
No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 2018

TRAVIS DEMOND JOHNSON

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION(S) PRESENTED

- 1. WHETHER THE DISTRICT COURT ERRED IN DEPARTING UPWARD UNDER THE UNITED STATES SENTENCING GUIDELINES §4A1.3 RESULTING IN AN UPWARD DEPARTURE DURING THE SENTENCING OF MR. JOHNSON**

- II. WHETHER THE DISTRICT COURT ERRED IN SENTENCING MR. JOHNSON TO A TOP OF THE COURT ADJUSTED GUIDELINES RANGE SENTENCE OF 105 MONTHS IN THAT SUCH SENTENCE WAS GREATER THAN NECESSARY TO ACHIEVE THE STATUTORY PURPOSES OF SENTENCING AND WAS SUBSTANTIVELY UNREASONABLE**

- III. WHETHER THE COURT ERRED IN ITS UPWARD DEPARTURE IN THE SENTENCING OF MR. JOHNSON BY:**
 - [A] AS PRESERVED, FAILING TO PROVIDE TIMELY NOTICE THAT IT WAS CONTEMPLATING AN UPWARD DEPARTURE.**
 - [B] FAILING TO PREDICATE THE UPWARD DEPARTURE ON A GROUND FOR DEPARTURE, EITHER IN THE PRESENTENCE REPORT, OR, BY A PRE-HEARING SUBMISSION BY THE GOVERNMENT.**
 - [C] PREJUDICING MR. JOHNSON DUE TO A SUBSTANTIAL INCREASE IN HIS SENTENCE, THUS NEGATING ALL OF HIS ACCEPTANCE OF RESPONSIBILITY EFFORTS, WHICH WAS AN ABUSE OF JUDICIAL DISCRETION**

LIST OF PARTIES

All parties appear in the caption of the case on the title page.

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, **Travis Demond Johnson**, respectfully prays that a writ of certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Eleventh Circuit, entered in the above entitled proceeding on December 17, 2018.

OPINION BELOW

The Opinion of the Court of Appeals for the Eleventh Circuit (App., *infra*, 1a-13a) is

unpublished.

JURISDICTION

The Petitioner, **Travis Demond Johnson**, was prosecuted by an Indictment alleging violation of Federal Criminal Laws in the United States District Court for the Middle District of Florida, convicted and sentenced to 105 months. He appealed his sentence to the Eleventh Circuit Court of Appeals invoking the Court's jurisdiction under 28 U.S.C. § 1291. (Doc. 40) His sentence was affirmed by an Order entered December 17, 2018. (Doc. 47)

The jurisdiction of this Court to review the Judgment of the Eleventh Circuit Court of Appeals is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district where in the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense. Sixth Amendment to the United States Constitution.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. Eighth Amendment to the United States Constitution.

STATEMENT OF THE CASE AND FACTS

Course of the Proceedings and Dispositions in the Court Below.

On August 17, 2017, a Federal Grand Jury in the Middle District of Florida, Jacksonville Division, returned a Three-Count Indictment naming Travis Demond Johnson as the Defendant. (Doc. 1)¹

Count One of the Indictment charged that on or about June 9, 2017, in Flagler County, in the Middle District of Florida, Travis Demond Johnson did knowingly, and, intentionally, in violation of 18 U.S.C § 922(g)(1) and 18 U.S.C. § 924 (a)(2), possessed, in and affecting interstate commerce, a firearm, a Hi Point (Haskell Manufacturing) model JHP .45 caliber pistol after having previously been convicted of a crime punishable by imprisonment for a term exceeding one year, including:

- a) Battery on a Law Enforcement Officer, on or about September 10, 1998,
- b) Shooting into an occupied vehicle, on or about March 9, 2004,
- c) Attempted 2nd degree murder (firearm), on or about March 9, 2004; and

¹ Most of the facts were adopted from the PSR unless where defendant objected; the facts were tailored to the issue(s) on Appeal. Additionally, the following facts are supported by the record on Appeal, but, are not necessarily conceded as true by Mr. Johnson.

d) Possession of Cocaine, on or about September 3, 2014.

Count Two charged, on June 9 2017, in the Middle District of Florida and elsewhere, the defendant knowingly and intentionally possessed, with intent to distribute, a mixture and substance containing a detectable amount of Cocaine Base, also known as “crack” cocaine, a Scheduled II controlled substance, in violation of 21 U.S.C. §§ 841(a) (1) and 841(b)(1)(C). Id.

Count Three charged, on or about June 27, 2017, in the Middle District of Florida and elsewhere, the defendant knowingly and intentionally possessed with intent to distribute a mixture and substance containing a detectable amount of cocaine base, also known as “crack” cocaine, a Schedule II controlled substance in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C). Id.

The Indictment also contained forfeiture provisions pursuant to 18 U.S.C. § 924 (d), 18 U.S.C. § 922(g), 21 U.S.C. § 853, and, 28 U.S.C. § 2461 (c). (Doc. 1)

On November 9, 2017, Mr. Johnson appeared before United States Magistrate Judge Monte C. Richardson and pleaded guilty to Counts One, Two, and, Three of the Indictment without a written Plea Agreement. (Doc. 21) The Notice Of Maximum Penalties was filed on November 9, 2017. (Doc. 23) On November 29, 2017, United States District Judge Marcia Morales Howard accepted Mr. Johnson’s guilty plea and adjudicated him guilty of the charges.

Doc. 26) Mr. Johnson was sentenced to 105 months, on March 20, 2018,

(Doc. 37) and is currently incarcerated in Federal prison. (Doc. 46)

The Offense Conduct

On June 9, 2017, a confidential informant (CI) working with the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) made contact with Mr. Johnson for the purpose of arranging a time to purchase crack cocaine. The pair agreed to meet, and the CI drove to Boone Street, Bunnell, Florida, and waited for Mr. Johnson. Surveillance captured Mr. Johnson exiting a residence on Church Street and walk to the location where the CI was parked. At that time, the CI gave Mr. Johnson \$200.00 in exchange for .7951 grams of crack cocaine. Thereafter, the CI and Mr. Johnson discussed the CI purchasing a firearm from Mr. Johnson in exchange for \$400.00. The CI told Mr. Johnson that he was going to gather the funds to purchase the firearm and that he would soon be in contact with Mr. Johnson. This interaction between Mr. Johnson and the CI began at 12:30 pm and ended at 12:38 pm.

Later in the day on June 9, 2017, Law Enforcement provided the CI with \$400.00 with which he was to purchase a firearm from Mr. Johnson. The CI subsequently traveled to the Church Street residence, and, at 1:07 pm, he picked up Mr. Johnson and proceeded to Mr. Johnson's residence located on Pine Street in Bunnell, Florida. At 1:09 pm, Mr. Johnson went inside the house and at 1:23 pm, he returned with a Hi Point (Haskell Manufacturing) model JHP, 45 caliber pistol, which he had concealed in the pocket of his shorts. Mr. Johnson re-entered the CI's vehicle and unloaded the firearm (which contained eight live rounds) before handing it to the CI, in exchange for \$400.00. The CI's interaction with Mr.

Johnson was captured on an audio and video recording, on which Mr. Johnson can be heard telling the CI that he had a hard time finding the pistol because he could not remember where he stored that particular one as he had “about seven or eight of them.”

On June 27, 2017, the CI contacted Mr. Johnson and again agreed to meet so that the CI could purchase crack cocaine from Mr. Johnson. Surveillance captured Mr. Johnson exiting the residence on Church Street and walk to the location where the CI was parked. At that time, the CI gave Mr. Johnson \$200.00 in exchange for 1.75 grams of crack cocaine. An Undercover Law Enforcement Officer accompanied the CI during this transaction.

On August 2, 2017, police conducted a traffic stop on a vehicle in which Mr. Johnson was the passenger and Keoka Davis was the driver. A search of the vehicle and Mr. Johnson revealed approximately 2.8 grams of marijuana and 10.5 grams of crack cocaine. (Mr. Johnson was arrested on that date and the State case remains pending in Flagler County, Florida.)

On August 9, 2017, the CI and Mr. Johnson met at the Church Street residence. The CI purchased 1.253 grams of crack cocaine from Mr. Johnson in exchange for \$200.00.

On August 18, 2017, the CI and Mr. Johnson agreed to, and did meet at Mr. Johnson’s residence so that the CI could purchase a firearm from the defendant. The CI was accompanied by an undercover detective. The CI and the Undercover Detective arrived at the residence at 3:27 pm, and, one minute later, the CI

purchased a Taurus, model PT1911, 9mm firearm (subsequently determined to be stolen) from Mr. Johnson in exchange for \$450.00. The pair engaged in conversation during which the defendant told the CI that he did not have ammunition for the firearm because he had fired it at someone. Prior to departing, the CI asked Mr. Johnson about purchasing crack cocaine, and Johnson advised that he could quickly retrieve the drugs for the CI. At 3:30 pm, Mr. Johnson and the CI exited the residence and the CI entered the undercover vehicle while Mr. Johnson entered an inoperable Volvo that was parked in his driveway. Once inside the Volvo (3:32 pm) Johnson displayed a firearm to the Agent and the CI, and told them that it was a Beretta that would cost “seven.” The defendant then left his residence, riding a bicycle, and upon returning at 3:35 pm, provided the CI with .756 grams of crack cocaine in exchange for \$100.00.

On August 24, 2017, authorities executed a search warrant at Mr. Johnson’s residence. The search of the home revealed 6.4 grams (including packaging) of marijuana, 20 rounds of .45 caliber ammunition, 38 rounds of .38 special ammunition, a grinder with marijuana residue, and, a digital scale commonly used to weigh illicit substances. A search of a 2004 Volvo, that was parked in the driveway (same vehicle Johnson entered on August 18, 2017, and displayed a firearm) revealed a loaded Smith & Wesson M&P Shield, 9mm firearm (subsequently determined to be stolen) and 1.34 grams of crack cocaine inside the trunk.

Prior to possessing the aforementioned firearms, including the one that he sold on June 9, 2017, Mr. Johnson had been convicted of several felony offenses and was prohibited from possessing a firearm.

Mr. Johnson is attributable with approximately 16.3941 grams of crack cocaine and 9.2 grams of marijuana (including packaging).

Law Enforcement's investigation revealed that the home located on Church Street was being utilized by Mr. Johnson and others to distribute illegal narcotics. Jason White was the primary occupant of the home, and, he sold drugs and a firearm from within the residence. On August 24, 2017, authorities executed a search warrant at the Church Street residence, White and three others were inside the home. A search revealed (among other things) digital scales commonly used to weigh narcotics as well as crack and powder cocaine.

The PSR further stated:

Victim Impact

Count One is a Title 18 offense and there is no identifiable victim. Counts Two and Three are Title 21 offenses and there are no identifiable victims.

Adjustment for Obstruction of Justice

The Probation Officer had no information indicating the Defendant impeded or obstructed justice.

Adjustment for Acceptance of Responsibility

The Defendant pleaded guilty to the Three Counts of the Indictment. The Defendant was interviewed by the Probation Officer and stipulated to the facts contained in the Government's Notice of Maximum Penalty. On the advice of Counsel, the Defendant postponed discussing his specific involvement until his Sentencing Hearing.

Offense Level Computation

The 2016 Guidelines Manual incorporating all guideline amendments was used to determine the Defendant's offense level. USSG §1B1.11. Counts 1, 2, and 3 are grouped for calculation USSG §3D1.2(c). Because application of USSG § 2K2.1 **provides for the higher offense level**, that guideline is

used to determine the offense level for the group of closely related counts. USSG §3D1.3.

Count Group 1: Possession of a Firearm by a Convicted Felon

Base Offense Level: The guideline for a violation of 18 U.S.C. § 922(g)(1) offense is USSG §2K2.1. The Defendant committed the instant offense subsequent to sustaining one felony conviction for a controlled substance, or a crime of violence offense, specifically, Attempted 2nd degree Murder (Firearm), in Volusia County Circuit Court, Case Number 03CF2184, on October 17, 2003. Therefore, the base level is 20. USSG §2K2.1(a)(4)(A).

20

Specific Offense Characteristics: Since the instant offense involved three firearms, two levels are added. USSG §2K2.1(b)(1)(A) +2

Specific Offense Characteristics: Since the firearm sold to the CI on August 18, 2017, and the firearm located inside an inoperable vehicle parked in his driveway on August 24, 2017, were stolen, two levels are added. USSG §2K2.1(b)(4). +2

Specific Offense Characteristics: Since the defendant a) sold a firearm and crack cocaine on the same dates (June 9 and August 18, 2017); b) displayed an additional firearm prior to selling crack cocaine to the CI on August 18, 2017; and, c) authorities located drugs and a firearm inside an inoperable vehicle parked outside his residence on August 24, 2017, four levels are added.

+4

Victim Related Adjustment: *NONE* 0

Adjustment for Role in the Offense: *NONE* 0

Adjustment for Obstruction of Justice: *NONE* 0

Adjusted Offense Level (Subtotal): 28

Acceptance of Responsibility: The defendant has clearly demonstrated acceptance of responsibility for the offense. Accordingly, the offense level is decreased by two levels. USSG §3E1.1(a). -2

Acceptance of Responsibility: The defendant has assisted authorities in the investigation or prosecution of the defendant's own misconduct by timely notifying authorities of the intention to enter a plea of guilty. Accordingly,

the offense level is decreased by one additional level. USSG §3E1.1(b) -1

Total Offense Level:

25

PSI, Doc. 36, ¶¶ 16-33 [emphasis supplied]

REASON(S) FOR GRANTING THE PETITION

I. THE DISTRICT COURT ERRED IN DEPARTING UPWARD UNDER THE UNITED STATES SENTENCING GUIDELINES § 4A1.3 RESULTING IN AN UPWARD DEPARTURE DURING THE SENTENCING OF MR. JOHNSON

The Presentence Investigation Report was generated by the Probation Department. The Initial Presentence Investigation Report (“PSR”) recommended 46-57 months and made mention of the adequacy of the criminal history (Doc. 28, 20-22) The revised and thus final report gave a total offense level of 25, and, a criminal history category of III. The Final Revised advisory guideline range was 70-87 months. (Doc. 36, 23, ¶ 99)

The initial PSR noted the adequacy of the defendant’s criminal history (Doc. 28, 22 ¶ 109) even after the increased calculations due to the government’s objections, the revised PSR merely recounted, without much thought or consideration, the same exact language although the range had significantly increased to 70-87 months. (Doc. 36, 23, ¶ 115)

Mr. Johnson, through Counsel filed a response asking that the District

Court depart downward based on criminal history. Counsel correctly stated that “the [sentencing] guidelines had taken into account the Defendant’s (past) criminal history, the offense , and, other relevant factors.” (Doc. 36, 23, ¶ 117).

The District Court sua sponte during the Sentencing Hearing decided to depart upward to criminal history Category IV. This resulted in an advisory guideline range of 84-105 months. The District Court sentenced Mr. Johnson to a sentence of 105 months.

United States Sentencing Guideline § 4A1.3(a) governs how the District Court can make an upward departure based on a perceived, inadequate, criminal history category. It allows the District Court to make an upward departure if it determines that an upward departure is appropriate in a case.

Travis Johnson shows that the District Court did not take into consideration all of the personal characteristic facts listed in the Presentence Investigation Report when it sentenced him. Those factors are listed in Part C of the report. It shows that he had not had any contact with his mother over a long period of time.

For several months following his mother’s detention (1985), the defendant and his siblings were in foster care. However, the late Anna

Williams (their maternal grandmother) eventually gained custody of them, and, she functioned as Mr. Johnson's only custodian for several years. The defendant could not recall a specific time, but, he reported that during his adolescence, his grandmother beat him so badly that he was unable to sit.

School authorities recognized that he was in pain and child protective services became involved. The defendant was ultimately removed from his grandmother's care and he began living with an unnamed uncle in Orlando, Florida. (Doc. 36, 17, ¶ 70)

The defendant advised that while living with his uncle he was prone to "acting out," largely because he craved his mother's love and wanted to be with her. Also, Mr. Johnson found his uncle's rules to be too stringent, so he ran away. He lived on the streets and provided for himself by stealing. The defendant eventually met an older woman (she was age 18), and he began residing with her in Deland, Florida. Approximately one year into his relationship with her, a Child Protective Services employee observed him in a supermarket. The interaction led to Johnson being taken into custody and eventually being placed in a foster care home in New Smyrna Beach, Florida. Mr. Johnson recalled fond memories of his time with "Ms. Hazel," and he identified her as the only foster parent who ever showed him love and

attention. Mr. Johnson reportedly flourished under Ms. Hazel's care and he remained with her until he turned 17 years old. (Doc. 36, 17-18)

Mr. Johnson did not recall fond childhood memories. He described having experienced neglect and physical abuse, as early as age five, from such people as his maternal grandmother and foster care parents. Johnson stated that being in foster care was traumatic and he continues to struggle with unresolved feelings surrounding his experiences. He indicated that only one of many foster parents he was with genuinely cared for him. He advised the others perceived him as a "meal ticket." He advised that one particular foster parent forced him to steal in order to have food and clothing. (Doc. 36, 18, ¶ 73) This childhood contributed, in large part, to his youthful contacts with law enforcement

Mr. Johnson has no criminal conviction, since 2014. The Court's reliance on Mr. Johnson's criminal convictions prior to 2014 and including that year is misplaced and is erroneous. *See, USSG §4A1.3(a)(3), (Departures Based on Inadequacy of Criminal History Category (Policy Statement) (Prohibition- A prior arrest record itself shall not be considered for purposes of an upward departure under this policy statement.) See also, United States v.*

Adudu, 993 F.2d 821 (11th Cir. 1993) [reliance on actual offense conduct is error]. (Doc. 44, 15, line 3) Mr. Johnson barely qualified for criminal history Category II by achieving only 4 points for the range of 4-6 points, for which 3 points were earned in calendar year 2003.

Similarly, any reliance on a 2017 arrest, without more, is an error at Law, as the drugs involved are arguably relevant conduct. See PSR (Doc. 36,5, ¶ 9). See also, United States v. Hunerlach, 258 F.3d 1282 (11th Cir. 2001). [District Court improperly departed upward based on an earlier conviction that constituted relevant conduct.]

The United States Supreme Court in United States v. Booker, 543 U.S. 220, 125 S. Ct. 738 (2005) made the United States Sentencing Guidelines advisory, rather than mandatory. Id. at 259, 125 S. Ct. 764. The Court also determined that a Federal Sentence be reviewed for reasonableness. Id. at 260-261, 125 S. Ct. 765. The District Court looks at a case individually, assesses all facts presented, and gives an appropriate sentence after considering the factors listed in 18 U. S. C. §3553(a).

It is clear from the sentencing transcript (Doc. 44) that the District Court failed to consider the factor in 18 U.S.C. § 3553(a)(3). This subsection that the Court should consider “the kinds of sentences available.” In considering this factor and the personal facts listed above, the District Court would have given a sentence at the low end on the Probation Office revised guideline range of 70 months. (See Doc. 36, 21¶ 99)

This Court should grant the petition, remand the case to the District Court with directions to sentence Mr. Johnson to a sentence of 70 months or below.

II. THE DISTRICT COURT ERRED IN SENTENCING MR. JOHNSON TO A TOP OF THE COURT ADJUSTED GUIDELINE SENTENCE OF 105 MONTHS IN THAT SUCH SENTENCE WAS GREATER THAN NECESSARY TO ACHIEVE THE STATUTORY PURPOSES OF SENTENCING, AND, WAS SUBSTANTIVELY UNREASONABLE

Following the arrest of Mr. Johnson in this case, he came forth and accepted responsibility for his actual offense conduct and thereafter pled directly to all the counts of the Indictment. Mr. Johnson did so with the goal of receiving a downward departure from the applicable Guideline Range, or, the imposition of a Sentence below the Statutory Maximum. The PSI reviewed Mr. Johnson’s criminal history in detail and graded him out with a Criminal History Category of III.

Mr.

Johnson's Offense Guidelines were enhanced for specific offense characteristics for at least one stolen gun, as well as for being an armed street level drug dealer. In addition, the Grouping Rules of Chapter 3 of the Guidelines were applied, all of which resulted in a combined Offense Level of 28. (Doc. 36, 7 ¶ 30) After being given credit for Acceptance of Responsibility, the Total Offense Level was 25. (Doc. 36, 7 ¶ 33) The resulting guideline imprisonment range was 70-87 months. (Doc. 36, 21 ¶ 99)

A Sentencing Hearing was held before the District Court, and after hearing from the parties and presumably considering the Presentence Investigation Report, the Court described the offense conduct as "serious" and questioned whether the Guidelines were adequate to reflect the "serious" nature of the offense. (Doc. 44, 42) [... I can't say how serious that is...] The Court concluded that the Guidelines in this case were inadequate to reflect the seriousness of the offense, or to protect the public, or provide a deterrent for Mr. Johnson, and they were inadequate to accomplish just punishment. The Court thereafter proceeded to Sentence Mr. Johnson to a top of the Guideline Range Sentence of 105 months imprisonment.

Mr. Johnson contends that the District Court committed error in that it abused its discretion in weighing the Section 3553(a) factors in arriving at the sentence which itself lies outside the range of a reasonable sentence as dictated by the facts of this particular case. More specifically, the

District Court gave undue consideration to the offense conduct and relevant conduct of Mr. Johnson, and gave significant weight to improper factors and unreliable facts.

The Appellate Court reviews Sentencing decisions only for abuse of discretion and usually invoke a two-step process. First, the Court reviews to "insure" that the District Court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guideline Range, treating the Guidelines as mandatory, failing to consider the §3553(a) factors, selecting a Sentence based upon clearly ~~arbitrary~~ facts, or failing to adequately explain the chosen Sentence-including an explanation for any deviation from the Guideline Range". *Gall v. United States*, 552 U.S. 38, 51 (2007); *United States v. Shaw*, 560 F.3d 1230, 1237 (11th Cir. 2009); *United States v. Pugh*, 515 F.3d 1179, 1190 (11th Cir. 2008). If the Court finds the sentence procedurally sound, the second step is to review the sentence's "substantive reasonableness" under the totality of the circumstances, including "the extent of any variance from the Guideline Range". *Gall*, 552 U.S. at 51. Sentences which are outside the Guideline Range are not presumed to be unreasonable, but the Court must take the extent of any departure variance into its calculus. *Id.*

Even though the Guidelines are advisory only, they are still the starting point and initial benchmark for the Court's to consider. *Gall*, 552 U.S. at 596. In each case, the Court must make an individualized assessment of the defendant based upon the facts presented, and, if the Court decides that an outside -

guideline sentence is warranted, the Court must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance. *Id.*; *United States v. Pugh*, 515 F3d. 1179, 1191 (11th Cir. 2008). *Gall* further instructs that a "major departure" should be supported by a more significant justification than a minor one. The chosen sentence should be adequately explained for meaningful appellate review and to promote the perception of fair sentencing. *Id.*; *United States v. Pugh*, 515 F3d. 1179, 1190 (11th Cir. 2008) .

In reviewing the substantive reasonableness of the Sentence imposed upon Mr. Johnson, the Eleventh Circuit Court must consider the totality of the circumstances, including the extent of the departure/variance from the Guidelines. Clearly, this Court must give due deference to the District Court's handling of the Guidelines. Similarly, this Court must give deference to the District Court's handling of the Section 3553(a) factors on a whole, but, a District Court's unjustified reliance on any one §3553(a) factor may be symptomatic of an unreasonable sentence. *United States v. Pugh*, 515 F.3d at 1191. See, *United States v. Crisp*, 454 F.3d 1285, 1292 (11th Cir. 2006). Additionally, a sentence may be substantively unreasonable when the District Court selects the arbitrarily, bases the sentence on impermissible factors, gives significant weight to improper or irrelevant factors, or fails to consider pertinent Section 3553(a) factors. *United States v. Ward*, 506 F.3d 468, 478 (6th Cir. 2007); *United States v. Campa*, 459

F.3d 1121, 1174 (11th Cir. 2006); *United States v. Kelly*, No. 17-13243 (3-6-18 11th Cir. 2018). And, finally, discretion can be abused by the District Court even when it does consider all factors, but balances them unreasonably. *United States v. Irey*, 612 F.3d 1160 (11th Cir. 2010); *Ameritas Variable Life Insurance Company v. Roach*, 411 F.3d 1328, 1330 (11th Cir. 2005).

The District Court's decision to impose a 59 month departure/variance over the low end of the "initial" advisory guidelines, even though Mr. Johnson's case is within the "heartland" to which the Sentencing Commission intended for either a 46 -57 months, or, 70 - 87 months to apply, would further indicate that the Court abused its discretion in this case. See *Kimbrough v. United States*, 552 U.S. 85, 109 (2007); *Irey*, 612 F.3d at 1188. In this case, the Court's primary justification for a variance has already been reflected in the applicable Guideline Range. See e.g., *United States v. Lopez*, 343 Fed. Appx., 484, 486 (11th Cir. 2009). Further, Mr. Johnson was rated under the Guidelines not just for the Section 922(g)(1) offense (Base Offense Level 20), he was also enhanced for related offense conduct such as possession of a firearm in connection with drug offenses, the number of firearms, and the fact that the firearm was stolen. (Doc. 36, 7). This all resulted in the combined Offense Level being 28. After credit for Acceptance of Responsibility of Three Levels, the resulting Total Guideline Level was found to be 25. This in and of itself is a significant increase in the Guideline Imprisonment Range, and certainly weighs all facets of Mr. Johnson's offense

conduct.

A typical One Count charge under Section 922(g)(1) may rate out at a Total Offense Level of 17 (Base Offense Level 20 less Acceptance of Responsibility of 3 Levels), which, if the defendant is in Criminal History Category III results in a guideline imprisonment range of 30-37. In this case, based upon the combined offense conduct, Mr. Johnson has a guideline imprisonment range of 70 - 87 months (using the Probation Office Final PSR) which results in an additional 57 months being added on to the guidelines between the lowest and highest of both ranges. This observation is made only to show Mr. Johnson's offense conduct has been effectively taken into account in this mine-run case. There is nothing in the record to suggest that Mr. Johnson's conduct is any worse than other convicted felons, Category III, convicted of firearm possession by a convicted felon, and thereby deserving of a 75 months departure/variance over the low end of the guidelines. [difference between a typical unenhanced low end range of 30 months and the high end of the ultimate Court adjusted range in this case of 105 months) See United States v. Valdes, 500 F. 3d 1291, 1292 & N.2 (11th Cir. 2007)(per curiam) (vacating in part because many of the bases for the sentence imposed were already accounted for in calculating the Guidelines Range).

As was herein above noted, the District Court did speak generally to other 3553(a) factors including especially the criminal history of the Defendant.

The Court described Mr. Johnson's current arrest as one of "a very serious offense". (Doc. 44, 42). What was not noted by the District Court was that there is a scant criminal history convictions of Mr. Johnson, since 2014, almost four years earlier. Further, neither was there a note of the fact that as a result of the prior convictions, Mr. Johnson received the requisite four Criminal History points, for the crimes. Clearly, the Guidelines reflected the seriousness of these prior offenses. The Sentencing Guidelines overall accounted for the criminal conduct of Mr. Johnson.

The criminal history of Mr. Johnson confirms that he is a street seller of small amounts of illegal drugs and merely sells firearms as an infrequent opportunity. He has two (2) adulthood felony convictions — one in 2003 and another in 2014. (PSR, Doc. 36, 13-14). The Sentencing Guidelines have captured his criminal conduct and history and placed him in a Category III. There is nothing in the record that demonstrates that Mr. Johnson's criminal history is any worse than any other Category III drug dealer. While the Court felt Mr. Johnson's uncharged criminal history (... repeated and numerous violations of probation and community control...) [Doc. 44, 44 lines 4-6] was one of showing utter contempt for the criminal laws, this in and of itself does not support the upward departure/variance imposed in this case. See United States v. Valdes, 500 F.3d at 1292 & N.2 (11th Cir. 2007). Mr. Johnson has basically been shown to be a small time street seller of drugs who peddled guns infrequently.

When considering the factors which the District Court relied upon, it becomes clear that the justification for the 75 month upper departure/variance was not sufficiently compelling to support such a large departure/variance. See *Irey*, 612 F.3d at 1287. Merely citing the negative characteristics of Mr. Johnson, be it his criminal record or the nature of the crime itself or any uncharged conduct, without providing other justification, does not adequately justify the imposition of an upward departure/variance.

Overall, the §3553(a) factors generically recited by the Court do not support the upward sentencing departure/variance in this case. The offense conduct, as well as Mr. Johnson's criminal history, are common to most defendants similarly situated, and reflects the unreasonableness of the sentence imposed in this case. See, e.g., *United States v. Gall*, 552 U.S. 38, 51 (2007). The Court's unjustified reliance on any one Section 3553(a) factor may lead one to conclude that the Sentence imposed was unreasonable. See *United States v. Crisp*, 454 F.3d 1285, 1292 (11th Cir. 2006); *United States v. Pugh*, 515 F.3d 1179, 1191 (11th Cir. 2008), *U. S. v. Ihm*, No. 17-10523 (10-31-2007) (11th Cir. 2017).

Likewise, a Sentence may be substantially unreasonable when a Court fails to consider pertinent Section 3553(a) factors. See *United States v. Pugh*, 515 F.3d 1179, 1191 (11th Cir. 2008). It is notable in this case that the Court, while finding the offense conduct serious, and while making reference to a significant criminal conduct, seemingly overlooks other characteristics of Mr. Johnson which are

pertinent to the offense conduct.

Accordingly, when taking into consideration the Section 3553(a) factors as a whole, and, considering the totality of the circumstances of this particular case, Mr. Johnson would suggest that the sentence imposed on him was greater than necessary to achieve the statutory purposes of sentencing, and, was substantively unreasonable.

Rather than following the parsimony principle and imposing a sentence sufficient to meet the goals of sentencing, the District Court instead imposed a sentence which was longer than necessary to accomplish those goals due to the procedural errors. The sentence imposed by the District Court in this case was substantively unreasonable, and this Court should vacate that sentence and remand the case to the sentencing Judge for resentencing. Given Mr. Johnson's personal history and characteristics, the statutory directives contained in 18 U.S.C. § 3553(a) would be satisfied by a below-guideline sentence, and the imposed sentence of 105 months was unreasonable.

An offender characteristic, or, other circumstance identified in Chapter Five, Part H (Offender Characteristics), or, elsewhere in the guidelines is not ordinarily relevant in determining whether a departure is warranted, may be relevant to this determination if such offender characteristic or other circumstance is present to an exceptional degree. USSG §5K2.0(a)(4).

A Sentencing Court's factual decisions used in determining adjustments, such as relevant conduct, acceptance of responsibility, and uncharged conduct, are reviewed under the clearly erroneous standard. United States v. Spraggins, 868 F.2d 1541,1543 (11th Cir. 1989).

Generally, the burden of proof for all factual matters at sentencing is the preponderance of evidence. The burden is upon the government to establish the initial offense level; and the burden is then on the party seeking an adjustment to that offense level. United States v. Alston, 895 F.2d 1362,1373 (11th Cir. 1990).

Mr. Johnson was afforded a 3 level reduction. [See PSR] [Doc. 40, 6-7] This was not an issue. The Trial Court accepted the level reduction : 3 points for timely acceptance of responsibility which provided Mr. Johnson a Criminal History III, Level 25 guideline sentence of 70-87 months. [Doc. 36, 21 ¶ 99]

The Trial Judge did not adhere to the recommended sentencing table calculation and in fact did depart upward and sentence Mr. Johnson to 105 months.

The Court's action was *sua sponte* and without notice to Mr. Johnson nor was it predicated upon any presentence report explicit, unambiguous, recommendation and not merely a flippant observation as explained earlier in

comparing the Initial versus Revised PSRs. However, the Government did argue for a higher sentence of 105 months. [Doc. 44, 39]

The Supreme Court held that "before a District Court can depart upward on a ground not identified as a ground for upward departure either in the presentence report or in a pre-hearing submission by the government, [Fed. R. Crim. P. 32] requires that the District Court give the parties reasonable notice that it is contemplating such a ruling. This notice must specifically identify the ground on which the District Court is contemplating an upward departure".

Burns v. United States, 501 U.S. 129, 135-39 (1991), *rev'd* 893 F.2d 1343 (D.C. Cir. 1990). See also, *United States v. Hinojosa-Gonzalez*, 142 F.3d 1122 (9th Cir. 1998), where, the Government's argument that the Defendant had adequate notice if he knew factual grounds for departure, but not legal basis, were accepted. It should be noted that both factual and legal grounds for departure are within *Rule 32*'s reach. See, *United States v. Moore*, 37 F.3d 169, 175 (5th Cir. 1994), which references the fact that although the record showed that the Court notified defendants that it contemplated an upward departure on the fines, there was no evidence that it gave notice of the basis for such a departure.³

³ Five of this Court's sister circuits- the Second, Fourth, Sixth, Ninth and Tenth- have held that Rule 32(h) notice applies to variances. See United States v. Cousins, 469 F.3d 572, 2006 WL 3435608 *6 (6th Cir. 2006) (published

The Court left "the question of timing of the reasonable notice . . . to the Lower Courts". *Id. at 139 n.6.* Some Courts have concluded that notice must be given before the Sentencing Hearing. See, *United States v. Morris*, 204 F.3d 776,778 (7th Cir. 2000), where the case was remanded with a "recommendation at the hearing does not fulfill the requirement of warning in advance of the hearing"; *United States v. Valentine*, 21 F.3d 395,397-98 (11th Cir. 1994), remanded predicated upon the departing on the ground raised for the first time at sentencing hearing violated reasonable notice requirement of *Burns*. "Contemporaneous - as opposed to advanced - notice of a departure, at least in this case, is 'more a formality than a substantive benefit,' and therefore is inherently unreasonable."

The Eleventh Circuit held in *United States v. Wright*, 968 F.2d 1167,1173-74 (11th Cir. 1996), that the opportunity to object to *sua sponte* departure at

opinion); *United States v. A-nati*, 457 F.3d 233, 237-38 (2nd Cir. 2006); *United States v. Evans- Martinez*, 448 F.3d 1163, 1167 (9th Cir. 2006); *United States v. Davenport*, 445 F.3d 366, 371 (4th Cir.2006), *U.S. v. Atencio*, 476 F.3d 1099 (10th Cir. 2007), :Four other Circuits, The Third, Seventh, Eighth, and Eleventh- have ruled that such notice is not required for variances. See *United States v. Irizarry*, 458 F.3d 1058, 1212 (11th Cir. 2006); *United States v. Nation*, 451 F.3d 189, 198-99 (3rd Cir.2006); *United States v. Walker*, 447 F.3d 999, 1007(7th Cir. 2006); *United States v. Long Soldier*, 431 F.3d 1105, 1122 (8th Cir. 2005). Circuits holding that Rule 32(h) notice is not required for variances have generally reasoned that because post-*Booker* defendants are on notice that the District Court must consider the §3553(a) factors, the "unfair surprise" rationale underlying *Burns* does not apply. See *Booker* 543 U.S. 220, See, also, *Booker*, 543 U. S. 220, (2005), e.g. [**14], *Irizarry*, 458 F.3d 1212, *Nation*, 451 F.3d 196, *Walker*, 447 F.3d 1007. See also, *U. S. v. Avila- Carillo*, 532 Fed. Appx. 841 (11th Cir. 2013) (involving a similar Division District Judge in this case).

sentencing hearing was not sufficient. See, Burns and Rule 32. Burns and Rule 32 make it clear that the defendant must receive "both an opportunity to comment upon the departure, and reasonable notice of the contemplated decision to depart." It should further be noted that this case is unsimilar to United States v. Andrews, 948 F.2d 448,449 (8th Cir. 1991), wherein, the Court cited Burns, and held that the fact that the departure issue were expressly noted in the PSR and that the Government requested departure, acted as sufficient notice.

C. The Court's upward departure in the sentence of Mr. Johnson was prejudicial due to its substantial increase in his sentence, thus negating all of his acceptance of responsibility efforts, which was an abuse of Judicial discretion.

Mr. Johnson has been clearly prejudiced. Mr. Johnson pled directly to the charges, wherein he would give up his Constitutional and Statutory Right to a trial and force the Government to prove the charges against him beyond and to the exclusion of each and every reasonable doubt in exchange for the following considerations: three (3) levels reduction for not putting the Government to the task of proving the charges against him and accepting responsibility in a timely fashion and further assisting himself to lower his prospective sentence.

It should be noted that although a District Court may choose a different means to depart in the pronouncement of a sentence, such as declaring it a

variance [Doc. 44, 52], this is nothing more than a nomenclature for a "departure". A departure, in this instance, which is unwarranted and unreasonable under the overall circumstances.

"In reviewing the reasonableness of a sentence outside the Guideline range, appellate courts may therefore take the degree of variance into account and consider the extent of a deviation from the Guidelines," in addition to the sentencing court's justifications. See, *Gall v. United States*, 552 U.S. 38,128 S. Ct. 586 (2007). A justification for the variance must be sufficiently compelling to support the degree of the variance. *Id.* at 50.

"A District Court abuses its discretion when it (1) fails to afford consideration to relevant factors that were due significant weight (2) gives significant weight to an improper or irrelevant factor, or (3) commits a clear error of judgment in considering the proper factors." *United States v. Campa*, 459 F.3d 1121,1174 (11th Cir. 2006)(en banc).

The Trial Judge spent a portion of the Sentencing Hearing articulating as a predicate to its forthcoming sentence, departure/variance. [Doc. 44, 51-53] Although the Court addressed some of the 3553[a] concerns, the Court did not into consideration the argument made by Mr. Johnson's Counsel in the application of same into 3553[a] considerations. [Doc. 44, 51-53]

It should be noted that the need to depart upward relating to Mr. Johnson's

criminal conduct predicated on the likelihood that he would be committing further crimes clearly did not manifest itself during Mr. Johnson's Sentencing Hearing. The Trial Court was unclear that it did not believe that Mr. Johnson would in fact continue ongoing with a criminal enterprise once released from incarceration.⁴ Furthermore, the elements contained in United States v. Cantu, 12 F.3d 1506 (9th Cir. 1993), relating to the likelihood that predicated upon the nature and circumstances of the instant offense, the circumstances of the instant offense, the circumstances relative to his release from custody and the defendant's overall record do not appear to be factors, herein. Mr. Johnson has no significant criminal history. (Doc. 36, 11-14)

It readily appears that not only did the Government, but the Trial Court, believed that the guidelines held a weakness, in themselves, and could not be effective in dealing with the Appellant's case. It is clear, that this opinion is not the basis to upward departure. See, United States v. Lopez, 875 F.2d 1124, 1126-27 (5th Cir. 1989). (Doc. 44, 51-53)

The District Court must impose a sentence "sufficient, but not greater than necessary to comply with the purposes" listed in §3553(a)(2), including the need to reflect the seriousness of the offense, promote respect for the law, provide just punishment for the offense, deter criminal conduct and protect the public. See, 18 U.S.C. §3553(a)(2). In imposing a particular sentence, the court

⁴A 3353(a) consideration.

must also consider the nature and circumstances of the offense, the history and characteristics of the defendant, the kinds of sentences available, the applicable Guideline range, the pertinent policy statements of the sentencing commission, the need to avoid unwarranted sentencing disparities and the need to provide restitution to victims. See §3553(a)(1),(3)-(7).

The District Court did in fact address some, but not all of the §3553 considerations. The considerations it did not address were those § 3553 factors that were somewhat favorable to Mr. Johnson, herein. As previously indicated, there was no belief by the Trial Court that Mr. Johnson would in fact continue his criminal conduct once he was released from prison; that Mr. Johnson would not be a danger to the community due to future criminal activity; that Mr. Johnson clearly was remorseful and established credible insight into his situation and his willingness to accept responsibility and punishment.

The crimes for which Mr. Johnson was charged and for which he accepted responsibility were ones carried over a short period of time. The Court factored in activities which, in essence, negated the declaration of Mr. Johnson's acceptance of responsibility, referenced as Level 25, by going back in time, some 3-4 years, and addressing factors that should not have been addressed as to Mr. Johnson's involvement, in whatever nature that it may have occurred.

Once again, it should be noted that this Court similarly held that prior conduct that is counted as relevant conduct and setting the offense level for the current sentence may not also be used to support an upward departure. See, *United States v. Hunerlach*, 258 F.3d 1282, 1285-87 (11th Cir. 2001). It should be noted that the court in *United States v. McDonald*, 461 F.3d at 954 (8th Cir. 2006), cautioned against substantial variances predicated upon characteristics of the individual defendant for which the Guidelines calculation already addressed.

In *United States v. Kendall*, No. 05-2863 (8th Cir. May 2, 2006), the Eighth Circuit reversed an upward variance, indicating that the District Court's focus on the seriousness of the methamphetamine manufacturer and Kendall's criminal record in veering upwards were inappropriate since there was nothing which sets Kendall's case apart from any other methamphetamine case.

Additionally, it should be noted the remaining §3553 factors were not relevant to Mr. Johnson. There was no need for restitution. What was not considered by the Trial Court was Mr. Johnson's situation as to the very nature of the punishment that he would be receiving, post-sentencing, in addition to what he received to as his confinement, pre-sentencing. Mr. Johnson would be subject to maximum security detention (Doc. 46 - designation to Coleman U.S.P.) which would restrict many of the benefits that others sentenced by the Court would in fact receive; that he would not be eligible for early release and would have to serve his time more fully due to the firearm conviction involved. The past, as well as the future nature of Mr. Johnson's sentence, certainly

comes into play in determining what is "fair and just."

The Appellate Courts should always consider "additional salient facts that were elicited, and uncontroverted." See, *United States v. Pugh*, 515 F.3d 1179, 1191 (11th Cir. 2008). The failure to mention facts may well reflect the district court's judgment that those facts are not important, but the importance of facts in light of §3553(a) factors is not, in itself, a question of fact, but instead is an issue of law. See, *United States v. Taylor*, 487 U.S. 326 [1988]. Here, the Trial Court did not recognize the controlling law that Mr. Johnson was entitled to legal consideration predicated upon the factual scenario of his pre-trial and sentence confinement, as well as his post-sentence treatment as a firearm possession convict.

That the Guideline established sentence of 70-87 months for which Mr. Johnson "earned" was appropriate not only in itself, but supported by the §3553(a)(2) considerations. The Court's upward departure was unreasonable and an abuse of discretion; considerations utilized to achieve Mr. Johnson's upward departure sentence were predicated upon erroneous considerations.

"Justice is the tolerable accommodation of the conflicting interests of society and I don't believe there is a royal road to obtain such accommodations

concretely.⁵ There appears to be no royal road to achieve such recommendations. Sometimes, it is just a matter of doing what one perceives as fair.

The Court's reasoning for an upward departure/variance took into consideration factors that it should not have taken into consideration, and, when reviewing the overall facts and legal arguments presented on behalf of Mr. Johnson that existed at the time of the sentencing and now addressed in the Appeal, is clear that Mr. Johnson's upward departure/variance increasing his sentence was unreasonable.

CONCLUSION

⁵ Judge Learned Hand. See *Matter of State, A Political Excursion* by Phillip Hamburger (1946)

CONCLUSION

The petition for a writ of certiorari should be granted

Respectfully submitted



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