19-7164

No. 18-50783

IN THE

SUPREME COURT OF THE UNITED STATES

Dominic Howard — PETITIONER
(Your Name)

vs.

United States of America RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Fifth Court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Dominic Howard
(Your Name)

P.O. Box 1010
(Address)

Bastrop, Texas 78602
(City, State, Zip Code)

(Phone Number)

ORIGINAL

No. 7:18-cr-114-DC

Petition for Writ of Certiorari

Dominic Howard, Petitioner

v.

United States of America, Respondent

Petition for Writ of Certiorari and

Motion for Leave to Proceed in Forma Pauperis

To the United States Supreme Court

Petitioner Dominic Howard, ask that a Writ of Certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on September 6, 2019, No 18-50783, USDC No 7:18-CR-114-1. And Petitioner Dominic Howard pursuant to rule 39.1 Supreme Court Rules, and title 18 U.S.C. 3006 A(d)(7), respectfully move this Honorable Court for leave to proceed in Forma Pauperis, and for leave to file the attached Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit without payment of fees.

"Pro Se pleadings are held to a less stringent standard than pleadings drafted by an attorney's and will therefore be liberally constructed", Hughes V. Lott, 350 F.3d 1157, 1160 (2003).

Parties to the Proceeding

The caption of this case names all parties to the proceeding in the court whose judgment is sought to be reviewed.

1. U.S. Fifth District Court

2. U.S. Fifth District Court of Appeals

3. Dominic Howard, Appellant

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Jurisdiction

The United States Courts of Appeals for the Fifth Circuit entered its judgment on September 6, 2019. This petition is filed within 90 days after entry of judgment. The Supreme Court of the United States of America has jurisdiction to grant a writ of Certiorari under 28 U.S.C. 1254(1)

Statement of Case

On April 25, 2018, a federal grand jury for the Western District of Texas, Midland-Odessa division returned a one-count indictment charging Appellant with 4distribution of child pornography, in violation of 18 U.S.C. 2252(a)(2). The indictment alleged that the conduct of forming the basis of prosecution occurred on or about March 18, 2018. On June 15, 2018, appellant pled guilty to count one of the indictment. Under the guidelines, appellant's sentencing range was 46 – 57 months, with the offense carrying a mandatory maximum of 60 months. However, the Court found an upward departure to be warranted and sentenced Appellate to 120 months of imprisonment. Appellant filed a timely Notice of Appeal on September 18, 2018. On March 21, 2018, an 18 year old female known as "A.K." entered the Midland Police Department (MPD) and spoke with detectives about a man who has posted sexually explicit photos of her on a website. The man was later identified as Appellant. A.K., stated she initially met Appellant several years ago when she was 15 years of age and was a sophomore in high school. She indicated Appellant was 22 years old at the time. A.K. stated she met Appellate on Instagram and hey eventually exchanged nude pictures of each other. After exchanging pictures with appellant, A.K. claimed she was pressured into engaging in sexual intercourse with Appellant and provide him sexually explicit images of herself due to his alleged threats. On March 18, 2018, A.K. reached out o Appellant for financial assistance. A.K. claim that Appellant informed her that she would have to have sex with him if she wanted help, and that Appellant told A.K. that is she did not have sex with him, he would post images of her online. A.K. refused o have sex with appellant. A.K. then stated the images she sent Appellant three years prior,

when she was underage, were then posted o social media sites, specifically tumbler, without her consent. At the time of the plea, appellant admitted culpability only as to the elements of the offense under 18 U.S.C. 2252. Appellant did not admit o any other allegations in the factual basis offered by the government.

Issues

Issue #1. District court's written explanation was insufficient and in error failing to comply with the U.S.S.G. 4A1.3(c.)(1). This was not proven beyond a reasonable doubt with "FACTS". This was an abuse of discretion on behalf of the Court.

1. **The district's court's upward departure was unreasonable; and**

2. **He court's written statement of reasons did not explain sufficiently, as required by 18 U.S.C. 3553(c.) why the applicable criminal history category substantially underrepresented the seriousness of he defendant's criminal history.**

3. **The district court improperly calculated the guideline sentencing range.**

Defendant is asking that the Court use facts when complying to U.S.S.G. 4A1.3(c.)(1).

Departure upward from guidelines, such decision are reviewed for an abuse of discretion, U.S. v Henderson, 636 F.3d 713, 717 (5th Cir. 2011).

U.S.S.G. 4A1.3 (c.)(1) states:

4A.1.3 departure based on inadequacy of criminal history category (policy statement)written specification of basis for departure – in departing from the otherwise applicable criminal history category under this policy statement, the court shall specify in writing the following:

(1) In he case of an upward departure, the specific reasons why the applicable criminal history category substantially under represents the serious of the defendant's criminal history or the likelihood that the defendant will commit other crimes.

Under commentary (Application notes):

2. Upward Departures –

(a) Examples.- an upward departure from the defendant's criminal history category may be warranted based on any other of the following circumstances:

(i). A previous foreign sentence for a serious offense

(ii) Receipt of prior consolidated sentence of ten years for a series of serious assaults.

(iii) A similar instance of large scale fraudulent misconduct established by a adjudication in a Securities and Exchange Commission enforcement proceeding.

(iv) commission of the instant offense while on bail or prerelease for another serious offense.

In the 4A1.3(c.)(1) and the commentary:

1. The defendant did not have no prior history
2. There is no evidence that the defendant would commit any other crimes.
3. Defendant did not commit any unlawful act(s) while on pre-release.

Remand is also required so that the Court can comply with requirements that it provides a written basis for departure. 18 U.S.C. 3553(c.) requires that a Court imposing a sentence outside the recommend guidelines range, must give, in writing, "the specific reason for the imposition of the sentence. 3553(c.), the court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence-

(1) Is of the kind, within the range, described in subsection(a)(4), and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) Is not of the kind, or is outside the range, described in subsection(a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must be also stated with specificity In a statement of reasons form issued under section 994(w)(1)(B) of title 28 U.S.C. 994(w)(1)(B)....

In addition 4A1.3 directs hat "in case of an upward departure, "the district court shall specify in writing...specific reasons why the applicable criminal history category substantially under represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes". The district court failed to give specific reasons for the departure. Instead, the Court simply stated that it found "the guidelines range in this case does not accurately represent and is not accurately reflective of the nature of the offense, considering each and every detail". There was no evidence presented to support the reason for the departure.

In Apprendi v. New Jersey, 530 U.S. 466, 147 L Ed 2d 435, 120 S. Ct 2348 (2000), the U.S. Supreme court held that the Federal Constitution requires any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt, also Blakely v Washington, 542 U.S,.269, 159 L. Ed 2d 03, 124 S. Ct 2531 (2004).

Even though the maximum sentence time under the Guidelines was not used, the facts me be proven and no assumed. These claimed errors of law and procedures was a fundamental defect which results in a complete miscarriage of justice and presents exceptional circumstances where the need for the remedy afforded by writ... is apparent, Davis v U.S. 417, 333, 346, 94 S. Ct 2298, 41 L. Ed. 2d 109 (1974). Although post Booker, the Sentencing Guidelines are advisory only, the District Court must avoid

significant procedural error, such as improperly calculating the Guidelines sentencing range. Gall v U.S. 552 U.S. 38, 48-51, 128 S. Ct. 586, 169 L. Ed. 2d 445 (2007). The court sentenced defendant to an upward departure without any clear evidence to support such factors. "that this should receive significant weight, or it represents a clear error of judgment in balancing sentencing factors", Quote from U.S. v Cooks, 589 F.3d 173, 186 (5th Cir. 2009).

This is a significant procedural error with an act of abuse of discretion.

(1). No evidence to support the upward departure.

(2) Defendant did not have any prior criminal history

(3) Defendant under Appendi did not have a jury verdict with facts established to support the enhancement where the sentence exceeded the maximum.

Appendi v New Jersey, 530 U.S. 466, 147 L. Ed 2d 435, 120 S. Ct 2348 (2000) and the verdict passed where the evidence to support such enhancement was not admitted by the defendant or proven to a jury beyond a reasonable doubt, Blakely V. Washington, 542 U.S. 296, 159 L. Ed. 2d 03, 124 S. Ct 2351 (2004).

There was no evidence to support the enhancement and the defendant did not have the opportunity to confront the witness. The witness admitted in her written statement that she was asking for financial assistance (basically blackmailing the defendant) and when the financial assistance never materialized, the witness reacted against the defendant.

Issue #2. The sentenced received was not reasonable per the Sixth Amendment based on the preponderance of evidence. These findings carried severe consequences for Appellant at sentencing essentially doubling the time he will spend in incarcerated. In the absence of these findings, the Court would not uphold appellant's sentence as substantively reasonable.

Because these facts were legally necessary to support the sentence imposed, they must be proven by the government or in the alternative, admitted by the appellant. "Ultimately, the District Court need only determine its factual finding at sentencing by a preponderance of the relevant and sufficiently reliable evidence" U.S. v Betacourt, 422 F.3d 240, 247 (5th Cir. 2005). The witness was asking for financial assistance and when this did not materialized did the witness decided to do anything about the situation regarding the photo's. This created a question of the witness reliability.

"The District Courts can not rely on facts contained in the PSR (presentencing report) that are not supposed by "an adequate evidentiary basis with sufficient indicia of reliability". U.S. v Harris, 702 F. 3d 226, 230 (5th Cir.2012), U.S. v Elwood, 999 F.2d 814, 817- 18 (5th Cir. 1993) ("Bald, conclusionary statements do not acquire the patting of reliability by mere inclusion in the PSR").

When making factual findings to support a sentence, the district court "may consider any information which bears sufficient indicia of reliability to support its probable accuracy" U.S. v Zuniga, 720 F.3d 587, 590 (5th Cir. 2013).

The government must prove sentencing enhancements by a preponderance of the evidence, U.S. v Juarez, 626 F. 3d 246, 251 (5th Cir. 2010).

In Rita v U.S., 551 U.S. 338, 341, 127 S. Ct 2456, 2459, 168 L. Ed. 2d 203 (2007), the Supreme Court summarized its recent Sixth amendment jurisprudence as examining "whether the law forbids a judge to increase defendant's sentence unless the judge finds facts that the jury did not find (and the offender did not concede)". The defendant did not admitted to any aggravating issues in Court. The Court permitted a non-binding appellate presumption of reasonableness for within-guideline sentences. However, the court also recognized Rita's argument that according a presumption of reasonableness to within-guideline sentence that depended on substantial judicial fact-finding "raises Sixth Amendment concerns".

In Gall V U.S., 552 U.S. at 60, Justice Scalia again emphasized that "the Court has not foreclosed as applied constitutional challenges to sentences" and that the door therefore remains open for a defendant to demonstrate that his sentence, whether inside or outside the advisory guideline range, would have upheld but the existence of a fact found by the Sentencing Judge and not by the jury.

Given the importance of the district court's finding concerning A.K. and the allegations of threats and sexual assault of a minor. Appellant was entitled to contest the allegations to a jury of his peers and to require proof beyond a reasonable doubt. This or his admission of these matters was a prerequisite to the district court using these allegations as a basis for doubling Appellant's term of imprisonment.

Appellant's rights under the Sixth Amendment were abrogated by the district court when it imposed such a significant upward departure based upon findings that were not proven by the government or admitted by the Appellant.

Appellant has no juvenile or adult criminal history and therefore he has had a criminal history category of I. Appellant's total offense was calculated at 23. This resulted in a range of 46-57 months of imprisonment. Considered another was, in order for appellant to be eligible under the guidelines for a 120 month sentence, Appellant would have had to receive a total offense level of 24, with the highest criminal history category of VI. This would have put Appellant in the 100 – 125 range. This illustrates the extreme and unreasonable nature of the upward departure in the Appellant's case. Due process was denied even though the defendant objected, Williams v New York, 337 U.S. 241, 246-247, 69 S. Ct 1079, 93 L. Ed 1337 (1949). The appellant has the right to confront any witnesses, especially on hearsay which was no proven in court. "A clear fad finding directive to which there is no exception" People v. Hall, 8 Cal 4th 950, 957, 883 P.2d 974 (1994) quoting from Cunningham v. California, 166 L .Ed 2d. 549 U.S. 270.

"The Supreme Court has repeatedly held, under the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence. While this rule is rooted in longstanding common-law practice, it explicit statement in our decisions is recent", Cunningham v. California, 166 L .Ed 2d. 549 U.S. 270.

"When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts, "which the law makes essential to he punishment",... and the judge exceeds his proper authority". Blakely v. Washington, 542 U.S. 296, 159 L. Ed 2d 403, 123 S. Ct. 2531 (2004), (1quotin J. Bishop, Criminal Procedure 87, p 55 (2d ed. 1872) from Cunningham v. California, 166 L .Ed 2d. 549 U.S. 270.

Issue #3. The information in the PSR was not reliable and statements listed was not proven beyond a reasonable doubt with no facts used. This created undue bias, plain error when an upward enhancement was used..

The plain error standard of review, defendant must prove that

1. **The court erred, the court did not use facts**
2. **He error was obvious under the law at the time of review, and**
3. **It affected substantial rights, (that is the error affected he outcome of the proceedings).**

Johnson v. U.S., 520, 461, 117 S. Ct 1554, 137 L. Ed 718 (1997) Even if all these items are met, the Court should only exercise its discretion in cases where the error "seriously affects the fairness, integrity or public reputation of judicial proceedings, U.S. v Olano, 507 U.S.. 725, 434 – 35. 113 S. Ct 1170, 123 L. Ed. 2d 508 (1993).

If a defendant challenges he factual basis of his sentence then the government must prove he disputed facts by a preponderance of the evidence with "reliable and specific evidence". U.S. v Cataldo, 171 F. 3d 1316, 1321 (11th Cir. 1999).

The Court held that "before a district court can depart upward on a ground not identified as ground for upward departure either in the presentence report or in a prehearing submission by the government....the district court must give parties reasonable notice hat it is contemplating such a ruling" Burns v U.S. 501 U.S. 129, 111 S. CT. 2182, 115 L. Ed. 2d 123 (1991).

In Burns, the Court focused upon "the extraordinary case in which he district court, on its own initiative and contrary o the expectations of both the defendant and the Government, decides that the factual ad

legal predicates for a departure are satisfied, Id, at 111S. Ct. 2182, 115 L. Ed 2d 123. In the context of sentencing, he proper factors are set out in U.S.C.S. 3553(a), and a district court commits a clear error in judgment when it weighs those factors unreasonably, arriving at a sentence that does not achieve he purpose of sentencing as stated on 3553(a). In order to determine whether that has occurred, he reviewing court is required to make the sentencing calculus itself and to review each step the district court took in making he sentence. In sentencing, the district judges at times make mistakes that are substantive, "and at times they impose sentences that are unreasonable, circuit courts exist o correct such mistakes that are substantive" U.S. v Irey, 612 F. 3d 1160 (5h Cir 2010).

We believe that the Supreme Court meant what it said that the Rita opinion, Rita v U.S., 551 U.S. 338, 341, 127 S. Ct 2456, 2459, 168 L. Ed. 2d 203 (2007) and elsewhere about our duty o correct sentencing mistakes". The witness reliability is in question as to her basically blackmailing the defendant as stated by her own testimony on March 18, 2018, "A.K. reached out to Appellant for financial assistance". Defendant admitted only to the culpability as to the elements of the offense under 18 U.S.C.S. 2252.

Defendant did not admit to any of the other allegations in the factual basis as offered y the government. The court went to sentence the defendant to 120 months, based upon uncharged conduct as alleged y A.L., when she was a minor. This departure constituted a abuse of discretion by the District Court and the findings by the court were not proven by the government or admitted by the defendant. The District Court failed to give specific reasons for the departure. Defendant was constitutionally entitled to contest the allegations to a jury of his peers and to require proof beyond a reasonable doubt.

The Sixth Amendment to the Constitution provides that "in all criminal prosecutions the accused shall enjoy he right... to be confronted with the witness against him. U.S. Constitution: Amendment VI, he

confrontation clause is violated when hearsay evidence is admitted as substantive evidence against the defendant who has o opportunity to cross-examine the declarant. Ketucky v Sticer, 482, U.S. 730, 737, 107 S. Ct 2658, 96 L. Ed. 2d 631 (1987).

The Court did not let defendant cross examine declarant and there was no facts used when an upward departure was used. Appellant's rights were abrogated by the district court when it imposed such a significant upward departure based upon findings not proven by the government or admitted by the Appellant. These findings carried severe consequences for Appellant at sentencing. Essentially doubling the time he will spend incarcerated. In the absence of these findings, the District Court and the Appeal Court would not uphold the Appellant's sentence as substantively unreasonable.

As a general matter, "the sentencing judge is entitled to find by a preponderance of the evidence all the facts relevant to the determination of a Guideline sentencing range and all facts relevant to the determination of a non-Guideline sentence U.S. v Mares, 402 F. 3d 511, 518 (5th Cir. 2005).

In a typical sentencing, judge-found facts will be used to apply Guideline enhancements and departure provisions, and perhaps to justify a sentence somewhat above or somewhat below the guideline range. But this is no typical sentence. The variance was unhinged from any guideline provision, and its extent was severe, in that it concerted a 60 months sentence into a 120 month sentence doubling the sentence of the defendant who also had no prior criminal history.

Appellant has no juvenile or adult criminal history. Therefore, he has a criminal history category of I. Appellant's total offense level was calculated at 23, this would result in a range of 46 – 57 months imprisonment. Considered this way, I order for Appellant to be eligible under the guidelines for a 120 month's sentence, the defendant would have to receive a total offense level of 24, with the highest criminal history of category VI. This would have put the Appellant in the 100 – 125 range but with such an extensive criminal history record as to warrant a category VI. This illustrates the extreme and unreasonableness nature of this upward departure in Appellant's case.

In Gall v. U.S., 552 U.S. 38 (2007), Justice Scalia again emphasized that "the Court has not foreclosed as-applied constitutional challenges to sentences" and that the door therefore remains open for a defendant to demonstrate that his sentence, whether inside or outside the advisory Guideline range, would not have been upheld but for the existence of a fact found by the sentencing judge and not by the jury. This conclusion follows from the Supreme Court's affirmation of the "substance" of the Sixth Amendment, which "guarantee that the jury will stand between the individual and the power of the government." U.S. v Booker, 543 U.S. 220, 237 (2005).

Given the importance of the district's court's findings concerning A.K. ad the allegations of threats and sexual assault of a minor, Appellant was constitutionally entitled to contest the allegations to a jury of his peers and to require proof beyond a reasonable doubt. This, or his admission of these matters, was prerequisite to the district court using these allegations as a basis for doubling Appellant's term of imprisonment. Any facts necessary to leally support a sentence must be charged in the indictment and proven to a jury beyond a reasonable doubt.

In Rita v U.S., 551 U.S. 338, 352 (2007), the Supreme Court summarized its recent Sixth Amendment jurisprudence as examining "whether the law forbids a judge to increase a defendant's sentence unless the judge finds facts that the jury did not find (and the offender did not concede). The court permitted a no-binding appellate presumption of reasonableness for within-guideline sentence that depended o substantial judicial fact-finding "raises Sixth Amendment concerns." Indeed, as Justice Scalia argued in his concurring opinion,

For every given crime there is some maximum sentence that will be upheld as reasonable based only on facts found by the jury or admitted by the defendant. Every sentence higher than that is legally authorized only by some judge-found fact, in violation of th4e Sixth Amendment, Rita, 551 U.S. at 372 (Scalia, J., concurring).

The holding in his case does not render the advisory Guidelines immune from Constitutional scrutiny, Peugh v U.S. 569, 133 S. Ct 2072, 186 L. Ed.2d 84, or render "sentencing procedures entirely "immune from scrutiny under the due process clause", Williams V. New York, 337 U.S. 241, 252, n 18, 69 S. Ct 1079, 93 L.Ed 1337.

"The Government bears the burden of proving by a preponderance of the evidence that a sentencing enhancement applies" U.S. v Napolitan, 762 F. 3d 297, 309 (3rd Cir 2014), and the evidence used at sentencing is "subject to a due process standard of reliability"; U.S. v Paulino, 996 F.2d 1541, 1547 (3rd Cir 1993); see U.S. v Roman, 121 F. 3d 136, 141 (3rd Cir 1997)(explaining that the government can only meet it "burden by presenting reliable and specific evidence.

Issue #4. The Court abused is discretion and imposing an unreasonable sentence based on "explicit" and "threaten" in nature that was not proven. The Court did not focus solely on the offense conduct per the indicted charge and considered other information not proven and issued an upward variance.

The district court department upward from he 46 – 57 months sentencing range under the Guideline and the mandatory maximum 60 months sentence pursuant to conviction under 18 U.S, C. 2252 to a sentence of 120 months, based upon uncharged conduct as alleged in the factual basis concerning A.K., when she was a minor. Conduct which was not neither proven by the government nor admitted by the Appellant.

Appellant had a total offense level of 23 and with no criminal history, a criminal history of category of I, yielding he above referenced range of 46 – 57 months. Despite this, the district court departed upward with a resulting 120 month sentence. Under these circumstances, such a departure constituted an abuse of discretion by the district court. Additionally, the district court failed to adequately explain the reasons for such a unsubstantial upward departure from the guideline range, and why the district court believed that the recommended range did not accurately reflect the seriousness of the offense as required by 18 U.S.C. 3553(a).

When Mr. Howard appealed the District Court's ruling, Mr. Howard submitted his motion for review to The Fifth Court of Appeals under No 18-50783 under page 3, "We have affirmed similar or greater upward variances or departure based on the 3553(a) factors. See:

U.S. v Herbert, 813 F. 3d, 562-63 (5th Cir. 2015)(affirming upward variance to 92 years from a guideline sentence of "six to seven years");

U.S. v Brantley, 537 F.3d 347, 348 (5th Cir. 2008) (upholding an upward departure or variance to 180 months where he maximum guideline sentence was 51 months);

U.S. v Smith, 417 F.3d 433, 491-93 (5th Cir. 2005) (upholding a 120 month upward departure sentence where the maximum guidelines sentence was 41 months)".,

Under "Herbert", this was involving someone's lost of life, Herbert had abused his position of trust and authority as a police officer to take Mr. Bloch's life. Mr. Howard was not a public official and did not abused his position since he was not a police officer and did not take someone's life (murder). To compare Mr. Howard to Herbert is not comparing apples to apples.

Under "Brantley", the court used this case as this was an individual who had been convicted of similar offense EIGHT times in five states over 20 years. This case does not apply to Mr. Howard since he did not have any prior criminal history and was not convicted of any similar criminal history.

Under "Smith", who had an extensive criminal history. Under Smith's PSR, "he had been conning women for over 11 years and had an extensive criminal history involving 20 years' worth of convictions arising out of persistent theft, forgery, and fraud". Mr. Howard has not been "conning women for over 11 years and did not have 20 years' worth of convictions. Mr. Howard did not have any prior criminal history.

The Appeals Court referenced these case example(s) and this does not compare to Mr. Howard's case (situation) regarding the criminal history which Mr. Howard had no prior criminal history. These circumstances are different where the three cases cited have an extensive criminal history versus Mr. Howard. How could the Appeal Court compare murder and or an extensive criminal history record(s) regarding the "Herbert, Brantley, and Smith", versus Mr. Howard's .record of no prior criminal history.is unnerving to the conscious and creates of unfair and unjust comparisons of the record(s) of these individuals versus Mr. Howard. The defendant is not saying what he did is not grieves but comparing the above cited cases to Mr. Howard is unfair and unjust.

Mr. Howard did not:

(1) Did not have a prior criminal history,
(2) Did not murder or take someone's life,
(3) Did not have an criminal offense history EIGHT times in five states over 20 years,
(4) Did not have 20 years' worth of convictions for persistent theft, forgery, and or fraud.

The District Court and the Appeal's Court affirming the District Court's judgment on Mr. Howard committed an abuse of discretion against Mr. Howard by not comparing similar conduct and history versus the three case laws they cite. The Appeal Court listed those cases to show the greater variances and departures on those particular cases which has no bearing to Mr. Howard due to the fact they are not similar cases. This was unreasonable and any novice person in regards to law can see this is a plain error, abuse of discretion and affected Mr. Howard's substantial rights and seriously affects he fairness, integrity, and or public reputation of the judicial proceedings", Pucket v U.S., 556 U.S. 129, 135, 129 S. Ct. 1423, 173 L. Ed.2d 266 (2009).

The upward departure doubled the Appellant's time and this was accomplished with nothing more than the district court's conclusion that certain allegations contained in the factual basis in the PSR were true. The same allegations were not charged, and were not submitted to a "trier of facts", or admitted to be the

Appellant. A court may depart upward "to reflect the actual seriousness of the offense". The departure may be based on "conduct (1) underlying a charged dismissed as part of a plea agreement in the case, or underlying a potential charge not pursed in the case as part of the plea agreement or for any other reason; and (2) that did not enter into the determination of \the applicable guideline range.

The government must prove the charge by a preponderance of the evidence U.S. v Smith, 681 F. 3d 932, 936 (8th Cir 2012), also Booker prevents a judge from using a judicially found facts to a sentence a defendant outside of the statutory maximums. U.S. v Azure, 536 F. 3d 922, 933 (8th Cir. 2008) "although he quantum of proof is less than the beyond a reasonable doubt formulation used at trial, the burden of proof remains unchanged at sentencing: the government bears the burden".

None of any allegations, outside those in the indictment were proved by the government, or admitted to on the record, by Appellant. In fact, Appellant's trial counsel spoke on this very matter:
Mr. DOONAN: "Certainly, your Honor, basically Mr. Howard is admitting to the elements of the offense as charged in the indictment. And in so as the facts meet those elements of the indictment, he's not admitting to the other facts outside of that". "By way of example, not exclusively, he's not admitting that they engaged in intercourse under oath. He's not admitting to the threats. He's no admitting to any of those things. What he is admitting to is hat he had photographs, he knew she was underage in the photographs, and he did distribute those photographs via the Tumbler web site". Under these circumstances, such a departure constituted an abuse of discretion by the district court. The basis for the upward departure amounts nothing more than "judicially unfounded facts."

If the crime of conviction covers more conduct than the generic offense, the sentencing enhancement does not apply – "even if the defendant actual conduct...fits with the generic offense's boundaries", Mathis v U.S., 136 S. Ct. 2243, 2248, 195 L. Ed.2d 604 (2016).

Issue #5. The defendant did not take this case to trial with the agreement and tendering his "guilty" plea for a sentencing range of (46 – 57) months. This amounts to significant procedural error with the undue influence with no facts to present. In addition the statements were not proven beyond a reasonable doubt and did not submit this to a jury in order for upward departure variance given.

Information was offered to defendant in order not to take the case to trial and defendant accepted the offer and plead "guilty". During the day of sentencing hearing, the offer was changed and the level of the Guideline range was changed to a higher amount by the government which caused an undue influence, procedural error, and unwarranted prejudice toward the defendant. Defendant is asking for an enforcement of the contract performance.

"Contactus ad mentem partium verbis notaam intelliendus" A contract is to be understood according to the intention of the parties as expressed in words. page 1907 Black's Law dictionary 10th Edition. "Defendant's guilty plead must be 'voluntary and related waivers must be made knowingly, intelligently and with sufficient awareness of the relevant circumstances and likely consequences". U.S. v Ruiz, 536 U.S. 622, 629, 122 S. Ct 2450, 153 L. Ed. 2d 586 (2002). "Plea of guilty did not...waive his previous Constitutional claims", Haynes v U.S., 390 US 85, 87 n 2, 88 S. Ct. 722, 19 L. Ed 2d 923 (1968). Mr. Howard did knowingly entered a "guilty" plea based on the information presented by his lawyer via the government. The agreement was later breached.

"To a prisoner this prospect of additional time behind bars is not some theoretical or mathematical concept". Barber v Thomas, 560 U.S. 444, 504, 130 S. C. 2499, 177 L. Ed. 2d (2010). Any amount of jail time is significant", Glover v U.S.., 531, 198, 203, 121 S. Ct. 696, 148 L. Ed. 2d 604 (2001) and "has exceptionally severe consequences for the incarcerated individual for society which bears the direct and indirect cos of incarceration", U.S. v Jenkins, 854 F. 3d 181, 192 (CA2, 2017).

Rule 11 pleas. The government offered a plea and the defendant accepted he plea only to have the agreement changed on the day of the sentencing hearing and the counsel did no file any objections to this change. The counsel was ineffective by not objecting to this agreement change and or file any motion to such.

A. An offer was made for the custody time by the government. Defendant accepted and decided not to take he case to trial.

B. Defendant offer o tender his "guilty plea", based on verbal and court stated guidelines level offered (contract was accepted by he defendant).

C. He custody time was changed by a third party and y the government at the last minute of the sentencing hearing, this caused a (breach of contract) y the government and by the probation officer.

In Missouri v Frye, the Supreme Court held that among the defense counsel's duty to communicate formal plea offers to the defendant, 566 U.S. 134, 145, 132. S. Ct. 1399, 182 L. Ed. 2d 379 (2012). The Supreme Court recognized in Frye, to informal offers and even, possibly to informal plea negotiation, Carmichael v U.S., 659 F. Appx 1013, 1022 (11th Cir. 2018), (deciding that trial counsel provided ineffective assistance when he failed to convey the government's informal plea offers o the defendant); U.S. Polatis, 2012 U.S. Dis Lexis 39064, 2013 WL 1149842 a 10 n 16 (D Utah, Mar 29, 1012)(noting approval of defendant's argument "that even if a firm offer is not conveyed to defense counsel, when the government indicates it is willing to negotiate a resolution in a case, defense counsel has a duty to engage in the negotiation process)."

(1) The plea agreement may specify that an attorney for the Government will:

(b) recommend or agree not to oppose the defendant's requires that a particular sentencing range is appropriate or that a particular provision of the Sentencing guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request does not bid the Court; or

(c.) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing or policy statement, or sentencing factor does or does not apply (such a recommendation or request binds the Court once the Court accepts the plea agreement).

When a plea rest in any significant degree on a promise or an agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled. "by entering into the plea, surrenders a number of his constitutional rights", Noland-cooper, 155 F. 3d at 236 (3rd Cir. 1998), U.S. v Hayes, 946 F. 2d 230 (3rd Cir. 1991).

A petitioner must "demonstrate that a reasonable jurists would find the District Court assessment of the Constitutional claim(s) debatable or wrong", Slack v McDaniel, 529 US 473, 120 S. Ct 1595, 146 L. Ed 2d 542 (2000); Lambert v Blackwell, 387 F. 3d 210, 230 (3rd Cir. 2004).

If guilty plea was induced by prosecutorial promise that was later breached, relief will be necessary, U.S. v Gonzalez-Hernandez, 481 F. 2d 648 (5th Cir. 1973). "Breach of contract cause the other party's promise to have been coerced or induced by fraud. Although the analogy may not hold in all respects, plea bargains are essentially contracts, Malbury v. Johnson, 467 U.S. 504, 508, 104 S. Ct. 2543, 81 L. Ed. 2d 437 (1984).

There was an error here that a plea was made based on the information given to the defendant which an agreement was not being upheld and changes were made on the day of sentencing. Under the Fed. R. Crim P 52(b) recognizes a limited exception to this preclusion of the failure to abide by raisin on appeal of the unpreserved claim of trial error, Puckett v U.S., 566 U.S. 129, 173 L. 2d 266, 129 S. Ct 1423 (2009). The defendant did not understand the Guidelines as stated in the Sentencing hearing, page 18, Line # 3-4. The defendant made his plea based on the Government's offer only to be changed by the Court in error due to lack of evidence (facts) to back up heir conclusions for an upward variance.

"Ultimate relief to which petitioner is entitled" must be left to the discretion of the State Court which is in a better position to decide whether the circumstances of this case require only that there be specific performance of the agreement on the plea "or, alternatively that "the circumstances require granting the relief sought by the petitioner, i.e., the opportunity to withdraw his plea of "guilty", Santobello v. New York, 404 U.S. 257, 92 C. Ct 495, 30 L, Ed 427 (1971). The court should analyze this plea agreement under contract law standards. The court determine whether the Government's conduct is inconsistent with what the defendant reasonably understood.

The courts should give the doubt to the defendant in light of the Government's bargaining power, U.S. v Schwartz, 511 F.3d 403, 405 (3rd Cir. 2008).

Rule 32(d) say that such a motion may be granted "to correct manifest of justice and Rule 11 was not fully complied and that the District court should of hold an evidentiary hearing to determine "whether manifest of injustice would result if the conviction based on he guilty plea is permitted to stand, U.S. v Scart, 551, F2d 1124, (8th Cir. 1977). "A failure to scrupulously comply with Rule 11 will invalidate a plea without showing a manifest of injustice", U.S. v Cantur, 469 F.2d 435 (3rd Cir 1972).

"A guilty plea will be set aside on collateral attacks only where to not do so would result in a miscarriage of justice, or where there exist exceptional circumstances justifying such relief", Ever v. U.S., 579 F.2d 71 (10th Cir. 1978), U.S. Ttimmreck, 441 U.S. 780, 60 L. Ed. 2d 634, 99 S. Ct 2085 (1979). Due to lack of upholding the contract (agreement on the plea), plain error, significant procedural errors, undue bias, prejudice, and lack of proof, this is an extreme exceptional with the meaning of the Court's precedent on plain error(s) review, U.S. v Rosales, 850F. 3d 246 (5th Cir. 2017)..

The Supreme Court held that an "ineffective-assistance of counsel claim may be brought in a collateral proceeding under 225, whether or not the petitioner could have raised the claim o direct appeal", Massaaro v U.S., 538 US 500, 504,(2003). These errors are plain and these error's affects the defendant's substantial rights", Molina-Martinez v U.S., 578 U.S. 136 S. Ct 1338, 194 L. Ed.2d 444.

The Guidelines are "effectively advisory", Booker, 43 U.S. 220, 160 L.Ed.2d, 125 S. Ct 738 (2005). A District Court hat incorrectly mis-calculates he Guideline range commits reversible procedural error, Gall, 522 U.S. a, 128 S. Ct. 586, 169 L. Ed. 2d 445.

The government breaches an agreement "not to oppose" a motion when it makes statements that do more than merely state facts or simply validate facts found I the Presentencing report and provide a legal characterization of those facts or argue the effect of those facts to the sentencing judge, Brye, 32 F.3d 1179, 1998 WL 318563 at 3 (citing U.S. v Hawley, 93 F. 3d 682, 693 (10th Cir. 1996) quoting from U.S. v Noland-Cooper, 155 F. 3d 221 (3rd Cir. 1998).

The Sentencing factors: 18 U.S.C. 3553(a)

The factors which must be considered by sentencing courts when determining a fair and just punishment to mete out in a particular case, the Supreme court has emphasized that "highly relevant – if not essential the selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics", Williams v New York, 337 U.S. 241, 246. 93 L. Ed.2d 1337, 69 S. Ct. 1079.

Permitting sentencing courts to consider the wildest possible breath of information about a defendant ensures that the punishment will suit not merely the offense but the individual defendant", Wasman v. U.S., 468 U.S. 559, 564, 104 S. Ct. 3217, 82 L. Ed.2d 424 (1984)., Pepper v U.S., 179 L. Ed.2d 196, at 212 (2010). Concomitantly, "the history and characteristics of the defendant" are of the first of the enumerated factors the statue governing imposition of a sentence requires sentencing courts to consider, 18 U.S.C. 3553 (a). To be sure, determining the appropriate sentence to impose is one of the most arduous and contemplative functions performed by a district court. During this task the law does not bai judges" considerations: "no limitations shall be placed on the information concerning the backroad, character, and conduct for the purpose of imposing an appropriate sentence".

(a) Must be considered at the second step of the inquiry contain overarching provisions directing the district courts to consider, inter alia:

1 the nature and circumstances of the offense;.

2 The history and characteristics of the defendant;

3 The need for the sentence imposed to;

4 Reflect the seriousness of the offense;

5 Promote respect for the law;

6 Provide just punishment for the offense;

7 Afford adequate deterrence o criminal conduct;

8 Protect the public from further crimes of the defendant;

18 U.S.C. 3661, Evidence of Howard's conduct since appearing before the Court for sentence

constitutes a critical part of his "history and characteristics" that Congress intended the courts to consider. See Pepper supra, 179 L. Ed.2d, at 215. Consistent therewith, Howard submits for the courts consideration that during his imprisonment, he has diligently ad earnestly engaged in an intense curricula of rehabilitative programming, completing an:

1. Foundation for Freedom 1 – completed 09/06/2019
2. FDIC Money Smart Prog RPP – currently enrolled in
3. Comm Drivers License Classes 1, 2 and 3 completed 04/25/19.
4. Completed G.E.D. diploma / High School Diploma 10/31/2018.

In addition Mr. Howard has no detainers (State or Federal), and has no disciplinary history in the last 6 months. Also Mr. Howard has completed his financial responsibility payments (F.R.P.). Howard submits that his post-sentencing behavior lends credence o the positive assumption that imprisonment beyond the 120 months sentencing range would be unnecessary to "afford adequate deterrence to criminal conduct, "nor to protect the public from further crimes" perpetrated by Howard 3553(a)(2)(B)(c.). see U.S. v Gall, 552 U.S. 38, 59, 129 S. Ct 569, 169 L.Ed.2d 445 (2007).

Howard's efforts at rehabilitation leads to the conclusion that it is unlikely that he will engage in further criminality; a central factor for the Court must assess when deciding whether to grant the instant motion. Indeed, Howard's post-sentencing conduct may be taken as the most accurate indicator of "his present purposes and tendencies and significantly to suggest the period of restrain and the kind of discipline that sought to be imposed upon him," Pennsylvania ex rel. Sullivan v Ashe, 302 U.S. 51, at 55, , 58 S. Ct. 59, 82 L. Ed. 43 (1937).

Accordingly evidence of Howard's post-sentencing efforts that rehabilitation bears directly on the court's overarching duty to "impose a sentence sufficient, but not greater than necessary to serve the purpose of sentencing, 18 U.S.C. 3553; Pepper, supra, 179 L. Ed.2d, at 215.

Conclusion

Issue #1. District court's written explanation was insufficient and in error failing to comply with the U.S.S.G.

4A1.3(c.)(1). This was not proven beyond a reasonable doubt with "FACTS". This was an abuse of discretion.

1. **The district's court's upward departure was unreasonable; and**

2. **He court's written statement of reasons did not explain sufficiently, as required by 18 U.S.C. 3553(c.) why the applicable criminal history category substantially underrepresented the seriousness of he defendant's criminal history.**

The district court improperly calculated the guideline sentencing range. Defendant is asking that the Court use facts when complying to U.S.S.G. 4A1.3(c.)(1).

Issue #2. The sentenced received was not reasonable per the sixth Amendment based on the preponderance of evidence. These findings carried severe consequences for Appellant at sentencing essentially doubling the time he will spend in incarcerated. In the absence of these findings, the Court would not uphold appellant's sentence as substantively reasonable.

Issue #3. The information in the PSR was not reliable and statements listed was not proven beyond a reasonable doubt with any facts used. This created undue bias, plain error when an upward enhancement was used.

The plain error standard of review, defendant must prove that

1. **The court erred, the court did not used facts;**

2. **He error was obvious under the law at the time of review, and**

3. **It affected substantial rights, (that is the error affected he outcome of the proceedings).**

Issue #4. The Court abused is discretion and imposing an unreasonable sentence based on "explicit" and "threaten" in nature that was not proven. The Court did not focus solely on the offense conduct per the indicted charge and considered other information not proven and issued an upward variance.

Issue #5. The defendant did not take this case to trial with the agreement and tendering his "guilty" plea for a sentencing range of (46 – 57) months. This amounts to significant procedural error with the undue influence with no facts to present. In addition the statements were not proven beyond a reasonable doubt and did not submit this to a jury in order for upward departure variance given.

Information was offered to defendant in order not to take the case to trial and defendant accepted the offer and plead "guilty". During the day of sentencing hearing, the offer was changed and the level of the Guideline range was changed to a higher amount by the government which caused an undue influence, procedural error, and unwarranted prejudice toward the defendant. Defendant is asking for an enforcement of the contract performance.

Motions to vacate sentences "may raise only Constitutional errors and other injuries that could not have been raised on direct appeal that will result in a miscarriage of justice if left unaddressed", U.S. v Williams, 183 F 3d 458, 462 (5th Cir 1999); Davis v U.S., 94 S. Ct 2298, 2305 (1974); Hill v U.S., 82 S. Ct 468, 471 (1962).

In Alleyne, the Supreme Court held that any fact hat increases a criminal defendant's mandatory minimum sentence is an "element" of the crime, rather than a "sentencing factor" and thus must be submitted to a jury, Alleyne, 580 U.S. at 114 – 116. This was not done for the Defendant. "courts are

not bound by the Guidelines, but even in an advisory capacity guidelines serve as "meaningful benchmark" in the process initial determination of a sentence and "though the process of appellate review", quoting from Rosales-Mireles v U.S., remand for sentencing, while not costless does not invoke he same difficulties as a remand for retrial does", Molina-Martinez v U.S., 136 S. C 1338, 194 L. Ed 2d 444.

"Any amount of jail time is significant, Glover v U.S. 531, 198, 203, 121 S. Ct 696, 148 L. Ed 2d 604 (2001), "has exceptionally severe consequences for the incarcerated individual and for society which bears the direct and indirect cos of incarceration", U.S. v Jenkins, 859 F. 3d. 181, 192 (CA2 2017).

If the Courts refused to correct obvious errors of their own devise that threaten to require individuals to linger longer in a Federal prison than the law demands would affect the defendant's substantial rights and would affect the fairness, integrity, and public reputation of the judicial proceedings, U.S. v Sabillion Uma, 772 F.3d 1328, 1333-1334 (Cal0 2014).

For claims denied on their merits, "the petitioner must demonstrate jurist would find the District Court's assessment for the constitutional claims debatable or wrong", Slack V McDaniel, 529 U.S. 473, 484 (2000), U.S. v Jones, 287 F.3d 325, 329 (5th Cir 2002).

We pray that the court review these issues so hat there will be no questions as to any questionable competence, integrity and the administration of justice of the District court.

Declaration / Certificate if Service

The undersigned Pro Sec, forma pauperis certifies on the 27 day of November, 2019 do declare that under the penalty of perjury that all statements made in this Motion are true and correct pursuant to title 28 U.S.C. 1746 and that a true and correct copy for the foregoing motion for request authorization for a petition for 225 o the Supreme court of the United States on my case 7:18 CR-114-DC.

The motion was filed with the clerk of the United States Supreme Court by depositing same first class postage prepaid into the internal mailing system available to prisoner's immured in FCI Bastrop, and thereby was served by operation of the Courts filing system upon the Clerk of the Supreme Court is menable to service through the Court's ECF.

Dominic Howard

Movant, Pro Sec, Forma Pauperis