No. 19-____

IN THE

Supreme Court of the United States

RON CHRISTOPHER WHITLEY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the 156-month sentence is greater than necessary to comply with the purposes of sentencing under 18 U.S.C. § 3553(a) where the district court failed to provide significant justifications to support its departure from the correctly-calculated guidelines range of 30 to 37 months in this run-of-the-mill drug case.

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Petitioner Ron Christopher Whitley respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINION BELOW

The Fourth Circuit's unpublished opinion is available at __F. App'x ___, 2019 U.S. App. LEXIS 21001, 2019 WL 3208440 (4th Cir. July 16, 2019); *see also infra*, Pet. App. 1a.

JURISDICTION

The Fourth Circuit issued its opinion on July 16, 2019. Pet. App. 1a. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 3553(a) of Title 18 of the United States Code provides in relevant part that the sentencing court "shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes" of sentencing.

STATEMENT OF THE CASE

A. District Court Proceedings

Like many offenders, Petitioner Ron Whitley's criminal behavior is inextricably intertwined with his lifelong struggle with substance abuse. His father introduced him to alcohol and drugs at an early age, and he began drinking and using marijuana regularly as a teenager. In his early twenties, Petitioner progressed to cocaine and crack. His addiction grew until he was consuming alcohol, marijuana, crack cocaine, and cocaine on a daily basis. (Fourth Circuit Joint Appendix 98-99; hereinafter "J.A.").

By 2004, Petitioner was smoking between 1 to 3.5 grams of crack every day. (J.A. 98). Unfortunately, his income as a brick mason was insufficient to cover his expenses, particularly after this employment ended due to a decline in work. (J.A. 119). Like many others, Petitioner turned to drug dealing to support his addiction. And like many others, Petitioner's drug-dealing did not escape notice by the authorities. Unlike many drug offenders, however, who typically spend time in the state justice system before attracting federal attention, Petitioner's first felony prosecution was a federal one. In 2004, he pled guilty to his role in a crack conspiracy case in the Eastern District of North Carolina. The presentence report

prepared for that case indicated that Petitioner was a minor player in the overall conspiracy, having participated in only two drug transactions. (J.A. 114). The report also noted that there was "no information indicating [Petitioner] possessed firearms during his drug transactions." (J.A. 114); *see also* J.A. 113 ("With the exception of RON WHITLEY, each coconspirator was armed with a firearm during the course of the conspiracy."). At sentencing, Petitioner's guideline imprisonment range was 108 to 135 months under the law at the time.[1] (J.A. 122). However, the court granted the government's motion for a downward departure and sentenced Petitioner to 68 months' incarceration and three years of supervised release. (J.A. 96). Despite his drug addiction, Petitioner received no substance abuse treatment while incarcerated at the Bureau of Prisons during this time. Nonetheless, Petitioner adjusted to custody and was a model prisoner, incurring no disciplinary infractions while incarcerated. (J.A. 130).

When he was released in 2008, Petitioner obtained a job as a warehouse driver for a furniture company, where he worked for approximately one year. (J.A. 133). However, he lost his job and shortly thereafter resumed his drug habit. (J.A. 132). This relapse led to revocation of his supervised release and new federal drug

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[1] The Fair Sentencing Act subsequently reduced the 100-to-1 crack cocaine and powder disparity, widely viewed as irrational and racially biased, to 18 to 1, *see generally United States v. Dorsey*, 567 U.S. 260, 269 (2012) (discussing the Fair Sentencing Act), and amendments to the Guidelines further reduced these crack cocaine disparities and altered the drug quantity table. As a result, Petitioner's guideline for this felony was significantly higher than it would be under today's fairer and more racially just Guidelines. If Petitioner had been sentenced under current guidelines for his 2005 drug conspiracy, his guideline range would be 46 to 57 months.

charges. Specifically, on March 7, 2011, Petitioner pled guilty to conspiracy to distribute and possess with the intent to distribute five grams or more of cocaine base (crack)—his second federal drug conspiracy conviction. This time, his guideline imprisonment range was 70 to 87 months.[2] (J.A. 135). He was sentenced to 60 months' imprisonment and five years of supervised release. While incarcerated, Petitioner completed a forty-hour substance abuse treatment program. (J.A. 99). He incurred only one disciplinary infraction, for possessing a non-hazardous tool. (J.A. 96).

While Petitioner was serving his sentence in 2012, his only son, Jayquan, died. (J.A. 98). Because he was in prison, Petitioner was unable to attend his son's funeral. Devastated, Petitioner sank deeper into depression. When he was released from custody in 2015, Petitioner completed a drug treatment program and found employment as a machine operator. However, business slowed and he was laid off. (J.A. 99). As he did before during periods of stress, Petitioner once again relapsed, which led him to further criminal activity. The instant federal drug charges against him arose when a confidential informant purchased heroin from Petitioner on several occasions in April and May of 2016. (J.A. 92-93). On February 6, 2017, Petitioner pled guilty without a plea agreement to three counts of distribution and possession with intent to distribute a quantity of heroin—his third federal drug conviction. (J.A. 15-41).

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[2] Again, under today's fairer standards, Petitioner's guideline imprisonment range would be 57 to 71 months, instead of 70 to 87 months.

Following the plea, the probation officer prepared a presentence investigation report in Petitioner's case. (J.A. 90-106). Among other things, the presentence report asserted that Petitioner was a career offender under § 4B1.1 of the Sentencing Guidelines, and that the guideline imprisonment range was 188 to 235 months. (J.A. 101-102). Petitioner objected, arguing that his prior federal convictions for conspiracy under 18 U.S.C. § 846 did not qualify as controlled substance offenses under the Guidelines. (J.A. 105). At sentencing, the district court overruled Petitioner's objection and sentenced him as a career offender to 235 months' imprisonment and six years of supervised release. (J.A. 6).

Petitioner appealed his sentence to the United States Court of Appeals for the Fourth Circuit, asserting that the district court improperly sentenced him as a career offender. Agreeing that the district court reversibly erred, the circuit court vacated the judgment and remanded the case for resentencing. *See United States v. Whitley*, 737 F. App'x 147 (4th Cir. 2018). Upon remand to the district court, the probation officer modified the presentence report to reflect a corrected guideline imprisonment range of 37 to 46 months. (J.A. 107). The probation officer filed the modified presentence report on October 15, 2018. The next day, the court issued an order notifying the parties that it was "contemplating an upward departure under U.S.S.G. §4A1.3(a)(1)" because "[r]eliable information indicates that defendant's criminal history underrepresents the seriousness of the defendant's criminal history and the likelihood that he will commit other crimes." (J.A. 42).

At the sentencing hearing, the court determined that the total offense level was 15. With a criminal history category of IV, both parties agreed with the court that the guideline imprisonment range for Petitioner's offense was 30 to 37 months. (J.A. 48). Neither side had any additional objections. The remainder of the hearing, therefore, focused on sentencing considerations.

Counsel for the United States argued that an upward departure was necessary because "the criminal history and characteristics of the defendant do not and are not captured by this type of guideline." (J.A. 49). In support of his argument, counsel highlighted Petitioner's two prior federal drug conspiracy convictions, along with the revocations that accompanied those convictions. Counsel also said that Petitioner's criminal history "start[ed] from the age of 17 continuing until the age of 45." (J.A. 49). The government repeated that "the history and characteristics of the defendant are not adequately captured by the Guidelines in this case" and requested an upward departure or variance. (J.A. 49).

Counsel for Petitioner contended that an upward departure was unnecessary, given that his criminal history did "not fit squarely with any of the examples listed in the application notes" and that his criminal history category, as reflected by his criminal history score, already accounted for his risk of recidivism and the seriousness of his criminal history. (J.A. 50). For example, she noted that both of Petitioner's felony convictions received a full three points each, and that he received an additional two points for being on supervised release when he committed the instant offense. These convictions resulted in a total of eight points, placing him in

criminal history category IV. Regarding his previous federal convictions, counsel emphasized that Petitioner "was one of the lowest people on the totem pole" and "was only involved in two transactions." (J.A. 50). She also pointed to the presentence report's finding that "he was the one and only person in that situation that didn't possess a firearm." (J.A. 50). As such, counsel asserted that an upward departure was unwarranted.

The court said that Petitioner was a "pretty committed drug dealer" because it was "the second time in 14 years" that the court was "doing this job"—that is, sentencing Petitioner for a federal drug offense. (J.A. 50). The court noted that "[h]is relevant conduct started while he was still in the custody of the BOP in a halfway house," which the court said was "shocking." (J.A. 50-51). The court acknowledged that the drugs involved were "not large quantities" but that Petitioner had "change[d] it to heroin this time." (J.A. 51). The court asked, "How committed do you have to be as a drug dealer to be in the custody of the BOP in a halfway house after having sustained prior federal conviction and revocation and be a heroin dealer?" (J.A. 52).

Counsel for Petitioner agreed that "the problem has [not] changed, and the solution hasn't changed, so something has to change here. Prison hasn't fixed it." (J.A. 52). The court replied, "Well, he's at least incapacitated when he's actually in the BOP." (J.A. 52). Addressing Petitioner's two prior drug convictions, counsel pointed out that it was not unusual to see federal defendants with multiple prior drug convictions: "We see people who have been to court multiple, five, six, seven,

eight times for drug convictions. They were just all in State Court the first seven times." (J.A. 53). Petitioner's prior record was unusual, in that he had been federally prosecuted both times. The court responded that the majority of defendants with multiple prior state convictions "were all in their twenties," in contrast to Petitioner, who, the court said, was "committed in his 40s, committed to this as a vocation, as a calling." (J.A. 54). The court believed that "[t]he federal system in the BOP provides much greater opportunities for a person to actually change their life than our state system does" and that "those young defendants that we talked about cycling through the state system, they don't get all the benefits that Petitioner has gotten all the different times he's been in the Federal Bureau of Prisons." (J.A. 54). The court said, "All of the things that the BOP does in a great positive way they did for him, and so I'm still on the upward departure." (J.A. 55).

Counsel for Petitioner agreed that his behavior was repetitive, but she noted that he was "not a big-time dealer" and was instead only a "street-level dealer." (J.A. 55). She argued that any upward departure should reflect "some balance so there is a difference between a major—somebody's that's running drugs up and down the East Coast and someone like Petitioner." (J.A. 56).

The court acknowledged that none of the examples set forth in the application notes to Section 4A1.3 for upward departures fit Petitioner's case. However, the court said that "the commentary to the Section 4A1.3 does note that the policy statement recognizes that the criminal history score is unlikely to take into account all the variations and the seriousness of the criminal history that may occur." (J.A.

57). In Petitioner's case, the court found that criminal history category IV "woefully underrepresents . . . the seriousness of his criminal history and the likelihood that he'll commit other crimes. This is a man committed so far in his 47 years on this earth, particularly in his 30s and 40s, to being a drug dealer." (J.A. 57). After reciting the circumstances of Petitioner's prior federal convictions and revocations, the court upwardly departed to criminal history category VI, the highest category, and from an offense level of 15 to an offense level of 27, for a new guideline range of 130 to 162 months. (J.A. 62). The court then heard arguments regarding the sentencing factors under 18 U.S.C. §3553(a).

Counsel for Petitioner requested a sentence at the bottom of the guideline range. She pointed out that he had "an impressively clean record while in custody," with only one infraction over the course of his time in custody. (J.A. 62). While in custody, he had "been given jobs with real responsibilities in the Bureau of Prisons." (J.A. 63). In addition, Petitioner was taking classes for a commercial driver's license, re-entry strategy, as well as a drug education class. Although Petitioner had applied to the BOP's intensive drug treatment program, the RDAP program, counsel said that he had not "been eligible for it yet because of the amount of time that he was facing, but that's something he wants to get into." (J.A. 63). Counsel emphasized that part of Petitioner's criminal behavior stemmed from drug addiction, such that "curing the drug addiction, fixing those problems, getting his [commercial driver's license] doing all of that will put him on the right path." (J.A. 63). She noted that when the court initially imposed the career offender 235-month

sentence, "a lot of things hit" home for Petitioner. For example, he realized that "he's going to be well into his sixties when he's released from custody," his grandchildren would be grown, and that "[h]is parents are more than likely, almost certainly going to be deceased when he is released." (J.A. 64). It was, counsel said, Petitioner's "scared-straight moment." (J.A. 65). Under these circumstances, counsel contended that a 130-month sentence was more than sufficient for Petitioner to "get the message" that "this time it has to be different." (J.A. 65).

Petitioner also personally addressed the district court at length. (J.A. 66-68). Affirming his counsel's statement that the initial 235-month sentence "woke [him] up," Petitioner said that he "really took it serious this time" and had begun reevaluating his life, particularly since he now had grandchildren and "couldn't handle" "thinking about them growing up and me not in their life." (J.A. 66). The court voiced skepticism, pointing out that Petitioner had lost his son while he was incarcerated, but that "it didn't change anything." (J.A. 68). Petitioner responded that his son's death did change things, but that he "just didn't handle it right" because his "mind went blank." (J.A. 68). But he acknowledged that "it was just all [his] fault" and that he did not blame anyone else for what he had done. When he was released, Petitioner intended to "take one day at a time and be a productive person out there and be there for my family and my loved ones." (J.A. 68). He said that he was "going to do the right thing, whether . . . you all believe me or not." (J.A. 68).

Counsel for the United States asserted that Petitioner was "a person who has made a career of criminality" and that "[f]rom the age of 17 until his mid 40s, we see an increase and a continuation of criminality." (J.A. 68-69). The government contended that Petitioner had squandered "numerous opportunities" to correct his behavior, and said that "the only time that he's not engaging in criminal conduct is while he's in . . . custody." (J.A. 70). His "lifetime of criminality," the government claimed, warranted a sentence at the top of the guidelines because Petitioner "clearly does not understand or appreciate the importance of not engaging in this sort of lifestyle." (J.A. 72). The government argued that a top-end guideline was necessary to incapacitate Petitioner and thus protect the public, account for his history of criminal behavior, and deter others from criminal conduct.

Upon consideration of the case, the district court imposed a sentence of 156 months. In announcing its sentence, the court said that the "need to incapacitate" Petitioner was "tremendous," "even though the quantities are not large." (J.A. 77). The court also cited the need to promote respect for the law and "provide just punishment for somebody who has been relentless." (J.A. 77). The court entered its amended judgment on November 13, 2018. (J.A. 9; 81-87). Petitioner timely appealed to the United States Court of Appeals for the Fourth Circuit. (J.A. 88).

B. Court of Appeals Proceedings

On appeal to the Fourth Circuit, Petitioner argued that the court's stated justifications for the 156-month sentence did not support departure to a sentence nearly five times above the top of the correctly-calculated guideline range of 30 to 37

months. The Fourth Circuit rejected this argument and affirmed the judgment of the district court. This petition followed.

THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

Petitioner argued to the Fourth Circuit that the district court imposed a substantively unreasonable sentence. The Court of Appeals rejected Petitioner's argument and affirmed the district court. Thus, the federal claim was properly presented and reviewed below and is appropriate for this Court's consideration.

REASONS FOR GRANTING THE PETITION

The Court of Appeals erred in affirming the unreasonable sentence imposed in this case. As this Court has recognized, in a typical case, a guidelines sentencing range embodies the § 3553(a) factors and "reflect[s] a rough approximation of sentences that might achieve § 3553(a)'s objectives." *Rita v. United States*, 551 U.S. 338, 350 (2007). When the sentencing judge chooses to depart from this range, the judge "must explain his conclusion that . . . an unusually harsh sentence is appropriate in a particular case with sufficient justifications." *Gall v. United States*, 552 U.S. 38, 46 (2007); *accord* 18 U.S.C. § 3553(c) (a district court must "state in open court the reasons for its imposition of the particular sentence"). Such justifications must be "sufficiently compelling to support the degree of the variance." *Gall*, 552 U.S. at 50. It is "uncontroversial that a major departure should be supported by a more significant justification than a minor one." *Id.*

Here, the 156-month sentence—a 119-month deviation above the top of the advisory guideline range of 30 to 37 months—represents a "major departure." *Gall*,

552 U.S. at 50. Such a dramatic deviation from the range requires "significant" and "sufficiently compelling" justifications. *Id.* The sentencing court, however, failed to provide such justifications, which does not exist in this case, at any rate. Because the circumstances of Petitioner's case simply do not support such an extreme departure from the guideline range, the sentence is, at bottom, "'greater than necessary" to achieve the sentencing purposes of 18 U.S.C. § 3553(a) and must therefore be vacated. *See Rita*, 551 U.S. at 341 (courts of appeals must set aside sentences they find "unreasonable").

The sentencing court determined that an upward departure was needed under U.S.S.G. § 4A1.3 to account for Petitioner's criminal history and risk of recidivism. However, Petitioner's criminal history category and guideline range already accounted for this, and he did not have any prior unscored convictions that typically form the basis for an upward departure under § 4A1.3. For example, he did not have any "sentences for foreign or tribal offenses," "prior sentences of substantially more than one year," or "prior similar misconduct established by a civil adjudication." *Id.* at (a)(2)(A)-(C). Nor was Petitioner "pending trial or sentencing on another charge at the time of the instant offense" and he had no "[p]rior adult criminal conduct not resulting in a criminal conviction." *Id.* at (a)(2)(D)-(E). Thus, Petitioner's case presented none of the standard grounds for departure under § 4A1.3.

Moreover, the sentencing court erred by focusing on a single sentencing factor—Petitioner's criminal history—to the exclusion of other relevant sentencing

factors. Petitioner's offense was a run-of-the-mill drug case—the only unusual element of the case was that it represented Petitioner's third federal prosecution. But as counsel for Petitioner told the court, plenty of federal drug offenders have multiple prior drug convictions from state court. That Petitioner was unlucky enough to be prosecuted by the federal government instead of by the state does not convert him into a drug kingpin. On the contrary, the record showed that Petitioner was only a street-level dealer who primarily sold small quantities of drugs to support his own addiction. As such, the nature and circumstances of the offense do not support the extreme sentence. *See* 18 U.S.C. § 3553(a)(1) (court must consider the nature and circumstances of the offense).

In addition, the court's extreme departure promotes sentencing disparities between Petitioner and similarly-situated defendants. 18 U.S.C. § 3553(a)(6) (court should avoid sentencing disparities). According to the Sentencing Commission's data, 13,595 offenders were sentenced nationwide for drug trafficking offenses between October 1, 2017 and June 30, 2018. The mean sentence for these offenders was 76 months, while the median sentence was 60 months. Of these 13,595 individuals, 4,775 received within-guideline sentences, while 4,743 received downward departures, and 4,027 received variances. Of the total number, only 50 offenders received an upward departure—approximately 0.4 percent. Thus, the district court's sentence places Petitioner among the 0.4 percent of drug traffickers who received an upward departure—i.e., the "worst of the worst." The magnitude of

this disparity supports the conclusion that the sentence is substantively unreasonable.

In sum, the court erred in imposing a sentence nearly five times above the top of the advisory guideline range. Petitioner's offense was a run-of-the-mill drug case, and while Petitioner would never be mistaken for a model citizen, he cannot be counted among the top 0.4 percent of drug offenders deserving of such an extreme upward departure. Accordingly, the sentence is substantively unreasonable and should be vacated. The Court of Appeals therefore erred in affirming the judgment. For these reasons, Petitioner respectfully requests that this Court grant the petition for writ of certiorari.

CONCLUSION

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

Respectfully submitted,

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OCTOBER 15, 2019

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-4826

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

RON CHRISTOPHER WHITLEY,

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. James C. Dever III, District Judge. (5:16-cr-00256-D-1)

Submitted: June 25, 2019 Decided: July 16, 2019

Before AGEE and KEENAN, Circuit Judges, and TRAXLER, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

G. Alan DuBois, Federal Public Defender, Jennifer C. Leisten, Assistant Federal Public Defender, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Raleigh, North Carolina, for Appellant. Robert J. Higdon, Jr., United States Attorney, Jennifer P. May-Parker, Nick J. Miller, Assistant United States Attorneys, OFFICE OF THE UNITED STATES ATTORNEY, Raleigh, North Carolina, for Appellee.

PER CURIAM:

Ron Christopher Whitley appeals the 156-month sentence imposed following his guilty plea to three counts of distribution and possession with intent to distribute heroin, in violation of 21 U.S.C. § 841(a)(1) (2012). Whitley argues that this sentence—which resulted from the imposition of an upward departure—is substantively unreasonable. We affirm.

We review a sentence, "whether inside, just outside, or significantly outside the [Sentencing] Guidelines range," for reasonableness "under a deferential abuse-of-discretion standard." *Gall v. United States*, 552 U.S. 38, 41 (2007). This standard encompasses review for both procedural and substantive reasonableness. *United States v. Howard*, 773 F.3d 519, 528 (4th Cir. 2014). In assessing procedural reasonableness, we consider whether the district court improperly calculated the Guidelines range, insufficiently considered the 18 U.S.C. § 3553(a) (2012) sentencing factors, or inadequately explained the sentence imposed. *Gall*, 552 U.S. at 51.

In assessing the substantive reasonableness of the district court's upward departure, we must "consider whether the sentencing court acted reasonably both with respect to its decision to impose such a sentence and with respect to the extent of the divergence from the sentencing range." *United States v. Washington*, 743 F.3d 938, 944 (4th Cir. 2014) (internal quotation marks omitted). "The farther the court diverges from the advisory [G]uideline[s] range, the more compelling the reasons for the divergence must be." *United States v. Tucker*, 473 F.3d 556, 561 (4th Cir. 2007) (internal quotation marks omitted). This court, however, must "give due deference to the district court's decision that the

§ 3553(a) factors, on a whole, justify the extent of the variance." *United States v. Zuk*, 874 F.3d 398, 409 (4th Cir. 2017) (internal quotation marks omitted). "[E]ven though we might reasonably conclude that a different sentence is appropriate, that conclusion, standing alone, is an insufficient basis to vacate the district court's chosen sentence." *Id.* (internal quotation marks, ellipsis, and alterations omitted).

The Sentencing Guidelines permit an upward departure based on the inadequacy of a defendant's criminal history category "[i]f reliable information indicates that the defendant's criminal history category substantially under-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes." U.S. Sentencing Guidelines Manual § 4A1.3(a)(1), p.s. (2016). Relevant considerations include prior sentences not used in computing the defendant's criminal history category, prior sentences of substantially more than one year imposed as a result of independent crimes committed on different occasions, the nature of the defendant's prior offenses, and his likelihood of recidivism in light of prior lenient treatment he received. *See* USSG § 4A1.3(a)(2), cmt. n.2(B) & background, p.s. A court may properly base a USSG § 4A1.3(a), p.s., departure on prior convictions too old to be counted in calculating the defendant's criminal history. *Howard*, 773 F.3d at 529; *see* USSG § 4A1.2(e) (describing applicable time period for calculating prior sentences).

Whitley argues that the district court imposed a substantively unreasonable sentence because it focused exclusively on his prior criminal record and failed to consider other relevant sentencing considerations. He contends that his offense conduct is insufficient to place him in the worst .4 percent of drug traffickers who received an upward departure,

thereby creating unwarranted disparities with similarly situated defendants. He also asserts that the district court's reasoning for departing upward was insufficient to support the sentence imposed.

We reject these arguments. Whitley's criminal history generated eight criminal history points-including six points for two prior federal drug conspiracy convictions-and included several additional, unscored prior convictions that demonstrated a pattern of criminal conduct in Whitley's life beginning at age 17 that was largely unabated throughout his adult life, despite lenient treatment by both the state courts and the federal court. Although Whitley argued he was a "street level" rather than a "big time" dealer, even he conceded the repetitiveness of his behavior and acknowledged that his behavior had not changed despite promising it would in his prior sentencings in federal court. These factors easily support the district court's conclusion that Whitley's criminal history category substantially underrepresented his criminal history and likelihood of committing similar crimes in the future.

Whitley argues that only approximately .4 percent of drug trafficking offenders receive upward departure sentences, and that the nature and circumstances of his run-of-the-mill offense conduct—which involved 21.7 grams of heroin—do not place him within these "worst of the worst" among drug offenders. Whitley, however, provides nothing to suggest or show that other drug offenders are similarly situated. Further, as the district court recognized, Whitley was a "committed" drug trafficker, whose trafficking activity continued despite conviction and lenient sentencing and through his release from imprisonment. In light of his history, the district court's significant concern for Whitley's

likelihood of recidivism and the need to deter future misconduct, to promote respect for the law, to provide just punishment, and to protect the public was well-taken, notwithstanding the drug amount for which Whitley was held accountable.

Further, this court has recognized that a district court may abuse its discretion by placing undue emphasis on a single sentencing factor that is "only tangentially connected" to the defendant's criminal conduct and at the expense of other relevant factors. *Zuk*, 874 F.3d at 410. Here, however, the district court explained why it concluded that a sentence within the original Guidelines range was not appropriate, making plain it had considered not only the argument made by counsel for the Government but also Whitley's allocution and the arguments in mitigation made by his counsel; the court also appears to have credited Whitley's arguments about his behavior within the Bureau of Prisons in declining to depart to the 162-month sentence requested by the Government. Given the myriad of aggravating and mitigating factors presented by the parties, the district court acted within its discretion in imposing the 156-month upward departure sentence in this case. *Cf. United States v. McCoy*, 804 F.3d 349, 352 (4th Cir. 2015) (upholding upward departure and collecting cases upholding 239-month and 166-month upward departures based on defendant's criminal histories).

Accordingly, we affirm the criminal judgment. We dispense with oral argument because the facts and legal contentions are adequately before this court and argument would not aid the decisional process.

AFFIRMED