

No. 18-9536

Supreme Court, U.S.

FILED

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OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

SHAWN J. GIESWEIN

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

Shawn J. Gieswein
Pro Se
P.O. Box 7000
Texarkana, Texas
75505

ORIGINAL

QUESTIONS PRESENTED

Whether the United States Court of Appeals for the Tenth Circuit erroneously denied Certificate of Appealability in Mr. Gieswein's case.

(1). Was Mr. Gieswein's attorney ineffective for failing to argue or raise that the Guidelines recommend concurrent sentences under 5G1.2(c) and 3D1.2-5?

(2). Was Mr. Gieswein's attorney ineffective for failing to argue or raise the "intent" requirement established in Benford under Tenth Circuit precedent?

(3). Was Mr. Gieswein's attorney ineffective for failing to argue or raise that Mr. Gieswein's prior conviction for Destruction of property by explosive device, OKla. Stat. Tit. 21 1767.1(a)(1), is not a "crime of violence" under 4B1.2(a)(2) and that the conviction exceeded the ten year limit under 4A1.2(e)?

(4). Was Mr. Gieswein's attorney ineffective for failing to argue or raise that the substantial upward variance was not warranted under the 3553 factors and that the district court applied to much weight to one 3553 factor, incapacitation, and not enough to the 3553 factors that does require more weight, 3553 factors 6-9,?

(5). Was Mr. Gieswein's attorney ineffective for failing to argue or raise that a "De Novo" resentencing was not required when the knot of calculation was undisturbed with the removal of the ACCA enhancement?

(6). Was Mr. Gieswein's attorney ineffective for failing to argue or raise that Mr. Gieswein did not tamper with a witness that was not going to testify in court or that he knew that Amber Lovett or his Mother was going to testify in an official proceeding?

(7) Was Mr. Gieswein's attorney ineffective for failing to argue or raise that "intent" in Benford must be established in Mr. Gieswein's firearm case and that Mr. Gieswein is protected under the Second Amendment right to keep and bear arm in his home for protection, that under any form of scrutiny 922(g)(1) is unconstitutional?

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Petitioner Shawn J. Gieswein respectfully petitions for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit for review of its decision to deny Certificate of Appealability.

INTRODUCTION

By denying Certificate of Appealability the Tenth Circuit did not argue the merits of Mr. Gieswein's constitutional claims. The Tenth Circuit did not follow Supreme Court precedence, in that, the district court did not determine what the guidelines recommended or that the guidelines anchor the district courts discretion in conflict with Molina-Martinez v. United States, 578 U.S. __, 136 S.Ct. 1338, 194 L. Ed.2d 444 (2016) Peugh v. United States, 569 U.S. 530 (2013) and Beckles v. United States, 137 S.Ct. 886 (2017). The Tenth Circuit did not apply the principles set forth in Lymon v. United States, 2018 U.S. App Lexis 27880 (10th Cir. 2018) In light of the apparent difference in these approaches, both the district court and the court of appeals would benefit greatly from further elucidation of the extent that the guidelines anchor the district courts discretion and what would establish "intent" for possession of a firearm and what conduct would raise to tampering with a witness and lack of knowledge to an official proceeding. The district court would benefit greatly from furthur explanation on how to apply the 3553 factors and what weight to apply to different 3553 factors. The district court would benefit greatly from further elucidation of the extent to which a "De Novo" resentencing applies. The district courts and the Court of Appeals have struggled with the Heller decision and how to apply "scrutiny" to complete bans on firearms under 18 U.S.C. 922(g)(1-9). The Heller decision was decided 10 years ago and this Court has not expounded upon the exceptions laid out in Heller. The Third Circuit is the only court of appeals to rule that 922(g)(1) is unconstitutional. 922(g)(1) bans all firearms from 20 million American citizens, and there right to protect their home and family. The Second Amendment can not be "decided on a case-by-case basis whether the right is really worth insisting upon." The Third Circuit ruled in Binderup that 922(g)(1) is unconstitutional and that rule must apply to all 922(g)(1) cases.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit concerning Mr. Gieswein's 2255 Motion is reported at United States v. Gieswein, no. 18-6220 5:18-CV-00468-F and 5:07-CR00120-F-1 (10th Cir. April 19, 2019)

JURISDICTION

Jurisdiction is proper pursuant to 28 U.S.C. 1254(1). The Tenth Circuit entered its judgment and opinion affirming the judgment of conviction and sentence on April 19, 2019. This petition is being filed within 90 days of that date and, accordingly, is timely. See Sup. Ct. R. 13.1.

STATUTORY OR OTHER PROVISIONS

INVOLVED

A. 18U.S.C. 3553(a)

This case implicates 18 U.S.C. 3553(a). It states the following:

- (a) Factors to be considered in imposing a sentence-The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider--
 - (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
 - (2) The need for the sentence imposed--
 - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
 - (B) to afford adequate deterrence to criminal conduct;
 - (C) to protect the public from further crimes of the defendant; and
 - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
 - (3) The kind of sentence available;
 - (4) the kinds of sentences and the sentencing range established for--
 - (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines--
 - (i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendment made to such guidelines by act of Congress (regardless of whether such amendments have

yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under 994(p) of title 28);

(5) any pertinent policy statement--

(A) issued by the Sentencing Commission pursuant to section 994(a) (2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) The need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victim of the offense.

B. 18 U.S.C. 3553(b)(1)

This case also implicates 18 U.S.C. 3553(b)(1). It states the following:

Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purpose set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also

due regard for the relationship of the sentence imposed to sentences prescribed by guideline applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

C. Fed. R. Crim. P.(d)(1)

This case also implicates Rule 32(d)(1) of the Federal Rules of Criminal Procedure. Rule 32(d)(1) provides as follows:

(d) Presentence Report.

(1) Applying the advisory Sentencing Guidelines. The presentence report must:

(A) identify all applicable guideline and policy statements of the Sentencing Commission;

(B) calculate the defendant's offense level and criminal history category;

(C) state the resulting sentencing range and kinds of sentences available;

(D) identify any factor relevant to:

(i) the appropriate kind of sentence, or

(ii) the appropriate sentence within the applicable sentencing range;

(E) identify any basis for departing from the applicable sentencing range.

STATEMENT OF THE CASE

A. Original Sentencing

Mr. Gieswein was convicted of illegally possessing a firearm in violation of 18 U.S.C. 922(g)(1) and witness tampering in violation of 18 U.S.C. 1512(b)(1). United States v. Gieswein, 887 F.3d 1054, 1056 (10th Cir. 2018)

Prior to his first sentencing, a Presentence Report ("PSR") concluded that Mr. Gieswein had three prior convictions that qualified as violent felonies from Oklahoma State Court under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. 924(e), including: (1) destruction of property by an explosive device; (2) lewd molestation; and (3) first-degree burglary. Based on a total offense level of 33 and a criminal history category of IV, his recommended Guideline range was 188-235 months of imprisonment. 887 F.3d at 1056

The government moved for an upward variance based on Mr. Gieswein's criminal record. He was convicted in 1995 of destroying a car with a pipe bomb. While on a suspended sentence for that crime, Mr. Gieswein was convicted of lewd molestation. While under a suspended sentence for that crime, Mr. Gieswein was convicted of first-degree

burglary. He had also violated a protective order against that girlfriend on two occasions. Also while under the suspended sentence for lewd molestation, Mr. Gieswein was convicted of having embezzled \$3,000 from his employer. At the time of his original sentencing, Mr. Gieswein had pending charges for failing to register as a sex offender.

The District Court adopted, as the starting point of its sentencing analysis, the recommended Guideline range. The District Court, however concluded that an upward variance was appropriate because, according to the District Court, the guidelines did "not give sufficient effect to the depth and breadth, the persistence and the depravity and harmfullness of the criminal conduct of the defendant." 887 F.3d at 1057. Concluding that Mr. Gieswein had engaged in "a broader range of criminal activity than I have ever seen out of a single defendant," the district court imposed a sentence of 240 months, the statutory maximum (five months above the upper end of the recommended Guideline range). 887 F.3d at 1057. The District Court sentenced Mr. Gieswein to 240 month on count 1 and 120 months on count 2, to be run concurrently.

B. Resentencing

After the Tenth Circuit had affirmed Mr. Gieswein's convictions on direct appeal and denied a number of unsuccessful pleadings collaterally attacking his conviction and sentence, Mr. Gieswein sought permission to file a successive motion pursuant to 28 U.S.C. 2255 based on the decision of the United States Supreme Court in Johnson v. United States, 576 U.S. ___, 135 S.Ct. 2551, 192 L.Ed. 2d 569 (2015). In Johnson, the Court had struck down the ACCA's residual clause as unconstitutionally vague. 135 S.Ct. at 2563, 192 L.Ed. 2d at 584. After this Court held in Welch v. United States, __ U.S. ___, 136 S.Ct. at 1257, 1265, 194 L.Ed.2d 387, 403-04 (2016) that Johnson applies retroactively to cases on collateral review, the Tenth Circuit granted Mr. Gieswein authorization to file a second 2255 motion. The government conceded that Mr. Gieswein's prior conviction for lewd molestation no longer qualified as a violent felony and the District Court then vacated his sentence. 887 F.3d at 1057.

At resentencing, an addendum to the original PSR noted Mr. Gieswein's disciplinary record while in prison, which included eight incidents, and a ¹⁵⁰s additional, pending charge for assault and battery on a police officer or other law enforcement officer that had occurred before his original sentence. 887 F.3d at 1057

The addendum to the PSR recommended a base offense level of 24. In addition, though Mr. Gieswein's prior conviction for lewd molestation no longer qualified as a violent felony under the ACCA, the PSR concluded that it was a "crime of violence" under the definition of "forcible sex offense" contained in U.S.S.G. 4B1.2(a)(2) and application note 1. Mr. Gieswein objected, arguing that the offense did not qualify as a "crime of violence". 887 F.3d at 1057

The government again moved for an upward departure, contending that Mr. Gieswein should be resentenced to 240 months. 887 F.3d at 1057

At resentencing, the district court overruled Mr. Gieswein's objections and adopted the PSR's findings. The court again started its sentencing analysis with the applicable Guideline range, concluding that, with a base offense level of 24, a two level enhancement for obstruction of justice, and a criminal history category of IV, Mr. Gieswein's amended guideline range was 92 to 115 months. 887 F.3d at 1057-58

The Court concluded, however, that the new Guideline range "falls far short of reflecting the extent ^{to} which Mr. Gieswein is a menace to society" and departed upward substantially. (3 times over the guideline range) The court stated that Mr. Gieswein criminal history was "remarkable not only for the seriousness of the defendant's conduct but for, if you will, the diversity of it." After reviewing that history, the court reiterated its comments from the original sentence that the guidelines failed to "give sufficient effect ^{to} the depth and the breadth and the persistence and the depravity and the harmfulness of this defendant's criminal conduct." The court further concluded that that statement "is even more true now with the additional assault case." (Quoted in 887 F.3d at 1057-58)

Citing what the district court described as "incapacitation" of Mr. Gieswein as the predominant motivating factor under 18 U.S.C. 3553(a), the district court varied upward to 240 months (125 months above the upper end of the applicable Guideline range). The district court stated that it would have gone higher if not for that maximum. Finally, the court noted that its conclusion "would be the same even if all of the defendant's objections to the Presentence report had been successful." Mr. Gieswein then filed a timely appeal with the Tenth Circuit. (quoted in 887 F.3d at 1058)

C. The Tenth Circuit's Opinion

The Tenth Circuit concluded that the district court had

procedurally erred in concluding that Mr. Gieswein's lewd molestation conviction was a "forcible sex offense" as defined by U.S.S.G. 4B1.2(a)(2) app. n. 1. 887 F.3d at 1060. In so doing, the court noted that the guidelines impose an increased offense level for certain firearms offenses if the defendant had two prior felony convictions for a "crime of violence," U.S.S.G. 2K2.1(a)(2), which includes a felony "forcible sex offense," U.S.S.G. 4B1.2(a)(2). Applying the categorical approach to determining whether the conviction for lewd molestation qualified as a forcible sexual offense, and not the circumstance-specific approach, the court concluded that the Oklahoma statute at issue could not be categorically be considered a crime of violence under the forcible sex offense theory. 887 F.3d at 1058-60

The starting point of the district court's sentencing analysis--the district court's guidelines calculation--thus rested on the erroneous conclusion that Mr. Gieswein's prior lewd molestation conviction was a forcible sexual offense. Absent the error by the district court, Mr. Gieswein's Guideline range would have been 63 to 78 months instead of the 92 to 115 months adopted by the district court (or at least 162 months below the 240 months imposed). Specifically, without counting the lewd molestation offense as a crime of violence, Mr. Gieswein's offense level would have been four levels lower. 887 F.3d at 1062 and n. 5

The Court of Appeals then considered whether having found a procedural error, resentencing was required. The court stated that, "if we find a procedural error, resentencing is required if the error was not harmless." 887 F.3d at 1061 The court explained that, "procedural error is harmless 'if the record viewed as a whole clearly indicates the district court would have imposed the same sentence had it not relied on the procedural miscue(s)." Id. The court of appeals further noted that the government bears the burden of demonstrating harmlessness by a perponderance of the evidence. Id.

Quoting from this Court's decision in Molina-Martinez v. United States, 578 U.S. __, 136 S.Ct. 1338, 194 L.Ed.2d 444 (2016), the Tenth Circuit stated that, "when a defendant is sentenced under an incorrect Guideline range...the error itself can, and most often will be sufficient to show a reasonable probability of a different result. 887 f.3d at 1061. The Court of Appeals added that, "because the guidelines 'form the essential starting point in any federal sentencing analysis,' an error in calculating the correct range 'runs the risk of affecting the ultimate sentence regardless of whether the court ultimately imposes a sentence within or outside the range the guidelines suggest." Id. Quoting from this

Court's decision in Peugh v. United States, 569 U.S. 530, 541 (2013), the court added that "a properly calculated Guideline range ensures 'that sentencing decisions are anchored by the guidelines and that they remain a meaningful benchmark through the process of appellate review,' even in cases in which 'the sentencing judge sees a reason to vary from the guidelines." 887 F.3d at 1061

Nonetheless, the COurt of Appeals stated that "there may be instances when, despite application of an erroneous Guideline range, a reasonably probability of prejudice does not exist" Id. (quoting Molina-Martinez, 136 S.Ct. at 1346). Yet, the Tenth Circuit added that "it will be a 'rare case' in which we can confidently state that a guidelines calculation error 'did not affect the district court's selection of the sentence imposed." 887 F.3d at 1061. The court of Appeals also added, by way of example, that "a highly detailed explanation of the sentence imposed by the district court 'could make it clear that the judge based the sentence he or she selected on factors independent of the Guidelines." Id. (quoting Molina-Martinez, 136 S.Ct. at 1347).

The Court of Appeals concluded that the District Court's resentencing of Mr. Gieswein was one of those exceptional instances in which a procedural error was harmless. In support of this conclusion, the court cited the fact that Mr. Gieswein's original sentencing, the district court varied upward from his then-advisory guideline range of 188-235 months' imprisonment; and that, as justification for the upward variance, had stated, as noted above, that the Guidelines did not give sufficient effect to Mr. Gieswein's criminal history. 887 F.3d at 1061. The Court of Appeals also cited that fact that, though Mr. Gieswein's Guideline range had changed to 92 to 115 months the district court imposed the same 240 months' imprisonment; and that, as justification for the upward variance at that time, the district court made the statements about Mr. Gieswein's criminal history that we note above and cited, as the predominant factor at play, the need to "incapacitate" the defendant. 887 F.3d at 1062.

The Court of Appeals stated that the fact that the district court elected to impose the same sentence even though Mr. Gieswein's new Guideline range was less than half of his original range suggests that the district court would again impose the same sentence under an even lower Guideline range. Yet, the Court of Appeals stated that this factor, standing alone, would not be enough to demonstrate harmlessness, explaining that a procedural error is not harmless if it requires the court to speculate on whether the district court would have reached the same result absent the error. 877 F.3d At 1062.

The Tenth Circuit also stated that it was giving little weight to the district court's statement that its conclusion would have been the same even if all of Mr. Gieswein's objections to the PSR had been successful. The Court of Appeals made clear that it has "rejected the notion that the district court can insulate sentencing decisions from review by making such statements." *Id.* at 1062-63

The Court of Appeals, however, identified two factors that "tipped the scales toward harmlessness" in addition to the district court's reimposition of the same sentence. First, the Court of Appeals noted, the district court stated that it chose to impose a sentence of 240 months because the figure was the statutory maximum and would have imposed a higher sentence if possible. That statement, the Court of Appeals found, indicated that the statutory maximum, rather than the guidelines range, was driving force behind the selected sentence. Second, the Court of Appeals noted, the district court provided a thorough explanation for its decision to impose the statutory maximum as based on Mr. Gieswein's criminal history as being underrepresented by his guideline range. 887 F.3d at 1063.

D. 18 U.S.C. 2255 Petition

Mr. Gieswein filed a 2255 petition in the district court for multiple ineffective assistance of counsel claims. The district court ruled that Mr. Gieswein could raise all issues under a "De Novo" resentencing and that the issues was not time barred or considered a second or successive 2255 petition.

The district court did not rule that Mr. Gieswein's claims for ineffective assistance of counsel was frivolous. The district court ruled that Mr. Gieswein failed to show that his attorney was ineffective for not raising sentencing errors and guideline errors. The district court denied a certificate of appealability when it entered its final order in Mr. Gieswein's case. The district court did not hold an evidential hearing in Mr. Gieswein's case.

E. Tenth Circuit's Denial

The Tenth Circuit denied a Certificate of Appealability in Mr. Gieswein's case, and agreed with the district court's findings.

BASIS FOR JURISDICTION IN THE UNITED STATES DISTRICT COURT

The district court had jurisdiction as the court of first instance pursuant to 18 U.S.C. 3231.

REASON FOR GRANTING THE PETITION

The Court of Appeals did not grant Mr. Gieswein's 2255 petition and left important questions unanswered and conflict between the Sister Circuits, and how to apply the Guidelines.

Of course, after this Court's decision in United States v. Booker, 543 U.S. 220 (2005), the guidelines are advisory only. Nonetheless, a district court still "must consult those guidelines and take them into account when sentencing." 543 U.S. 264; see also 18 U.S.C. 3553(a)(4). A district court must also consider various other sentencing factors listed in 3553(a), including "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. 3553(6). "The post-Booker federal sentencing scheme aims to achieve uniformity by ensuring that sentencing decisions are anchored by the Guidelines...." Peugh, 569 U.S. at 541

Under the Sentencing Reform Act of 1984, the United States Sentencing Commission establishes Sentencing Guidelines based on two factors: the seriousness of a defendant's offense and his criminal history. Hughes v. United States, U.S., 138 S. Ct. 1765, 201 L.Ed. 2d 72, 80 (2018) In combination, these two factors yield a range of potential sentences from which a district court may choose in sentencing a particular defendant. Hughes, 138 S.Ct. at 1772, 201 L.Ed. 2d at 80

The Sentencing Guidelines thus "provide the framework for tens of thousands of federal sentencing proceedings that occur each year." Molina-Martinez, 578 U.S. at , 136 S.Ct. at 1342, 194 L.ED.2d at 450. The goal of the Guidelines is to achieve "uniformity in sentencing... imposed by different federal courts for similar criminal conduct,' as well as 'proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of different severity." Rita v. United States, 551 U.S. 338, 349 (2007). To achieve those ends, the Commission engaged in "a deliberative and dynamic process" to create Guidelines that account for a variety of offenses and circumstances. USSC, Guidelines Manual 2ch. 1, pt.A, intro. comment, p. 14 (Nov. 2015). As part of that process, the Commission considered the objectives of federal sentencing identified in the Sentencing Reform Act of 1984—the same objectives that federal judges must consider when sentencing defendants. Molina-Martinez, 136 S.Ct. at 1342, 194 L.Ed.2d at 451-52; see also 28 U.S.C. 991(b) and 18 U.S.C. 3553(a). The result is a set of elaborate, detailed Guidelines that aim to embody federal sentencing objectives "both in principle and in practice." Rita, 551 U.S. at 350

The Guidelines' central role in sentencing means that an error related to the Guidelines can be particularly serious. Molina-Martinez, 136 S.Ct. at 1345-46, 194 L.Ed.2d at 454-455. A district court that "improperly calculates" a defendant's Guideline range, for example, has committed a "significant procedural error." Gall, 552 U.S. at 49. That same principle explains the court's ruling that a "retrospective increase in the Guideline range applicable to a defendant creates an ex post facto violation." Peugh, 569 U.S. at 542.

In light of these facts, this Court has confirmed that "the Guidelines are not only the starting point for most federal sentencing proceedings but also the lodestar." Molina-Martinez, 136 S.Ct. at 1345-1346, 194 L.Ed.2d at 454-455. The Guidelines inform and instruct the district court's determination of an appropriate sentence. In the usual case, then, the systemic function of the selected Guidelines range will affect the sentence. *Id.* The Guidelines "serve as the starting point for the district court's decision and anchor the court's discretion in selecting an appropriate sentence." *Id.* 136 S.Ct. at 1349, 194 L.Ed. 2d at 458.

The District Court has made two significant errors in Mr. Gieswein's case. Mr. Gieswein's attorney was ineffective by not objecting in open court that the court made these errors, at the least to preserve them for appellate review. The District Court made several more errors that would have resulted in a lower guideline range in Mr. Gieswein's case and would have resulted in concurrent sentences instead of consecutive sentences.

The Circuit courts are split on how the guidelines apply to federal sentences. The Sixth Circuit has determined that under 3D1.2 and 5G1.2(c) that a defendant's sentences run concurrently and that the count with the highest statutory maximum is the statutory maximum for the entire group. McClain v. United States, 2015 U.S. App. Lexis 23291 (6th Cir. Aug. 2015) The Tenth Circuit has ruled in Lymon that: "the court has discretion to impose consecutive sentences under 3584." Lymon v. United States, 905 F.3d 1149, 2018 WL 4701430, at *2 (10th Cir. Oct. 2018)

The record clearly shows that the district court or Mr. Gieswein's attorney did not argue or discuss 3D1.2 or 5G1.2(c) of the Guidelines and how they would affect Mr. Gieswein's sentence. "a sentencing court must correctly determine whether the guidelines recommend concurrent sentences, and the failure to do so results in procedural error." Nania v. United States, 724 F.3d 824, 830 (7th Cir. 2013), Whitehead Jr. v. United States, 660 Fed Appx 219, no. 15-4783 (4th Cir. 2016)

"Counsel's failure to object was based on a failure to grasp the relevant legal standards rather than a sound trial strategy, and defendant's sentence would have been more than seven years lower had counsel objected." Carthorne Sr.v. United States, 878 F.3d 458 (2017)

"When a defendant's lawyer is confronted with error during a judicial proceeding, he has the responsibility to object contemporaneously, calling the question to the court's attention and preserving the issue for appellate review. Fed. R. Crim. P. 51(b)." Carthorne Sr. v. United States, 878 F.3d 458 (2017)

"the plain error and ineffective assistance of counsel standards do not necessarily generate identical outcomes with respect to the same alleged error." Carthourne Sr. v. United States, 878 F.3d 458 (2017)

The Tenth Circuit ruled that the district court's procedural error was harmless under the plain error standard, yet the procedural error was not harmless under the ineffective assistance of counsel standard.

Mr. Gieswein's attorney did not object to the fact-based approach instead of a categorical approach to determine if Mr. Gieswein's prior conviction for lewd molestation was a crime of violence.

"A reasonable probability that the outcome of a sentencing would change is enough to show prejudice under the Strickland standard." Carthorne Sr. v. United States, 878 F.3d 458 (2017)

Mr. Gieswein's attorney failed to argue or raise the "nexus" for witness tampering at resentencing. The attorney did not understand that this issue could be argued at a "De Novo" resentencing. Once the district court ordered a "De Novo" resentencing Mr. Gieswein could argue all issues past and present. Mr. Gieswein is actually innocent of witness tampering, 18 U.S.C. 1512(b)(1) because he had no knowledge that his actions was going to affect an "official Proceeding". "The government is required to prove a nexus between the defendant's conduct and a particular official proceeding." Tyler v. United States, 732 F.3d 241 (3rd Cir. 2013) "a defendant who lacks knowledge that his actions are likely to affect a judicial proceeding lacks the requisite intent to obstruct." Tyler v. United States, 732F.3d 241 (3rd Cir. 2013)

Mr. Gieswein did not ask Amber Lovett or others to testify and Amber Lovett was not a witness nor had any knowledge of the crime or firearm in question. Mr. Gieswein's attorney did not research his case and object to count 2 in Mr. Gieswein's case. Mr. Gieswein is serving an illegal sentence, in that, he is actually innocent of witness tampering.

Mr. Gieswein's attorney was ineffective for failing to raise important issues that would affect his sentence and did not do relevant research into Mr. Gieswein's case or the Sentencing Guidelines and how they apply to Mr. Gieswein's sentence. Mr. Gieswein's attorney did not argue or raise what the Sentencing Commissions sentencing statistics average sentence is for a felon in possession of a firearm to prevent an unwarranted sentence disparity. See Singh v. United States, 877 F.3d 107, 2017 U.S. App Lexis 24994 (2nd Cir. 2017)

Mr. Gieswein's attorney failed to raise or argue that the 3553 factors(a)(4-9) affect Mr. Gieswein's sentence and the discretion of the district court. The district court applied no weight to 3553(a)(4-9), yet applied all the weight to 3553(a)(3). This Court and Congress have ruled that the district courts must consider "the history and characteristics of the defendant" among other factors... in order to avoid unwarranted sentencing disparities the court should not give them excessive weight." (see U.S.S.G. CH. 5 Part H) "Because the Guidelines are a factor under 3553(a)(4) and (5), a sentencing court abuses its discretion when it does not consider them." Garcia-Lara v. United States, 499 F.3d 1133 (10th Cir. 2007)

Mr. Gieswein's attorney failed to argue that his statutory maximum sentence was 120 months. Chapter 3 of the Sentencing Guidelines clearly state that; "the count represented by that conduct is to be grouped with the count to which it constitutes an aggravating factor. This provision prevents 'double counting' of offense behavior. Of course, this rule applies only if the offenses are closely related." Chapter 5 of the Sentencing Guidelines state that; "5G1.2(c) If the sentence imposed on the count carrying the highest statutory maximum is adequate to achieve total punishment, then the sentences on all counts shall run concurrently, except to the extent otherwise required by law." Total punishment is defined as the Guideline range.

Mr. Gieswein's attorney failed to raise or argue that his prior conviction for destruction of property by explosive device, Okla Stat. tit. 21 1767.1(a)(1), is not a crime of violence and that under 4A1.1(c) the prior conviction should not be counted because it was past the 10 year time limit allowed under 4A1.2(e).

Mr. Gieswein's Guideline range has fallen from 188-235 months down to 63-78 months, and the correct calculation should be 27-33 months. Mr. Gieswein is serving an unwarranted, unreasonable sentence, and the district court has made two significant procedural errors that affect Mr. Gieswein's sentence.

This Court is currently deciding a firearms case and the mens rea of 922(g). Rehaif v. United States, case no. 17-9560

Mr. Gieswein has argued that 922(g)(1) is unconstitutional and infringes upon the Second Amendment right to keep and bear arms. This court has denied Certiorari in Mr. Gieswein's case four times. The facts in Mr. Gieswein's case is a perfect avenue to discuss and rule on the Constitutional bounds of 922(g)(1). Mr. Gieswein owned the firearm in question for 11 years, the firearm was registered in his name and he kept the firearm for protection in his home. The government stated that Mr. Gieswein used his firearms lawfully and responsibly.

The Circuit court are split on the constitutional aspects of 922(g)(1). The Third Circuit has ruled that 922(g)(1) is unconstitutional in Binderup. All of the other Circuits have ruled that 922(g)(1) does burden the Second Amendment core right, but have used intermediate scrutiny to deny that 922(g)(1), which bans all felons from possessing all firearms, is unconstitutional.

This Court has stated in Heller that: "Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home 'the most preferred firearm in the nation to keep and use for protection of one's home and family, would fail constitutional muster.' and "We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest-balancing' approach. The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is really worth insisting upon. A constitutional guarantee subject to future judges' assessment of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad." Heller v. United States, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008) "But the enshrinement of constitutional rights necessarily takes certain policy choices off the table. These include the absolute prohibition of handguns held and used for self-defense in the home." Heller v. United States, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008)

This Court has denied Certiorari for 10 years on cases that involve the Constitutionality of 922(g)(1). This Court ruled in Heller that: "And there will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those

exceptions come before us." Heller v. United States, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008)

Mr. Gieswein is raising this issue and his case is a perfect fit for this Court to discuss and decide if a felon can keep and bear firearms in his home for protection.

The district courts and the Court of Appeals would benefit greatly from further elucidation of the extent to which the Second Amendment right protects felons or not to keep and bear arms in the home for protection. The district courts and Court of Appeals would benefit greatly from further elucidation of the extent that ineffective assistance of counsel applies to guideline errors and the discretion a court has under the guidelines. The district court and the Court of Appeals would benefit greatly in determining if 5gl.2 is stronger advisement than 18 U.S.C. 3584 advisement.

"What reasonable citizen wouldn't bear a rightly diminished view of the judicial process and its integrity if courts refused to correct obvious errors of their own devise that threaten to require individuals to linger longer in federal prison than the law demands." Rosales-Mireles v. United States, 2018 BL 214344, U.S. no 16-9493 (2018) (quoting Judge Neil M. Gorsuch)

Mr. Gieswein would take this statement even farther. "What reasonable citizen wouldn't bear a rightly diminished view of the Supreme Court that ruled that they would expound upon the historical justification for the exceptions they have mentioned, but refused to when that exception came before them. The judicial process and integrity of the judicial system would be in contempt of its own demise." Shawn J. Gieswein

CONCLUSION

For the foregoing reasons, Petitioner Shawn J. Gieswein respectfully requests that this Court grant certiorari to review the judgment of the United States Court of Appeals in this case.

Respectfully submitted this 2 day of
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SHAWN J. GIESWEIN
Pro Se
P.O. Box 7000
Texarkana, Texas
75505