

No:

**In the
Supreme Court of the United States**

NORMAN L. HUNTER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Should a writ of certiorari be granted to determine whether the district court erred in sentencing Hunter as a career offender when the offenses utilized to enhance his sentence were aged and not considered part of the guideline determination?

**PARTIES TO THE PROCEEDINGS
IN THE COURT BELOW**

In addition to the parties named in the caption of the case, the following individuals were parties to the case. The United States Court of Appeal for the Sixth Circuit and the United States District Court for the Northern District of Ohio.

None of the parties is a company, corporation, or subsidiary of any company or corporation.

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PETITION FOR WRIT OF CERTIORARI

I, Norman L. Hunter, the Petitioner herein, respectfully prays that a Writ of Certiorari is issued to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled cause.

OPINION BELOW

The opinion of the Court of Appeals for the Sixth Circuit, whose judgment is herein sought to be reviewed, is an unpublished opinion in *United States v. Hunter*, 2018 U.S. App. LEXIS 7630 (6th Cir. Mar. 26, 2018) and is reprinted as Appendix A to this petition.

STATEMENT OF JURISDICTION

The Sixth Circuit's denial of Hunter's direct appeal was entered on March 26, 2018

The Jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES AND RULES INVOLVED

The Fifth Amendment to the Constitution of the United States provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the Constitution of the United States provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witness against him; to have

compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Id. Sixth Amendment U.S. Constitution

STATEMENT OF THE CASE

On August 3, 2016, a federal grand jury in the Northern District of Ohio returned a superseding indictment charging Hunter and co-defendant Matthew Martin with conspiring to possess with the intent to distribute fentanyl in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A) and 846 (Count 1), and possessing with the intent to distribute fentanyl in violation of Sections 841(a)(1) and (b)(1)(A) and 18 U.S.C. § 2 (Count 2). Count 3 charged Hunter with being a felon in possession of firearms.

On October 17, 2016, Hunter pled guilty to Counts 1 and 3, under the terms of a plea agreement with the government. In exchange for Hunter's guilty plea, the government agreed to move to dismiss Count 2. Hunter was sentenced to 200 months imprisonment on Count 1 and a current term of 120 months imprisonment on Count 3, followed by 20 years of supervised release. Hunter was ordered to pay a \$200 special assessment.

Hunter proceeded on appeal contesting the reasonableness of the sentence. On March 26, 2018, the Sixth Circuit Court of Appeals affirmed the sentence and conviction. This timely request for a writ of certiorari followed.

STATEMENT OF THE FACTS

A. Overview of the Offense

Hunter, who has had several prior drug incidents, was arrested after a search warrant was executed at his home in Bedford Heights, Ohio. The police found \$4,695.00 in cash and five firearms. After his arrest, Hunter who pleads guilty stipulated that he knowingly possessed and distributed a controlled substance, and that “at least 1.2 kilograms, but less than 3 kilograms of fentanyl” were attributable to him during the conspiracy.

As a part of a plea agreement, the parties recommended that the district court impose “a sentence within the range and of the kind specified pursuant to the advisory Sentencing Guidelines in accordance with the computations and stipulations set forth” in the plea agreement. Additionally, the government stipulated that it had no objection to the court imposing a low-end Guideline sentence. Hunter acknowledged that the “sentencing rest[ed] within the discretion of the Court; that federal sentencing law require[d] the Court to impose a sentence which is sufficient, but not greater than necessary, to comply with the purposes of 18 U.S.C. § 3553(a), and that the Court must consider among other factors the advisory Sentencing Guidelines in effect at the time of sentencing and that in determining the sentence the Court may depart or vary from the advisory guideline range.” Hunter also preserved the right to appeal a sentence that exceeded “the

maximum of the sentencing imprisonment range determined under the advisory Sentencing Guidelines in accordance with the sentencing stipulations and computations in this agreement, using the Criminal History Category found applicable by the Court.”

At sentencing, the district court concluded that Hunter was a career offender and, after acceptance of responsibility and other adjustments, had a total offense level of 28, criminal history category of VI, yielding a Guideline range of 140 to 175 months. Hunter asked for the minimum guideline sentence based on his difficult upbringing, his sister’s murder, his family relationships and support, his acceptance of responsibility, and his view that his criminal history was overrepresented. The prosecutor stated that the government had no objection to the court imposing a 140-month minimum guideline sentence and requested the court impose a guideline sentence. The court rejected the parties’ sentencing recommendations.

The court observed that Hunter’s request for a criminal history score of IV, which would have applied without the career offender Guideline enhancement, was lower than it otherwise would have been because “a number of his convictions [were] too old to have scored.” The court observed that Hunter’s “history [wa]s replete with not only convictions, drug related, but his inability to comply with conditions of supervision.” The district court found “no evidence” that his

“criminal history in any way overstate[d] the seriousness of his criminal history or . . . the likelihood the defendant will commit other crimes.”

Consequently, the court found that a guideline sentence would not adequately address the relevant Section 3553(a) factors and imposed a 200-month sentence on Count 1.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD ISSUE A WRIT OF CERTIORARI BECAUSE THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT HAS INTERPRETED A FEDERAL STATUTES IN A WAY THAT CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT

Supreme Court Rule 10 provides in relevant part as follows:

Rule 10 CONSIDERATIONS GOVERNING REVIEW ON WRIT OF CERTIORARI

(1) A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefore. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

(a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States Court of Appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a ... United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decision of this Court.... *Id.*

Id. Supreme Court Rule 10.1(a), (c)

QUESTIONS PRESENTED

I. SHOULD A WRIT OF CERTIORARI BE GRANTED TO DETERMINE WHETHER THE DISTRICT COURT ERRED IN SENTENCING HUNTER AS A CAREER OFFENDER WHEN THE OFFENSES UTILIZED TO ENHANCE HIS SENTENCE WERE AGED AND NOT CONSIDERED PART OF THE GUIDELINE DETERMINATION

Most of Hunter's prior occurred when he was a child between the ages of 18 and 23 years old. At the time of his sentencing, Hunter was 43 years old. He had a 1997 federal drug case for which he was convicted, as well as a 2015 case that involved trafficking in marijuana.

The final guideline range was determined at a level 28, with a Criminal History Category IV, which would result in an advisory guideline sentencing range of 140 - 175 months. Even the government noted that a sentence of 140 was appropriate. The court sentenced Hunter to 200 months, considerably above all the sentencing recommendations. As a start, sentences must be both procedurally and substantively reasonable. See *United States v. Castilla-Lugo*, 699 F.3d 454, 458-59 (6th Cir. 2012) (citing *United States v. Haj-Hamed*, 549 F.3d 1020, 1023 (6th Cir. 2008)).

Before deciding on a sentence, a district court judge receives input from both parties as well as a pre-sentencing report from a probation officer. *United States v. Serrano-Mercado*, 784 F.3d 838, 839 (1st Cir. 2015). The judge must also consider the factors set forth in 18 U.S.C. § 3553 (a), *Peugh v. United States*, 569 U.S. 530,

133 S. Ct. 2072 (2013) and may consider deviations from the Guidelines that are not derived from Section 3553 and that contravene "broad policy pronouncement[s] of the Sentencing Commission," *United States v. Martin*, 520 F.3d 87, 96 (1st Cir. 2008). A district court "may not presume that the Guidelines range is reasonable," *Peugh*, 133 S.Ct. at 2080 (quoting *Gall v. United States*, 552 U.S. 38, 50, 128 S. Ct. 586, 169 L. Ed. 2d 445 (2007)), and must explain on the record the basis for a "chosen sentence," *United States v. Ramirez*, 189 F. Supp. 3d 290, 296 n.7 (D. Mass. 2016).

In *Gall v. United States*, 553 U.S. 38, 51 (2007), this Court determined that appellate courts must first look to whether the district court committed "significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence." However, when the parties agree to a determinative sentence, the court must give consideration to those factors under Title 18 U.S.C. § 3553, which was not done in the instant matter. "It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue." *Id.*, at 113, 116 S. Ct. 2035, 135 L. Ed. 2d 392. Section

3553(a)(2)(A) requires judges to consider "the need for the sentence imposed . . . to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense."

In *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005), and *Rita v. United States*, 551 U.S. 338, 389-392, 127 S. Ct. 2456, 168 L. Ed. 2d 203 (2007), a bare majority held that the Sentencing Reform Act of 1984 (Sentencing Reform Act), as amended, 18 U.S.C. § 3551 et seq., 28 U.S.C. § 991 et seq., violated the Sixth Amendment insofar as it required district judges to follow the United States Sentencing Guidelines, but another bare majority held that this defect could be remedied by excising the two statutory provisions, 18 U.S.C. §§ 3553(b)(1) and 3742(e) (2000 ed. and Supp. IV), that made compliance with the Guidelines mandatory. As a result of these two holdings, the lower federal courts were instructed that the Guidelines must be regarded as "effectively advisory," *Booker*, 543 U.S., at 245, 125 S. Ct. 738, 160 L. Ed. 2d 621, and that individual sentencing decisions are subject to appellate review for "reasonableness," *id.*, at 262, 125 S. Ct. 738, 160 L. Ed. 2d 621. The *Booker* remedial opinion did not explain exactly what it meant by a system of "advisory" guidelines or by "reasonableness" review, and the opinion is open to different interpretations.

The implication of this passage is that district courts are still required to give some deference to the policy decisions embodied in the Guidelines and that

appellate review must monitor compliance. District courts must not only "consult" the Guidelines, they must "take them into account." *Id.*, at 264, 125 S. Ct. 738, 160 L. Ed. 2d 621. In addition, the passage distances the remedial majority from Justice Scalia's position that, under an advisory Guidelines scheme, a district judge would have "discretion to sentence anywhere within the ranges authorized by statute" so long as the judge "state[d] that 'this court does not believe that the punishment set forth in the Guidelines is appropriate for this sort of offense.'" *Id.*, at 305, 125 S. Ct. 738, 160 L. Ed. 2d 621 (opinion dissenting in part).

Moreover, in the passage quoted above and at other points in the remedial opinion, the Court expressed confidence that appellate review for reasonableness would help to avoid "'excessive sentencing disparities'" and "would tend to iron out sentencing differences." *Id.*, at 263, 125 S. Ct. 738, 160 L. Ed. 2d 621. Indeed, a major theme of the court in *Rita v. United States*, 551 U.S. 338, 127 S. Ct. 2456, 168 L. Ed. 2d 203 (2007), was that the post-*Booker* sentencing regime would still promote the Sentencing Reform Act's goal of reducing sentencing disparities. See, e.g., 551 U.S., at 348, 349, 354, 127 S. Ct. 2456, 168 L. Ed. 2d 203, *Booker*, 543 U.S. at 259-260, 263-264, 125 S. Ct. 738, 160 L. Ed. 2d 621. As disparity that has occurred in this case.

Before deciding on a sentence, a district court judge receives input from both parties as well as a pre-sentencing report from a probation officer. *United States v.*

Serrano-Mercado, 784 F.3d 838, 839 (1st Cir. 2015). The judge must also consider the factors set forth in 18 U.S.C. § 3553 (a), *Peugh*, 133 S.Ct. at 2080, and may consider deviations from the Guidelines that are not derived from Section 3553 and that contravene "broad policy pronouncement[s] of the Sentencing Commission," *United States v. Martin*, 520 F.3d 87, 96 (1st Cir. 2008). A district court "may not presume that the Guidelines range is reasonable," *Peugh*, 133 S.Ct. at 2080 (quoting *Gall v. United States*, 552 U.S. 38, 50, 128 S. Ct. 586, 169 L. Ed. 2d 445 (2007)), and must explain on the record the basis for a "chosen sentence." *United States v. Ramirez*, 189 F. Supp. 3d 290, 296 n.7 (D. Mass. 2016).

In this case, none of Hunter's prior convictions was for possession or distribution of large amounts of controlled substances. As stated at sentencing, none of Hunter's convictions have involved an offense of violence. And as stated at sentencing Hunter was unaware that the drug, in this case, was fentanyl, instead believing that the drug was cocaine. As established at the sentencing hearing, Hunter was remorseful for his conduct and has accepted responsibility in this case. Attached to his sentencing memorandum was fourteen letters from family and friends of Hunter. At the sentencing hearing, three individuals spoke on his behalf which included Hunter's wife, his uncle who was also a pastor and a life-long friend. Both the letters and the individuals who spoke discussed the good that Hunter has done for both the community and individuals.

Hunter faced difficult circumstances from the time he was young. Hunter had an abusive addict for a father and a childhood spent in poverty surrounded by drugs and violence. Defense counsel also pointed out the death of Hunter's sister, and with all of these things combined shaped him in terms of how he handled his adulthood. As was discussed at sentencing, it was recognized that Hunter had prior criminal convictions. But as was noted, Hunter's criminal history was based upon drug related offenses and that he does not have any violence whatsoever.

Defense counsel pointed to the fact that three of Hunter's drug cases occurred when he was between the ages of 18 and 23 years old. At the time of sentencing, in this case, Mr. Hunter was 43 years old. He also had a 1997 federal drug case for which he was convicted, as well as a 2015 case that involved trafficking in marijuana. The district court placed undue emphasis on the drugs in this case. The court placed undue emphasis on the type of drugs and the courts belief that Hunter was a large-scale drug trafficker by noting that drug related deaths from heroin and fentanyl had soared in Cleveland or Cuyahoga County, Ohio, and based upon this the court found that there was a need to send a message that if you're going to be a major drug trafficker or large scale drug trafficker moving kilograms of drugs into our community, "you will go to prison for a very, very long time." That statement shows that the factors of Title 18 U.S.C. § 3553 were not considered.

In *United States v. Grossman*, 513 F.3d 592, 596 (6th Cir.2008), the Court noted that, while "*Gall* bars a 'rigid mathematical formula' for reviewing outside guidelines sentences, it permits district and appellate courts to require some correlation between the extent of a variance and the justification for it." In *Grossman*, the district court varied 25 months upward to impose a sentence. In Hunter's case, the court varied upward 60 months. Over twice the amount of time noted in *Grossman*.

In *Booker*, the Supreme Court struck down the provision of the federal sentencing statute that required federal district judges to impose a sentence within the Federal Guidelines range, along with the provision that deprived federal appeals courts of the power to review sentences imposed outside the Guidelines range. The Court instructed federal district judges to impose a sentence with reference to a wider range of sentencing factors set forth in the federal sentencing statute, and directed federal appeals courts to review criminal sentences for "reasonableness." In this case, reasonableness cannot be determined based on the sentence imposed.


While it is recognized that a district court is not bound by any agreements between the parties, here, not only was there an agreement based upon *specific factors* but the government further agreed that there would be no objection to a sentence of 140 months. The government was in the best position to determine the facts of the case and the sentence to impose as appropriate.

CONCLUSION

Based on the foregoing, this Court should grant this request for a Writ of Certiorari and remand order the Court of Appeals for the Sixth Circuit.

Done this _____, day of June 2016

Respectfully submitted,



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