

APPENDIX

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Appendix A

UNPUBLISHED**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 18-4591

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

HOWARD ARON WASHINGTON, JR.,

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. James C. Dever III, District Judge. (5:17-cr-00016-D-1)

Submitted: November 27, 2019

Decided: January 8, 2020

Before MOTZ, KEENAN, and FLOYD, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Mitchell G. Styers, BANZET, THOMPSON, STYERS & MAY, PLLC, Warrenton, North Carolina, for Appellant. Robert J. Higdon, Jr., United States Attorney, Jennifer P. May-Parker, Assistant United States Attorney, Bradford M. DeVoe, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Raleigh, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Howard Aron Washington, Jr., pled guilty to aiding and abetting distribution and possession with intent to distribute crack cocaine, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(C) (2012), 18 U.S.C. § 2 (2012). The district court imposed an upward departure and sentenced Washington to 150 months' imprisonment. Washington argues that his sentence is procedurally and substantively unreasonable. We affirm.

We review a criminal sentence, "whether inside, just outside, or significantly outside the Guidelines range," for reasonableness "under a deferential abuse-of-discretion standard." *Gall v. United States*, 552 U.S. 38, 41 (2007). This review requires consideration of both the procedural and substantive reasonableness of the sentence. *Id.* at 51. In determining procedural reasonableness, we examine, among other factors, whether the district court properly calculated the defendant's advisory Guidelines range, gave the parties an opportunity to argue for an appropriate sentence, considered the 18 U.S.C. § 3553(a) (2018) sentencing factors, selected a sentence based on facts that were not clearly erroneous, and sufficiently explained the selected sentence. *Id.* at 49-51. Only after determining that the sentence is procedurally reasonable do we consider whether it is substantively reasonable, "tak[ing] into account the totality of the circumstances, including the extent of any variance from the Guidelines range." *Id.* at 51.

Washington contends that his sentence is procedurally unreasonable because the district court did not have a sufficient justification for the departure and failed to depart incrementally when it increased his offense level from 21 to 27 pursuant to U.S. Sentencing Guidelines Manual § 4A1.3(a)(4)(B) (2016). When upwardly departing from Criminal

History Category VI, the district court should “structure the departure by moving incrementally down the sentencing table to the next higher offense level in Criminal History Category VI until it finds a guideline range appropriate to the case.” USSG § 4A1.3(a)(4)(B). A district court is not required to “explain its rejection of each and every intervening level . . . or go through a ritualistic exercise in which it mechanically discusses each criminal history category or offense level it rejects en route to the category or offense level that it selects.” *United States v. Dalton*, 477 F.3d, 195, 199 (4th Cir. 2007) (alterations, citations, and internal quotation marks omitted). However, 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.” *Id.* at 200 (internal quotation marks omitted).

Although the district court correctly noted it did not have to discuss every intervening level, it did not offer any reasons why offense level 27 was more appropriate for Washington than any other level. Moreover, the district court sentenced Washington to 54 months above his original Guidelines range, a substantial departure. *Gall*, 552 U.S. at 50 (“We find it uncontroversial that a major departure should be supported by a more significant justification than a minor one.”).

However, “it is unnecessary to vacate a sentence based on an asserted [G]uidelines 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. 2017).

A Guidelines error is considered harmless if [this Court] determine[s] that (1) the district court would have reached the same result even if it had decided

the guidelines issue the other way, and (2) the sentence would be reasonable even if the guidelines issue had been decided in the defendant's favor.

United States v. Gomez-Jimenez, 750 F.3d 370, 382 (4th Cir. 2014) (internal quotation marks omitted).

Here, the district court stated that if its upward departure were in error, it would impose the same 150-month sentence as a variance by applying the 18 U.S.C. § 3553(a) (2018) factors. This satisfies the assumed error harmlessness inquiry's first prong. Further, for the reasons discussed below, we find that the sentence was reasonable.

“When rendering a sentence, the district court must make an *individualized* assessment based on the facts presented.” *United States v. Carter*, 564 F.3d 325, 328 (4th Cir. 2009) (emphasis in original). The court also “must address or consider all non-frivolous reasons presented for imposing a different sentence and explain why he has rejected those arguments.” *United States v. Ross*, 912 F.3d 740, 744 (4th Cir.), *cert. denied*, ___ S. Ct. ___, 2019 WL 4922236 (2019) (No. 18-9654). “The sentencing court’s explanation need not be extensive, but the record must make clear that the judge actually listened to, considered, and rendered a decision on these arguments such that this court can conduct a meaningful review of the sentence imposed.” *United States v. Harris*, 890 F.3d 480, 485 (4th Cir. 2018). “[T]he district court need not robotically tick through § 3553(a)’s every subsection,” but “a talismanic recitation of the § 3553(a) factors without application to the defendant being sentenced does not demonstrate reasoned decisionmaking or provide an adequate basis for appellate review.” *Carter*, 564 F.3d at 329 (internal quotation marks omitted). Additionally, “[t]he context surrounding a district court’s explanation may imbue

it with enough content for us to evaluate both whether the court considered the § 3553(a) factors and whether it did so properly.” *United States v. Montes-Pineda*, 445 F.3d 375, 381 (4th Cir. 2006).

“Substantive reasonableness examines the totality of the circumstances to see whether the sentencing court abused its discretion in concluding that the sentence it chose satisfied the standards set forth in § 3553(a).” *United States v. Hargrove*, 701 F.3d 156, 160-61 (4th Cir. 2012) (internal quotation marks omitted). Sentencing courts “have extremely broad discretion when determining the weight to be given each of the § 3553(a) factors.” *United States v. Jeffery*, 631 F.3d 669, 679 (4th Cir. 2011). The Supreme Court has mandated that a reviewing court must “give due deference to the district court’s decision that the § 3553(a) factors, on a whole, justify the extent of the variance. The fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court.” *Gall*, 552 U.S. at 51.

Here, the district court was actively engaged in the sentencing hearing, heard argument from counsel, explicitly discussed several of the § 3553(a) factors and applied them to the facts of Washington’s case, and did not analyze any impermissible factors. It specifically addressed Washington’s sentencing arguments, rebuffing his request to apply the Guidelines range for powder cocaine, granting his request for a nine-month reduction based on USSG §§ 5G1.3(b), 5K2.23, and explained why Washington’s requested sentence was insufficient. In imposing the sentence, the court discussed in detail Washington’s history, the seriousness of his offense, and the need for just punishment and deterrence. It recommended that Washington obtain his GED and participate in a narcotic treatment

program. Despite Washington's arguments to the contrary, the district court provided an adequate individualized assessment. Accordingly, we conclude that Washington's sentence is reasonable.

We therefore affirm the district court's judgment. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

FILED: January 8, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-4591
(5:17-cr-00016-D-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

HOWARD ARON WASHINGTON, JR.

Defendant - Appellant

JUDGMENT

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

Appendix B

UNITED STATES DISTRICT COURT

Eastern District of North Carolina

UNITED STATES OF AMERICA) **JUDGMENT IN A CRIMINAL CASE**
v.)
HOWARD ARON WASHINGTON JR.) Case Number: 5:17-CR-16-1-D
)
) USM Number: 63081-056
)
) Mitchell G. Styers
) Defendant's Attorney

THE DEFENDANT:

pleaded guilty to count(s) Count 2 of the Indictment

pleaded nolo contendere to count(s) _____ which was accepted by the court.

was found guilty on count(s) _____ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
21 U.S.C. § 841(a)(1), 21 U.S.C. § 841(b)(1)(C), and 18 U.S.C. § 2	Distribution and Possession With Intent to Distribute a Quantity of a Mixture and Substance Containing a Detectable Amount of Cocaine Base (Crack) and Aiding and Abetting	4/2/2013	2

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on count(s) _____

Count(s) 1 of the Indictment is are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

8/8/2018
Date of Imposition of Judgment


Signature of Judge

James C. Dever III, Chief United States District Judge
Name and Title of Judge

8/8/2018
Date

DEFENDANT: HOWARD ARON WASHINGTON JR.
CASE NUMBER: 5:17-CR-16-1-D

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

Count 2: 150 months

The court orders that the defendant provide support for all dependents while incarcerated.

The court makes the following recommendations to the Bureau of Prisons:

The court recommends that the defendant receive intensive substance abuse treatment and vocational and educational training opportunities. The court recommends that he serve his term in FCI Bennettsville, South Carolina.

The defendant is remanded to the custody of the United States Marshal.

The defendant shall surrender to the United States Marshal for this district:

at _____ a.m. p.m. on _____

as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

before 2 p.m. on _____

as notified by the United States Marshal.

as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: HOWARD ARON WASHINGTON JR.
CASE NUMBER: 5:17-CR-16-1-D

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of:

Count 2: 3 years

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
 - The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. You must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: HOWARD ARON WASHINGTON JR.
CASE NUMBER: 5:17-CR-16-1-D

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____

Date _____

DEFENDANT: HOWARD ARON WASHINGTON JR.

CASE NUMBER: 5:17-CR-16-1-D

ADDITIONAL STANDARD CONDITIONS OF SUPERVISION

The defendant shall not incur new credit charges or open additional lines of credit without approval of the probation office.

The defendant shall provide the probation office with access to any requested financial information.

The defendant shall participate as directed in a program approved by the probation office for the treatment of narcotic addiction, drug dependency, or alcohol dependency which will include urinalysis testing or other drug detection and may require residence or participation in a residential treatment facility.

The defendant shall consent to a warrantless search by a United States Probation Officer or, at the request of the probation officer, any other law enforcement officer, of the defendant's person and premises, including any vehicle, to determine compliance with the conditions of this judgment.

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

The defendant shall support his dependent(s).

DEFENDANT: HOWARD ARON WASHINGTON JR.

CASE NUMBER: 5:17-CR-16-1-D

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

<u>TOTALS</u>	<u>Assessment</u>	<u>JVTA Assessment*</u>	<u>Fine</u>	<u>Restitution</u>
	\$ 100.00	\$	\$	\$

- The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.
- The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss**</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
TOTALS	\$ _____ 0.00	\$ _____ 0.00	

- Restitution amount ordered pursuant to plea agreement \$ _____
- The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).
- The court determined that the defendant does not have the ability to pay interest and it is ordered that:
 - the interest requirement is waived for the fine restitution.
 - the interest requirement for the fine restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: HOWARD ARON WASHINGTON JR.
CASE NUMBER: 5:17-CR-16-1-D

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A Lump sum payment of \$ _____ due immediately, balance due
 not later than _____, or
 in accordance with C, D, E, or F below; or

B Payment to begin immediately (may be combined with C, D, or F below); or

C Payment in equal _____ (*e.g., weekly, monthly, quarterly*) installments of \$ _____ over a period of _____ (*e.g., months or years*), to commence _____ (*e.g., 30 or 60 days*) after the date of this judgment; or

D Payment in equal _____ (*e.g., weekly, monthly, quarterly*) installments of \$ _____ over a period of _____ (*e.g., months or years*), to commence _____ (*e.g., 30 or 60 days*) after release from imprisonment to a term of supervision; or

E Payment during the term of supervised release will commence within _____ (*e.g., 30 or 60 days*) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F Special instructions regarding the payment of criminal monetary penalties:

The special assessment in the amount of \$100.00 shall be due in full immediately.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Joint and Several

Defendant and Co-Defendant Names and Case Numbers (*including defendant number*), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

The defendant shall pay the cost of prosecution.
 The defendant shall pay the following court cost(s):
 The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.