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In The
Supreme Court of the United States

HOWARD ARON WASHINGTON, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT IN UNITED STATES V. WASHINGTON IS INCONSISTENT WITH THIS COURT'S DECISION IN GALL V. NEW JERSEY, 552 U.S. 38 (2007), IN THAT THE DISTRICT COURT USED AN IMPERMISSIBLE METHODOLOGY TO UPWARDLY DEPART AND FAILED TO OFFER ANY REASONS WHY THE OFFENSE LEVEL SELCTED WAS APPROPRIATE.

LIKEWISE, THE DECISION IS INCONSISTENT WITH THIS COURT'S REASONING AND DECISION IN ROSALES-MIRELES V. UNITED STATES, 138 S. CT. 1897, 1902 (2018)

PARTIES TO THE PROCEEDING

All parties to the proceeding appear in the caption of the case on the cover page.

STATEMENT OF RELATED CASES

United States v. Howard Washington, 5:17-cr-00016, Eastern District of North Carolina. Judgment entered August 8, 2018.

United States v. Howard Washington, 18-4591, Fourth Circuit Court of Appeals, Judgment entered January 8, 2020.

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

OPINION OF THE COURT BELOW

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment below:

The opinion of the United States Court of Appeals for the Fourth Circuit for which review is sought is United States v. Washington, No. 18-4591. A copy of the slip opinion is included as Appendix A.

STATEMENT OF THE BASIS FOR JURISDICTION

The judgment sought to be reviewed in this case is the decision of the United States Court of Appeals for the Fourth Circuit in Case No. 18-4591, decided by unpublished opinion, dated January 8, 2020. *See Appendix A.*

The district court had jurisdiction of these cases pursuant to 18 U.S.C. § 3231, which grants original jurisdiction to the district courts of all offenses against the laws of the United States.

The United States Supreme Court has jurisdiction to review these decisions upon a Writ of Certiorari pursuant to 28 U.S.C. § 1254(1), which confers jurisdiction by writ of certiorari granted upon the petition of a party to a criminal case after rendition of a judgment in a court of appeals. This petition is filed pursuant to Rule 10(a) of the Rules of the Supreme Court of the United States and addresses a decision of the United States Court of Appeals for the Fourth Circuit which so far departed from the accepted and usual course of judicial proceedings, and which sanctioned such a departure by the district court, as to call for an exercise of the supervisory power of the United States Supreme Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

On April 8, 2013, Howard Washington was arrested on state charges related to the instant offense. On December 21, 2016, Mr. Washington was arrested by Raleigh Police Task Force officers upon a federal criminal complaint alleging that on or about April 2, 2013, he did aiding and abetting others, knowingly distributed and possessed a quantity of cocaine base in violation of Title 21 U.S.C. § 841(a)(1).

Washington appeared before a United States Magistrate and was ordered detained. The Grand Jury returned an indictment on January 12, 2017 which alleged in Count 1 Washington was charged with Conspiracy to Distribute a quantity of cocaine base, in violation of Title 21 U.S.C. § 841 from February 2013 to April 2, 2013; and in Count 2 Washington was charged with Distribution and Possession of cocaine base on April 2, 2013, in violation of Title 21 U.S.C. § 841

Beginning in 2012, investigators with the Federal Bureau of Investigation working with the Raleigh Police Department were investigating the trafficking of controlled substances in and around the city of Raleigh, North Carolina. Agents utilized wire intercepts, confidential informants, and surveillance to conduct a series of controlled buys from various individuals during this operation including a primary target Lamont Long. Long was federally prosecuted for these activities in February 2016.

Howard Washington came into the attention of the investigation when he was heard on a wiretap February 28, 2013. A series of controlled purchases were made from Long in April 2013. The wiretap shows Washington driving Long to a controlled

purchase on April 2, 2013. The wiretap also indicated that Washington purchased cocaine base on April 5. On April 7, the wiretap indicated Washington made another purchase from Long. Shortly after the exchange, Raleigh Police officers stopped Washington in a traffic stop and seized 6.9 grams of crack cocaine. Washington was charged for the cocaine; he pled, and received a sentence of 9 to 23 months in Wake County Superior Court, as reflected in Paragraph 22 of the PSR. Washington was released from custody on February 25, 2014 after serving nine months in state custody. This conviction is reflected in Paragraph 22 of the PSR. (JA 166)

On July 8, 2015, Washington was arrested and charged with possession of cocaine in Wake County Superior Court. On August 8, 2015, Washington was arrested and charged with delivery of cocaine to a CI. Washington pled guilty to both charges which were consolidated, and he received a sentence of 9 to 20 months. Washington was released from state custody October 15, 2016 after serving nine months in state custody. These convictions are reflected in Paragraphs 24-25 of the PSR. (JA 166-167)

Co-conspirator Long's federal prosecution had commenced during the period of Washington's incarceration. Raleigh Police officers questioned Washington as to involvement in a homicide in December 2016 which he denied any involvement with. Raleigh Police did not bring charges against him in regards to the homicide, but did arrest him on the criminal complaint for the instant offense on December 21, 2016. On January 12, 2017, Washington was indicted in state court for murder, but was not served with the indictment during these proceedings. (JA 167)

On September 18, 2017, with a written Plea Agreement pursuant to Rule 11(c)(1)(A) and (B), Howard Washington pled guilty to Count 2 of the Indictment which charged conduct that concluded on April 2, 2017. The parties agreed the drug quantity to be at least 22.4 grams but less than 112 grams of cocaine base, and the maximum downward adjustment for acceptance of responsibility is applicable. The government agreed to dismiss Count 1 at sentencing. (JA 23-72, 73-79)

A revised presentence report (“PSR”) was prepared and recommended a base offense level of 24 based upon the application of the U.S.S.G. § 2D1.1(c)(8). The PSR also included a three-point reduction for acceptance of responsibility and found Mr. Washington to have a criminal history category VI. Resulting in an advisory Guideline range of 77 to 96 months. (JA 159-175)

Neither the government nor the defendant filed any objection to the Presentence report prior to the filing of the final version May 7, 2018. (JA 175)

On May 14, 2018, Mr. Washington filed a motion seeking a downward variance based on the disparity of cocaine base versus cocaine powder ratio utilized by the Guidelines. (JA 80-83)

Mr. Washington appeared before the district court for sentencing on June 18, 2018. At the hearing, the district court began reviewing the PSR and afforded both sides to argue as to an appropriate sentence. Defendant requested the court to consider a departure based on U.S.S.G. § 5G1.3 to account for the nine months Washington was in state custody on related offense conduct. Additionally, Washington requested the court consider a variance by utilizing the base offense level for 44 grams

of powder cocaine versus the cocaine base Guideline which would result in an advisory Guideline range of 24 to 30 months. (JA84-103)

The district court stated Washington has a “troubling criminal history.” (JA 90) The district court stated it “was surprised...the Government’s not moving [for an upward departure] under [U.S.S.G.] § 4A1.3.” (JA 90) The district court stated it does not impose a variance based upon the different ratios for cocaine and cocaine base. (JA 94)

Washington’s trial counsel asked the district court to impose a sentence from the bottom of the advisory Guideline range recommended by the PSR and give him credit for the 9 months spent in state custody by imposing a sentence of 68 months (JA 94-95)

The government responded while it considered moving for an upward departure, it came prepared to argue a top-of-the Guideline sentence. (JA 97-98)

The parties argued whether the drug quantity stated in the PSR included the drugs from state conviction which resulted in the 9-months incarceration for Mr. Washington. (JA 99-100)

The government suggested that if the court wanted to continue the hearing, it would resolve the issue of the drug quantity and reconsider whether it should file an upward departure on inadequate criminal history and potential de facto career offender. (JA 101) The district court agreed and continued the hearing for 30 days.

On June 29, 2018, the government filed a motion for upward departure and/or upward variance under seal with exhibits under seal. (JA 176-199)

On August 6, 2018, Mr. Washington filed a response to the government's motion for upward departure and its own motion to dismiss for violation of Double Jeopardy and the Department of Justice's policy regarding double prosecutions known as the Petite Policy. (JA 104-109)

On August 7, 2018, the government filed its response to defendant's motion to dismiss. (JA 110-114)

On August 8, 2018, Mr. Washington appeared before the district court for the continuation of the sentencing hearing. The district court determined the advisory Guideline to be based on an offense level of 21 and criminal history category V to reach an advisory Guideline range of 70 months to 87 months imprisonment. (JA 118)

The district court then asked defense counsel why the motion to dismiss was filed outside of the scheduling order entered in this case. Washington agreed the motion was untimely, and outside of the scheduling order. The government stated the motion was untimely and on its merits is frivolous. (JA 123) The district court determined the motion to be untimely, and alternatively to be frivolous. (JA 123)

The district court then took up the government's motion for upward departure and/or upward variance. The government argued Washington is a validated gang member and covered in tattoos reflecting such. Government argued that Washington's criminal history is underrepresented at VI and is a career offender. Washington's criminal history as set forth in the PSR, does not account for his dangerousness and likely path to recidivism. But for the recent Fourth Circuit decision, Washington would have been sentenced under the Career Offender Guidelines pursuant to

U.S.S.G. § 4B1.1(b)(3). (JA 127) The government requested the court to sentence Washington to 188 months – what would have been the top the Guidelines for him as a career offender. (JA 129)

Washington responded to the government's contentions regarding criminal history points and the likelihood of recidivism and danger to the community. (JA 129-131)

Washington's counsel argued to the district court, if the government sincerely believed Mr. Washington was a danger to the community, it would not have delayed its prosecution of Mr. Washington by forty-two months. (JA 132)

The district court announced it was going to upwardly depart based on criminal history and the seriousness of the offense being underrepresented by a criminal history category VI and the Total Offense Level of 21. (JA 135) The district court proceeded to examine each of the convictions shown in the PSR. The district court stated it was not relying on any dismissed charges, other arrests, or pending charges. (JA 138) Without addressing any intervening levels, the district court stated the appropriate offense level was 27 to determine a new advisory Guideline range of 130 to 162 months. (JA 146)

The district court sentenced Mr. Washington to 150 months of active imprisonment followed by supervised release for three years. (JA 146) Mr. Washington gave timely notice of appeal on August 8, 2018. (JA 157-158)

**FACTS MATERIAL TO THE CONSIDERATION OF THE
QUESTION PRESENTED**

At the sentencing hearing, the district court procedurally erred in imposing a sentence of 150 months because the methodology utilized to calculate the advisory Guideline range based on an upward departure was improper. The Appellant's objection to the upward departure and request for a non-frivolous alternate sentence preserved the court's error.

The appellate court determined the district court erred by failing to offer any reasons why an offense level 27 was more appropriate than any other level. The appellate court determined the sentence of 54 months above his original Guidelines range to be a "substantial departure." However, the appellate court held that it was not required to vacate the sentence, if it concluded the error harmless.

ARGUMENTS AMPLIFYING REASONS FOR WRIT

I. THE DISTRICT COURT'S METHODOLOGY IN IMPOSING A SUBSTANTIAL GUIDELINE DEPARTURE CONSTITUTED PROCEDURAL ERROR AND WAS INCONSISTENT WITH THIS COURT'S DECISION IN GALL V. NEW JERSEY, 552 U.S. 38 (2007).

Howard Washington pled guilty to count two of the indictment-- distribution of an unspecified amount of cocaine base on April 2, 2013. The Government presented for the factual basis the drug amount was 25 grams of cocaine base. (JA 56)

The United States Probation Office prepared and submitted the presentence report which called for a Guideline range of 77 to 96 months. Washington objected to the upward departure, the resulting Guideline range, and made arguments for a specific sentence of 68 months. Thus, he preserved the perceived error on the record. Washington timely appealed his sentence of 150 months.

The appellate court correctly determined the district court had erred in utilizing a Guideline which constituted a substantial departure. Slip opinion page 3. The underlying opinion states, "a district court's "fairly general statement that it considered lesser offense levels and found them to be inadequate falls short of the incremental analysis required by section 4A1.3." *Citing Dalton v. United States*, 477 F.3d 195, 200 (4th Cir. 2007)

Additionally, Washington contends, the district court committed procedural error by failing to state sufficient individualized reasons for the sentence imposed and why the sentence requested by him was not sufficient. The district court is required to state in open court, the reasons for the sentence imposed pursuant to 18 U.S.C. § 3553(c) and is further required to state individualized reasons pertaining to the

specific defendant. Rita v. United States, 551 U.S. 338 (2007), Gall v. United States, 552 U.S. 38 (2007). Not only did the trial court fail to sufficiently state its reasons, it also failed to address the specific sentence argued for by Washington's counsel. Washington requested a sentence of 68 months, stating that a 68-month sentence was reasonable in consideration of the § 3553(a) factors. The United States Supreme Court and the United States Court of Appeals for the Fourth Circuit, in direct difference to this Court's clear precedents, mandates that the district court explain why a non-frivolous sentence requested by either party would not be appropriate. When given a requested sentence, "a district judge should address the party's arguments and 'explain why he has rejected those arguments.'" Carter at 328 (*quoting Rita v. United States*, 551 U.S. 338 (2007)).¹

Therefore, the district court's error was preserved for appellate review, and the appellate court determined the sentencing procedure to be error. The Petitioner respectfully submits to this Court a prayer for relief to correct this error which affects the fundamental fairness of his case.

II. THE APPELLATE COURT'S PRESUMPTION OF HARMLESSNESS TO THE INCORRECTLY CALCULATED ADVISORY GUIDELINE RANGE DISREGARDS THIS COURT'S DECISION IN ROSALES-MIRELES v. UNITED STATES, 138 S. Ct. 1897, 1902 (2018).

In this case, the appellate court determined because the district court stated it would impose the same sentence as a variance, the error in calculating the upward departure Guideline was harmless. Under this Court's precedents, that constitutes

¹ See United States v. Lynn, 592 F.3d 572, 578-79 (4th Cir.2010).

reversible error. When the sentencing court commits an error in the Guidelines range calculation, the resulting sentence no longer bears the reliability that would support a “presumption of reasonableness” on review. *See Gall*, 552 U.S. 38, 51.

The Fourth Circuit holds “it is unnecessary to vacate a sentence based on an asserted guidelines calculation error if we can determine from the record that the asserted error is harmless.” United States v. McDonald, 850 F.3d 640, 643 (4th Cir.), cert. denied, — U.S. —, 138 S. Ct. 208, 199 L.Ed.2d 137 (2017). The Fourth Circuit continues to abide by this review standard even after Rosales-Mireles v. United States, 138 S. Ct. 1897 (2018).

The Petitioner believes the appellate court continued use of assumed error harmlessness analysis runs afoul of this Court’s reasoning that “regardless of its ultimate reasonableness, a sentence that lacks reliability because of unjust procedures may well undermine public perception of the proceedings.” Rosales-Mireles v. United States, 138 S. Ct. 1897, 1910 (2018).

This Court’s precedents have held a court of appeals can only consider the substantive reasonableness of a sentence after first determining that “the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range.” Gall, 552 U.S., at 51, 128 S. Ct. 586

The Petitioner contends the decision and reasoning set forth in Rosales-Mireles v. United States abrogates the Fourth Circuit’s continued reliance on the assumed error harmlessness analysis, coupled with a lack of any individualized reasons for the sentence imposed constitutes reversible error. The sentence imposed with

acknowledged procedural error should not be swept under rug by allowing the appellate court to conclude it harmless when it permits a sentence of twice the recommended Guideline without sufficient reasons stated in the record.

CONCLUSION

For the foregoing reasons, Petitioner respectfully asks this Court to grant a Writ of Certiorari, vacate the unpublished opinion of the United States Court of Appeals for the Fourth Circuit, which denied relief to the Petitioner.

Respectfully submitted,



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