
No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

JESSE SAWYER

Petitioner,

against

UNITED STATES OF AMERICA

Respondent.

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEAL
FOR THE SECOND CIRCUIT**

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

/s/ Bruce R. Bryan

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ISSUES PRESENTED FOR REVIEW

1. Whether the powers of federal appellate courts are diminished and whether a defendant is deprived of his fundamental right to appellate review when an appellate court's stated errors in a mandate regarding a criminal sentence do not have any binding effect on the district court and the district court may therefore refuse to correct the errors on remand?
2. Whether the appellate standard of review of "substantive reasonableness" of a criminal sentence requires a federal appellate court to deferentially review and weigh the district court's reasons for its sentence, or is the standard of review met solely by determining whether the sentence is within an unspecified range of the mathematical average of sentences imposed by other courts for the same crime?
3. Whether a sentence that the majority conceded is "barbaric" is also, by definition, substantively unreasonable?

PARTIES TO PROCEEDINGS

The Petitioner in this Court is Jesse Sawyer. The Respondent is the United States of America.

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Petitioner, Jesse Sawyer, respectfully prays that a writ of certiorari issue to review the judgment and opinions of the United States Court of Appeals for the Second Circuit, wherein the Second Circuit acknowledged, in a divided opinion, that the district court had disagreed on remand with its conclusion that the court had not properly weighed certain sentencing factors, but held that because the district court had reduced the 30-year sentence by five years on a different ground it had effectively complied with

its instruction. The majority also held it was sufficient for the district court to bring the sentence within “the elastic bounds of reasonableness” as determined by a comparison of the length of the sentence imposed on Sawyer with the length of sentences imposed by other courts on other defendants for the same crime.

OPINIONS BELOW

A copy of the Opinion of the United States Court of Appeals for the Second Circuit, dated October 26, 2018, has been published at *United States v. Sawyer*, 907 F.3d 121 (2d Cir. 2018) (“*Sawyer III*”). Said Opinion is reproduced in Appendix A, *infra*. A copy of the Opinion in *United States v. Sawyer*, 892 F.3d 558 (2d Cir. 2018) (“*Sawyer II*”) has been published and is reproduced in Appendix B, *infra*. A copy of the Summary Order in *United States v. Sawyer*, 672 Fed. Appx. 63 (2d Cir. 2016) (“*Sawyer I*”) was not published and is reproduced in Appendix C, *infra*.

JURISDICTION

The Judgment of the United States Court of Appeals for the Second Circuit as set forth in the Opinion in *United States v. Sawyer*, 907 F.3d 121 (2d Cir. 2018) (“*Sawyer III*”) is dated and was entered on October 26, 2018. Sawyer filed a petition for rehearing and/or rehearing *en banc* on December 12, 2018. The petition was denied on January 3, 2019. This Court’s jurisdiction is invoked under 28 U.S.C. § 1254(1). The United States District Court for the Northern District of New York had jurisdiction of this case pursuant to 18 U.S.C. § 3231.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves, in part, the construction of the due process clause of the Fifth Amendment of the United States Constitution. This case also involves the interpretation of 18 U.S.C. §3553(a). The pertinent text of the Constitution is set forth in Appendix D, *infra*.

STATEMENT OF THE CASE

Jesse Sawyer (“Jesse”), a 26-year-old young man with a “scant criminal history,” pleaded guilty to production of child pornography after he took approximately fifteen to twenty lewd photographs for his own viewing of two girls, aged 4 and 6. Jesse “kept the photos and there was no evidence that he took any steps to distribute them to third parties.” *Sawyer III* at 123 (Majority Opinion) Nor did Jesse “have sex with the victims or any other underage persons.”

It was undisputed that Jesse was himself a tragic victim of childhood sexual abuse. At the initial sentencing, the district court found that Jesse had “a horrid, nightmarish childhood” characterized by “incredible sadness.” He had been “treated as less than plant life by those who were supposed to take care of [him].” “[B]y the age of seven [Jesse] had been victimized sexually by a number of men and women.” He was “introduced to drugs and alcohol before [he] turned 10 years old.” Jesse was forced to witness the activities of

prostitutes. Relatives sodomized him as a child. His father once beat him so badly he lost control of his bowels.

The district court concluded that Jesse was “a 26-year-old man who really had no childhood.” No one “remove[d] [him] from the hell that [he] lived.” A psychologist examined Jesse and concluded that with sex offender treatment, his risk of recidivism would reduce. Nonetheless, the district court sentenced Jesse to 30 years imprisonment because he allegedly was a danger to the community and because it could not “excuse that darkness in [his] heart and soul” caused by his “horrendous” childhood.

On the first appeal, the Second Circuit issued a mandate in which it reversed and vacated Sawyer’s 30-year sentence as substantively unreasonable. *United States v. Sawyer*, 672 Fed. Appx. 63 (2d Cir. 2016). The panel stated there were two errors in how the district court determined the sentence: (1) the court failed to accord sufficient mitigating weight for the “horrendous” sexual abuse Sawyer suffered as a child, and (2) the court “overrelied” on Sawyer’s danger to the community. The Second Circuit said Jesse’s “background, considered alongside expert testimony that it contributed to the commission of the offense, meets [the standard that severe child abuse of a defendant warrants a reduced sentence]; it justifies not just a departure from the Guidelines, but a significant one indeed.”

The panel also said there was insufficient evidence for the district court to conclude that Jesse was such a danger to the community that a 30-year sentence was necessary. None of the factors stated by the court at the initial sentencing “appear[ed] remotely sufficient to support imposing such a sentence on a person who shared no images with others, possessed fewer images than defendants in typical cases, and did not have sex with the victims or any other underage persons.” Nor was there any “specific evidence that he was likely to do so in the future.”

In the mandate, the panel unequivocally stated the errors that caused the reversal: “In light of the district court’s overreliance of Sawyer’s danger to the community, and its failure to afford sufficient weight to Sawyer’s history and personal characteristics, settled law dictates that the sentence be vacated of grounds of substantive unreasonableness.” The panel said that on remand, the reduction to Jesse’s sentence should be “significant.” The panel instructed the court to impose a new sentence “that comports with [the panel’s] opinion.”

On remand, the district court well understood what the mandate required it to do, but the court expressly refused to do it. The court said: “*On the mandate*, the issue, failure to afford sufficient weight to the way you were raised in determining your sentence..., I still can’t say in good

conscience that my sentence at that time was substantively unreasonable.” (emphasis added) The court further said, “the Second Circuit disagreed with me” that Jesse is a danger to the community, but “this record is completely clear to me anyway.” The court told Jesse that, “sadly, because of the way you were raised, you continue to be a clear and present threat to society and specifically to children.” The court reiterated that “the Second Circuit disagrees with me, but I feel as strongly today as I did two years ago that Mr. Sawyer presents a clear danger to the public.”

Before imposing the new sentence, the district court said: “[h]owever, the court now notes the Bureau of Prisons records indicate the defendant has engaged in several educational classes, having obtained a GED, having been awarded valedictorian status of his class.” Jesse had “also attended a victim impact class, he’s awaiting entry into the sex offender treatment program..., has attended drug education programming, and is awaiting entry into the nonresidential drug treatment program and has no noted disciplinary record.”

The district court concluded Jesse had “made positive adjustments within the Bureau of Prisons and therefore finds a non-guideline sentence to be sufficient but not greater than necessary to meet the goals of sentencing.” The court imposed a sentence of 25 years. The court stated it knew the

Second Circuit disagreed with the new sentence but that the court remained of the opinion that Jesse was “a clear danger to the public.”

Jesse again appealed to the Second Circuit, arguing that the district court had refused to follow the panel’s mandate and that the 25-year sentence remained substantively unreasonable. The appeal returned to the same panel that reversed and remanded the case. On June 19, 2018, the panel in a split decision “conclude[d] that the district court did not follow this panel’s prior mandate” and “vacated the sentence for the second time and order[ed] resentencing before a different judge.” *United States v. Sawyer*, 892 F.3d 558 (2d Cir. 2018). But then on July 26, 2018, the panel issued an order withdrawing the opinion and dissent and said a new opinion would follow. (Order, dated July 26, 2018, Dkt. No. 145)

On October 26, 2018, the panel in a split decision affirmed the 25-year sentence. *Sawyer III*, 907 F.3d 121 (2d Cir. 2018). The new majority acknowledged that the district court had “disagreed with our analysis but found that Sawyer’s exemplary record as an inmate justified a reduction to 25 years.” The majority said it affirmed the 25-year sentence “because the district court effectively complied with our instruction to significantly reduce Sawyer’s sentence and because that sentence is now within the realm of reasonableness.”

The majority conceded that when the panel had remanded the case for resentencing, the panel had “identified a specific shortcoming in the district court’s consideration of the [Section 3553(a)] factors, in that ‘the district court clearly failed to give appropriate weight to a factor...that should have mitigated the sentence substantially: the history and characteristics of the defendant.’” *Id.* at 124 (quoting *Sawyer*, 672 F. App’x at 67) The majority also acknowledged that the district judge “expressed in detail her disagreement with our decision” and that “nothing in our decision convinced her to revisit her conclusions regarding the relevance of Sawyer’s childhood or his likely danger to the community.” In fact, the district judge “expressly rejected [the panel’s] reasoning”—an act that the majority characterized as “odd and regrettable.”

But the majority opinion said the mandate “must be understood in terms of our authority to review a district court’s decisions.” The majority said district courts have broad discretion in sentencing and the Second Circuit’s review for substantive reasonableness is “particularly deferential.” The majority said the “mandate did not require the district judge to weigh the sentencing factors in the way we would have done, so long as she brought the sentence within the (elastic) bounds of reasonableness.” The majority determined the “elastic bounds of reasonableness” by whether the

25-year sentence was similar in length to sentences routinely imposed by other courts for the same crime. Based on such comparison, the majority “[r]egrettably” concluded that the 25-year sentence was not “shocking.” The majority conceded that the 25-year sentence was nonetheless “barbaric” but not “all that unusual.”

Chief District Judge Crawford sitting by designation dissented. He said it was wrong “to fail to enforce our original ruling.” “It is not necessary to agree with an appellate ruling, but under any system of the rule of law it is necessary to follow it.” The Chief Judge observed that after that the court merely “found another, previously unavailable reason to impose a reduced sentence” based on Jesse’s “model conduct within the prison system after his original sentence.” Chief Judge Crawford said the issue in this case has broad implications. It “goes directly to our authority to supervise the sentencing process.”

Booker “expanded the reach of substantive unreasonability review.” Consistent with *Booker*, there is a process of review having two parts. First, this Court examines “the *reasons* given by the district court to explain its decision.” (emphasis in original). “Giving reasons is mandatory.” Second, this Court then considers “whether the §3553(a) factors, on the whole, justify the sentence.” This Court defers to the district court on the sentence

except for “those falling outside of a “broad range.” “Deference to the district court makes reversal on grounds of substantive unreasonability relatively rare, but it does not eliminate meaningful review of the reasons for the sentence.”

Applying the foregoing principles to this case “reveals that the sentencing process went awry following the first appeal.” At the initial sentencing, the court “gave minimal weight to the defendant’s lengthy history of child abuse” and overstated Jesse’s alleged “future danger to the community.” On the first appeal, the panel “disagreed with the weight the district court assigned to the defendant’s personal history and his future dangerousness.” The panel’s ruling required the district court to reconsider its overreliance on future danger to the community and the insufficient weight given to the defendant’s history and personal characteristics. But “the district court declined to follow this clear mandate.” It “addressed both factors and found no reason to change its mind.”

The dissent stressed the importance of this case, saying it “poses a fundamental question of court governance.” The majority opinion raises the specter that a district court will now be “free on remand to take a second look and decline to change its position.” But the mandate rule requires “that

the decision of the panel must be followed.” (citing *Briggs v. Pennsylvania R. Co.*, 334 U. S. 304, 306 (1948)).

While it is within the discretion of the district court to decide “how much to change the sentence based on the factors identified in the mandate,” the “discretion does not extend to the outright rejection of the mandate which occurred in this case.” The mandate had identified two primary factors that had not been given their proper weight. “That error placed the sentence beyond the broad discretion accorded district courts.” The refusal of the district court to give some weight to these factors means “that these factors still have not received consideration in the manner consistent with the mandate.”

Chief Judge Crawford said the directive of the Second Circuit is to determine “whether the reasons given by the sentencing judge can reasonably support the sentence.” “The critical issue is not whether the term of years is too long or too short.” In the case at bar, the original sentence “has been reimposed—reduced only by an unrelated factor not previously available.” Chief Judge Crawford concluded that “[b]y failing to enforce its original mandate, the majority denies the defendant a sentence that fairly addresses the reasons which [the panel] previously identified as critical to a just sentence.”

REASONS FOR GRANTING THE PETITION

Certiorari should be granted because the majority opinion of the Second Circuit conflicts with the decisions of this Court in *United States v. Booker*, 543 U.S. 220 (2005); *Gall v. United States*, 552 U.S. 38 (2007); *Rita v. United States*, 551 U.S. 338, 356 (2007) and *Biggs v. Pennsylvania R. Co.*, 334 U.S. 304 (1948). This case also involves important questions of first impression and public importance. “This case poses a fundamental question of court governance.” Dissenting Opinion, October 26, 2018, p.5 (Crawford, C.J. Vermont) This case further poses the significant question of whether a sentence that the majority concedes is “barbaric” is also, by definition, substantively unreasonable. (See Majority Opinion, October 26, 2018, p. 7) Finally, this case raises the exceptional question of whether a defendant is deprived of his fundamental right to appellate review, when the appellate court’s stated errors in a mandate do not have any binding effect on the district court and the district court may therefore refuse to correct them on remand.

Jesse Sawyer agrees with the analysis in Chief Judge Crawford’s dissenting opinion issued and incorporates it by reference in support of this Petition. The majority opinion conflicts with *Biggs v. Pennsylvania R. Co.*, 334 U.S. 304, 306 (1948) stating that “an inferior court has no power or

authority to deviate from the mandate issued by an appellate court.” The majority opinion strikes at the heart of an appellate court’s ability to enforce its decisions on lower courts.

The mandate clearly stated that the district court committed reversible error by its “overreliance of Sawyer’s danger to the community, and its failure to afford sufficient weight to Sawyer’s history and personal characteristics.” The mandate ordered the court to impose a new sentence “that comports with this [Court’s] opinion.” *Sawyer I*, 672 Fed. Appx. At 67. The mandate did not direct the district court on the extent to which it must lower the sentence, other than to say that it should be “substantial.” *Id.*

As demonstrated by district court’s statements at the resentencing, the court clearly understood that the mandate ordered it to (1) accord mitigating weight for the “horrendous” sexual abuse Sawyer suffered as a child, and (2) to reduce its “overreliance” on Sawyer’s alleged danger to the community. The district court refused. Such act unequivocally violated the mandate.

The majority opinion overlooked the clear and unequivocal language of the mandate and instead states that district courts have broad discretion regarding the sentences they impose. While true, this fact does not change the unequivocal language of the mandate that was violated. To excuse this violates *Biggs*. As discussed below, there are strong reasons for the mandate

rule, and to fail to enforce it will degrade the authority of appellate courts to require inferior courts to follow its rulings.

The majority's opinion also conflicts with this Court's opinion in *United States v. Booker*, 543 U.S. 220 (2005), which declared unconstitutional a mandatory system of sentencing based on a mathematical computation involving enumerated inflexible factors. In *Booker*, this Court explained the basis for the substantive reasonableness standard of review. It implied the standard, among other things, from the text of a prior statute that required appellate courts to determine whether the sentence "is unreasonable, having regard for...factors to be considered in imposing a sentence...; and the reasons for the imposition for the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c)." *Id.* at 261.

This Court said "[t]hose factors in turn will guide appellate courts, as they have in the past, in determining whether a sentence is reasonable." *Id.* In sum, *Booker* requires appellate courts to examine the reasons the district court used for imposing the sentence. *See Rita v. United States*, 551 U.S. 338, 354 (2007) ("Circuit courts exist to correct such mistakes when they occur.").

Likewise, the majority opinion is inconsistent with this Court's opinion in *Gall v. United States*, 552 U.S. 38 (2007). This Court in *Gall* rejected "the use of a rigid mathematical formula that uses the percentage of a departure as the standard for determining the strength of the justifications required for a specific sentence. *Id.* at 47. This Court said the district court must adequately explain the chosen sentence to allow for meaningful appellate review." *Id.* at 50. When conducting appellate review of the sentence, the appellate court must "take into account the totality of the circumstances." *Id.* at 51.

Contrary to *Gall*, the majority opinion takes a step toward an inflexible system of appellate review based on mathematical computation and away from the present "reason" based system of appellate review. "Reasonableness" under the majority opinion is determined by comparing the length of the sentence under review with the average sentence imposed by other courts for the same crime, divorced from any "reasoning" based on mitigating or aggravating facts that should justly raise or lower the sentence.

A system of appellate review based on the average length of sentences in other cases is flawed, among other things, because each sentence is based on facts unique to each case. To solely rely on the average length of other sentences, without giving consideration to the underlying "reasons" for those

sentences, greatly oversimplifies the complex process of sentencing. It will inevitably lead to affirming substantively unreasonable sentences, including sentences with strong mitigating facts that should have justified substantial deviations from the mathematical average. To rely on the mathematical average of other sentences for the same crime also ignores most of the Section 3553(a) factors relevant to appellate review, reducing review to the single factor of disparity of sentences.

The majority's mathematically based system of appellate review will have a chilling effect on district courts regarding their power to deviate from the mathematical norm despite compelling reasons for doing so, for fear that such deviation might be found by an appellate court to be "beyond the bounds of reasonableness." The majority opinion will also loosen the restraints on district courts to justify their sentences with valid reasons, knowing that appellate courts will not intervene so long as the sentence does not substantially deviate from a mathematical average.

The majority's opinion conflicts with *Booker*, which requires a "reason" based system of appellate review for determining whether a sentence is substantively unreasonable. The process of review has two parts: (1) an appellate court first examines the *reasons* the district court gave to explain its decision, and (2) this appellate court then considers whether the

§3553(a) factors, taken as a whole, justify the sentence. While *Booker* grants great deference to the district court's decision making, it does not eliminate meaningful review of the reasons for the sentence. The mandate on the first appeal in this case followed *Booker*. The majority opinion in the second appeal did not.

This case has exceptional public importance for several reasons. Arguably, sentencing is the most important function of a federal judge in a criminal case. Appellate review is critical because sentences are often long and trial judges can err. As stated by Chief Judge Crawford, the issue raised by this case goes “directly to [an appellate court's] authority to supervise the sentencing process.” “This case poses a fundamental question of court governance.” “[U]nder any system of the rule of law it is necessary [for district courts] to follow” the rulings of appellate courts. *Sawyer III*, 907 F.3d at 126 (Crawford, C.J., dissenting)

The rule of law differentiates a just society from a dictatorship. It is the hallmark of our system of justice. The mandate rule protects the rule of law. It requires inferior courts to obey the rulings of superior courts regardless of whether inferior courts disagree with what they are told to do. Without the mandate rule, our judicial system will deteriorate into judicial dictatorship, with each party subject to the whim of a trial judge without

recourse to a higher court to correct the wrong. The mandate rule protects litigants from trial judges who feel unbounded by the rule of law and instead “do what is right in their own eyes.”

Under the majority opinion, the Second Circuit’s ruling that a district court has erred when it weighed §3553(a) factors is merely a “suggestion” that can and will be ignored because district judges generally believe they are right in the sentences they impose. Over time, the respect and authority of appellate courts will suffer.

This case further poses the significant question of whether a sentence that the majority concedes is “barbaric” is also, by definition, substantively unreasonable. *Id.* at 126 (Majority Opinion). The Oxford Dictionary defines the word “barbaric” to mean “savagely cruel.” It defies logic and common understanding to say that a “savagely cruel” sentence is “reasonable.” Such sentences were imposed in the Dark Ages but should have no place in the present day. A “barbaric” sentence is “shocking.”

Finally, this case raises the exceptionally important question of whether a defendant is deprived of his fundamental right to appellate review, when the appellate court’s stated errors in a mandate do not have binding effect on the district court on remand. From a criminal defendant’s perspective, the appellate court is his only recourse if a district judge goes

awry at sentencing. If an appellate court abandons review of whether a district court erred in its consideration the §3553(a) factors, then appellate review of a sentence will effectively become meaningless. In the end, the district court will have the final say, regardless of whether it commits error.

CONCLUSION

For the reasons stated above, this Petition for a Writ of Certiorari should be granted.

DATED: January 23, 2019

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