NO:

IN THE
SUPREME COURT OF THE UNITED STATES

O'NEIL ANTHONY HARRIS,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

I.

Whether a District Court Disregards Congressional Intent and Imposes an Unreasonable Sentence When it Applies an Upward Variance to the Advisory Sentencing Guideline Range Based Upon Factors Which Were Removed as a Basis For Sentence Enhancement Pursuant to Amendments Which Were Made to the Applicable Guideline Section.

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

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PETITION FOR WRIT OF CERTIORARI

O'neil Anthony Harris respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in Case No. 17-14814 in that court on April 20, 2018, *United States v. O'neil Anthony Harris*, which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida.

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida, is contained in the Appendix (A-1).

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and PART III of the RULES OF THE SUPREME COURT OF THE UNITED STATES. The decision of the court of appeals was entered on April 20, 2018. This petition is timely filed pursuant to SUP. CT. R. 13.1. The district court had jurisdiction because petitioner was charged with violating federal criminal laws. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, which provide that courts of appeals shall have jurisdiction for all final decisions of United States district courts.

STATUTORY AND OTHER PROVISIONS INVOLVED

Petitioner intends to rely upon the following constitutional provisions, treaties, statutes, rules, ordinances and regulations:

Title 28, U.S.C. § 994(p) provides: the [sentencing] commission, at or after the beginning of a regular session of Congress, but not later than the first day of May, may promulgate under subsection (a) of this section and submit to Congress amendments to the guidelines and modifications to previously submitted amendments that have not taken effect, including modifications to the effective dates of such amendments. Such an amendment or modification shall be accompanied by a statement of the reasons therefor and shall take effect on the date

specified by the commission, which shall be not no later than 180 days after being so submitted and no later than the first day of November of the calendar year in which the amendment or modification is submitted, except to the extent that the effective date is revised or the amendment is otherwise modified or disapproved by act of Congress.

Additionally U.S.S.G. § 2L1.2 (effective November 1, 2016) provides: If, before the defendant was ordered deported or removed from the United States for the first time, the defendant sustained - a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was five years or more, increase by 10 levels;….

STATEMENT OF THE CASE

On May 26, 2017, O'Neil Anthony Harris entered a guilty plea to having attempted to re-enter the United States without the consent of the Attorney General or the Secretary of Homeland Security after having previously been removed and deported from the United States, in violation of 18 U.S.C. §§ 1326(a) and (b)(2). The court ordered the preparation of a Presentence Investigation Report for utilization at Mr. Harris' sentencing hearing.

The Presentence Investigation Report provided for a total offense level of 6, a criminal history category of III and an advisory sentencing guideline range of 2 to 8 months. Neither Mr. Harris nor counsel for the government disputed that this was a correct calculation of the advisory sentencing guideline range.

On October 2, 2017, the government filed a Motion for an Upward Variance from the Advisory Sentencing Guideline Range. The government argued that although Mr. Harris' advisory guideline range is 2 - 8 months, the district court should consider the equivalent of a 10-offense level enhancement to this calculation because amendments which were made to U.S.S.G. § 2L1.2 in 2016 by the Sentencing Commission now excluded one of Mr. Harris' prior convictions from the offense level calculation. The government argued that the failure of the sentencing guidelines to take this prior conviction into account in the computation of his offense level was contrary to congressional intent as well as to the prevailing case law in the Eleventh Circuit.

Mr. Harris responded noting that U.S.S.G. § 2L1.2 was amended in 2016 and was applied properly in his case. Mr. Harris noted that if his offense occurred one year earlier and the 2015 version of the sentencing guidelines applied, his offense level would be subject to enhancement based upon a particular prior conviction; however, the sentencing commission amended the applicable guideline section and Congress did not act to change the amendment which then became effective on November 1, 2016. The sentencing commission expressly removed the language upon which the government asked the district court to rely for imposition of a sentencing variance. Mr. Harris also noted that the caselaw upon which the government relied in support of its variance request was decided approximately 15 years before the guideline section at issue was amended. Finally Mr. Harris noted that his prior conviction was, in fact, taken into account in the advisory guideline

range calculation since it is included in the computation of his criminal history category.

On October 18, 2017, Mr. Harris appeared before the district court for sentencing. At that time the government called Narciso Fernandez, an officer with Customs and Border Protection, to testify. Officer Fernandez noted that Mr. Harris was arrested on September 1, 2002 for intent to deliver cannabis. On December 11, 2012, Mr. Harris was interdicted and processed by Border Patrol for expedited removal from the United States. Officer Fernandez noted: at the time Mr. Harris was ordered removed from the United States he had not been convicted of the cannabis offense. Officer Fernandez summarized: he was arrested in Chicago in 2002. In 2012, Mr. Harris tried to re-enter the United States. Once Mr. Harris received an Order of Removal at the border he was extradited to Illinois. Mr. Harris was sentenced to eight years of imprisonment on June 13, 2013. He served a portion of his eight-year sentence and was then sent back to Immigration and Customs Enforcement custody to finish the removal proceeding. He was then deported from the United States on September 24, 2016. Mr. Harris was then interdicted near Tavernier, Florida on March 12, 2017 while attempting to reenter the United States.

Mr. Harris was ordered deported from the United States on December 12, 2012. If there was no warrant from Illinois, the Order of Removal would have been executed; however, Mr. Harris was sent to Chicago and convicted of the Illinois

offense on June 13, 2013. Consequently Mr. Harris was convicted approximately six months after the Expedited Order of Removal was entered.

The district court then determined that the applicable sentencing guideline range was 2 - 8 months. The government then asked for an upward variance from the advisory guideline range arguing that the guideline section at issue is in conflict with the statute of conviction because the statute does not require the defendant to be convicted prior to being ordered removed but simply convicted prior to being removed. The government repeated its earlier written argument in support of a variance and again requested that the court consider the equivalent of a 10-level enhancement to the advisory sentencing guideline range which resulted in a guideline imprisonment range of 24 to 30 months.

Mr. Harris responded and repeated his written argument noting that if this case happened one year ago and the prior version of the sentencing guidelines was in effect the guidelines would be similar to what the government suggested since the 2015 version of § 2L1.2 uses as a time reference an individual's physical removal from the United States. The amended version, which is now law, uses the words "ordered removed" instead of "removed" which appeared in the prior version of the guidelines. Mr. Harris was ordered removed before he was convicted. Therefore under the version of the sentencing guidelines which was in effect at the time Mr. Harris was sentenced the enhancement to the advisory guideline range does not apply.

Additionally Mr. Harris noted that the Illinois conviction provided him with three criminal history points based on the length of the sentence and an additional two points because he was on supervision when he improperly returned to the United States. Therefore the prior case was taken into account in determining the applicable criminal history category.

The district court determined that congressional intent was clear and noted that the court has discretion to rule and carry out the intent of Congress. The district court granted the government's Motion for Upward Variance and agreed to sentence Mr. Harris as though the 10-level enhancement applied to his case. Mr. Harris was then sentenced to the custody of the Bureau of Prisons for a term of 24 months which is followed by one year of supervised release.

REASON FOR GRANTING THE WRIT

I.

A District Court Disregards Congressional Intent and Fails to Impose a Reasonable Sentence When it Applies an Upward Variance to the Advisory Sentencing Guideline Range Based Upon Factors Which Were Removed as a Basis For Sentence Enhancement Pursuant to Amendments Which Were Made to the Applicable Guideline Section.

"When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, just give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842-43 104 S. Ct. 2778, 2781-82 (1984).

Here, although *Chevron, U.S.A.* pertains to an agency's interpretation of a statute, the issue before the court regarding Congressional intent is the same. In

this case, Congress has directly spoken to the precise question at issue in this case by permitting the guideline section at issue to be amended without change thereby eliminating from consideration by the sentencing court the precise basis that the Government urges the sentencing court to utilize to enhance Mr. Harris' sentence. There is no room for judicial interpretation of the guideline amendment – the provision of the guidelines which would have provided the enhancement sought by the government, although applicable in 2015, was eliminated by the sentencing commission in 2016.

A district court abuses its discretion when it varies from the advisory sentencing guideline range based upon a prior conviction which no longer qualifies as a basis for sentence enhancement. In reviewing a sentencing decision, we must ensure procedural and substantive reasonableness. *Gall v. United States*, 552 U.S. 38, 51, 128 S.Ct. 586, 597 (2007). Factors in determining procedural reasonableness include, for example, whether the district court properly calculated the guideline range and considered the § 3553(a) factors. *Id.* Once we determine that the sentence is procedurally reasonable, we must then consider the substantive reasonableness of the sentence. *Id.* A sentence may be substantively unreasonable if, under the totality of the circumstances, it does not achieve the purposes stated in § 3553(a). *United States v. Pugh*, 515 F.3d 1179, 1191 (11th Cir. 2008).

In this case the final version of Mr. Harris' Presentence Investigation report (PSI) calculated his advisory sentencing guideline range as follows: the base offense level (pursuant to U.S.S.G. § 2L1.2) is 8. There were no enhancements or decreases

for specific offense characteristics, victim -related adjustments, role in the offense or obstruction of justice. Mr. Harris' adjusted offense level is 8. After application of a two-level adjustment for acceptance of responsibility by virtue of his entry of a guilty plea, Mr. Harris' total offense level is 6.

Mr. Harris has five criminal history points which results in a criminal history category of III. His criminal history is based upon a guilty plea and sentencing in Cambridge, Illinois on June 13, 2013 for which he received an eight year sentence and three years of supervised release. An offense level of 6 and the criminal history category of III resulted in an advisory sentencing guideline range of 2 to 8 months.

The sentencing guidelines which were in effect when Mr. Harris was convicted in this case provide in part:

If, *before the defendant was ordered deported or ordered removed from the United States for the first time*, the defendant sustained -

(A) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was five years or more, increase by 10 levels;….

See U.S.S.G. § 2L1.2(b)(2)(A) United States Sentencing Guidelines Manual (effective November 1, 2016). (Emphasis supplied).

Mr. Harris did not qualify for this enhancement. He was ordered removed from the United States on December 12, 2012; however, he was not convicted of the Illinois offense until June 13, 2013, i.e. six months after the order of deportation. Therefore the 10-level guideline enhancement pursuant to U.S.S.G. §2L1.2(b)(2)(A) does not apply.

The prior version of § 2L1.2 which appears in the Sentencing Guidelines Manual which became effective on November 1, 2015 provides for a base offense level of 8. Thereafter § 2L1.2(b)(1)(A) [specific offense characteristics] provides for a 16-level enhancement *"if the defendant previously was deported, or unlawfully remained in the United States*, after:

(A) a conviction for a felony that is (1) a drug trafficking offense for which the sentence imposed exceeded 13 months; …." *See* United States Sentencing Guidelines Manual, effective November 1, 2015. (emphasis supplied).

In 2016, the United States Sentencing Commission amended § 2L1.2 in part by changing "if the defendant previously ***was deported*** … after a conviction…" to "if, before the defendant ***was ordered deported or ordered removed*** …". The Sentencing Commission's amendment to § 2L1.2 no longer qualified Mr. Harris for a sentence enhancement because he was not convicted before he was ordered deported. Therefore, by applying the equivalent of a 10-level enhancement to Mr. Harris' advisory guideline range, the district court has sentenced Mr. Harris as if the guideline had not been amended and as if the Sentencing Commission had not specifically removed the verbiage by which the enhancement would otherwise apply.

"The Sentencing Commission … instructed sentencing judges to "use the Guidelines Manual in effect on the date that the defendant is sentenced," regardless of when the defendant committed the offense, unless doing so 'would violate the *ex post facto* clause'. U.S.S.G. § 1B1.11. And therefore when the Commission adopts new, lower Guidelines amendments, those amendments become effective to

offenders who committed an offense prior to the adoption of the new amendments but are sentenced thereafter." *Dorsey v. United States*, 567 U.S. 260, 275, 132 S.Ct. 2321, 2332 (2012).

Below, the Government relied on the Eleventh Circuit's opinion in *United States v. Zelaya*, 293 F.3d 1294 (11th Cir. 2002) in which the appellate court found that "deportation" means a defendant's physical removal from the United States. *Id.* at 1298. Mr. Harris respectfully notes that the Eleventh Circuit's opinion was a correct interpretation of the law when the case was decided in 2002 and is consistent with an interpretation of § 2L1.2 prior to the 2016 amendment. In 2016, § 2L1.2 was amended and the *Zelaya* interpretation of deportation and its validity toward the proper interpretation of the new version of the guideline no longer applies.

Title 28, United States Code, § 994(p) provides:

> The [sentencing] commission, at or after the beginning of a regular session of Congress, but not later than the first day of May, may promulgate under subsection (a) of this section and submit to Congress amendments to the guidelines and modifications to previously submitted amendments that have not taken effect, including modifications to the effective dates of such amendments. Such an amendment or modification shall be accompanied by a statement of the reasons therefor and shall take effect on the date specified by the commission, which shall be no later than 180 days after being so submitted and no later than the first day of November of the calendar year in which the amendment or modification is submitted, except to the extent that that the effective date is revised or the amendment is otherwise modified or disapproved by act of Congress.

In this case, the amendment to § 2L1.2 became effective on November 1, 2016 without modification or disapproval by Congress. Congress had the authority and

ability to avert this change: it did not and, therefore, the government is hard-pressed to argue that the amended § 2L1.2 which applies to Mr. Harris' case is not a proper reflection of congressional intent.

A guidelines sentence between 2 and 8 months was appropriate in this case. *See United States v. Hunt*, 526 F.3d 739, 746 (11th Cir. 2008) ("[A]lthough we do not automatically presume a sentence within the guideline range is reasonable, we ordinarily expect a sentence within the guidelines range to be reasonable").

The Eleventh Circuit noted, in part, "the district court did not apply the 10 level enhancement pursuant to Section 2L1.2(b)(2)(A) in the present case. The court, however, did conclude that the advisory guideline range of 2 to 8 months imprisonment was insufficient to punish defendant, an illegal alien who was deported and re-entered the United States after being convicted of a serious crime. We cannot say that the district court abused its discretion by concluding that Defendant's conduct warranted a sentence above the guideline range. See *United States v. Thome*, 611 F.3d 1371, 1379 (11th Cir. 2010) (explaining that a court is free to consider any information relevant to a defendant's background, character, and conduct when imposing an upward variance)." Op. at 8, 9.

However, the sole basis for the significant variance from the advisory guideline range which was argued by the government is that the amended § 2L1.2 failed to properly take into account congressional intent regarding the treatment of aliens with felony convictions who have been ordered deported from the United States. The amendment to § 2L1.2 belies the government's argument since had

congress intended that defendants such as Mr. Harris receive the enhancement it would not have permitted the 2016 change to the guideline. The government's reading of congressional intent is consistent with the 2015 version of § 2L1.2; it is not consistent with the 2016 version.

Mr. Harris recognizes that his sentencing enhancement is based on variance, not application of the former guideline provision; however, when the sole basis for a variance is predicated upon a former version of the guideline which was subsequently amended, and is imposed contrary to clear congressional intent, it is an abuse of discretion to enhance a defendant's sentence in that manner. This renders Mr. Harris' sentence unreasonable and mandates that his sentence be vacated and that this matter be remanded to the district court for re-sentencing.

CONCLUSION

Based upon the foregoing petition, the Court should grant a Writ of Certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

MICHAEL CARUSO
Federal Public Defender

By: *Stewart G. Abrams*
Stewart G. Abrams
Assistant Federal Public Defender
Counsel for Petitioner

Miami, Florida
July 18, 2018

A P P E N D I X

APPENDIX

A-1

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-14814
Non-Argument Calendar

D.C. Docket No. 4:17-cr-10009-JLK-4

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ONEIL ANTHONY HARRIS,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(April 20, 2018)

Before MARCUS, ROSENBAUM, and JULIE CARNES, Circuit Judges.

PER CURIAM:

Defendant Oneil Harris appeals his 24-month sentence, imposed after he pled guilty to illegal reentry after deportation. On appeal, he argues that the district court's upward variance from the guideline range constituted an abuse of discretion. After careful review, we affirm.

I. BACKGROUND

In March 2017, United States Customs and Border Protection officers located a disabled vessel approximately two nautical miles from Tavernier, Florida. The officers boarded the vessel and discovered 11 passengers below deck, none of whom had legal status in the United States or permission to enter the United States. Defendant, a citizen and national of Jamaica, was one of the passengers below deck. A subsequent investigation revealed that Defendant was ordered removed from the United States in December 2012. However, he was not physically removed from the United States until September 2016, following a conviction and imprisonment sentence in Illinois for possession with intent to deliver cannabis.

Defendant was charged with illegal reentry after having been previously deported for an aggravated felony, in violation of 8 U.S.C. § 1326(a), (b)(2). He later pled guilty without the benefit of a plea agreement.

Applying the 2016 Guidelines, the Presentence Investigation Report assigned Defendant a base offense level of 8 pursuant to U.S.S.G. § 2L1.2(a).

Defendant received a two-level reduction for acceptance of responsibility, resulting in a total offense level of 6. He received three criminal history points for a June 2013 conviction in Illinois for possession with intent to deliver cannabis, for which he received an eight-year sentence. The PSR noted that Defendant was arrested in 2002 but failed to appear and was not convicted until 2013. Defendant also received two additional criminal history points because the present offense was committed while he was on parole for the 2013 drug offense, resulting in a criminal history category of III. Based on a total offense level of 6 and a criminal history category of III, Defendant's guideline range was 2 to 8 months' imprisonment.

Prior to the sentencing hearing, the Government filed a motion for an upward variance. Specifically, the Government argued that the 2016 Guidelines provide for a 10-level enhancement under U.S.S.G. 2L1.2(b)(2)(A) if a defendant sustained a conviction for a felony offense and received a sentence of five years or more before the defendant was ordered removed from the United States for the first time. Because Defendant was not convicted of the felony drug offense until after he was ordered removed in 2012, the Government acknowledged that the enhancement did not apply. The Government nevertheless argued that the district court should vary upward as though the enhancement did apply because

Defendant's conduct warranted an increased sentence pursuant to 8 U.S.C. § 1326(b)(2) and the 18 U.S.C. § 3553(a) factors.

At the sentencing hearing, the Government presented testimony from United States Customs and Border Protection Officer Narcisco Fernandez. Officer Fernandez testified about Defendant's June 2013 drug conviction in Illinois and his immigration history. Specifically, Officer Fernandez explained that an expedited order of removal was entered against Defendant in December 2012 after he was apprehended while trying to enter the United States in Dania, Florida. Defendant was not immediately removed at that time because he was extradited to Illinois to face the drug charges stemming from his arrest in 2002. Following Officer Fernandez's testimony, the district court calculated a guideline range of 2 to 8 months' imprisonment.

The Government reiterated that § 2L1.2(b)(2)(A)—which provides for a 10-level enhancement if the defendant was convicted of a felony offense and received a sentence of five years or more before he was ordered removed from the United States—conflicts with § 1326(b)(2), which requires only that a defendant is physically removed from the United States subsequent to a conviction for an aggravated felony. The Government asserted that an upward variance was warranted to punish Defendant for his actions, which involved committing a serious crime, being deported, and then coming back to the United States.

Although the Government clarified that it was not asking for the court to apply the enhancement, it asserted that if the enhancement had applied, Defendant's guideline range would have been 24 to 30 months' imprisonment.

Defendant asserted that the court should deny the Government's motion for an upward variance because he did not qualify for the 10-level enhancement under the 2016 version of the Guidelines due to the fact that he was ordered removed *before* he was convicted of the felony drug offense.

The court granted the Government's motion for an upward variance, concluding that Congress clearly intended to deter aliens who have a prior felony conviction from reentering the United States. The court stated that it would exercise its discretion to vary upward and sentence Defendant within the range that would have been applicable if the 10-level enhancement under the 2016 Guidelines had applied: 24 to 30 months' imprisonment. After considering the 18 U.S.C. § 3553(a) factors, the court sentenced Defendant to 24 months' imprisonment. Defendant objected to the procedural and substantive reasonableness of the upward variance and this appeal followed.

II. DISCUSSION

Using a two-step process, we review the reasonableness of a sentence imposed by the district court for an abuse of discretion. *United States v. Cubero*, 754 F.3d 888, 892 (11th Cir. 2014). We first look to whether the district court

committed any significant procedural error, such as miscalculating the advisory guideline range, treating the Sentencing Guidelines as mandatory, failing to consider the § 3553(a) factors,[1] selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence. *Id.* Then we examine whether the sentence is substantively reasonable in light of the totality of the circumstances. *Id.* The party challenging the sentence bears the burden of showing that it is unreasonable. *United States v. Pugh*, 515 F.3d 1179, 1189 (11th Cir. 2008).

"A district court making an upward variance must have a justification compelling enough to support the degree of the variance and complete enough to allow meaningful appellate review, and this Court will vacate such sentence only if left with the definite and firm conviction that the district court committed a clear error of judgment in weighing the § 3553(a) factors by arriving at a sentence outside the range of reasonable sentences dictated by the facts of the case." *United States v. Dougherty*, 754 F.3d 1353, 1362 (11th Cir. 2014) (brackets and quotations omitted). We "may not presume that a sentence outside the guidelines is

[1] The § 3553(a) factors include: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (3) the need for deterrence; (4) the need to protect the public; (5) the need to provide the defendant with needed education or vocational training or medical care; (6) the kinds of sentences available; (7) the Sentencing Guidelines range; (8) pertinent policy statements of the Sentencing Commission; (9) the need to avoid unwarranted sentencing disparities; and (10) the need to provide restitution to victims. 18 U.S.C. § 3553(a).

unreasonable and must give due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance." *United States v. Irey*, 612 F.3d 1160, 1187 (11th Cir. 2010) (quotations omitted).

Defendant argues that the district court abused its discretion by imposing a 24-month sentence, which reflected a 16-month upward variance from the top of the guideline range of 2 to 8 months' imprisonment. We disagree. Although the upward variance was significant, it is still well below the 20-year statutory maximum sentence. *See* 8 U.S.C. § 1326(b)(2); *see also United States v. Gonzalez*, 550 F.3d 1319, 1324 (11th Cir. 2008) (explaining that a sentence well below the statutory maximum is an indicator of reasonableness).

Moreover, when imposing the 24-month sentence, the district court emphasized Congress's intent in deterring individuals like Defendant, who reenter the United States after being convicted of a serious crime. *See United States v. Zelaya*, 293 F.3d 1294, 1298 (11th Cir. 2002) ("Section 1326(b)(2) mandates a harsher punishment for an alien who, having been deported subsequent to committing an aggravated felony, illegally re-enters the United States." (quotations omitted)). Indeed, Defendant was removed in September 2016 following the completion of his eight-year sentence in Illinois for possession with intent to deliver cannabis. Less than one year later, Defendant illegally reentered the United States in March 2017. The district court considered Defendant's argument that his

motivation for returning to the United States was to see his wife and children but nevertheless concluded that an upward variance was justified by the § 3553(a) factors, including Defendant's history and characteristics, the need for deterrence, and the need to promote respect for the law.

Defendant asserts that the district court abused its discretion by deciding to vary upward based on an enhancement that does not apply to him. According to Defendant, § 2L1.2(b) was amended in 2016 to expressly prevent the sentencing enhancement from applying to defendants like him. The 2016 version of § 2L1.2(b) provides in relevant part for a 10-level enhancement if the defendant sustained a conviction for a felony offense for which the sentence imposed was more than five years "before the defendant was ordered deported or ordered removed from the United States for the first time." U.S.S.G. § 2L1.2(b)(2) (2016) (emphasis added). It is undisputed that because Defendant's June 2013 conviction for possession with intent to deliver cannabis did not occur until after he was issued an expedited order of removal in December 2012, he does not qualify for the 10-level enhancement under § 2L1.2(b)(2)(A).

And to be clear, the district court did not apply the 10-level enhancement pursuant to § 2L1.2(b)(2)(A) in the present case. The court, however, did conclude that the advisory guideline range of 2 to 8 months' imprisonment was insufficient to punish Defendant, an illegal alien who was deported and reentered the United

States after being convicted of a serious crime. We cannot say that the district court abused its discretion by concluding that Defendant's conduct warranted a sentence above the guideline range. *See United States v. Tome*, 611 F.3d 1371, 1379 (11th Cir. 2010) (explaining that a court is free to consider any information relevant to a defendant's background, character, and conduct when imposing an upward variance).

Notably, although Defendant was arrested on the Illinois drug offense in 2002, he was not convicted until 2013. Indeed, he absconded for nearly a decade before he was apprehended by Customs and Border Protection officers while attempting to illegally enter the United States in 2012. Thus, it was through his own conduct that Defendant was able to delay the timing of his conviction. Had Defendant not fled, he presumably would have been convicted on the Illinois drug charge before the order of removal had issued. In other words, his criminal conduct clearly occurred before issuance of that order. Then, following both a drug conviction and his eventual removal in 2016, Defendant illegally reentered the United States in March 2017.

On these facts, the district court's decision to impose an upward variance comports with the purpose of the § 1326(b)(2), which is to provide more severe punishment for the "illegal entry by a deportee who has earlier committed a serious crime while in the United States." *Zelaya*, 293 F.3d at 1298. Under these

circumstances, we are not left with the definite and firm conviction that the district court committed a clear error of judgment in weighing the factors in this case. *See Dougherty*, 754 F.3d at 1362.

To the extent Defendant argues that district court improperly justified the upward variance with factors that were already contemplated by the Guidelines, his argument is without merit. We have stated that "a district court can rely on factors in imposing a variance that it had already considered in imposing an enhancement." *United States v. Rodriguez*, 628 F.3d 1258, 1264 (11th Cir. 2010).

Accordingly, Defendant's sentence is **AFFIRMED**.

A-2

United States District Court

Southern District of Florida

KEY WEST DIVISION

UNITED STATES OF AMERICA

v.

ONEIL ANTHONY HARRIS

JUDGMENT IN A CRIMINAL CASE

Case Number - 4:17-10009-CR-KING-004

USM Number: 15840-104

Counsel For Defendant: Stewart G. Abrams, AFPD
Counsel For The United States: Jessica K. Obernauf, AUSA
Court Reporter: Gizelle Baan-Proulx

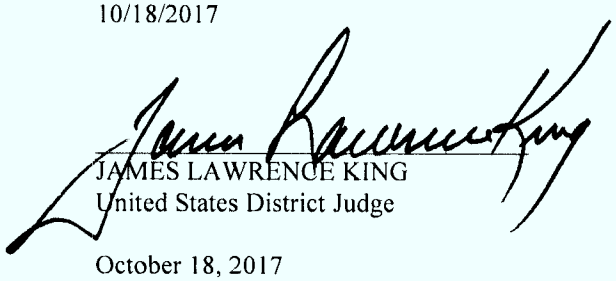
The defendant pleaded guilty to Count Fourteen of the Indictment.
The defendant is adjudicated guilty of the following offense:

TITLE/SECTION NUMBER	NATURE OF OFFENSE	OFFENSE ENDED	COUNT
8 U.S.C. § 1326(a) and (b)(2)	Illegal re-entry after deportation for an aggravated felony	March 12, 2017	14

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of any material changes in economic circumstances.

Date of Imposition of Sentence:
10/18/2017



JAMES LAWRENCE KING
United States District Judge

October 18, 2017

DEFENDANT: ONEIL ANTHONY HARRIS
CASE NUMBER: 4:17-10009-CR-KING-004

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **TWENTY-FOUR (24) Months**.

The Court makes the following recommendations to the Bureau of Prisons:

That the defendant be designated to FCI Miami, or FCI Coleman, Florida.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By: _____
Deputy U.S. Marshal

DEFENDANT: ONEIL ANTHONY HARRIS
CASE NUMBER: 4:17-10009-CR-KING-004

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **ONE (1) Year**.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

If this judgment imposes a fine or a restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first fifteen days of each month;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. The defendant shall notify the probation officer **at least ten (10) days prior** to any change in residence or employment;
7. The defendant shall refrain from the excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
11. The defendant shall notify the probation officer within **seventy-two (72) hours** of being arrested or questioned by a law enforcement officer;
12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

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SPECIAL CONDITIONS OF SUPERVISION

The defendant shall also comply with the following additional conditions of supervised release:

Surrendering to Immigration for Removal After Imprisonment - At the completion of the defendant's term of imprisonment, the defendant shall be surrendered to the custody of the U.S. Immigration and Customs Enforcement for removal proceedings consistent with the Immigration and Nationality Act. If removed, the defendant shall not reenter the United States without the prior written permission of the Undersecretary for Border and Transportation Security. The term of supervised release shall be non-reporting while the defendant is residing outside the United States. If the defendant reenters the United States within the term of supervised release, the defendant is to report to the nearest U.S. Probation Office within 72 hours of the defendant's arrival.

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CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on the Schedule of Payments sheet.

Total Assessment	Total Fine	Total Restitution
$100.00		

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994, but before April 23, 1996.

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SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A. Lump sum payment of **$100.00** due immediately, balance due

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

The assessment/fine/restitution is payable to the CLERK, UNITED STATES COURTS and is to be addressed to:

U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
400 NORTH MIAMI AVENUE, ROOM 8N09
MIAMI, FLORIDA 33128-7716

The assessment is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution,(7) penalties, and (8) costs, including cost of prosecution and court costs.