United States*, 488 F.3d 325, 328–30 (6th Cir. 2007) (observing that Mr. Valentine's original sentence violated both *Apprendi* and *Booker*, but holding that he could not collaterally attack his sentence on those grounds).

illustrates that, without authoritative guidance, lower courts will perpetuate rather than "remedy . . . systemic injustice." *See Freeman*, 131 S. Ct. at 2690, 2695. Accordingly, this Court should grant Mr. Valentine's petition for a writ of certiorari in order to ensure that lower courts effectuate Congress's and the Commission's remedial goals in the § 3582(c) context.

3. Mr. Valentine would benefit from a favorable decision in this case. Should the district judge on remand properly estimate Mr. Valentine's relevant conduct by a preponderance of the evidence—as due process requires—there would be "no basis on this record to exercise discretion against [Mr.] Valentine." Pet.App. 23a. Mr. Valentine has earned positive reviews from his full-time employment in prison, has taken numerous classes to improve his skills and facilitate his transition to society, and has proven himself an attentive father, even while behind bars, to ensure that his two children are engaged, law-abiding, and self-sufficient citizens. *See id.* 22a–23a; *see also* Appellant's Brief, at 11, Doc. 18, Case No. 13-1152 (6th Cir. 5/3/2013). Judge Jonker recognized this in granting Mr. Valentine a 52-month reduction, before he was compelled to undertake the impossible task of reviewing a cold record to attribute a new quantity to Mr. Valentine. Pet.App. 27a. Since then, Mr. Valentine has only endeavored harder to ensure his smooth reentry upon release. A constitutionally proper estimate of Mr. Valentine's relevant conduct would surely entitle him to a sentence reduction.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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