

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OTIS SYKES
PETITIONER

-vs-

UNITED STATES OF AMERICA
RESPONDENT

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

PETITION FOR WRIT OF CERTIORARI

Otis Sykes
Reg.No. 10758-025
Federal Correctional Institution
P.O. Box 52020
Bennettsville, SC 29512

QUESTION(S) PRESENTED

DEFENDANT SEEKS THIS SUPREME COURT'S REVIEW OF HIS ABOVE GUIDELINES SENTENCE IMPOSED WITHIN AN INCORRECT GUIDELINES RANGE UTILIZING "ADDITIONAL EVIDENCE" WHICH SEVERLY AFFECTS PETITIONER'S SUBSTANTIAL RIGHTS IN LIGHT OF THE RULING IN MOLINA-MARTINEZ V. U.S., 578 U.S. 136 S.C.T. 1338, 194 L.ED. 444 (2016); ROSALES-MIRELES V. U.S. 2018 BL 214344 U.S. NO. 16-9493 (JUNE 18, 2018).

TABLE OF CONTENTS

OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	15
CONCLUSION	29

INDEX TO APPENDICES

APPENDIX - A

Opinion of the United States Seventh Circuit Court of Appeals

APPENDIX - B

Opinion of the District Court (Sentencing Hearing Transcript)

TABLE OF AUTHORITIES CITED

<u>Cases</u>	page(s)
Molina-Martinez v. United States, 578 U.S. 136 S.Ct. 1338 194 L.Ed. 444 (2016) ..	17,25
Roseles-Mireles v. United States, 2018 BL 214344 U.S. No. 16-9493(June 18, 2018)	17,27
U.S. v. Booker, 125 S.Ct. 738 (2005)	15,26
U.S. v. Dominguez-Benitez, 542 U.S. 74, 159 L.Ed. 2d 157, 124 S.Ct. 2333 (2004)	26
U.S. v. Olana, 507 U.S. 725 113 S.Ct. 123 (1993)	26,29
U.S. v. Rita, 127 S.Ct. 2456, 2463 (2007)	16
U.S. v. Schmitt, 495 F.3d 860 (7th Cir. 2007)	23
U.S. v. Wachowiak, 496 F.3d 744 (7th Cir. 2005)	16
 <u>Statutes</u>	
Title 18 U.S.C. § 3553(a)	2,15
 <u>Constitutional Amendments</u>	
Fifth Amendment	2,21
Sixth Amendment	2,21

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari will issue to review the judgement below.

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at Appendix A to the petition and is reported at:

United States of America versus Joseph Faulkner and Otis Sykes
885 F.3d 488; 2018 U.S. App. LEXIS 6758 Nos. 16-2860 & 16-3525
January 11, 2018 Argued, March 19, 2018 Decided.

The opinion of the United States District Court appears at Appendix B to the petition and is unpublished.

JURISDICTION

The date on which the United States Court of Appeals decided my case was March 19, 2017. No petition for rehearing was timely filed in my case. A re-submission was granted by the Clerk.

The jurisdiction of this Supreme Court of the United States is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

FIFTH AMENDMENT: "No person shall be held to answer for a capital, or other wise infamous crime, unless on a presentment or indictment of a Grand Jury ... nor be deprived of life, liberty, or property, without due process of law; ..."

SIXTH AMENDMENT: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him; .."

Title 18 U.S.C. § 3553(a):

(a) Factors to be considered in imposing a sentence. The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The Court, in determining the particular sentence to be imposed shall consider;

(1) The nature and circumstances of the offense and history and characteristics of the defendant;

(2) The need for the sentence imposed-

(A) to reflect the seriousness of the offense; to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence for criminal conduct;

(C) to protect the public from further crimes of the defendant;

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

STATEMENT OF THE CASE

Otis Sykes was charged in a superseding indictment in the United States District Court for the Northern District of Illinois, along with twenty three (23) others in a several years long widespread narcotics conspiracy involving the Imperial Insane Vice Lords street gang. Otis Sykes, however, was not a member of the Imperial Insane Vice Lords. Otis Sykes was charged in Count 9 with conspiracy to distribute controlled substances in violation of 21 U.S.C. § 846 and with 7 counts of distribution of a small amounts of heroin and cocaine base in violation of 21 U.S.C. § 841(a)(1), Counts 11-12, 15, 18-21.

Otis Sykes filed a motion to suppress the statement he made to law enforcement when he was interviewed in the Illinois Department of Corrections. On March 31, 2015, the court held a hearing on the motion to suppress and on May 15, 2015, denied the motion.

On December 8, 2015, after a bench trial, Otis Sykes was found guilty of all counts of violating 21 U.S.C. § 841(a)(1) and § 846. Judge Bucklo went on to find that Otis Sykes was accountable for less than one-hundred (100) grams of heroin.

The trial evidence is only summarized here, as a detailed recitation is not necessary to the resolution of this writ of certiorari. The trial evidence, including Otis Sykes' statement to law enforcement, established that Otis Sykes began working as a street worker at the Keystone Drug Market in 2003. Joseph Faulkner supplied the heroin and it was sold in jabs, which were thirteen (13) \$10.00 bags. Each jab contained approximately

one (1) gram of heroin. Sykes worked the drug market with Nick Davis, Kyle Pagan, and Deshaun Brown. Sykes sold five (5) or six (6) jabs (grams) per day. There were ten (10) to twelve (12) others working at the drug market.

Sykes quit working for the drug market when he was arrested and convicted for heroin trafficking in March 2005. Sykes returned to selling for the Keystone Drug Market in 2008 and continued until his arrest in 2011. In total, Otis Sykes was responsible for distribution of 7,840 grams of heroin between 2003 and 2005, and in 2008-2011. (The aforementioned facts are taken from Otis Sykes' statement to law enforcement and the Government's version).

The evidence also established that Otis Sykes distributed heroin and crack cocaine to undercover officers at or near the Keystone Drug Market on February 9, 2008 (.8 grams of heroin); October 11, 2009 (heroin); December 29, 2010 (heroin-count 11); January 8, 2011 (heroin-count 12); May 11, 2011 (heroin-count 15); June 30, 2011 (crack cocaine with Jasmine McClain-count 18); June 30, 2011 (heroin with Jasmine McClain-count 19); July 5, 2011 (crack cocaine with Jasmine McClain-count 20); July 5, 2011 (heroin count-19).

A Pre-Sentence Investigation Report (hereinafter PSR) was prepared. The PSR concluded that Otis Sikes was accountable for between three (3) and ten (10) kilograms of heroin, specifically 7,840 grams between 2003-2005 and 2008-2011 and applied guideline section U.S.S.G. 2D1.1(c)(4) for a base offense level of thirty-two (32). It declined to apply U.S.S.G. 2D1.1(b)(1) enhancement

for maintaining a premises for distribution of a controlled substance; and any U.S.S.G. 3E1.1 reduction for acceptance of responsibility.

The PSR determined that Otis Sykes had two (2) criminal history based on a conviction and sentence for possession of Cannabis resulting in a criminal history category of 11. In so finding, the PSR determined that seven (7) of Otis Sykes' eight (8) convictions and sentences for controlled substance offenses, specifically three deliveries of controlled substances and four (4) possession of Cannabis, were relevant conduct and/or part of the charged conspiracy. The PSR calculated the advisory sentencing guideline range as one hundred thirty five to one hundred sixty eight (135-168) months. The PSR also reflected that the Government intended to introduce evidence of Otis Sykes' involvement in the shooting murder of Andre Brown (Thuggish).

The Court held evidentiary hearings relative to Otis Sykes' participation in the Andre Brown murder on May 31, 2016 and June 16, 2016. At the May 31st hearing the following evidence was adduced: Sharon Stone testified that she was present on Keystone shooting dice with Vel, Marcus, and Cha Cha when Thuggish was shot to death. She heard shots from the other side of the street and got on the ground. A few seconds later she looked up and saw two (2) men in hoodies head through the gangway. She did not see the men fire any shots and does not recall telling detectives that Otis Sykes was one of the persons who shot Thuggish. Neither Vel, Marcus, nor Cha Cha shot Thuggish.

At the June 16th hearing, after objections to the consideration of uncharged conduct, the following evidence was adduced: Jackie Tyler testified pursuant to a letter of immunity and with the hopes of receiving a reduced sentence, that although he was a Mafia Insane Vice Lord he sold narcotics with Imperial Insane Vice Lords members, including Cha Cha and Marcus on Keystone. Otis Sykes was not a member of either gang.

About a week prior to the murder of Thuggish, Thuggish had robbed Otis Sykes of money and marijuana. Thuggish also insulted Sykes' mother and an argument ensued. The day of the shooting, Thuggish and Shorty (not Sykes) got into an argument and Thuggish threatened to kill Shorty.

On the day Thuggish was killed, June 22, 2012, Tyler was on the porch at 1121 N. Keystone looking at his cell phone when he heard a shot and saw Otis Sykes with a gun. Shorty, who also had a gun stood in front of Sykes. Tyler dove in the front yard and didn't hear anything except two or three additional shots. Tyler did not see Thuggish get shot and only later learned it was Thuggish who had been shot.

Tyler did not like Thuggish, as Thuggish had shot him and five others, killing one and stole from and extorted people. He and Cha Cha were happy when they found out Thuggish, who usually carried a gun, had been shot. Tyler had thirteen (13) felony convictions and used heroin everyday.

The Government also introduced into evidence, over objection, the grand jury statements of Charles vaughn and Nick Davis. Nick Davis had previously recanted his grand jury testimony. The Court

indicated it would "give it what weight I think it should be given". Vaughn's statement was to the effect that Shorty ran out of a gangway followed by Otis Sykes and Shorty shot Thuggish in the head. While Thuggish was lying on the ground Shorty and Sykes fired several more shots. Vaughn corroborated that Thuggish had robbed Sykes and insulted his mother and that was why Shorty shot Thuggish. Vaughn admitted that he lied to the police by saying he was in the house at the time of the shooting and thus seeing nothing and that he only heard what had happened.

The Government filed an objection to the PSR arguing that a U.S.S.G. 2D1.1(b)(12) enhancement for maintaining a premises for distribution of controlled substance was appropriate. The Government also filed a sentencing memorandum, taking the position that when the two (2) level U.S.S.G. 2D1.1(b)(12) enhancement is applied in addition to the drug quantity determined in the PSR and a criminal history category of 11, the advisory sentencing guideline range was one hundred sixty eight to two hundred ten (168-210) months. After setting forth the facts regarding the Thuggish murder as presented at both May 31, 2016 and June 16, 2016 evidentiary hearings, Otis Sykes' criminal history, and the 18 U.S.C. § 3553(a) factors the Government argued that a twenty five (25) year sentence was appropriate.

Otis Sykes filed a sentencing memorandum wherein he did not object to the PSR's conclusion that he was accountable for between three (3) and ten (10) kilograms of heroin and thus the base offense level was thirty two (32), but he argued that based on the Court's determination that the Government had proven less than

one hundred (100) grams of heroin at trial, the base offense level should be twenty two (22). Otis Sykes also took the position that the U.S.S.G. 2D1.1(b)(12) enhancement for maintaining a premises for distribution of a controlled substance should not be applied. Otis Sykes also denied any involvement in the murder of Thuggish; that his involvement was not supported by credible evidence and that the testimony presented at the evidentiary hearing was unreliable.

Otis Sykes also argued under 18 U.S.C. § 3553(a) that he was not a member of any street gang; that his criminal history did not include crimes of violence; that he truthfully admitted to drug dealing; his troubled upbringing; his being only a small time, street corner, small quantity drug dealer; that he should receive credit for time served in state custody for possession of heroin with intent to deliver which was part of the instant conspiracy, and based on the sentence of co-defendants, any sentence at or near the guideline range would present unwarranted sentencing disparity. Otis Sykes asked for a sentence "well below the advisory guideline range."

The first sentencing Hearing took place on July 1, 2016. At that hearing, while discussing drug quantities and the length of time Otis Sykes was selling drugs for the conspiracy, the issue arose as to whether if not considered relevant conduct, the seven (7) controlled substance convictions and sentences would result in criminal history points and thus a higher criminal history category and therefore a higher advisory sentencing guideline range. The Court asked for additional

briefing on the aforementioned issues. Before concluding the hearing, Judge Bucklo stated that "there is a preponderance of the evidence that Mr. Sykes participated in this murder. How much I will take that into account is, frankly, pretty little." "But I'm not going to add a lot of time for -".

The Government filed a supplemental sentencing memorandum in which they argued that the base offense level should be thirty two (32), treating the 2003-2005 as well as the 2008-2011 narcotics dealing as relevant conduct, with a criminal history of II. In the alternative they argued that if only the 2008-2011 sales are considered relevant conduct the base offense level would be thirty (30) with a criminal history category of III.

Otis Sykes filed a response to the Government's supplemental sentencing memorandum wherein he objected to the Government's proposed recalculation of drug quantities and the manner in which they arrived at them, maintaining that based on the Court's determination that the Government had proven less than one hundred (100) grams of heroin the base offense level should be twenty two (22) and that the U.S.S.G. 2D1.1(b)(12) enhancement for maintaining a premises for distribution of a controlled substance should not be applied.

The second sentencing hearing took place on August 10, 2016. At that hearing, the supplemental PSR was discussed. The supplemental PSR determined that if not considered to be relevant conduct, the seven (7) controlled substance convictions and sentences would result in eleven (11) criminal history points and with the addition of two (2) points pursuant to U.S.S.G. 4A1.1(d) would total 13

thirteen and the criminal history category would be VI. Further, counting the aforementioned convictions would result in application of the career offender provisions of U.S.S.G. 4B1.1. Under either scenario a criminal history category of VI with an offense level of thirty-two (32) would result in an advisory guideline range of two hundred ten to two hundred sixty two (210-262) months rather than one hundred thirty five to one hundred sixty eight (135-168) months. The Court again asked for additional briefing. Before concluding the hearing the Government announced that it was conceding that U.S.S.G. 2D1.1(b)(12) enhancement for maintaining a premises for distribution of a controlled substance should not be applied.

The Government filed a second supplemental sentencing memorandum in which they argued that the offense level should be thirty two (32) under any circumstance, but if relevant conduct began in 2003 the criminal history category would be II with an advisory guideline range of one hundred thirty five to one hundred sixty eight (135-168) months, but if relevant conduct began in 2008 the criminal history category would be VI as a career offender with an advisory guideline range of two hundred ten to two sixty two (210-262) months.

Otis Sykes filed a response to the Government's second supplemental sentencing memorandum wherein he reiterated his position that he did not object to the PSR drug quantity calculation (level 32 based on 3-10 kilograms) for guideline purposes, but only for 18 U.S.C. § 3553(a) purposes and that the appropriate criminal history category should be II, with

the seven (7) controlled substance convictions and sentences providing no criminal history points as they constitute relevant conduct.

The third sentencing hearing took place on September 15, 2016. At that hearing, Otis Sykes made clear that he was not disputing the PSR's determination that the offense level was thirty two (32) and that the criminal history category was II, as no criminal history points attach to the seven (7) of eight (8) controlled substance convictions and sentences as they constitute relevant conduct and that any arguments relating to drug quantity were related solely to the 18 U.S.C. § 3553(a) factors. All agreed that the resulting advisory guideline range was one hundred thirty five to one hundred sixty eight (135-168) months.

The Government argued for a sentence of two hundred twenty six (226) Months which represented their belief that a sentence of two hundred forty (240) months less credit for the fourteen (14) months Otis Sykes spent in state custody for possession of heroin with intent to deliver which was relevant conduct to the instant conspiracy. The basis for that recommendation was Otis Sykes' participation in the murder of Thuggish, which was in relation for Thuggish robbing Sykes. They stressed that that type of private justice that was rampant on the streets of Chicago between rival gangs and drug dealers.

The Government also stressed that Otis Sykes could have gotten out of the drug trade many times after his arrests and sentences, but yet he kept coming back to Keystone to sell drugs. That even after he moved out of the neighborhood he came back to sell drugs. The same behavior again and again. The Government

argued that the aforementioned made Otis Sykes different from the other street level drug dealers in this case, pointing to McClain and Watkins. Lastly, the Government pointed to the amount of drugs Sykes was accountable for, his prior convictions which had posed no deterrence and his near career offender status, as the basis for an above guideline sentence of two hundred twenty six (226) month sentence, which it pointed out was within what would have been within Mr. Sykes career offender guideline range of two hundred ten to two hundred sixty two (210-262) months.

The defense argued that the sentence requested by the Government was based on uncharged and unproven conduct and is thus unfair and inappropriate and while it does not violate the letter of Apprendi v. New Jersey, it violates the spirit of it. The defense argued the motives of others to kill Thuggish and the credibility of the witnesses to the murder. The defense again argued that Otis Sykes was a street level dealer selling small quantities and should be sentenced as such and to do otherwise would create a massive sentencing disparity; that while he has a significant criminal history there are no weapons or violence related convictions; that he never denied his drug dealing to agents or the probation officer or at trial; the effect of the sudden death of his mother and drug abuse of his father on Otis Sykes; and that he should receive credit for the fourteen (14) months spent in state custody for possession of heroin with intent to deliver which was part of the relevant conduct to the instant conspiracy. Otis Sykes spoke very briefly in allocution.

Judge Bucklo adopted the advisory sentencing calculations as

set forth in the PSR and as agreed to by the parties, specifically a guideline range of one hundred thirty five to one hundred sixty eight (135-168) months.

The Court addressed the 3553(a) factors. In addressing the nature and circumstances of the offense the Court noted that it was years and years of a drug conspiracy filled with violence. In addressing the history and characteristics of the defendant the Court notes that Otis Sykes had not learned from his prior convictions and sentences and just kept coming back even after he was robbed by Thuggish. That it was possible he could be a career offender. The Court reiterated that it found that Otis Sykes participated in the murder, but despite that it was "not going to treat it in the same way that I might treat other murders because I know about Andre Brown. But the Government, of course, is also correct that that doesn't justify murder." The Court also stated that Otis Sykes had not accepted responsibility as he still denied that he was part of the conspiracy.

The Court went on to state that the sentence had to reflect the seriousness of the offense, promote respect for the law and provide just punishment for the offense as well as adequate deterrence and to protect the public from further crimes by Otis Sykes, the time spent in state custody, and to provide Otis Sykes with educational and vocational training and drug treatment.

The Court, for all of the aforementioned reasons did not believe that the guideline range of one hundred thirty five to one hundred sixty eight (135-168) months adequately take into

account all of Otis Sykes' conduct, history and length of participation. Judge Bucklo then imposed a total concurrent guideline sentence of one hundred ninety five (195) months, a total concurrent three (3) year term of supervised release, and an eight hundred dollar (\$800.00) special assessment.

On September 26, 2016, Otis Sykes filed a timely notice of appeal to the Seventh Circuit Court of Appeals. On January 11, 2018, the Court of Appeals heard oral arguments in the case. On March 19, 2018, the Court's decision was handed down affirming Sykes conviction and sentence.

REASONS FOR GRANTING THE PETITION

Otis Sykes above guidelines sentence of one hundred ninety five months (195) is unreasonable because in imposing it, the district court misapplied the mandatory factors under Title 18 U.S.C. § 3553(a) by improperly relying on Otis Sykes' criminal history which was relevant conduct to and/or part of the offense of conviction and Otis Sykes' alleged participation in the uncharged murder of Thuggish. The district court also failed to account for the unwarranted disparity in sentences between Otis Sykes and others similarly situated. Overall, the sentence imposed was longer than necessary to meet the sentencing goals under § 3553(a)(2).

This Supreme Court's decision in United States v. Booker, 125 S.Ct. 738 (2005), requires the sentencing judge first to compute the guidelines just as he would have done before Booker, and then because Booker demoted the guidelines from mandatory to advisory status, to decide whether the guideline sentence is the correct sentence to give the defendant. Booker sentencing discretion is exercised in accordance with the sentencing factors specified in 18 U.S.C. § 3553(a), which in pertinent part provides:

(a) factors to be considered in imposing a sentence. The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The Court, in determining the particular sentence to be imposed shall consider-

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed-

- (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
- (B) to afford adequate deterrence to criminal conduct
- (C) to protect the public from further crimes of the defendant; and
- (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

3553(a), unlike the guidelines themselves after Booker, is mandatory. The sentencing judge cannot, after considering the factors listed in the statute, import his own philosophy of sentencing if it is not consistent with them. "But 3553(a) factors are broad, vague and open ended." United States v. Wachowiak, 496 F.3d 744 (7th Cir. 2005). "The sentencing Judge has considerable discretion to individualize the sentence to the offense and the offender as long as the Judge's reasoning is consistent with 3553(a)" United States v. Rita, 127 S.Ct. 2456, 2463 (2007).

In arriving at Otis Sykes' sentence, the district court, by adopting the PSR's calculations found that Otis Sykes was accountable for between three (3) and ten (10) kilograms of heroin, specifically 7,840 grams and applied guideline section U.S.S.G. 2D1.1(c)(4) for an offense level of thirty two (32), with no U.S.S.G. 2D1.1(b)(12) enhancement for maintaining a premises for distribution of a controlled substance; no U.S.S.G. 2D1.1(b)(1) enhancement for possessing a dangerous weapon; and no U.S.S.G.

3E1.1 reduction for acceptance of responsibility. With a criminal history category of II the advisory sentencing guideline range was one hundred thirty five to one hundred sixty eight (135-168) months.

Yet the district court imposed an above guidelines sentence of 195 months. What is at issue is the district court's subsequent reliance upon: A. Otis Sykes criminal history. B. The alleged participation of Sykes in the Thuggish murder. C. The district court's unwarranted disparity in sentences between Sykes and other co-defendants similarly situated.

In approaching this Supreme Court regarding the imposition of an above guidelines sentence of 195 months, when Sykes faced by relevant sentencing criteria, a sentence within a guidelines range of 135 to 168 months, this Court's decisions in Molina - Martinez v. United States, 578 U.S. 136 S.Ct. 1338, 194 L.Ed. 444 (2016) and Rosales-Mireles, 2018 BL 214344, U.S. No. 16-9493, (June 18, 2018). In Molina-Martinez, it was held; "Courts reviewing Guidelines errors cannot apply a categorical "additional evidence" rule in cases, like this one, where a district court applies an incorrect range but sentences the defendant within the correct range." In Rosales-Mireles, it was held; "A miscalculation of a Guidelines sentencing range that has been determined to be plain and to affect a defendant's substantial rights calls for a court of appeals to exercise it's discretion under Rule 52(b) to vacate the defendant's sentence in the ordinary case."

Sykes^{*} calculated base offense level of 32 with a criminal history of II, corresponded to a sentencing range of 135 to 168 months. The district court's determination of a 195 months sentence

corresponds to a base offense level of 36 with a criminal history category of II, sentencing guidelines range of 210 to 262 months. The district court utilized this sentencing range at the lowest end of 210 months, minus credit for Sykes time served in the Illinois Department of Corrections for a state sentence in connection with the federal offense of conviction, a 15 months reduction in arrival and determination of the 195 month sentence. Yet this deviation of 4 levels upward, construing an above guidelines sentencing, violated Sykes' substantial rights regarding the sentence imposed, in light of Molina-Martinez, and Rosales-Mireles. It is not our position that the district court did miscalculate the advisory sentencing guidelines or the advisory guideline range. It is Sykes' argument that the district court after properly calculating the advisory guideline range failed to properly consider the mandatory § 3553(a) factors and as a result imposed an unreasonable above guidelines sentence than necessary to meet § 3553(a)'s goals of sentencing. To meet this goal of sentencing Sykes to an above guidelines sentence, the district court considered the following in violation of Sykes' substantial rights:

Otis Sykes Criminal History

With respect to Otis Sykes' criminal history, it is undisputed that Sykes has ten convictions, including eight convictions and sentences for controlled substance offenses, specifically three deliveries of controlled substances and five possessions of Cannabis. It is also undisputed that only one of those convictions resulted in criminal history points as all the others were

considered either part of and/or were relevant conduct to the charged conspiracy.

It is clear from the district court's comments that the court placed substantial weight on Sykes' criminal history in arriving at Sykes' sentence. "It's a very lengthy history", "he really could have been sentenced as a career offender", "you kept coming back there .. selling drugs", "You know, you had been arrested, you had been prosecuted, you pled guilty. You've gone to jail. And each time you came out, and you went back to it"

At first blush it could be said that there should be absolutely nothing improper about using a defendant's criminal history to increase a defendant's sentence. Further reflection dispels that notion in this case, because Sykes' criminal history (with one exception) is part and parcel of the multi-year narcotics distribution conspiracy he was convicted of. Sykes' prior convictions were for drug dealing which formed the basis for his participation in the charged conspiracy. Thus his participation in the conspiracy was improperly relied upon by the district court to increase his sentence for participation in the conspiracy. The Sentencing Guidelines themselves support the proposition that prior convictions which are considered part of the offense of conviction (relevant conduct) should not be used to increase a sentence. See U.S.S.G. 4A1.2(a)(1) excluding from the term "prior sentence" conduct that is part of the instant offense and thus excluding criminal history points for conduct part of the instant offense.

Sykes' argument on appeal before the Seventh Circuit concerning

this issue was that the district court gave too much weight to his criminal history at arriving at his above guidelines sentence. Most of the prior convictions were for drug distribution which were subsumed into the conspiracy charge. Thus these were thus already considered in arriving at the Guidelines range, and should not have been used to further increase his sentence.

The appeals court to the above referenced contentions cited that; "Sykes does not dispute his criminal history. The presentence report discusses an extensive history with ten convictions, that span nine years, with eight of those for drug related offenses. But Judge Bucklo was primarily concerned with the length of the history, and the pattern of offenses, namely Sykes never learned to leave the drug dealing life behind even after so many convictions." Despite the appeals court's affirmance of the use of the prior convictions by the district court in rendering an above guidelines sentence, still it was improper because the alleged priors, as argued, were part of and subsumed into the conspiracy charge. It is also respectfully submitted that the district court's reliance on Otis Sykes' criminal history which was part and parcel of the offense of conviction, to increase his sentence was improper and resulted in a sentence that was greater than necessary and a violation of Sykes' substantial rights as well.

Alleged Participation In The Thuggish Murder

Otis Sykes was never charged with the murder of Thuggish. Otis Sykes was never indicted by a grand jury for the murder of Thuggish. Nor was Otis Sykes ever tried by a jury of his peers

concerning any alleged participation involving the murder of Thuggish. A jury was never required to find guilt beyond a reasonable doubt. Otis Sykes was not afforded the opportunity to confront all the witnesses against him in violation of his Sixth Amendment rights of:

"In all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him;..."

In fact, the hearsay grand jury statements of Charles Vaughn and Nick Davis were admitted into evidence against Otis Sykes. These statements were unreliable as Nick Davis had recanted his grand jury testimony and Vaughn admitted he lied to the police about what he saw and/or heard about the murder. For this, Otis Sykes, as mentioned, was never indicted by a grand jury for this murder of Thuggish, and the use of "pretty little" weight the district court gave this in determining Sykes' sentence violated Sykes' Fifth Amendment rights concerning:

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury....nor be deprived of life, liberty, or property, without due process of law;"

It is respectfully submitted that Sykes' alleged participation in the Thuggish murder deserved no weight and contrary to Judge Bucklo's statements that she would give it "pretty little" weight and I'm not going to add a lot of time for.. Judge Bucklo gave Sykes alleged participation in the Thuggish

murder substantial weight, weight sufficient to require in her mind a substantially above guidelines sentence. It is respectfully submitted that any weight Judge Bucklo gave to Sykes alleged participation in the Thuggish murder resulted in a sentence that is greater than necessary and unreasonable.

The appeals court's reasoning and affirmance of an above guidelines sentence in relation to the Judge's consideration of the Thuggish murder and Sykes alleged participation cited: "The Government intention to introduce evidence of uncharged conduct, namely the murder of Andre Brown (Thuggish). Thuggish was a Double I member and engaged in various acts of extortion and violence in the Keystone area. He had also robbed Sykes about a week prior to his death. He was killed on the street by two hooded men on June 22, 2012. The district court held multiple evidentiary hearings on the Thuggish murder. It took testimony from several witnesses who placed Sykes at the scene with a gun, though none saw him actually shoot Brown. Sykes contends that the witnesses lacked credibility and that someone else likely killed Thuggish. It appears that Sykes' primary point is that Judge Bucklo should have given little or no weight to the Brown murder as an enhancement. We must, however, take Judge Bucklo at her word when she said it was given little weight. Judge Bucklo mentioned the murder at the final sentencing hearing and that she would give it less weight than what one would expect from such a serious offense."

Despite the appeals court's reasoning, Sykes was never charged with the Thuggish murder and the use of it by the district

court was imposed in an arbitrarily manner in determining Sykes' above guidelines sentence of 195 months.

UNWARRANTED DISPARITY IN SENTENCING

One of the mandatory factors a Judge is required to consider is "the need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct. 18 U.S.C. § 3553(a)(6); United States v. Schmitt, 495 F.3d 860 (7th Cir. 2007).

With respect to the unwarranted disparity in sentences between Otis Sykes and similarly situated co-defendants, Sykes took the position that he is similarly situated with street level dealers Lafayette Goins, who was sentenced to 48 months; Talbot Shields, who was sentenced to 75 months; Orlando Martin, who was sentenced to 60 months; Marcus Minor, who was sentenced to 36 months; Darrell Pitts, who was sentenced to 64 months; Lorenzo Bailey, who was sentenced to 25 months; Sarah Watkins, who was sentenced to 3 years of probation; and most similarly situated to Jasmine McClain, who was sentenced to 21 months and that he should be sentenced accordingly.

The government took the position that because of Sykes' alleged participation in the Thuggish murder, no other defendant is similarly situated to Otis Sykes. Judge Bucklo did not address the issue of sentence disparity. She did not even attempt to explain or justify the disparity between the aforementioned non-cooperation sentences and the 195 month sentence she was imposing on Sykes. The Judge did not even attempt to explain and justify the disparity between the sentences imposed on Jasmine McClain

and Sarah Watkins and Otis Sykes who were all charged with the very same narcotics conspiracy (count 9) and similar distribution counts involving small quantities of narcotics. Judge Bucklo did not even attempt to explain and justify the disparity between the sentences imposed on Sykes (195 months) and McClain (21 months) who were often literally standing side by side making similar sales of small quantities as alleged in Counts 18, 19, 20, and 21, and who also had numerous controlled substance convictions.

Judge Bucklo did not even attempt to explain and justify the disparity between the 195 month sentence imposed on Sykes and the 164 month sentence imposed on Kyle Pagan. Like Sykes, Pagan was found to have a base offense level of 32 based on the amount of drugs they were accountable for. Unlike Sykes however, Pagan received a 2 level enhancement for possession of a firearm in furtherance of the conspiracy pursuant to U.S.S.G. 2D1.1(b)(1) and a 3 level enhancement for being a manager or supervisor, pursuant to U.S.S.G. 3B1.1(b). Pagan had an adjusted offense level of 37 while Sykes had an adjusted offense level of 32. Pagan was in criminal history category III while Sykes was in criminal history category II. Pagan's advisory guideline range was 262 to 327 months, while Sykes advisory guideline range was 135 to 168 months.

Despite the similarities and aggravating factors applicable to Pagan and Pagan's higher advisory guideline range, Judge Bucklo did not even attempt to explain and justify the disparity between the 195 month sentence she imposed on Sykes and the 164 month sentence she imposed on Kyle Pagan.

Judge Bucklo did not even address why the far more severe sentence imposed on Sykes and the aforementioned disparate sentences imposed on similarly situated co-defendants did not result in a sentence that was greater than necessary to promote the goals of sentencing. It is respectfully submitted that Judge Bucklo's failure to even attempt to explain and justify the disparity between the 195 month sentence imposed on Sykes and the sentences of the similarly situated co-defendants mentioned above, resulted in a sentence that is greater than necessary and is unreasonable.

On appeal concerning this raised issue, the appellate court took the stance overall that: "It is worth noting that Judge Bucklo exceeded the Guidelines range by just eighteen percent. This variance was well founded in her sentencing explanation. We find no error, procedural or substantive, in Sykes' sentence.

Both the lower courts reliance upon factors irrelevant to the determination of Sykes' above guidelines sentence, justify such in violation of this Supreme Court's rulings in Molina-Martinez, and Rosales-Mireles, concerning imposition of an above guideline sentencing error.

In Molina-Martinez, The Federal Sentencing Guidelines first enter the sentencing process when the United States Probation Office prepares a presentence report containing, as relevant here, an advisory Guidelines range based on the seriousness of a defendant's offense and the extent of his criminal history. A district court may depart from the Guidelines, but it "must

consult them and take them into account when sentencing."

United States v. Booker, 543 U.S. 220, 264 (2005). Given the Guidelines' complexity, A District Court's use of an incorrect Guidelines range may go unnoticed. That error can be remedied on appeal pursuant to the Federal Rules of Criminal Procedure 52(b), provided that (1) there is an error that was not intentionally relinquished or abandoned, United States v. Olano, 507 U.S.725; 732-733; (2) the error is plain, i.e., clear or obvious, *id.*, at 734; and (3) the error affected the defendant's substantial rights, *ibid.*, which in the ordinary case means he or she must "show a reasonable probability that, but for the error," the out come of the proceeding would have been different, United States v. Dominguez-Benitez, 542 U.S. 74, 82. Once these three conditions have been met, the court of appeals should exercise its discretion to correct the forfeited error if the error "seriously affects the fairness, integrity or public reputation of judicial proceedings." Olano, 507 U.S. at 736.

The appeals court's affirmance was based on the district courts sentencing explanation in reaching an above guidelines 195 month sentence concerning Sykes. Yet that determination was not based on relevant and factual enhancements, by specific reference within the Guidelines themselves. Sykes criminal history, upon which the court expounded upon during the various sentencing hearings (3), was part of the instant offense and under U.S.S.G. 4A1.2(a)(1) was excluded as being utilized for the assessment of any criminal history points.

Sykes alleged participation in the Thuggish murder was not considered as a cross reference under U.S.S.G. 2A1.1, by the district court either. Yet it was utilized and given little weight as stipulated by the district court in applying an above guidelines sentence of 195 months, after various evidentiary hearing were administered and testimony was given by individuals whose credibility was highly questioned, all done so in violation of Sykes Sixth Amendment "Confrontation Rights".

Recently, on June 18, 2018, this Supreme Court in Rosales-Mireles, held that, "Each year thousands of individuals are sentenced to imprisonment for violations of federal law. To help ensure certainty and fairness in those sentences, federal district courts are required to consider the advisory United States Sentencing Guidelines. Prior to sentencing, the United States Probation Office prepares a presentence investigation report to help the court determine the applicable Guidelines range. Ultimately, the district court is responsible for ensuring the Guidelines range it considers is correct.

In this instance, the Probation Office assessed Sykes presentence report based on the criteria relevant to Sykes' case when preparing the report. Considering amongst significant matters, the use of Sykes' criminal history. Negated from this report was any involvement that Sykes had participated in the Thuggish murder. Sykes' trial before the district court was not for any charges or incidents involving an alleged murder. Yet the district court utilized Sykes' convictions against him, along with the alleged Thuggish murder, after the Probation

Office had already considered the criminal history within the report. Determinations for Sykes base offense level at 32 and criminal history of II, corresponding to a sentencing guidelines range of 135 to 168 months were arrived at correctly. Yet the imposition of the 195 month above guidelines sentence imposed by the district court was based on an explanation that does not substantially suffice. Being that the imposition of the above guidelines sentence was administered upon allegations of Sykes' convictions which occurred during the commission of the instant offense, and an alleged involvement in a murder, which was uncharged, yet utilized after numerous evidentiary hearings by the sentencing court, in a very arbitrary manner.

In Molina-Martinez, this Court held that, "Where, however, the record is silent as to what the district court might have done had it considered the correct Guidelines range, the court's reliance on an incorrect range in most instances will suffice to show an effect on the defendant's substantial rights. Indeed, in the ordinary case a defendant will satisfy his burden to show prejudice by pointing to the application of an incorrect, higher Guidelines range and the sentence he received thereunder. Absent unusual circumstances, he will not be required to show more."

Sykes' 195 month above Guidelines sentence, as mentioned within this petition before, relates to a base offense level four levels upwards from 32 to 36, as initially assessed by the Probation Office, with a criminal history of II, Guidelines' range of 210 to 262 months for sentencing purposes. This departure was unwarranted and the explanation by the court for it's

application seriously affected Sykes' substantial rights under United States v. Olano, 507 U.S. 725, 732-733 113 S.Ct. 1770, 123 L.Ed. 2d 508 (1993), where it "(1) discerns an error; that error must (2) be plain, (3) affect the defendant's substantial rights, and (4) implicate the fairness, integrity, or public reputation of judicial proceedings."

Lastly, in this Supreme Court's decision regarding Molina-Martinez, it was the opinion of the Court that, "when a defendant is sentenced under an incorrect Guidelines range... the error itself can, and most often, be sufficient to show a reasonable probability of a different outcome absent the error."

Conclusion

Otis Sykes pray that a writ of certiorari will issue and that this case will be remanded back to the Seventh Circuit Court of appeals in light of this Court's rulings of Rosales-Mireles, and Molina-Martinez.

Respectfully Submitted,

Otis Sykes

Reg. No. 10758-025

Federal Correctional Institution

P.O. Box 52020

Bennettsville, SC 29512