
No.

IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA

DARMARCUS FISHER, ALSO KNOWN AS SKULL-D,
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. 18-60657

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the district court imposed a substantively unreasonable sentence and erred by imposing a 4-level enhancement for aggravated assault.

PARTIES TO THE PROCEEDING

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

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OPINIONS BELOW

The petitioner, Mr. Darmarcus Fisher, respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on September 20, 2019. The Opinion and Judgment are attached hereto as composite Appendix 1. The opinion of the Court of Appeals for the Fifth Circuit is not reported in the Federal Reporter, but can be found in the Westlaw electronic database at *United States v. Fisher*, No. 18-60657, 777 Fed. App'x 749 (2019). A copy of the unpublished Opinion is attached as Appendix 3.

The district court entered a Judgment reflecting this sentence on September 18, 2018. A copy of the Judgment is attached hereto as Appendix 2.

JURISDICTIONAL STATEMENT

Petitioner, Darmarcus Fisher, entered a plea of guilty to Title 18, United States Code, §922(g)(1). Mr. Fisher was sentenced to 120 months' imprisonment by the Honorable Michael P. Mills, United States District Judge for the Northern District of Mississippi.

The United States Court of Appeals for the Fifth Circuit affirmed in an unpublished *per curiam* opinion filed on September 20, 2019. No petition for rehearing was sought.

This Petition for Writ of Certiorari is filed within 90 days after entry of the Fifth Circuit Judgment, as required by Rule 13.1 of the Supreme Court Rules. The

jurisdiction of this Court to review the judgment of the Fifth Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION, FEDERAL STATUTE, AND SENTENCING GUIDELINE INVOLVED

U.S. Const. amend. V (Due Process Clause):

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

18 U.S.C. § 3553(a)

(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.[1]

(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.

U.S.S.G. § 2K2.1(b)(6)(B)

If the defendant used or possessed any firearm or ammunition in connection with another felony offense; or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense, increase by 4 levels.

If the resulting offense level is less than level 18, increase to level 18.

STATEMENT OF THE CASE

I. Procedural history

This stems from the affirmance of an appeal from a final judgment entered by the United States District Court for the Northern District of Mississippi sentencing Mr. Fisher to 120 months' imprisonment, followed by three years of supervised release. ROA.37-39.¹ On December 14, 2017, a one count Indictment was returned against Mr. Fisher for possession of ammunition by a convicted felon in violation of 18 U.S.C. § 922(g)(1). ROA.7. Mr. Fisher pled guilty on April 26, 2018 before the district court. ROA.53.

Prior to sentencing, defense counsel filed his Objections to the Presentence Investigation Report, arguing that Mr. Fisher should not receive a four-level enhancement for possessing ammunition in connection with an Attempted Aggravated Assault, pursuant to U.S.S.G. § 2K2.1(b)(6)(B). ROA.156-158, PSR ¶19². In the filing, defense counsel argued "self-defense" as grounds for denying the sentencing enhancement. ROA.156-57; Fifth Circuit Jury Instruction 1.36A (2015). The prosecution filed a Response to Objections to Presentence Report on August 22, 2018. ROA.161. At sentencing, the district court sentenced Mr. Fisher to 120 months' imprisonment, an upwards variance from the suggested sentencing Guidelines' range of 46-57 months, followed by three years of supervised release along with both

¹ ROA stands for "Record on Appeal" and is the citation used by the Fifth Circuit for the record.

² Because the PSR is a sealed document, defense counsel will only cite to the paragraphs listed in the PSR, not the record on appeal.

mandatory and special conditions. ROA.118, 124. Mr. Fisher filed a timely notice of appeal on September 18, 2018. ROA.44.

II. Sentencing hearing on September 13, 2018.

The district court held a sentencing hearing on September 13, 2018. ROA.67. At issue, was the unresolved objection made by defense counsel regarding the four-point Aggravated Assault enhancement. ROA.71. Defense counsel objected to the seven exhibits offered by the prosecution which were offered to show that Mr. Fisher possessed a firearm prior to being at the convenience store that night. ROA.72. The court admitted the exhibits. ROA.72.

The prosecution's first witness, Sergeant Bryan Jenkins, testified that there were multiple shooting incidents in Columbus, MS between the Vice Lords and Gangster Disciples in 2016. ROA.73-74. On March 7, 2016, an incident occurred at the OK Foods where Morris Lanier was shot in the leg. ROA.75. Mr. Fisher was observed at the crime scene with the person who fired the shot. ROA.75. Morris Lanier never identified Mr. Fisher as the shooter; only noting that Mr. Fisher was at the crime scene and in possession of a firearm. ROA.75-76, 97-98.

Later that evening, Mr. Fisher was involved in a shootout at King's Grocery, a convenience store. ROA.80. Mr. Fisher and his associates pulled into King's Grocery in an SUV. A few minutes after their arrival, another vehicle with Johnny Bonner arrived, firing shots towards King's Grocery and Mr. Fisher's vehicle. ROA.87.

Mr. Fisher is seen on video getting out of the SUV and walking towards the entrance to the convenience store. ROA.81-83. As he reached the front of the SUV,

shots were fired at him. It is undisputed that someone else fired the first shot at Mr. Fisher. ROA.95. Sergeant Jenkins testified that because shots were fired at Mr. Fisher, he was in imminent danger of death or serious bodily injury and, in terms of force being used, returning fire was no greater than what was being used against him. ROA.95. The people shooting at Mr. Fisher were believed to be associates of Morris Lanier, the person shot in the leg earlier in the day. ROA.87. Mr. Fisher ducked and moved back towards the passenger side of the vehicle, where he retrieved a handgun and returned fire. ROA.82-83.

At the same time, across the street from the convenience store, a white vehicle had parked in front of a residence. ROA.80-81, 84. The driver and her young son were unloading groceries when the shooting began. ROA.84. The vehicle and residence were struck by bullets, and luckily, no one was injured. ROA.85. Despite not being qualified as an expert, Sergeant Jenkins believed Mr. Fisher was responsible for the bullets fired into the house and vehicle based on Mr. Fisher's position and the direction he was shooting, even though other occupants from Mr. Fisher's SUV were also firing in the same direction. ROA.84-86.

Once Mr. Fisher had an opportunity to escape the bullets, he did so immediately. ROA.90, 103. Mr. Fisher fled the scene and was stopped by police just north of King's Grocery. ROA.90. During his state revocation hearing, Mr. Fisher admitted to possessing a firearm and firing it that day. ROA.92-93, 78.

Defense counsel explained to the court that the nature of the objection was the four-level enhancement concerning the shooting incident at King's Grocery.

ROA.109. Because it was uncontested that Mr. Fisher possessed a firearm in violation of the law, the only issue at sentencing was whether Mr. Fisher committed an Aggravated Assault at King's Grocery or acted in self-defense. ROA.110. According to defense counsel, the enhancement should not apply because Mr. Fisher could validly assert a claim of self-defense, according to the Fifth Circuit's pattern jury instructions and case law. ROA.110.

Since Mr. Fisher readily admitted to possession of a firearm earlier in the day, the only issue concerned the self-defense claim. ROA.110. Johnny Bonner and his associates were the offenders; Mr. Fisher and his associates were the victims. ROA.110. Bonner and his gang were shooting at Mr. Fisher and his associates. ROA.110. Mr. Fisher had to take cover behind the SUV to protect himself and grabbed a gun from inside to fire back in self-defense. ROA.110. This was temporary possession of a firearm to act in self-defense of his life and his associates' lives. ROA.111. Because Mr. Fisher was not the aggressor at the King's Grocery store, and only fired back in self-defense, the four-point enhancement should not apply. ROA.111.

The district court intervened and asked defense counsel, “[I]f I vary under 3553, does it even matter?” ROA.111. Defense counsel responded, “No, Your honor,” but also clarified that it would depend on the basis for the variance. ROA.111-12. Defense counsel summarized why the enhancement should not apply: the use of force is justified when a person reasonably believes that force is necessary for the defense of one's self against the immediate use of unlawful force, which is exactly what

happened at the convenience store. ROA.112. Sergeant Jenkins corroborated that Mr. Fisher was shot at first, and could reasonably use the same amount of force in self-defense. ROA.112.

The prosecution argued that Mr. Fisher was not the victim in this case and that the *Panter* case did not apply in this scenario, stating that it was Mr. Fisher's gun the entire time, not just some random gun found at the scene. ROA.113.

The district court proceeded to sentence Mr. Fisher to the statutory maximum sentence of 120 months' imprisonment. ROA.38, 124. Not believing that Mr. Fisher was a victim who acted in self-defense, the court denied the objection and granted the four-point enhancement. ROA.115. Further, the district court informed counsel that "quibbling over whether it would be 46-47 months" would not matter. ROA.115. After hearing remarks from Mr. Fisher, defense counsel, and the prosecution, the court stated that it had reviewed the video of the shooting incident at King's Grocery and the PSR. ROA.118. Noting that 18 U.S.C. § 3553 authorizes the district court to impose a variance after taking into consideration aggravating or mitigating factors, victim impact, the extreme conduct of Mr. Fisher, his criminal history, and lack of remorse, the court imposed the statutory maximum sentence. ROA.123-24.

Defense counsel renewed his objection to the four level enhancement and that he is allowed to claim self-defense at the grocery store. ROA.126. The facts showed that he was not the aggressor nor did he fire the first shots. ROA.126.

A timely appeal followed. ROA.44. The Fifth Circuit affirmed the sentence on September 20, 2019, finding the § 2K2.1(b)(6)(B) enhancement was properly

applied and that the sentence was substantively reasonable. *United States v. Fisher*, 777 Fed. App'x 749 (2019).

REASONS FOR GRANTING THE WRIT

As stated in Rule 10 of the Supreme Court Rules, “[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.”

Defendants have the right to claim self-defense if evidence is presented justifying the use of force against the use of unlawful force. In this case, a rival gang began shooting at Mr. Fisher at King's Grocery. Mr. Fisher ducked behind the front hood of the SUV, retreated back to the passenger side of the vehicle, reached inside for a firearm, and returned fire. Once the situation calmed down, Mr. Fisher immediately escaped the danger.

The district court denied Mr. Fisher's objection to the four-level enhancement for possessing a firearm in connection with an Attempted Aggravated Assault, pursuant to U.S.S.G. § 2K2.1(b)(6)(B) and denying the claim of self-defense. ROA.156-158, PSR ¶19.

After denying the four-level enhancement, the district court sentenced Mr. Fisher to the statutory maximum of 120 months. ROA.38, 124.

Reasonableness is the cornerstone of sentencing law. *Gall* requires the sentencing court to impose a procedurally and substantively reasonable sentence. 552 U.S. 38 (2007). The court must consider the 18 U.S.C. § 3553(a) factors and adequately explain its chosen sentence. *Id.*

Gall also requires sentences to be substantively reasonable and sufficient, but not greater than necessary to comply with the purposes set forth in 18 U.S.C. § 3553(a). Mr. Fisher received 120 months' imprisonment, a sentence almost triple the low end of the Guidelines' range. Fifth Circuit precedent states that a 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. Smith*, 440 F.3d 704, 708 (5th Cir. 2006). Based on this, and the court's failure to acknowledge the mitigation provided, the sentence is substantively unreasonable.

Granting certiorari in this case will provide valuable protection to defendants' due process rights, and will provide valuable guidance to lower courts on proper sentencing methods and what constitutes a reasonable sentence.

I. The Fifth Circuit erred by affirming the district court's decision to deny defense counsel' objection to the four level enhancement for Aggravated Assault.

As admitted by Sergeant Bryan Jenkins, Mr. Fisher was not the initial aggressor or shooter at King's Grocery, he was in imminent danger of death or serious bodily injury and, in terms of force being used, shooting back was no greater than what was being used against him. ROA.95. Mr. Fisher possessed a firearm earlier in the day, undisputedly, and possessed a firearm in self-defense at King's Grocery. ROA.110.

Fifth Circuit Pattern Jury Instruction 1.36(a) allows for a claim of

self-defense:

The defendant has offered evidence that he acted in self-defense. The use of force is justified when a person reasonably believes that force is necessary for the defense of oneself or another against the immediate use of unlawful force. However, a person must use no more force than appears reasonably necessary under the circumstances.

Force likely to cause death or great bodily injury is justified in self-defense only if a person reasonably believes such force is necessary to prevent death or great bodily harm.

The government must prove beyond a reasonable doubt that the defendant did not act in self-defense.

Pattern Crim. Jury Instr. 5th Cir. 1.36A (2015).

This is the crux of defense counsel's objection. ROA.109-113, 156. According to *United States v. Panter*, a defendant is allowed to temporarily possess a firearm in order to defend himself. 688 F.2d 268 (5th Cir. 1982). Congress did not intend to make ex-felons helpless targets and excepted a situation "where a convicted felon, reacting out of a reasonable fear for the life or safety of himself, in the actual, physical course of a conflict that he did not provoke, takes temporary possession of a firearm for the purpose or in the course of defending himself." *Id.* at 273.

Mr. Fisher, charged with possession of a firearm by a convicted felon, admitted to possessing a firearm earlier in the day. ROA.110. His admission to possession satisfies the factual finding necessary for his underlying conviction under § 922(g). ROA.110. It does not matter how long Mr. Fisher possessed the firearm; it only matters that he did possess the firearm and was prohibited from doing so.

Mr. Fisher went home and headed back out later that evening. ROA.93-94. It was during the incident at King's Grocery, Mr. Fisher temporarily took possession of

the firearm that was in the vehicle. ROA.108. In fact, Sergeant Jenkins confirmed that Mr. Fisher had to reach into the vehicle to retrieve the firearm because he was initially squatting near the front of the vehicle. ROA.108.

There is plenty of evidence to substantiate a claim that Mr. Fisher acted in self-defense to being shot at by a rival gang. One other court has addressed a claim of self-defense concerning a U.S.S.G. § 2K2.1(b)(6)(B) enhancement. In *United States v. Lee*, the Seventh Circuit found Lee was not justified in using deadly force against the aggressor who only threw a punch. 467 F. App'x 502, 504 (7th Cir. 2012). This is not the same situation, however, because Officer Jenkins admitted deadly force was appropriate at King's Grocery as the rival gang were firing shots first. ROA.95.

The district court erred by focusing on where the bullets ended up, rather than who started the shootout in the first place. ROA.114. The mere fact that the bullets struck a vehicle and a residence cannot sustain the denial of the self-defense claim. While no one argues that bullets striking a vehicle or a residence is not reckless or not dangerous, in this specific situation, Mr. Fisher should not have received the Aggravated Assault enhancement, pursuant to U.S.S.G. § 2K2.1(b)(6)(B)³.

Mr. Fisher offered sufficient evidence to invoke a claim of self-defense; the Government had the burden to prove Mr. Fisher did not act in self-defense, something it did not do. Pattern Crim. Jury Instr. 5th Cir. 1.36A (2015). He was not the aggressor, nor did he use unreasonable force; rather Mr. Fisher was justified in using

³ Mr. Fisher acknowledges this issue may be moot as the court varied upwards from the sentencing Guidelines range. However, Mr. Fisher wished to preserve the issue for review.

deadly force against the immediate use of unlawful deadly force and used no more force than was reasonably necessary under the circumstances. ROA.94-95.

II. The Fifth Circuit erred by affirming a substantively unreasonable sentence.

Substantive reasonableness is reviewed under an abuse of discretion standard. Where, as here, the district court imposed a non-Guidelines, upwardly varied sentence to the statutory maximum, this court must determine whether the sentence “unreasonably fails to reflect” the § 3553(a) sentencing factors. *United States v. Smith*, 440 F.3d 704, 708 (5th Cir. 2006).

An above-guidelines sentence is 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. Pennington*, 606 F. App’x 216, 225 (5th Cir. 2015).

§ 3553 sets forth the following factors:

- (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[.]

18 U.S.C. § 3553(a)(1)-(2)⁴.

In fashioning a sentence to meet these purposes, the courts are directed to consider a broad range of factors, including the nature and circumstances of the offense and the history and characteristics of the defendant. *See* 18 U.S.C. § 3553(a)(1)-(7). In Mr. Fisher's case, the sentence imposed by the district court was greater than necessary to meet § 3553(a)'s requirements and was therefore unreasonable. Courts of Appeal may consider the degree of variance from the Guidelines range when evaluating the reasonableness of a particular sentence. *Gall*, 552 at 594-95. It is extremely unlikely that a Court of Appeal will reverse a sentence as being "substantively unreasonable," even though this Court and Congress have always stated that a sentence should be "sufficient, but not greater than necessary." *See* 18 U.S.C. § 3553(a); *see also* *Gall v. United States*, 552 U.S. 38 (2007).

In this case, the district court varied from the Guidelines range of 46-57 months all the way up to 120 months, the statutory maximum. The district court relied on Mr. Fisher's criminal history, a factor that has already been taken into account by the sentencing Guidelines. *See* U.S.S.G. § 4A1.1 (discussing criminal history category). A period of incarceration that is doubling, almost tripling, the recommended Guidelines range will not assist Mr. Fisher in any way or give him the necessary tools to succeed upon release.

⁴ Other considerations are "the kinds of sentences available," § 3553(a)(3); the Guidelines, § 3553(a)(4); "any pertinent policy statement" issued by the Sentencing Commission, § 3553(a)(5); "the need to avoid unwarranted sentence disparities," § 3553(a)(6); and "the need to provide restitution to any victims," § 3553(a)(7).

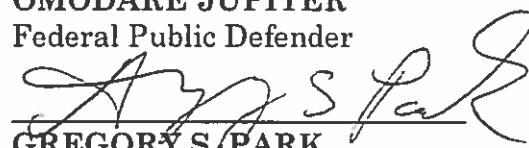
Similarly, the district court varied the sentence upwards to take into consideration the conduct at King's Grocery store. ROA.114-15, 122-23. After having watched the video from King's Grocery, the court stated, "I don't think that there's a responsibility on this Court to suspend the facts – when the facts are so clear that we suspend judgment." ROA.118. The facts were controverted and a reasonable claim of self-defense was established. Again, while the conduct itself may have been perceived as dangerous, it was in Mr. Fisher's self-defense. He was not intentionally shooting at the vehicle or residence across the street, it was only in response to the people shooting at him.

The Fifth Circuit affirmed the sentence, finding the sentence more than double and almost triple the low end of the guidelines range substantively reasonable. See 777 Fed. App'x 749 (2019).

CONCLUSION

For all of the reasons stated above, Mr. Fisher asks this Court to grant his Petition for Writ of Certiorari. Granting certiorari will afford this Court an opportunity to correct a grave constitutional error.

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