

No.

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ZACHARY HICKS

Defendant - Appellant.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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IN THE SUPREME COURT OF THE UNITED STATES

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Plaintiff - Appellee,

v.

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QUESTION PRESENTED

Whether the Trial Court Imposed an Unreasonable Sentence by Failing to Adequately Consider Hicks' Factors and Whether Trial Counsel Rendered Ineffective Assistance?

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No.

UNITED STATES OF AMERICA,
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ZACHARY HICKS
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**ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Zachary Hicks petitions for a writ of certiorari to review the United States Court of Appeals for the Ninth Circuit's Memorandum affirming his conviction. (Appendix)

OPINION BELOW

On May 28, 2019, the Ninth Circuit Court of Appeals entered a memorandum affirming Hicks' conviction and sentence.

JURISDICTION

The Court has jurisdiction. 28 U.S.C. § 1254(1)

CONSTITUTIONAL PROVISIONS AND REGULATIONS INVOLVED

18 U.S.C. § 3553(a)

CUSTODY STATUS OF PETITIONER

Hicks is serving his 100 month sentence in federal prison.

STATEMENT OF THE CASE

Hicks challenges the 100-month sentence imposed following his guilty-plea conviction for being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1).

REASON TO GRANT CERTIORARI

I. THE TRIAL COURT IMPOSED AN UNREASONABLE SENTENCE BY FAILING TO ADEQUATELY CONSIDER HICKS' FACTORS; TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE

A. Introduction

Hicks pleaded guilty to the single charge of felon in possession of a firearm. 18 U.S.C. § 922(g); (ER 2) (Dkt. 56) On April 6, 2018, the Honorable Garland E. Burrell, Jr. sentenced Hicks to 100 months in federal prison. (ER 3, 9,

17, 31)

B. The District Court Did Not Adequately Explain Hicks' Sentence

The Ninth Circuit found that the district court considered all of the arguments and mitigating evidence and it was not required to address explicitly each mitigating circumstance and each 18 U.S.C. § 3553(a) sentencing factor to show that it had considered them. *See United States v. Carty*, 520 F.3d 984, 992 (9th Cir. 2008) (en banc); *United States v. Perez-Perez*, 512 F.3d 514, 516-17 (9th Cir. 2008).

Hicks disagrees. A sentencing judge must explain a sentence sufficiently to communicate 'that a reasoned decision has been made' and 'permit meaningful appellate review.'" *United States v. Rudd*, 662 F.3d 1257, 1260 (9th Cir. 2011) (quoting *United States v. Carty*, 520 F.3d at 992.

In fashioning a sentence, the district court failed to consider all the relevant factors under 18 U.S.C. § 3553(a). The district court relied on part of the probation officer's report and focused on Hick's forthcoming honesty and a

desire to make a positive change in his life. (ER 16)

Although the district court cited portions of the probation officer's report, the district court overlooked that the probation officer failed to "identif[y] any factors that would warrant a departure from the applicable sentencing guideline range." (PSR 21 ¶¶98; 22 ¶102) Several factors warranted a departure from the applicable sentencing guidelines.

The district court overlooked Hicks' troubled upbringing and neglect by his drug addicted birth parents. (PSR 15 ¶¶ 58-59) The district court overlooked that Hicks' 81-year-old grandfather needed help with his daily routines. Hicks' grandfather needed Hicks to take him [his grandfather], who suffered from medical issues, to and from his doctors' appointments. Hicks' brother, a drug abuser, never cared for their grandfather. (PSR 9 ¶24)

C. The District Court Did Not Impose a Reasonable Sentence

"A substantively reasonable sentence is one that is

'sufficient, but not greater than necessary' to accomplish § 3553(a)(2)'s sentencing goals." *United States v. Crowe*, 563 F.3d 969, 977 n.16 (9th Cir. 2009) (quoting 18 U.S.C. § 3553(a)). "The touchstone of 'reasonableness' is whether the record as a whole reflects rational and meaningful consideration of the factors enumerated in 18 U.S.C. § 3553(a)." *United States v. Tomko*, 562 F.3d 558, 568 (3d Cir. 2009) (quoting *United States v. Grier*, 475 F.3d 556, 571 (3d Cir. 2007) (en banc)); see also *United States v. Ellis*, 641 F.3d 411, 423 (9th Cir. 2011); *United States v. Ruiz- Apolonio*, 657 F.3d 907, 911 (9th Cir. 2011).

The district court erred and imposed an unreasonable sentence in light of the requisite factors including, his exposure to domestic violence, the effects of incarceration on Hicks' family, and his good post-offense conduct. 18 U.S.C. § 3553(a)

The Ninth Circuit also finds the district court did not abuse its discretion and impose a substantively

unreasonable sentence. (Memo at 2) Hicks disagrees. The custodial sentence of 100 months (8.5 years) and term of supervised release were substantively reasonable in light of the 18 U.S.C. § 3583(e) sentencing factors and the totality of the circumstances. *United States v. Valdavinos-Torres*, 704 F.3d 679, 692-93 (9th Cir. 2012)

D. The Record Amply Supports Hicks' Claims of Ineffective Assistance

The Ninth Circuit declines to consider Hicks' ineffective assistance of counsel on appeal and suggests that he may raise his claim in a 28 U.S.C. § 2255 proceeding.

Hicks disagrees. Hicks' opening brief and the record on appeal support a strong case for ineffective assistance of counsel. "[A]s a general rule, we do not review challenges to the effectiveness of defense counsel on direct appeal." *United States v. Jeronimo*, 398 F.3d 1149, 1155 (9th Cir. 2005).

"We have permitted ineffective assistance claims to be reviewed on direct appeal only in the unusual cases where (1) the record on appeal is sufficiently developed to permit

determination of the issue, or (2) the legal representation is so inadequate that it obviously denies a defendant his Sixth Amendment right to counsel.” *Id.* at 1156 (citing *United States v. Daychild*, 357 F.3d 1082, 1095 (9th Cir. 2004)).

Hicks has presented such a case.

CONCLUSION

Hicks respectfully requests that this Court grant Certiorari.

DATED: August 8, 2019

Respectfully submitted,
FAY ARFA, A LAW CORPORATION

/s/ Fay Arfa

Fay Arfa, Attorney for Appellant

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

MAY 28 2019

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

No. 18-10161

Plaintiff-Appellee,

D.C. No. 2:16-cr-00246-GEB

v.

MEMORANDUM*

ZACHARY WILLIAM HICKS,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of California
Garland E. Burrell, Jr., District Judge, Presiding

Submitted May 21, 2019**

Before: THOMAS, Chief Judge, FRIEDLAND and BENNETT, Circuit Judges.

Zachary William Hicks appeals from the district court's judgment and challenges the 100-month sentence imposed following his guilty-plea conviction for being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1).

We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

APPENDIX

Hicks contends that the district court procedurally erred by failing to consider his sentencing arguments and mitigating circumstances. We review for plain error, *see United States v. Valencia-Barragan*, 608 F.3d 1103, 1108 (9th Cir. 2010), and conclude that there is none. The record demonstrates that the district court considered all of the arguments and mitigating evidence; it was not required to address explicitly each mitigating circumstance and each 18 U.S.C. § 3553(a) sentencing factor to show that it had considered them. *See United States v. Carty*, 520 F.3d 984, 992 (9th Cir. 2008) (en banc); *United States v. Perez-Perez*, 512 F.3d 514, 516-17 (9th Cir. 2008).

Hicks also contends that his sentence is substantively unreasonable. The district court did not abuse its discretion. *See Gall v. United States*, 552 U.S. 38, 51 (2007). The sentence at the low end of the applicable Guidelines range is substantively reasonable in light of the section 3553(a) sentencing factors and the totality of the circumstances. *See id.*

Finally, Hicks claims that his counsel rendered ineffective assistance by inadequately highlighting his mitigating circumstances. We decline to consider this claim on direct appeal. *See United States v. Rahman*, 642 F.3d 1257, 1259-60 (9th Cir. 2011). Hicks may raise this claim in a 28 U.S.C. § 2255 proceeding. *See United States v. McGowan*, 668 F.3d 601, 606 (9th Cir. 2012).

AFFIRMED.