

No. ____ - _____

In The
Supreme Court of the United States

JASON RANDALL HOWARD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

**MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*
AND
PETITION FOR A WRIT OF CERTIORARI**

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QUESTIONS PRESENTED

I.

Is Howard's 457% above-guideline variance sentence procedurally unreasonable because the District Court failed to consider the need to avoid unwarranted disparities between Howard's sentence and those imposed upon defendants with similar or worse records?

II.

Is Howard's 457% above-guideline variance sentence substantively unreasonable because it is greater than necessary to achieve its stated purpose "to protect the public from further crimes of the defendant?"

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MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Comes now the Petitioner, Jason Randall Howard, by and through counsel, William Pennington, and requests this Honorable Court to grant leave for him to proceed *in forma pauperis* without prepayment of costs.

In further support of his motion, the Petitioner says that he is currently incarcerated with the Federal Bureau of Prisons as a consequence of his 96-month sentence in the underlying District Court criminal case and that he was represented by appointed counsel in the District Court and Fourth Circuit Court of Appeals proceedings. Petitioner's completed form Affidavit of Indigency reflecting his qualifying financial status is attached hereto as Appendix A. A copy of the June 6, 2017, United States Court of Appeals for the Fourth Circuit Order Appointing Counsel is attached as Appendix B.



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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jason Randall Howard respectfully prays that a writ of certiorari issue to review the judgment below.

I.

Is Howard's sentence procedurally unreasonable because the District Court failed to consider the need to avoid unwarranted disparities between Howard's sentence and those imposed upon defendants with similar or worse records?

The District Court's Statement of Reasons does not include any explanation or rationale by the Court for imposing a substantial upward variance sentence - amounting to 457% of the top end of the calculated guidelines range - in light of the need to avoid unwarranted disparities in sentencing. The District Court did not even mention the disparity factor that is a mandatory consideration in assigning an above-guidelines sentence under 18 U.S.C. § 3553(a).

II.

Is Howard's sentence substantively unreasonable because it is greater than necessary to achieve its stated purpose "to protect the public from further crimes of the defendant?"

Howard's calculated U.S.S.G. guidelines range was 15-21 months corresponding to a level 12 and criminal history category III. The Court imposed a sentence of 96 months reciting that "the defendant is unable to comply with the laws and standards of the military, his employment and his community. It appears that the defendant has a pattern of violence that creates a substantial danger or unwarranted burden to the community."

However, nothing presented in the May 30, 2017, sentencing hearing during the testimony of the United States' seven witnesses was of a shocking nature or unusual in any way as compared to the general conduct and behavior of a typical methamphetamine conspiracy case defendant. Moreover, nothing in the Presentence Report or apparent in Howard's criminal history warranted an abrupt departure of 75 months above the high end of his adjusted guidelines range.

The Circuit Court should "take into account the totality of the circumstances, including the extent of any variance from the Guidelines range." *Gall v. United States*, 552 U.S. 38, 51. By emphasizing the minute details of Howard's criminal history and certain uncharged conduct, the District Court disregarded the operation and function of the sentencing guidelines which are already designed to recognize and account for a defendant's criminal history. Howard's criminal history was analyzed properly by the Probation Officer who

assigned a score of five points corresponding to a Criminal History Category of III.

An individualized assessment of Howard's history, behavior, involvement and the circumstances of the entire case reveal a defendant and a case which are unremarkable and not in any way unusual or distinguishable from any other local drug-and-gun case. There was no reason for the District Court to view Howard as any more dangerous or likely to re-offend than any typical or similarly-situated defendant.

Howard contends that the Court made an abuse of discretion at Sentencing in imposing a substantively unreasonable variance amounting to a 457% increase from Howard's calculated guidelines range.

OPINION BELOW

A copy of the Fourth Circuit Court of Appeals' July 27, 2018, Unpublished Per Curiam Opinion and Judgment Order are attached hereto as Appendices C and D. The District Court's May 31. 2017, Judgment in a Criminal Case is attached hereto as Appendix E.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

This case is on appeal from a final judgment in a criminal case entered May 31, 2017, by the United States District Court for the Northern District of West Virginia at Elkins, with the Honorable Judge John Preston Bailey, presiding. Notice of Appeal was filed on June 2, 2017.

Initial appellate jurisdiction was based upon the provisions of 18 U.S.C. §3742(a); 28 U.S.C. §1291 and Rule 4 of the Federal Rules of Appellate Procedure. Howard was entitled to an appeal of right by 18 U.S.C. §3742(a)(3) as he was sentenced on March 30, 2017, in the District Court for the Northern District of West Virginia to a term of imprisonment of 96 months when his calculated guidelines range was 15-21 months. Accordingly, Howard has not waived his right to appeal by the terms of his plea agreement.

The decision of the Fourth Circuit Court of Appeals for which Howard seeks review was issued on July 27, 2018. This Petition is filed within 90 days of the Fourth Circuit Unpublished Per Curiam Opinion and Judgment Order under Rules 13.1 and 29.2 of this Court.

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment 6 provides, in pertinent part:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury

United States Constitution, Amendment 14 provides, in relevant part:

No state . . . shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Constitution, Amendment 8 provides:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT OF THE CASE

The District Court sentenced Howard to a variance term of 96 months imprisonment when his properly-calculated guidelines range was 15-21 months.

Factual History

On August 6, 2016, a West Virginia state trooper observed the defendant, Jason Howard, standing on a porch of a residence in Elkins, West Virginia. The trooper was aware of outstanding arrest warrants against Howard. The officer approached and asked Howard to exit the porch. Howard complied. The officer asked if Howard possessed any weapons. Howard told the officer he was carrying a gun. The officer patted Howard down and located a loaded 9 mm pistol in Howard's waist area. Howard also possessed a .40 caliber magazine and .40 caliber pistol cartridges.

Procedural History

Howard was subsequently indicted along with 19 codefendants in a methamphetamine conspiracy. Howard was charged with conspiracy in Count 1 along with all codefendants in the conspiracy. Howard was also charged in Count 41 as a prohibited person in possession of a firearm.

Howard's plea agreement had provided for him to plea guilty to Count 41: Unlawful Possession of a Firearm in exchange for the United State's motion to

dismiss the charge against Howard in Count 1: Conspiracy to Commit Distribution of (greater than 500 grams) Methamphetamine. Also by the terms of the plea agreement, the parties agreed and stipulated Howard's base offense level to be 14. The plea agreement further provided for a conditional 2-level reduction under U.S.S.G. §3E1.1.

At sentencing, the United States moved for a variance up to ten years on the stated reasoning that such a sentence was necessary "to protect the public" and further on the basis of Howard's conduct and behavior as set forth in the Presentence Investigation Report, all of which was known at the time the plea agreement was offered. Also at the May 30, 2017, sentencing hearing, the United States presented seven witnesses whose testimony reiterated Howard's known criminal behavior resulting in his category III criminal history assignment.

The Court sentenced Howard to a term of 96 months imprisonment.

REASONS FOR GRANTING PETITION

I.

A District Court's upward variance sentence amounting to 457% of the upper end of the calculated guidelines range should be carefully scrutinized by the Appellate Courts.

II.

The entire system of plea bargaining in which most criminal cases are disposed is jeopardized when counsel cannot reasonably rely on an estimated guidelines range based on the contents of a written plea agreement.

III.

The United States Court of Appeals for the Fourth Circuit erroneously relied on *United States v. Powell*, 650 F.3d 388, 395 (4th Cir. 2011) in concluding that “[b]ecause defense counsel failed to ‘draw arguments from §3553 for a sentence different than the one ultimately imposed,’ Howard’s challenge to the district court’s sentencing explanation is unpreserved and, consequently, subject only to plain error review.”

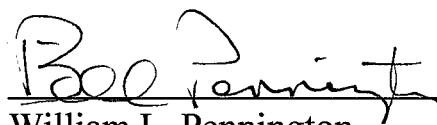
Howard did, in both his Defendant’s Sentencing Memorandum, and upon

the record during the sentencing hearing request the District Court to adhere to the low end of the calculated guidelines range in accordance with *United States v. Powell*, 650 F.3d 388, 395 (4th Cir. 2011). Moreover, reliance on the *Powell* case is misplaced because Powell received a guidelines range sentence.

CONCLUSION

This Court should grant Howard's Petition for a Writ of Certiorari.

Respectfully submitted this 25th day of September, 2018.



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PROOF OF SERVICE

I, William L. Pennington, counsel for Petitioner, do swear or declare that on this date, September 25, 2018, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

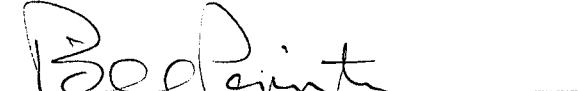
The names and addresses of those served are as follows:

Mr. Steven D. Warner, Assistant United States Attorney
Clarksburg Federal Center
320 West Pike St., Suite 300
Clarksburg, WV 26301-2710

Solicitor General of the United States
Room 5616 Department of Justice
950 Pennsylvania Ave., N. W.
Washington, DC 20530-0001

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 25, 2018.



William L. Pennington

APPENDIX A

Affidavit or Declaration in Support of Motion
for Leave to Proceed *In Forma Pauperis* by
Jason Randall Howard

**AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS***

I, Jason Randall Howard, am the petitioner in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	Average monthly amount during the past 12 months		Amount expected next month	
	You	Spouse	You	Spouse
Employment	\$ <u>00 00</u>	\$ <u>0</u>	\$ <u>0</u>	\$ <u>0</u>
Self-employment	\$ <u>0</u>	\$ <u>0</u>	\$ <u>0</u>	\$ <u>0</u>
Income from real property (such as rental income)	\$ <u>0</u>	\$ <u>0</u>	\$ <u>0</u>	\$ <u>0</u>
Interest and dividends	\$ <u>0</u>	\$ <u>0</u>	\$ <u>0</u>	\$ <u>0</u>
Gifts	\$ <u>0</u>	\$ <u>0</u>	\$ <u>0</u>	\$ <u>0</u>
Alimony	\$ <u>0</u>	\$ <u>0</u>	\$ <u>0</u>	\$ <u>0</u>
Child Support	\$ <u>0</u>	\$ <u>0</u>	\$ <u>0</u>	\$ <u>0</u>
Retirement (such as social security, pensions, annuities, insurance)	\$ <u>0</u>	\$ <u>0</u>	\$ <u>0</u>	\$ <u>0</u>
Disability (such as social security, insurance payments)	\$ <u>0</u>	\$ <u>0</u>	\$ <u>0</u>	\$ <u>0</u>
Unemployment payments	\$ <u>0</u>	\$ <u>0</u>	\$ <u>0</u>	\$ <u>0</u>
Public-assistance (such as welfare)	\$ <u>0</u>	\$ <u>0</u>	\$ <u>0</u>	\$ <u>0</u>
Other (specify): <u>N/A</u>	\$ <u>0</u>	\$ <u>0</u>	\$ <u>0</u>	\$ <u>0</u>
Total monthly income:	\$ <u>0</u>	\$ <u>0</u>	\$ <u>0</u>	\$ <u>0</u>

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
<i>n/a</i>	<i>n/a</i>	<i>n/a</i>	\$ <i>0</i> \$ <i>0</i> \$ <i>0</i>

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
<i>n/a</i>	<i>n/a</i>	<i>n/a</i>	\$ <i>0</i> \$ <i>0</i> \$ <i>0</i>

4. How much cash do you and your spouse have? \$ *0*
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount your spouse has
<i>n/a</i>	<i>n/a</i>	\$ <i>0</i> \$ <i>0</i> \$ <i>0</i>	\$ <i>0</i> \$ <i>0</i> \$ <i>0</i>

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

Home Value *n/a* Other real estate Value *n/a*

Motor Vehicle #1 Year, make & model *n/a* Motor Vehicle #2 Year, make & model *n/a*
Value _____ Value _____

Other assets Description *n/a* Value _____

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
<u>N/A</u>	\$ <u>0</u>	\$ <u>0</u>
	\$ <u>0</u>	\$ <u>0</u>
	\$ <u>0</u>	\$ <u>0</u>

7. State the persons who rely on you or your spouse for support.

Name	Relationship	Age
<u>N/A</u>	<u>N/A</u>	<u>N/A</u>

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home)	\$ <u>0</u>	\$ <u>0</u>
Are real estate taxes included? <input type="checkbox"/> Yes <input type="checkbox"/> No		
Is property insurance included? <input type="checkbox"/> Yes <input type="checkbox"/> No		
Utilities (electricity, heating fuel, water, sewer, and telephone)	\$ <u>0</u>	\$ <u>0</u>
Home maintenance (repairs and upkeep)	\$ <u>0</u>	\$ <u>0</u>
Food	\$ <u>0</u>	\$ <u>0</u>
Clothing	\$ <u>0</u>	\$ <u>0</u>
Laundry and dry-cleaning	\$ <u>0</u>	\$ <u>0</u>
Medical and dental expenses	\$ <u>0</u>	\$ <u>0</u>

	You	Your spouse
Transportation (not including motor vehicle payments)	\$ <u>0</u>	\$ <u>0</u>
Recreation, entertainment, newspapers, magazines, etc.	\$ <u>0</u>	\$ <u>0</u>
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	\$ <u>0</u>	\$ <u>0</u>
Life	\$ <u>0</u>	\$ <u>0</u>
Health	\$ <u>0</u>	\$ <u>0</u>
Motor Vehicle	\$ <u>0</u>	\$ <u>0</u>
Other: <u>n/a</u>	\$ <u>0</u>	\$ <u>0</u>
Taxes (not deducted from wages or included in mortgage payments)		
(specify): <u>n/a</u>	\$ <u>0</u>	\$ <u>0</u>
Installment payments		
Motor Vehicle	\$ <u>0</u>	\$ <u>0</u>
Credit card(s)	\$ <u>0</u>	\$ <u>0</u>
Department store(s)	\$ <u>0</u>	\$ <u>0</u>
Other: _____	\$ <u>0</u>	\$ <u>0</u>
Alimony, maintenance, and support paid to others	\$ <u>0</u>	\$ <u>0</u>
Regular expenses for operation of business, profession, or farm (attach detailed statement)	\$ <u>0</u>	\$ <u>0</u>
Other (specify): <u>n/a</u>	\$ <u>0</u>	\$ <u>0</u>
Total monthly expenses:		

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

Yes No If yes, describe on an attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? Yes No

If yes, how much? N/A

If yes, state the attorney's name, address, and telephone number:

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

Yes No

If yes, how much? N/A

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the costs of this case.

I'm incarcerated in the federal prison system and unable to work to earn a pay check to be able to provide any legal help.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: Aug, 20, 2018

(Signature)

APPENDIX B

June 6, 2017, ORDER Appointing Counsel for
Howard's Appeal to the United States Court
of Appeals for the Fourth Circuit in No. 17-4366

FILED: June 6, 2017

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-4366
(2:16-cr-00023-JPB-MJA-13)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

JASON RANDALL HOWARD

Defendant - Appellant

O R D E R

The court appoints William L. Pennington to represent appellant. Counsel is referred to the CJA Payment Memorandum and the CJA eVoucher Page for information on appointment terms and procedures.

CJA authorization for preparation of transcript is obtained by submitting an AUTH-24 request in the district eVoucher system. New appellate counsel must contact district eVoucher staff for appointment to the underlying district court case in order to submit the AUTH-24 request for district judge approval and the CJA 24 voucher for transcript payment. Counsel must also submit a Transcript Order Form

with attached AUTH-24 or CJA 24 form to the court reporter and district court and file the same in the court of appeals with the docketing statement. Upon filing of the Transcript Order Form, the Fourth Circuit will set deadlines for completion of the transcript.

CJA 20 and 21 vouchers are submitted for payment through the Fourth Circuit's CJA eVoucher system. Upon receiving email notification of this appointment from eVoucher, counsel may create CJA 20 and 21 vouchers for use in maintaining time and expense records and paying for expert services.

All case filings must be made using the court's Electronic Case Filing system (CM/ECF). Counsel not yet registered for electronic filing should proceed to the court's web site to register as an ECF filer. See **Required Steps for Registration as an ECF Filer.**

For the Court--By Direction

/s/ Patricia S. Connor, Clerk

APPENDIX C

July 27, 2018, Unpublished Per Curiam Opinion
in U.S. v. Jason Randall Howard No. 17-4366
United States Court of Appeals for the Fourth Circuit

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-4366

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JASON RANDALL HOWARD,

Defendant - Appellant.

Appeal from the United States District Court for the Northern District of West Virginia,
at Elkins. John Preston Bailey, District Judge. (2:16-cr-00023-JPB-MJA-13)

Submitted: May 31, 2018

Decided: July 27, 2018

Before AGEE and DIAZ, Circuit Judges, and SHEDD, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

William L. Pennington, Morgantown, West Virginia; Deirdre H. Purdy, Chloe, West Virginia, for Appellant. William J. Powell, United States Attorney, Stephen D. Warner, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Clarksburg, West Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Jason Randall Howard was named in two counts of a 41-count, 20-defendant indictment alleging a methamphetamine distribution conspiracy. Following Howard's guilty plea to possession of a firearm by a person convicted of a misdemeanor crime of domestic violence, in violation of 18 U.S.C. §§ 922(g)(9), 924(a)(2) (2012), the district court sentenced Howard to 96 months' imprisonment. On appeal, Howard challenges the procedural and substantive reasonableness of his sentence. For the reasons that follow, we affirm.

We review a sentence for reasonableness, applying a deferential abuse-of-discretion standard. *Gall v. United States*, 552 U.S. 38, 51-52 (2007). We "must first ensure that the district court committed no significant procedural error," such as improperly calculating the Sentencing Guidelines range, failing to consider the 18 U.S.C. § 3553(a) (2012) sentencing factors, or inadequately explaining the sentence imposed. *Id.* The sentencing explanation need not be extensive as long as we are satisfied that the district court "has a reasoned basis for exercising its own legal decisionmaking authority." *United States v. Engle*, 592 F.3d 495, 500 (4th Cir. 2010) (brackets and internal quotation marks omitted).

If a sentence is free of "significant procedural error," then we review it for substantive reasonableness, "tak[ing] into account the totality of the circumstances." *Gall*, 552 U.S. at 51. The sentence imposed must be "sufficient, but not greater than necessary," to satisfy the goals of sentencing. 18 U.S.C. § 3553(a). In reviewing a sentence outside the Guidelines range, we "may consider the extent of the deviation, but

must give due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance." *Gall*, 552 U.S. at 51.

Here, the district court calculated a 15- to 21-month Guidelines range, then imposed a significant upward variance sentence of 96 months. In reaching its sentencing decision, the court relied on several incidents detailed in Howard's presentence report, as well as testimony offered at sentencing, which established a pattern of repeated violent behavior toward others. Additionally, in its statement of reasons, the court indicated that it varied upward to protect the public from Howard's criminal conduct.

On appeal, Howard assigns error to the district court's failure to explain how an upward variance would serve "to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6). Because defense counsel failed to "draw arguments from § 3553 for a sentence different than the one ultimately imposed," Howard's challenge to the district court's sentencing explanation is unpreserved and, consequently, subject only to plain error review. *United States v. Powell*, 650 F.3d 388, 395 (4th Cir. 2011) (brackets, emphasis, ellipsis, and internal quotation marks omitted).

At sentencing, the district court stated that it considered each § 3553(a) factor and provided a lengthy explanation in which it displayed substantial concern for Howard's history of violent conduct. Mindful that the district court has "extremely broad discretion when determining the weight to be given each of the § 3553(a) factors," *United States v. Jeffery*, 631 F.3d 669, 679 (4th Cir. 2011), and that it is not obligated to "robotically tick through § 3553(a)'s every subsection," *United States v. Carter*, 564 F.3d 325, 329 (4th

Cir. 2009) (internal quotation marks omitted), we detect no plain error in the court's sentencing explanation.

Next, Howard raises three challenges to the substantive reasonableness of his sentence. Because these claims were not raised at sentencing, we review only for plain error. *United States v. Hargrove*, 625 F.3d 170, 184 (4th Cir. 2010). First, Howard faults the court for considering the need to protect the public without also evaluating his likelihood of recidivism. Although the court did not specifically address Howard's risk of recidivism, the court's review of Howard's unrelenting criminality made clear its finding that Howard was unlikely to avoid reoffending.

Second, Howard disputes the district court's reliance on criminal conduct that was already accounted for in the probation officer's calculation of his criminal history category. However, "a fact that is taken into account in computing a Guidelines range is not excluded from consideration when determining whether the Guideline sentence adequately serves the four purposes of § 3553(a)(2)." *United States v. Bollinger*, 798 F.3d 201, 221 (4th Cir. 2015) (internal quotation marks omitted). Thus, the court did not commit plain error by using these prior criminal incidents to justify its variance sentence.

Finally, Howard asserts that the upward variance was unwarranted because nothing before the district court distinguished him from an ordinary defendant in a methamphetamine conspiracy case. On the contrary, the record contained significant evidence of Howard's brutal acts of domestic violence, which are not part and parcel of a drug conspiracy. Thus, the court appropriately concluded that Howard was not deserving of a within-Guidelines sentence.

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Accordingly, we affirm the district court's judgment. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

APPENDIX D

July 27, 2018, Judgment Order in U.S. v. Jason
Randall Howard No. 17-4366 United States Court
of Appeals for the Fourth Circuit

FILED: July 27, 2018

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-4366
(2:16-cr-00023-JPB-MJA-13)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

JASON RANDALL HOWARD

Defendant - Appellant

JUDGMENT

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

APPENDIX E

May 31, 2017, Judgment in a Criminal Case in
Case Number 2:16CR23-13 United States District
Court for the Northern District of West Virginia

FILED

MAY 31 2017

U.S. DISTRICT COURT
ELKINS WV 26241

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF WEST VIRGINIA

UNITED STATES OF AMERICA) JUDGMENT IN A CRIMINAL CASE
v.)
JASON RANDALL HOWARD) Case Number: 2:16CR00023-013
) USM Number: 11965-087
) William L. Pennington
) Defendant's Attorney

THE DEFENDANT:

pleaded guilty to count(s) 41

pleaded nolo contendere to count(s) _____ which was accepted by the court.

was found guilty on count(s) _____ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. §§ 922(g)(9) and 924(a)(2)	Unlawful Possession of a Firearm	08/06/2016	41

See additional count(s) on page 2

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on count(s) _____

Count(s) One is dismissed on the motion of the United States.

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 material changes in economic circumstances.

May 30, 2017

Date of Imposition of Judgment

Signature of Judge

Honorable John Preston Bailey, U. S. District Judge
Name and Title of Judge

5-31-2017

Date

DEFENDANT: JASON RANDALL HOWARD
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IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of: 96 months, to run consecutively to the defendant's imprisonment under any previous state or Federal sentence.

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

That the defendant be incarcerated at an FCI or a facility as close to Randolph County, West Virginia, as possible;
 and at a facility where the defendant can participate in substance abuse treatment, as determined by the Bureau of Prisons;
 including the 500-Hour Residential Drug Abuse Treatment Program.

That the defendant be incarcerated at _____ or a facility as close to his/her home in _____ as possible;
 and at a facility where the defendant can participate in substance abuse treatment, as determined by the Bureau of Prisons;
 including the 500-Hour Residential Drug Abuse Treatment Program.

That the defendant be given credit for time served in custody between 08/06/16 and 12/14/16.

That the defendant be allowed to participate in a mental health treatment program as determined appropriate by the Bureau of Prisons.

That the defendant be allowed to participate in any educational or vocational opportunities while incarcerated, as determined by the Bureau of Prisons.

Pursuant to 42 U.S.C. § 14135A, the defendant shall submit to DNA collection while incarcerated in the Bureau of Prisons, or at the direction of the Probation Officer.

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

The defendant shall surrender to the United States Marshal for this district:

at _____ a.m. p.m. on _____
 as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

before 12:00 pm (noon) on _____
 as notified by the United States Marshal.
 as notified by the Probation or Pretrial Services Office.
 on _____, as directed by the United States Marshals Service.

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 UNITED STATES MARSHAL

DEFENDANT: JASON RANDALL HOWARD
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SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of: Three years.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the probation officer.
 The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
5. You must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
6. You must participate in an approved program for domestic violence. *(check if applicable)*

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

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STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You shall not commit another federal, state or local crime.
4. You shall not unlawfully possess a controlled substance. You shall refrain from any unlawful use of a controlled substance. You 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 probation officer.
5. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
6. You must answer truthfully the questions asked by your probation officer.
7. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
9. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
10. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
11. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
12. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
13. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
14. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
15. You shall not purchase, possess or consume any organic or synthetic intoxicants, including bath salts, synthetic cannabinoids or other designer stimulants.
16. You shall not frequent places that sell or distribute synthetic cannabinoids or other designer stimulants.
17. Upon reasonable suspicion by the probation officer, you shall submit your person, property, house, residence, vehicle, papers, computers, or other electronic communications or data storage devices or media, or office, to a search conducted by a United States Probation Officer. Failure to submit to a search may be grounds for revocation of release. You shall warn any other occupants that the premises may be subject to searches pursuant to this condition.
18. You are prohibited from possessing a potentially vicious or dangerous animal or residing with anyone who possess a potentially vicious or dangerous animal. The probation officer has sole authority to determine what animals are considered to be potentially vicious or dangerous.
19. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature

Date

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SPECIAL CONDITIONS OF SUPERVISION

- 1) You must participate in an outpatient substance abuse treatment program. The Probation Officer will supervise your participation in the program (provider, location, modality, duration, intensity, etc.).
- 2) You must not use or possess any controlled substances without a valid prescription. If you do have a valid prescription, you must disclose the prescription information to the Probation Officer and follow the instructions on the prescription.
- 3) You must submit to substance abuse testing to determine if you have used a prohibited substance. You must not attempt to obstruct or tamper with the testing methods.
- 4) You must participate in a mental health treatment program and follow the rules and regulations of that program. The Probation Officer, in consultation with the treatment provider, will supervise your participation in the program (provider, location, modality, duration, intensity, etc.).

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CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

TOTALS	Assessment	JVTA Assessment*	Fine	Restitution
	\$ 100	\$ 0	\$ 0	\$ 0

The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

The victim's recovery is limited to the amount of their loss and the defendant's liability for restitution ceases if and when the victim receives full restitution.

Name of Payee	Total Loss**	Restitution Ordered	Priority or Percentage
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
TOTALS	\$ _____	\$ _____	

See Statement of Reasons for Victim Information

Restitution amount ordered pursuant to plea agreement \$ _____

The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

The court determined that the defendant does not have the ability to pay interest and it is ordered that:

the interest requirement is waived for the fine restitution.

the interest requirement for the fine restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 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 is due as follows:

A Lump sum payment of \$ 100 due immediately, balance due
 not later than _____, or
 in accordance with C D, E, F, or G below); or

B Payment to begin immediately (may be combined with C, D, F, or G below); or

C Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F Special instructions regarding the payment of criminal monetary penalties:
Financial obligations ordered are to be paid while the defendant is incarcerated, and if payment is not completed during incarceration, it is to be completed by the end of the term of supervised release; or

G Special instructions regarding the payment of criminal monetary penalties:
The defendant shall immediately begin making restitution and/or fine payments of \$ _____ per month, due on the first of each month. These payments shall be made during incarceration, and if necessary, during supervised release.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to Clerk, U. S. District Court, Northern District of West Virginia, P.O. Box 1518, Elkins, WV 26241.

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

Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

The defendant shall pay the cost of prosecution.
 The defendant shall pay the following court cost(s):
 The defendant shall forfeit the defendant's interest in the following property to the United States:
A Taurus 709 slim 9mm pistol, Serial Number: TIR38363

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) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.