

No. _____

IN THE
Supreme Court of the United States

ERWIN BURLEY,
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 A WRIT OF CERTIORARI

DONNA LEE ELM
FEDERAL PUBLIC DEFENDER
MEGHAN ANN COLLINS
Counsel of Record
RESEARCH AND WRITING ATTORNEY
APPELLATE DIVISION
201 S. Orange Ave., Ste. 300
Orlando, Florida 32801
(407) 648-6338
Meghan_Boyle@fd.org
Counsel for Petitioner

JUNE 25, 2019

QUESTIONS PRESENTED

Whether this Court should exercise its supervisory power and grant review because the Eleventh Circuit has permitted an upward variance sentence almost double the high end of the guideline range without requiring the district court judge to explain why the sentencing guideline range was inadequate, based on the district court's citation to conduct already taken into account in the guideline calculation.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioner is Erwin Burley, defendant-appellant below. Respondent is the United States of America, plaintiff-appellee below. Petitioner is not a corporation.

TABLE OF CONTENTS

Questions Presented.	i
Table of Contents.	iii
Table of Appendices.	iv
Table of Authorities.	v
Petition for a Writ of Certiorari.	1
Opinions Below.	1
Jurisdiction.	1
Constitutional and Statutory Provisions Involved.	1
Statement of the Case.	2
Reasons for Granting the Writ.	7
This Court should grant review and exercise its supervisory power because the Eleventh Circuit failed to properly review the substantive reasonableness of the sentence, and sanctioned the district court's imposition of an upward variance based on conduct which already formed the basis of a guideline enhancement without explanation as to why the guideline range was inadequate.	
Conclusion.	10

TABLE OF APPENDICES

<i>United States v. Erwin Burley,</i>	
11th Circuit Case No. 18-10395	Appendix A
<i>United States v. Erwin Burley,</i>	
United States District Court Opinion, 3:16-cr-171	Appendix B

TABLE OF AUTHORITIES

Cases	Page(s)
<i>United States v. Burley</i> , 763 F. App'x 886 (11th Cir. 2019)	iv, 1, 3, 6
<i>United States v. Gall</i> , 552 U.S. 38 (2007)	9
<i>United States v. Irey</i> , 612 F.3d 1160 (11th Cir. 2010)	9
<i>United States v. Osorio-Moreno</i> , 814 F.3d 1282 (11th Cir. 2016)	8-9
Constitutional Provisions	
U.S. CONST. amend. V	1, 9
Statutes	
18 U.S.C. § 1591.....	2
18 U.S.C. § 2421.....	2
18 U.S.C. § 2422.....	3
18 U.S.C. § 3553(a).....	8
28 U.S.C. § 1254.....	1
Other Authorities	
U.S.S.G. § 2Gl.13	7, 8
S. CT. Rule 10.....	7

PETITION FOR A WRIT OF CERTIORARI

Erwin Burley respectfully petitions for a writ of certiorari to review the Eleventh Circuit's judgment.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 763 F. App'x 886 (11th Cir. 2019) and reprinted in the appendix, Appendix A.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Eleventh Circuit was entered on March 27, 2019. *See Appendix A.* The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V of the United States Constitution provides that:

No person shall be . . . deprived of life, liberty, or property, without due process of law;

U.S. CONST. amend V.

STATEMENT OF THE CASE

Erwin Burley was sentenced to 96 months in prison, a sentence more than three years longer than the high end of his applicable guideline range, based on conduct already factored into the guideline calculations and without an explanation as to why the applicable guideline range was not sufficient. This sentence was then affirmed on appeal by the Eleventh Circuit Court of Appeals.

Mr. Erwin Burley was arrested after two adult women, N.F. and S.W., told law enforcement that Mr. Burley had brought them to Florida from other states to have them engage in prostitution. Doc. 54 at ¶¶ 17, 28. The women alleged that Mr. Burley had been violent towards them. *Id.* at ¶¶ 38, 44. N.F. stated that Mr. Burley had beaten her with a phone cord and with his hands when she failed to meet a daily financial quota. *Id.* at ¶ 38. S.W. stated that Mr. Burley had used a firearm to pistol whip her. *Id.* at ¶ 44.

Mr. Burley was indicted on five counts. Doc. 4. Counts one and two charged that Mr. Burley did knowingly recruit, entice, harbor, transport, provide, maintain, advertise, patronize, or solicit a person, while knowing and in reckless disregard of the fact that means of force, threats of force, fraud, and coercion would be used to cause the person to engage in a commercial sex act, in violation of 18 U.S.C. § 1591. *Id.* at 1-2. Count one listed S.W. as a victim, and count two listed N.F. *Id.* Count three charged that Mr. Burley knowingly transported individuals, S.W. and N.F., in interstate commerce from Texas and Louisiana to Jacksonville, Florida, with the intent that S.W. and N.F. engage in prostitution, in violation of 18 U.S.C. § 2421.

Id. at 2. Counts four and five charged that Mr. Burley knowingly persuaded, induced, enticed, and coerced an individual to travel in interstate commerce with intent that the individual engage in prostitution, in violation of 18 U.S.C. § 2422(a).

Id. at 3. Count four listed S.W. as a victim, and count five listed N.F. *Id.* Had Mr. Burley been found guilty of all five counts, then his guideline range would have been 292 to 325 months. *Burley*, 763 F. App’x. at 887.

Mr. Burley entered into a plea agreement with the government in order to resolve his case. Doc. 40. In exchange for Mr. Burley entering a plea of guilty to count five of the indictment, the government agreed to dismiss the remaining counts and to recommend that he receive a sentence within his sentencing guideline range. Docs. 38, 40 at 3, 4. A magistrate judge heard the change of plea hearing and recommended that the plea be accepted; the district court accepted Mr. Burley's plea and adjudicated him guilty. Docs. 40, 43.

Although Mr. Burley pled guilty to a single count that listed N. F. as a victim, the Pre-Sentence Investigation Report (PSR) calculations also took into account the dismissed charges that listed S.W. as a victim and calculated the offense level as though there were multiple counts of conviction. Doc. 54 at ¶¶ 35-36, 43-51. The base offense level for each victim was set at 14 pursuant to U.S.S.G. § 2G1.1(a)(2). *Id.* at ¶¶ 37, 43. The offense levels were increased by 4 levels pursuant to U.S.S.G. § 2G1.1(b)(1)(A) and (B), because subsection (a)(2) applied, and the offense involved fraud and coercion. *Id.* at ¶¶ 38, 44. The PSR specifically stated that the four-level increase for coercion was based on Mr. Burley committing violence towards the

women and included the following paragraph as explanation regarding the enhancement based on his conduct with N.F.:

Examples of Burley's coercion of N.F. include him giving her drugs (ecstasy) to help her stay awake and prostitute; and beating her with a phone cord and his hands if she failed to meet a daily financial quota.

Id. at ¶ 38. As for S.W., the PSR stated:

Examples of Burley's coercion as it relates to S.W. include him using a firearm to pistol whip her if she did not earn a daily quota, if she complained of being tired, or if she did not respond to phone calls or texts of individuals who saw her online advertisements.

Id. at ¶ 44.

With a 2-level enhancement for multiple counts, and a 3-level reduction for acceptance of responsibility, the total offense level was 17. Doc. 54 ¶¶ 48-51, 53-55. Combined with his criminal history category of V, Mr. Burley's resulting advisory guideline imprisonment range was 46 to 57 months. *Id.* at ¶¶ 74, 118. Notably, the PSR did not list any grounds for an upward departure. *Id.* at ¶ 130.

From the beginning of the plea hearing, it was clear that the district court judge was unhappy with the plea agreement allowing Mr. Burley to plead to a single charge. Doc. 78 at 4-5. The government explained that the main reason for the plea agreement was both the difficulty in staying in contact with the victims in order to have them testify at a trial, as well as the victim's wish to bring this matter to a quick conclusion, . *Id.* at 5-6. Though the district court continued to have concerns as to accepting the plea, it decided to go forward with the sentencing hearing. *Id.* at 7.

In addressing the PSR, the district court stated that it was concerned that the range was inadequate given the defense conduct. Doc. 78 at 7-8. Defense counsel explained that Mr. Burley had previously objected to the PSR's facts regarding his alleged violent behavior, but now chose to withdraw those objections, and go forward with the plea rather than attack the backgrounds of the women. *Id.* 8-11. Defense counsel asked the district court to accept the plea negotiations and the guidelines, and argued that the terms of the agreement were appropriate given Mr. Burley's history and characteristics. *Id.* at 11. Defense counsel asked that Mr. Burley be sentenced to 24 months' imprisonment. *Id.* at 42.

The district court continued the sentencing hearing a day in order to further consider the matter. Doc. 78 at 54-55. The next day, the district court addressed its continuing concerns regarding the sentencing guidelines and the government's decision to allow Mr. Burley to plead to the single charge. Doc. 79 at 4-5. The district court then listed several examples of Mr. Burley's behavior towards the N.F., but failed to explain why the guideline range was not adequate to address this conduct. *Id.* at 4-8. The district court then stated its conclusion that an upward variance was necessary and, over defense counsel's objection, sentenced Mr. Burley to 96 months' imprisonment. *Id.*

Mr. Burley appealed his judgment and sentence to the Eleventh Circuit Court of Appeals. Doc. 65. Mr. Burley argued that his sentence was substantively unreasonable. Specifically, Mr. Burley argued that the district court had abused its discretion by imposing an upward variance based on his offense conduct, where that

offense conduct was already taken into account in calculating his applicable guideline range and the district court failed to explain why the applicable guideline range was inadequate.

The Eleventh Circuit Court affirmed the district court in an unpublished opinion. *United States v. Burley*, 763 F. App'x 886 (11th Cir. 2019). The Eleventh Circuit held that the district court did not abuse its discretion in varying upward to “address the magnitude of Burley’s sex trafficking crimes and maltreatment of his victims.” *Id.*

As to Mr. Burley’s argument that the offense conduct that was the basis for the variance was already included in the guideline calculations, the Eleventh Circuit stated:

We cannot say that the district court committed a clear error of judgment in determining that a sentence 39 months above the high end of Burley’s sentencing range best served the objectives of sentencing. *See Irey*, 612 F.3d at 1189. Burley argues that his “offense conduct ... was already taken into account by” the four-level enhancement he received for promoting a commercial sex act, United States Sentencing Guidelines Manual § 2G1.1(b)(1) (Nov. 2016), but that enhancement focuses on “fraud or coercion that occurs as part of the offense and anticipates no bodily injury,” *id.* § 2G1.1 cmt. n.2.

Burley, 763 F. App'x at 887. The Eleventh Circuit also noted that the district court believed an upward variance was appropriate as it was troubled by the plea agreement and Mr. Burley’s “egregious” treatment of the victims. *Id.* But the Eleventh Circuit did not address the fact that the district court failed to explain why the sentencing guideline range did not adequately address this matter.

REASONS FOR GRANTING THE PETITION

This Court should grant review and exercise its supervisory power because the Eleventh Circuit failed to properly review the substantive reasonableness of the sentence, and sanctioned the district court's imposition of an upward variance based on conduct that already formed the basis of a guideline enhancement without explanation as to why the guideline range was inadequate.

This Court has jurisdiction to exercise its supervisory power where a court of appeals has “so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court” S. CT. Rule 10. Here it is necessary for this Court to exercise that power because the Eleventh Circuit did not properly review the substantive reasonableness of Mr. Burley’s sentence. Furthermore, the Eleventh Circuit sanctioned the district court imposing an upward variance sentence on Mr. Burley: 1) based on conduct that was already part of his guideline calculation, and 2) without an explanation as to why the applicable guideline range was inadequate.

The explanation of how Mr. Burley’s sentence came to be is quite complex. The Office of Probation applied a four-level increase to his offense level for the use of coercion, per USSG § 2G1.1(b)(1) (Nov. 2016), and specifically cited his violent conduct towards the victims as the basis for that enhancement. The district court then decided to vary upward from the guideline range of 46 to 57 months and impose a sentence of 96 months, almost the double the high end of the guidelines, based on that same violent behavior. On appeal, Mr. Burley argued that it was error to doubly punish him for his conduct – once in an enhancement and once more

in an upward variance, especially where the district court did not first explain why the guideline range was inadequate. The Eleventh Circuit held that it was not error, noting that the comment on USSG § 2G1.1(b)(1) (Nov. 2016) states that it “anticipates no bodily injury.” Thus, the Eleventh Circuit implied that the four-level enhancement was not based on the violent behavior, so it was not error to use that behavior as a basis to upwardly vary. Regardless, Mr. Burley’s sentence was still ‘twice increased’ based on his violent behavior and by affirming this sentence the Eleventh Circuit has departed so far from the accepted and usual course of judicial proceedings, and sanctioned such a departure by a lower court, as to call for an exercise of this Court’s supervisory power.

In sentencing a defendant a district court must impose a sentence that is “sufficient, but not greater than necessary,” to effectuate Congress’s sentencing goals. 18 U.S.C. § 3553(a). Those goals are:

- (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.

18 U.S.C. § 3553(a)(2). In fashioning a sentence to meet these purposes, the district court must consider a broad range of factors, including the nature and circumstances of the offense and the history and characteristics of the defendant.

See 18 U.S.C. § 3553(a)(1)-(7). Review of the substantive reasonableness of a sentence is for abuse of discretion. *United States v. Osorio-Moreno*, 814 F.3d 1282,

1287 (11th Cir. 2016). “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. Irey*, 612 F.3d 1160, 1189 (11th Cir. 2010) (citation omitted). Further, where, as here, the district court varied considerably from the guideline range, the court of appeals must determine whether the variance was supported by “sufficient justifications.” *United States v. Gall*, 552 U.S. 38, 46-47 (2007).

Here the district court clearly and repeatedly expressed his displeasure with the conduct exhibited by Mr. Burley towards the victims, but it failed to connect that conduct to the guideline range. While a district court is not required to say “magic words” to justify an upward departure, at some point the court must explain why it believes that the sentencing guideline, the very one drafted for the offense committed by the defendant, is inadequate to address the conduct of the specific case. Without that explanation being placed on the record, the circuit court of appeals cannot determine whether the district court had “sufficient justifications” for imposing an upward departure. Therefore, by affirming the district court’s sentence of Mr. Burley based on the inadequate record on appeal, the Eleventh Circuit Court of Appeals has failed to review the substantive reasonableness of his sentence and sanctioned the district court’s violation of Mr. Burley’s right to Due Process.

CONCLUSION

For the above reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

DONNA LEE ELM
FEDERAL PUBLIC DEFENDER

*/s/*Meghan Ann Collins

MEGHAN ANN COLLINS
Counsel of Record
RESEARCH AND WRITING ATTORNEY
201 S. Orange Ave., Ste. 300
Orlando, Florida 32801
(407) 648-6338
Meghan_Boyle@fd.org
Counsel for Petitioner