

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA

ANGELA MAXINE LEE
Petitioner-Defendant

v.

UNITED STATES OF AMERICA
Respondent

On Petition for Writ of Certiorari from the
United States Court of Appeals for the Fifth Circuit.
Fifth Circuit Case No. 19-60081

PETITION FOR WRIT OF CERTIORARI

Omodare B. Jupiter (MB #102054)
Federal Public Defender
N. and S. Districts of Mississippi
200 South Lamar Street, Suite 200-N
Jackson, Mississippi 39201
Telephone: 601/948-4284
Facsimile: 601/948-5510

Abby W. Brumley (MB # 101929)
Assistant Federal Public Defender

Attorney for Defendant-Petitioner

QUESTION PRESENTED FOR REVIEW

Whether the above-Guidelines 84-month sentence ordered by the district court is substantively unreasonable under the § 3553(a) factors.

PARTIES TO THE PROCEEDING

All parties to this proceeding are named in the caption of the case.

TABLE OF CONTENTS

	<u>Page</u>
QUESTION PRESENTED FOR REVIEW	ii
PARTIES TO THE PROCEEDING.....	iii
TABLE OF CONTENTS.....	iv
TABLE OF AUTHORITIES	vi
I. OPINIONS BELOW	1
II. JURISDICTIONAL STATEMENT.....	2
III. STATUTE INVOLVED	3
IV. STATEMENT OF THE CASE	5
A. Basis for federal jurisdiction in the court of first instance.....	5
B. Statement of material facts.....	5
1. Ms. Lee's background.....	5
2. Facts about the felon in possession conviction.....	6
3. Facts about the sentencing hearing	7
V. ARGUMENT	8
A. Introduction	8
B. Review on certiorari should be granted in this case.....	8
C. The within-Guidelines sentencing recommendations of the prosecutor and the probation officer	10

D. Legal tests to measure the substantive reasonableness of a sentence	12
1. The nature and circumstances of the offense under § 3553(a)(1)	14
2. The history and characteristics of the defendant under § 3553(a)(1)	15
3. Just punishment for the offense and adequate deterrence to criminal conduct under § 3553(a)(2)(A) and (B).....	16
4. Protection of the public from further crimes of the defendant under § 3553(a)(2)(C)	17
5. The need for educational or vocational training, medical care, or other correctional treatment under § 3553(a)(2)(D)	17
6. The kinds of sentences available under § 3553(a)(3)	18
7. The Guidelines sentencing range under § 3553(a)(4)(A)	18
8. Conclusion: § 3553(a) analysis	19
VI. CONCLUSION.....	20
CERTIFICATE OF SERVICE	21
(Appendices 1, 2 and 3)	

TABLE OF AUTHORITIES

	<u>Page(s)</u>
<u>cases:</u>	
<i>Tapia v. United States</i> , 564 U.S. 319 (2011).....	17
<i>United States v. Churchwell</i> , 807 F.3d 107 (5th Cir. 2015)	12
<i>United States v. Gerezano-Rosales</i> , 692 F.3d 393 (5th Cir. 2012)	13
<u>statutes:</u>	
18 U.S.C. § 922.....	1, 5, 16
18 U.S.C. § 924.....	1, 5, 16
18 U.S.C. § 3231	5
18 U.S.C. § 3553	<i>passim</i>
18 U.S.C. § 3582	17
28 U.S.C. § 1254	2
<u>rules:</u>	
Rule 10, Supreme Court Rules.....	9
Rule 13.1, Supreme Court Rules.....	2
Rule 29.5, Supreme Court Rules.....	21
<u>United States Sentencing Guidelines:</u>	
U.S.S.G. Ch.1, Pt. A.1.1	16, 17

U.S.S.G. Ch.1, Pt. A.1.3	17
--------------------------------	----

I. OPINIONS BELOW

On August 7, 2018, the Grand Jury for the Southern District of Mississippi returned an Indictment charging Ms. Lee with felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(2) and 924(a)(2). The district court case number is 3:18cr153-HTW-LRA. Ms. Lee accepted responsibility for her actions by pleading guilty to the charge.

The district court sentenced Ms. Lee to serve 84 months in prison. The court entered a Final Judgment on February 1, 2019. The district court's Final Judgment is attached hereto as Appendix 1.

Ms. Lee filed a timely Notice of Appeal to the United States Court of Appeals for the Fifth Circuit on February 1, 2019. The Fifth Circuit case number is 19-60081. On appeal, Ms. Lee argued that the district court ordered an unreasonably high above-Guidelines prison sentence. The Fifth Circuit entered an order affirming the district court's sentence on September 26, 2019. A copy of the Fifth Circuit's Opinion and its Judgment are attached hereto as composite Appendix 2. The Opinion was not designated for publication, but it appears in the Federal Appendix at 777 Fed. App'x 782. A copy of the Opinion as it appears in the Federal Appendix is attached hereto as Appendix 3.

II. JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Fifth Circuit filed both its Order and its Judgment in this case on September 26, 2019. This Petition for Writ of Certiorari is filed within 90 days after entry of the Fifth Circuit's Judgment, as required by Rule 13.1 of the Supreme Court Rules. This Court has jurisdiction over the case under the provisions of 28 U.S.C. § 1254(1).

III. STATUTE INVOLVED

The issue in this case focuses on the unreasonably high prison sentence ordered by the district court. The reasonableness of a sentence is measured by the provisions of 18 U.S.C. § 3553(a), which states:

- (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 kinds of sentences available;
 - (4) the kinds of sentence 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 amendments 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 section 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 victims of the offense.

IV. STATEMENT OF THE CASE

A. Basis for federal jurisdiction in the court of first instance.

This case arises out of a criminal conviction entered against Ms. Lee for felon in possession of a firearm in violation of 18 U.S.C. §§ 922 and 924. The court of first instance, which was the United States District Court for the Southern District of Mississippi, had jurisdiction over the case under 18 U.S.C. § 3231 because the criminal charge levied against Ms. Lee arose from the laws of the United States of America.

B. Statement of material facts.

1. Ms. Lee's background.

Ms. Lee has not had an easy or privileged life. Many, if not most of the reasons that she has been unable to achieve the “American dream” have to do with the family and societal environment that she was born into. We do not mention these facts to make excuses for Ms. Lee’s felon in possession conviction – she realizes that possessing a gun was wrong and accepts responsibility for the crime. Rather, knowledge of Ms. Lee’s life circumstances put her admitted crime in proper perspective.

Ms. Lee did not meet her mother until she was ten years old. Her mom was an alcoholic and her dad was abusive. Ms. Lee was shipped from home to home as a child, but was raised primarily by her grandmother. After being kicked out of her

home, Ms. Lee dropped out of school at the end of her eighth grade school year.

When Ms. Lee was 18, her father died. Until just before the sentencing hearing, she has not spoken to her mom since 2006.

Ms. Lee's tumultuous early life led to drug abuse. It also led to a life of homelessness. She did not have a stable residence from the time she was 17 until February 2018, when she established a home with her boyfriend.¹ Ms. Lee spent much of that time living on the streets of Jackson, Mississippi.

These problems did not extinguish Ms. Lee's religious faith. At sentencing, she described her recent Bible readings and what they meant to her. She also described efforts to research halfway houses and outpatient drug treatment programs.

2. Facts about the felon in possession conviction.

Ms. Lee was a passenger in a car in Jackson, Mississippi when the subject incident occurred. The police pulled the car over for failing to use a turn signal. The policeman allegedly smelled marijuana, so he ordered all three occupants out of the car. One of Ms. Lee's hands was clinched into a fist, as if she was holding something. When questioned by the officer, she freely admitted that a marijuana blunt was in her hand. No other drugs were found in the car or on any other passenger.

¹ Ms. Lee was 41 in 2018.

The officer arrested Ms. Lee for misdemeanor possession of marijuana, and searched her purse incident to the arrest. A revolver was in her purse, loaded with only two rounds of ammunition. Ms. Lee testified that she possessed the gun because a man that shot at her was still stalking her. She had the gun for less than a week and had never fired it.

Ms. Lee has prior felony convictions, the most recent of which was a non-violent and non-drug related conviction in 2011. Because of the prior convictions, she was barred from possessing a gun. Possession of the revolver found during the traffic stop is the basis for the subject felon in possession charge.

3. Facts about the sentencing hearing.

Ms. Lee's Guidelines sentencing range was 37 to 46 months in prison. At the beginning of the sentencing hearing, the prosecutor recommended a sentence within that Guidelines range. He went on to state, "in this case, I didn't see any reason to make a recommendation outside the guideline."

The probation officer offered a similar opinion in the Presentence Investigation Report (hereinafter 'PSR'). That is, he could not identify any factors supporting a non-Guidelines sentence. He testified at the sentencing hearing that Ms. Lee was remorseful and accepted responsibility for her wrongdoing.

The court rejected the recommendations of the prosecutor and the probation officer. It ordered an 84-month sentence. The court ordered this significantly

above-Guidelines sentence because Ms. Lee absconded from supervision while she was on parole in relation to two prior convictions. Defense counsel objected to the above-Guidelines sentence, and the court overruled the objection.

V. ARGUMENT:

The above-Guidelines 84-month sentence ordered by the district court is substantively unreasonable under the § 3553(a) factors.

A. Introduction.

The above-Guidelines sentence ordered by the district court is the only issue on appeal. The Guidelines sentencing range, which was 37 to 46 months in prison, represents a just punishment for Ms. Lee. The 84-month sentence ordered by the district court was legally unreasonable under the law and facts of this case.

B. Review on certiorari should be granted in this case.

Rule 10 of the Supreme Court Rules states, “[r]eview on writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only for compelling reasons.” The issue in Ms. Lee’s case presents a compelling reason for this Court to grant certiorari.

When this Court found that mandatory application of the United States Sentencing Guidelines is unconstitutional, many defendants benefited. Many others, who are suffering unreasonably long prison sentences, did not. Ms. Lee falls into the latter category. Based on the following analysis, it is clear that the sentence ordered by the district court is unreasonably long. This Court should grant certiorari to correct that problem. More important, the Court should grant

certiorari to set a standard that even without a mandatory Guidelines system in place, district courts must base their sentences on a consistent reasoning process.

C. The within-Guidelines sentencing recommendations of the prosecutor and the probation officer.

Before delving into the legal analysis about whether Ms. Lee's above-Guidelines sentence is reasonable, we look to the sentencing recommendations of the prosecutor and probation officer in this case. Obviously, the prosecutor is in a position to recommend a sentence that, at a minimum, serves the ends of justice. And as this Court is well aware, the probation officer's job is to advise the district court about a reasonable sentence after conducting an objective in-depth investigation of the defendant and the specific facts of the case.

Practically the first words out of the prosecutor's mouth at the sentencing hearing were: "The Government's recommendation would be an appropriate sentence under the guideline that takes into effect the seriousness of the crime, but also the defendant's willingness to accept responsibility and plead guilty." He went on to state, "in this case, I didn't see any reason to make a recommendation outside the guideline." Later in the sentencing hearing, the prosecutor again recommended a Guidelines sentence.

The probation officer also opined that a within-Guidelines sentence should be ordered. The district court appeared to be dissatisfied with the probation

officer's opinion because it asked repeated questions in what could be construed as an attempt to persuade him to recommend an above-Guidelines sentence.² For example, the court asked the probation officer on two occasions, "how could it be worse," meaning how could the facts surrounding the felon in possession crime be any worse. Then the court questioned whether the probation officer had completely investigated Ms. Lee's criminal history.

Notwithstanding the court's queries, the probation officer stated, "I have done several of these cases similar to this. And I've seen a lot more egregious cases where I have recommended upward of the guidelines, but this is not one of those cases in this instance." He also stated that Ms. Lee "was very remorseful

² In an unrelated case, another district judge in Southern District of Mississippi characterized similar questioning by the judge in this case as "cross examination." *See United States v. Donald Ray Quinn*, Criminal No. 3:92cr121-DPJ-FKB, in the United States District Court for the Southern District of Mississippi. The other judge stated:

I do want to say for the record – I meant to say it early on – that I obviously read the order of recusal and, Ms. Stewart, your motion to try to get some context of what was going on.

I started to read the first transcript. And as I sort of got into what sounded like a cross-examination, I decided to stop reading it. And this may be overly cautious, but I didn't want – I didn't want there to be any suggestion that any bias for recusal by the prior judge might taint my review of the case so I elected not to read that, I guess it was a 95-page transcript. I read your motion, but I tried to separate my thought process from that of the original judge. I did want to put that on the record.

Hearing Transcript, pp. 21-22 (emphasis added). The hearing transcript is available for this Court's review under docket entry number 31 in *Quinn*, Case No. 3:92cr121, in the Southern District of Mississippi.

during her interview and sorry for how she had been conducting herself during the interview and did accept her responsibility.”

The probation officer’s comments at the sentencing hearing are consistent with what he wrote in the PSR. The PSR states, “[t]he probation officer has not identified any factors that would warrant a departure from the applicable sentencing guideline range.” It also states, “[t]he probation officer has not identified any factors under 18 U.S.C. § 3553(a) that may warrant a variance and imposition of a non-guidelines sentence.”

As the court recognized at sentencing, “the prosecution is supposed to know more about this case than I know and probation is supposed to know more about this case than I know[.]” Nevertheless, the court rejected the well-reasoned opinions of the prosecutor and probation officer when it ordered a significantly above-Guidelines 84-month prison term. This Court should give great weight to their opinions in this reasonableness of sentence analysis.

D. Legal tests to measure the substantive reasonableness of a sentence.

An above-Guidelines sentence is substantively unreasonable if it “(1) does not account for a factor that should have received significant weight, (2) gives significant weight to an irrelevant or improper factor, or (3) represents a clear error of judgment in balancing the sentencing factors.” *United States v. Churchwell*, 807 F.3d 107, 123 (5th Cir. 2015) (emphasis added; citation omitted).

Ms. Lee’s sentence is substantively unreasonable under two of the three tests stated above. First, the court gave too much weight to fact that Ms. Lee absconded from supervision in relation to parole or supervised release that she was serving in relation to prior convictions. Second, the district court erred in balancing the sentencing factors under 18 U.S.C. § 3553(a).

Under Fifth Circuit law, a court considers “the totality of the circumstances” when it analyzes substantive reasonableness. *United States v. Gerezano-Rosales*, 692 F.3d 393, 398 (5th Cir. 2012) (citations omitted). The starting point for the totality of the circumstances analysis is 18 U.S.C. § 3553, titled “Imposition of a sentence.” Under § 3553(a), “[t]he court shall impose a sentence sufficient, but not greater than necessary” to meet the ends of justice. Section 3553(a) requires judges to consider a number of factors when they craft appropriate punishments for offenses. The primary factors are:

- “the nature and circumstances of the offense” (§ 3553(a)(1));
- “the history and characteristics of the defendant” (*id.*);
- “to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense” (§ 3553(a)(2)(A));
- “to afford adequate deterrence to criminal conduct” (§ 3553(a)(2)(B));
- “to protect the public from further crimes of the defendant” (§ 3553(a)(2)(C));

- “to provide a defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner” (§ 3553(a)(2)(D));
- “the kinds of sentences available” (§ 3553(a)(3));
- “the sentencing range established for ... the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines” (§ 3553(a)(4)(A)); and
- “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct” (§ 3553(a)(6)).

Each of these factors is considered below.

1. The nature and circumstances of the offense under § 3553(a)(1).

There is nothing unusual or egregious about Ms. Lee’s possession of a gun. Police discovered the gun as a result of a minor traffic stop. While she had a very small amount of marihuana at the time of her arrest, Ms. Lee did not commit any type of felony, either violent or otherwise, while possessing the gun. When the officer asked Ms. Lee what was in her hand, she freely admitted that it was a marijuana blunt.

She possessed the gun for self-protection. Ms. Lee believed she needed a gun for self-protection because a man shot at her and was stalking her. Her felon

in possession crime had no victims and Ms. Lee did nothing to obstruct justice.

Finally, Ms. Lee accepted full responsibility for her wrongdoing. All of these facts relating to Ms. Lee's admitted wrongdoing support a conclusion that the district court should have ordered a lower sentence.

2. The history and characteristics of the defendant under § 3553(a)(1).

The district court justified its significantly above-Guidelines sentence on the fact that Ms. Lee absconded from supervision while on state court parole. The court also stated other purported facts about Ms. Lee's past, some of which, such as her homelessness, are inappropriate facts to consider in the § 3553(a) analysis. But the court "specifically" relied on the two times that she absconded from supervised release to support its above-Guidelines sentence.

There is no indication in the record that Ms. Lee committed any crime when she failed to report for supervision. She simply failed to report to her parole officer. While that was a mistake, we must understand that Ms. Lee was homeless during this period. Supporting a significantly above-Guidelines sentence on these two parole violations was an abuse of discretion.

In addition to Ms. Lee's past behavior, we must look at the current state of her life. Prior to the sentencing hearing, she researched halfway houses and outpatient drug treatment programs. She also began studying the Bible.

Apparently disbelieving that Ms. Lee actually read the Bible, the district court asked her several questions about the issue. She described that the book of Ephesians “talks about the armor of God.” She described that the book of Acts tells the story of Apostle Paul, and that he initially persecuted Christians, then he turned to Christ. Notwithstanding these detailed descriptions of what Ms. Lee read in the Bible, the court stated, “I’m not going to hold it against you. I’m not going to hold it against you, even though it doesn’t look to me like you really read it.”³

Simply stated, there is nothing about Ms. Lee’s history and characteristics that supports an 84-month sentence when the Guidelines sentencing range was only 37 to 46 months in prison.

3. Just punishment for the offense and adequate deterrence to criminal conduct under § 3553(a)(2)(A) and (B).

The felon in possession statute carries no required minimum sentence. 18 U.S.C. §§ 922(g)(1) and 924(a)(2). In addition to the statute, we consider the Sentencing Guidelines, which are adopted by the Sentencing Commission. The stated purpose of the Sentencing Commission “is to establish sentencing policies and practices for the federal criminal justice system that will assure the ends of justice by promulgating detailed guidelines prescribing the appropriate sentences for offenders convicted of federal crimes.” Sentencing Guidelines, Ch. 1, Pt.

³ See *supra*, footnote 2.

A.1.1. (emphasis added). Also, the Guidelines are meant to “combat crime through an effective, *fair* sentencing system.” *Id.* at Ch. 1, Pt. A.1.3. (emphasis added).

Ms. Lee’s Guidelines sentencing range is 37 to 46 months in prison. A sentence within this range would meet the ends of justice and provide a fair sentence.

4. Protection of the public from further crimes of the defendant under § 3553(a)(2)(C).

Ms. Lee has prior convictions for grand larceny and robbery. Those crimes occurred in 2001 and 2002, respectively. So her last crime that could be construed a violent crime occurred in 2002, which was 17 years ago. She has a year 2011 conviction for felon in possession of a firearm, but that is not a violent crime. She has no convictions for drug dealing. Under these facts, a Guidelines sentence would protect the public from future criminal activity.

5. The need for educational or vocational training, medical care, or other correctional treatment under § 3553(a)(2)(D).

It is possible that Ms. Lee may need treatment for drug abuse. However, treatment can be completed well within the Guidelines sentencing range of 37 to 46 months in prison. Further, a court may not increase a sentence to ensure that a defendant has adequate time to complete a BOP rehabilitation program. *Tapia v. United States*, 564 U.S. 319, 332 (2011) (holding that “Section 3582(a) precludes

sentencing courts from imposing or lengthening a prison term to promote an offender's rehabilitation.”).

6. The kinds of sentences available under § 3553(a)(3).

This factor does not come into play in the subject analysis.

7. The Guidelines sentencing range under § 3553(a)(4)(A).

The Guidelines sentencing range is 37 to 46 months in prison. As the Court is aware, the Sentencing Commission goes to great lengths to study and provide guidance regarding what constitutes fair sentences for all federal crimes. A sentence within Sentencing Commission's recommended range would meet the § 3553(a) considerations in this case.

The probation officer's opinion also comes into play under § 3553(a)(4). As stated in detail above, the probation officer believed that a Guidelines sentence would be appropriate for Ms. Lee. The probation officer stuck by his recommendation, even after repeated questions by the district court.⁴ This unbiased opinion supports vacating the above-Guidelines sentence.

Finally, we consider the prosecution's opinion about an appropriate sentence. On two occasions at the sentencing hearing, the prosecutor recommended a Guidelines sentence.

⁴ See *supra*, footnote 2.

The prosecutor's opinion provides further support for vacating the above-Guidelines sentence of 84 months in prison.

8. Conclusion: § 3553(a) analysis.

All of the individual § 3553(a) factors support a finding that Ms. Lee should have been sentenced within the 37 to 46 month Guidelines sentencing range. Viewing these factors in total, as well as viewing all of the circumstances in this case, provides further support for this conclusion. Ms. Lee therefore asks this Court to vacate her sentence and remand the case to the district court for resentencing within the Guidelines range.

VI. CONCLUSION

Based on the arguments presented above, Ms. Lee asks the Court to grant her Petition for Writ of Certiorari in this case.

/s/Abby W. Brumley

Abby W. Brumley

Assistant Federal Public Defender
Office of the Federal Public Defender
Southern District of Mississippi
200 South Lamar Street, Suite 200-N
Jackson, Mississippi 39201
Telephone: 601/948-4284
Facsimile: 601/948-5510

Attorney for Defendant-Petitioner