

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2018

RAPHAEL PERSON, Jr., *Petitioner*

v.

UNITED STATES, *Respondent*

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

Office of the Ohio Public Defender

By: Stephen P. Hardwick
Assistant Public Defender
Counsel of Record
250 E. Broad Street, Suite 1400
Columbus, Ohio 43215
(614) 466-5394
(614) 752-5167 – Fax
stephen.hardwick@opd.ohio.gov

Counsel for Petitioner, Raphael Person

Questions Presented

Whether, when a district court imposes a sentence based on several factors, one of which is improper, the court of appeals should affirm the sentence unless the district court relied exclusively on that factor, or whether it should remand for resentencing unless the appellee shows that the error is harmless.

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When a district court imposes a sentence based on several factors, one of which is improper, the court of appeals should affirm the sentence unless the district court relied exclusively on that factor, as the Sixth Circuit did in this case, or whether it should remand for resentencing unless the appellee shows that the error is harmless.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Raphael Person respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit, affirming his sentence.

List of Proceedings

United States v. Raphael Person, Jr., United States Court of Appeals for the Sixth Circuit, Case No. 18-3527, final judgment April 23, 2019.

United States v. Raphael Person, Jr., United States Court of Appeals for the Sixth Circuit, Case No. 16-4031, final judgment Nov. 19, 2017.

United States v. Raphael Person, Jr., United States District Court for the Southern District of Ohio, Case No. 2:13-cr-00217-2, initial final judgment September 7, 2016, final judgment on remand after appeal, June 12, 2018.

Opinions Below

The Sixth Circuit's opinion in this matter was unpublished, and it is attached in Appendix 2a. The district court's judgment entry of sentence on remand is unpublished, and it is attached as Appendix 10a. The Sixth Circuit's initial opinion is unpublished, and it is attached as Appendix 17a. The district court's initial judgment entry of sentences is unpublished, and it is attached as Appendix 27a.

Jurisdiction

The Sixth Circuit denied Petitioner's appeal on April 23, 2019. On July 17, 2019, Justice Sotomayor granted Petitioner's request for an extension of time through August 21, 2019, to file this petition. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) and Supreme Court Rule 12.

Sentencing Guidelines Involved

United States Sentencing Commission, Guidelines Manual, §5G1.3(d), p.s. (Nov. 2016) provides:

In any other case involving an undischarged term of imprisonment, the sentence for the instant offense may be imposed to run concurrently, partially concurrently, or consecutively to the prior undischarged term of imprisonment to achieve a reasonable punishment for the instant offense.

USSG §5G1.3(d), comment. (n.4), provides:

(A) In General. Under subsection (d), the court may impose a sentence concurrently, partially concurrently, or consecutively to the undischarged term of imprisonment. In order to achieve a reasonable incremental punishment for the instant offense and avoid unwarranted disparity, the court should consider the following:

- (i)** the factors set forth in 18 U.S.C. § 3584 (referencing 18 U.S.C. § 3553(a));
- (ii)** the type (e.g., determinate, indeterminate/parolable) and length of the prior undischarged sentence;
- (iii)** the time served on the undischarged sentence and the time likely to be served before release;
- (iv)** the fact that the prior undischarged sentence may have been imposed in state court rather than federal court, or at a different time before the same or different federal court; and
- (v)** any other circumstance relevant to the determination of an appropriate sentence for the instant offense.

(B) Partially Concurrent Sentence. In some cases under subsection (d), a partially concurrent sentence may achieve most appropriately the desired result. To impose a partially concurrent sentence, the court may provide in the Judgment in a Criminal Case Order that the sentence for the instant offense shall commence on the earlier of (i) when the defendant is released from the prior undischarged sentence; or (ii) on a specified date. This order provides for a fully consecutive sentence if the defendant is released on the undischarged term of imprisonment on or before the date specified in the order, and a partially concurrent sentence if the defendant is not released on the undischarged term of imprisonment by that date.

Statement of the Case

Petitioner's Background

Raphael Person is a father of four children who owned a tattoo parlor and ran a residential renovation company.

December 2011 Robbery

Government witness and co-defendant Mickey Velazquez testified that when Raphael Person learned that Mr. Velazquez wanted to buy a car using Craigslist, Mr. Person suggested stealing the purchase money from the seller. Mr. Velazquez arranged for Ricardo Velasquez-Flores to respond to an ad from Cedo Zecevic of Columbus, Ohio, because Mr. Velasquez-Flores spoke English. Mr. Velasquez-Flores spoke or texted with Cedo Zecevic's sixteen-year-old son, Slobadan to set up the purchase.

Mr. Velazquez testified that he waited with Mr. Person while the sale was conducted, and then followed the Zecevic to their home. Mr. Zecevic testified that when he and his son got out of their car, two masked men with AR-15 rifles appeared, said that they were police, and accused Slobadan, and his father of conducting a drug transaction. Mr. Zecevic said he knew about firearms because he had experience with "police activity" in "Croatia, Serbia."

One of the masked men ordered the Zecevic to the ground, and a shot was fired. Slobadan got down to the ground, and Mr. Zecevic said that one of the men "push[ed] me with a gun[.]" and then he went down to the ground. The masked men then demanded to know where "the money" was. The men took an envelope with the

\$5,900 paid for the car, as well as Mr. Zecevic's wallet. The entire encounter outside Mr. Zecevic's home took about thirty seconds. Co-defendant Velasquez testified that Raphael is the person who fired the gun.

February 2012 Robbery

Mark Gillespie of Middletown, Ohio testified that he had posted his employer's Nissan 350Z for sale on Craigslist. A few days before the eventual sale of the car, a man named, "Mickey" visited to look at it. Mickey Velazquez then came back to Middletown and paid \$18,000 in cash for the car. Mr. Gillespie took a picture of Mickey Velazquez, along with Mr. Velazquez's identification.

About ten minutes after the sale, as Mr. Gillespie and his father went outside, two masked men approached yelling, "DEA" and "Where's the drugs? Where's the money?" The larger of the two fired a gun in the air. Then one of the two men grabbed the envelope containing the \$18,000. Mr. Gillespie testified that he was "hit" with what he assumed "was the butt of a gun" on the neck at the base of his head. The "hit" made him "stumble halfway to the ground." He said that he "didn't need to go to the hospital or anything."

The gunmen then directed Mr. Gillespie and his father inside and ordered them to lay down in the garage. He heard someone else say, "They are getting robbed, call 911." Then Mr. Gillespie heard tires squeal as the two men drove away. Mickey Velazquez testified that his brother, Chow Lee Velazquez, and Mr. Person left his house wearing black that evening, and the plan was for them to do the robbery.

Indictment and Jury Trial

Mr. Person was indicted and arrested on the following charges:

- Count 1: Conspiracy to commit violations of the Hobbs Act (robbery), 18 U.S.C. § 1951; (December 30, 2011, to February 17, 2012);
- Count 2: Hobbs Act (robbery), 18 U.S.C. § 1951 (December 30, 2011);
- Count 3: Discharging a firearm during the commission of an offense of violence, 18 U.S.C. § 924(c)(1)(A)(iii) (December 30, 2011);
- Count 4: Hobbs Act (robbery), 18 U.S.C. § 1951 (February 17, 2012);
- Count 5: Discharging a firearm during the commission of an offense of violence. 18 U.S.C. § 924(C)(1) (February 17, 2012).

Mr. Person pleaded not guilty, and the case proceeded to trial, and a jury convicted him on all counts.

First Sentencing Hearing

The Presentence Investigation Report recommended that Mr. Persons receive a two-level enhancement for causing “bodily injury” to Mr. Gillespie. In his sentencing memorandum, Mr. Person objected to the enhancement. Mr. Person explained that Mr. Gillespie testified only that he was hit in the back of the head and stumbled without falling to the ground. Mr. Person also argued that there “was no indication that [Mr. Gillespie] suffered any bruising, swelling, soreness, headaches or other ailment as a result of the strike to his head and neck that would indicate injury that is painful and obvious, and clearly did not require medical attention.”

The district court overruled the objection, finding that:

Well, as I indicated, the note to the guidelines defines bodily injury as, quote, any significant injury, and then it gives examples. For instance, it says an injury that is painful or obvious or is of the type for which medical attention ordinarily would be sought. The use of an example in this definition indicates that a significant injury does not have to be

painful or obvious or the type for which medical attention ordinarily would be sought. But rather, these are the two examples of what would be a significant injury.

Now, Mr. Gillespie testified at trial that he, quote, was hit with the butt of the gun. I am assuming it was the butt of the gun, he said, forcing us through the door. He went on to say that he was hit at, quote, the base of the head and neck area. And when asked how hard he was hit, he testified, quote, it was enough to stumble me halfway to the ground, end quote. He did not go to the hospital, but, however, the Court finds that this evidence is sufficient to establish that Mr. Gillespie sustained a, quote, significant injury. Being hit with the butt of a gun at the lower head and neck area with sufficient force to compel him halfway to the ground would be enough to result in a painful and obvious injury.

The district court ordered that the sentence in this case be served consecutively to Mr. Person's state court murder conviction:

Now, the Court is going to order that the sentences imposed in this case be served consecutive to the sentences imposed in the State murder conviction. These are completely separate federal offenses, no commonality involved in them. He committed a murder and other related crimes in State court and received a sentence from the State court, and that is completely independent. The fact that certain defendants may have plead guilty in both courts and received concurrent sentences, that is unpersuasive to me in a way that it would be inappropriate for the Court to impose concurrent sentences in this case.

The district court sentenced Mr. Person to serve a total of 506 months in prison as follows:

- 86 months incarceration on each of Counts 1, 2 and 4, to run concurrently;
- 120 months incarceration on Count 3 to run consecutive to the sentence imposed on Counts 1, 2 and 4; and
- 300 months incarceration on Count 5 to run consecutive to the sentence imposed on Counts 1 through 4.

Appendix 17a. The district court ordered all sentences to be served consecutively to a prison term in Case No. 14-CR-1714 in the Franklin County, Ohio, Court of Common Pleas. *Id.*

The Sixth Circuit affirms Mr. Person's conviction but reverses his sentence

On appeal, the Sixth Circuit reversed Mr. Person's sentence in light of *Dean v. United States*, ___ U.S. ___, 137 S. Ct. 1170, 197 L. Ed. 2d 490 (2017), which held that district courts may consider the existence of § 924(c) mandatory minimums when determining the sentences on other counts. Appendix 27a.

Resentencing

On remand, Mr. Person's lawyer asked the district court to order that Mr. Person's sentence in this case be served concurrently with his unrelated state-court sentence from Franklin County Common Pleas Court Case Number 14CR-1714. Counsel pointed out that Mr. Person's state-court sentence was 41 years to life in prison, and that the sentence included 18 years to life for murder and a firearms specification. Counsel argued that given his experience with the Ohio Parole Board, Mr. Person would have no chance for even asking the Ohio Parole Board for release until he was at least 70 years old. The Government did not contest the accuracy of counsel's explanation of the state court punishment. Instead, the Government argued that for Mr. Person "to serve a sentence that would never let him get out is totally appropriate."

The district court imposed the same 506-month prison term it had previously imposed, but the district court added that it was imposing consecutive sentences because it was not certain that Mr. Person would serve the state court sentence:

Now, I originally ordered that this sentence should run consecutive to the state sentence imposed in Franklin County Common Pleas Court Case No. 14CR-1714. I don't believe the remand requires the Court to reconsider that determination; but even if it did, I have—it would be my judgment that, as it was before, that the sentence in this federal case should be consecutive to the state court sentence; and the reasons are that, as I noted in the earlier sentencing hearing, that the...the Court would note that enforcement of that state court sentence is really an unknown quantity. It could be reversed on appeal or collateral attack. Even if enforced, he could be released earlier by the Ohio Parole [Board], so the Court wants to ensure that its sentence in this case is sufficient to accomplish all of the appropriate goals of sentencing in this case, and the Court is not inclined to take a chance on any speculation about the effect of the state court sentence.

Appendix 10a.

Appeal of Resentencing

Mr. Person filed a timely appeal, and in his brief argued:

A court abuses its discretion when it “arbitrarily selected the sentence, based the sentence on impermissible factors, failed to consider pertinent [18 U.S.C. §] 3553(a) factors, or gave an unreasonable amount of weight to any pertinent factor.” *United States v. Gray*, 470 F. App'x 468, 474 (6th Cir. 2012), citing *United States v. Cunningham*, 669 F.3d 723, 2012 WL 593110, at *8 (6th Cir. 2012), and *United States v. Collington*, 461 F.3d 805, 808 (6th Cir. 2006)).

The Sixth Circuit affirmed. Appendix 2a. The court ruled that it wasn't clear that the district court committed error. *Id.* (“It is far from clear that the district court was wrong about the finality of Person's state-court sentence.”) The Sixth Circuit also held that the district court “did not rely exclusively” on the uncertainty

when deciding to impose Mr. Person’s federal sentence consecutively to his state sentence. *Id.*

Reasons for Granting the Writ

When a district court imposes a sentence based on several factors, one of which is improper, the court of appeals should affirm the sentence unless the district court relied exclusively on that factor, or whether it should remand for resentencing unless the appellee shows that the error is harmless.

The Sixth Circuit has correctly ruled that a sentence should be reversed where a district court gives an unreasonable amount of weight to one sentencing factor. *See, United States v. Gray*, 470 F. App’x 468, 474 (6th Cir. 2012), citing *United States v. Cunningham*, 669 F.3d 723, 2012 WL 593110, at *8 (6th Cir. 2012), and *United States v. Collington*, 461 F.3d 805, 808 (6th Cir. 2006)). Other circuits agree. *See, e.g., United States v. Ramirez-Plata*, 749 F. App’x 762, 764 (10th Cir. 2019); *United States v. Irely*, 612 F.3d 1160, 1194 (11th Cir. 2010).

But the Sixth Circuit has limited that rule by rejecting Mr. Person’s claim because the district court “did not rely exclusively on [the perceived uncertainty of Mr. Person’s state court sentence] when deciding to re-impose a consecutive federal sentence.” *Id.* The Sixth Circuit has used a similar rule before. *United States v. Turner*, 424 F. App’x 530, 534 (6th Cir. 2011) (district court “did not rely exclusively on such impermissible grounds”).

By contrast, the Eleventh Circuit requires a more complete examination of a district court’s reliance on an impermissible sentencing factor. That court has held that a district court’s sentencing decision should be reversed when it is

“substantially affected by ... consideration of impermissible factors.” *United States v. Cavallo*, 790 F. 3d 1202, 1238 (11th Cir. 2015), citing *United States v. Clay*, 483 F. 3d 739, 745 (11th Cir. 2007); *United States v. Williams*, 456 F. 3d 1353, 1361 (11th Cir. 2006), *abrogated on other grounds*, *Kimbrough v. United States*, 552 U.S. 85, 128 S. Ct. 558, 169 L. Ed. 2d 481 (2007). That court also puts the burden on “the party defending the sentence to show, based on the record as a whole, that the error was harmless.” *United States v. Williams*, 456 F.3d 1353, 1362 (11th Cir.2006), *abrogated on other grounds by Kimbrough v. United States*, 552 U.S. 85, 93, 128 S.Ct. 558, 566, 169 L.Ed.2d 481 (2007).

Here, the district court abused its discretion when it based its decision to impose Mr. Person’s prison sentence consecutively based on an incorrect and entirely speculative interpretation of state sentencing law and practices. Specifically, the district court ordered that Mr. Person serve the 506-month (42-year) prison term in this case consecutively to a sentence of 41 years to life imposed for a separate state court conviction.

Here, the government did not dispute in the district court that, even if the sentence in this case was served concurrently with the state court sentence, Mr. Person would remain in prison until he was at least 70 years old. The district court speculated that the state court sentence “could be reversed on appeal or collateral attack. Even if enforced, he could be released earlier by the Ohio Parole [Board].” But the district court did not explain how that could happen.

The Government did not dispute that Mr. Person’s state court sentence was final, as a result, nothing in the record suggests that the state court sentence might not be final.

At Mr. Person’s resentencing hearing, the Government also did not assert that Mr. Person’s state court sentence was subject to challenge. Instead, the Government argued that for Mr. Person “to serve a sentence that would never let him get out is totally appropriate.” *Id.* at 1856. Further, neither the district court nor counsel for either side pointed to any action or appeal that Mr. Person could file to appeal or collaterally challenge his state court conviction.

***The state court dockets show that Mr. Person has no timely way to appeal or collaterally challenge his sentence.*¹**

The state court of appeals issued its decision in Mr. Person’s state court appeal on May 9, 2017—more than a year before the resentencing hearing in this case. *State v. Person*, 2017-Ohio-2738, ¶ 27 (Ct. App.). An application to reopen his appeal would have been due on August 7, 2017, 90 days after the decision in the state court of appeals. Ohio App. Rule 26(B)(1). Under Ohio S. Ct. Prac. R 7.01(A)(1)(a)(i), a discretionary appeal to that court would have been due on June 23, 2017, 45 days after the decision in the state court of appeals.

Both courts do allow delayed applications, but Mr. Person would have to show good cause for a lengthy delay, and there is nothing in the record that shows

¹ The court of appeals could take judicial notice of the state-court record. *See* Fed. R. Evid. 201; *Keith v. DeKalb Cty.*, 749 F.3d 1034, 1041 & n.18 (11th Cir. 2014) (taking judicial notice of a state court’s online docket.online judicial system); and *Meus v. Weatherford (In re Meus)*, 718 F. App’x 937, 941 n.5 (11th Cir. 2018) (taking judicial notice of online docket).

he had any chance to meet that burden or to contradict his counsel's assertion that he had no chance of release from Ohio prisons until he was at least 70 years old. Ohio S. Ct. Prac. R 7.01(A)(4); Ohio App. Rule 26(B)(1).² Further, any collateral challenge to the sentence would have been due on March 1, 2017, 365 days after the trial transcript was filed in the court of appeals. Ohio Rev. Code Ann. § 2953.21(A)(2).

In addition, because Mr. Person's state court sentence has a maximum of life in prison, he cannot be released unless the Ohio Parole Board agrees. Ohio Rev. Code Ann. § 2967.23. And a review of the state court judgment shows that it includes 15 mandatory years of prison for the murder, plus another 15 years of mandatory firearm specifications.³ So even if Mr. Person's 11 years of non-mandatory prison time is cut in half by discretionary judicial release pursuant to Ohio Rev. Code Ann. § 2929.20. Mr. Person would be 69 years old before he could ask for parole. Further, as defense counsel stated (and as the Government did not dispute), the Ohio Parole Board does not release inmates serving terms for murder

² After he filed his brief in the Sixth Circuit, Mr. Person, *pro se*, filed a request for a delayed appeal to the Supreme Court of Ohio pursuant to Ohio S. Ct. Prac. R 7.01(A)(4). Docket of *State v. Person*, Ohio Sup. Ct. No. 2019-236, <https://www.supremecourt.ohio.gov/Clerk/ecms/#/caseinfo/2019/0126> (accessed Aug. 14, 2019), but it was unanimously denied two months later. *State v. Person*, 155 Ohio St. 3d 1404, 2019-Ohio-944, 119 N.E.3d 433, *recon. den.* *State v. Person*, 156 Ohio St. 3d 1469, 2019-Ohio-2953, 126 N.E.3d 1181. He has never filed a delayed motion for the reopening of his appeal. Docket of *State v. Person*, Franklin App. No. No. 16AP-12, accessed through <https://fcdcfjs.co.franklin.oh.us/CaseInformationOnline/> (accessed Aug. 14, 2019).

³ *State v. Person*, Franklin Common Pleas No. 14CR-1714, Judgment Entry (Dec. 8, 2015), accessed through <https://fcdcfjs.co.franklin.oh.us/CaseInformationOnline/> (accessed October 26, 2018).

immediately upon eligibility, so Mr. Person would be well into his 70's or 80's before he had a realistic opportunity for release.

Because it was based on pure speculation, the district court's holding that Mr. Person's state court prison term could be appealed or collaterally attacked was unreasonable speculation not supported by the record of this case or of the state court proceedings. The district court abused its discretion by putting an unreasonable amount of weight on the chance that Mr. Person's state court sentence could be reduced or vacated.

Finally, the Sixth Circuit expressly held that Mr. Person had an argument that "the district court put far too much weight on remote possibilities." Appendix 2a. Accordingly, if this Court grants review and reverses the Sixth Circuit's decision on the standard of review, that court would have to revisit his substantive claim.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Office of the Ohio Public Defender

/s/ Stephen P. Hardwick

Stephen P. Hardwick

Assistant Public Defender

Counsel of Record

250 E. Broad Street, Suite 1400
Columbus, Ohio 43215
(614) 466-5394
(614) 752-5167 (fax)
stephen.hardwick@opd.ohio.gov

Counsel for Appellant, Raphael Person

#1256968