

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA

JEREMY T. WALKER
Petitioner-Defendant

v.

UNITED STATES OF AMERICA
Respondent

On Petition for Writ of Certiorari from the
United States Court of Appeals for the Fifth Circuit.
Fifth Circuit Case No. 3:14cr119-WHB-LRA

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the district court erred at sentencing by increasing Mr. Walker's Sentencing Guidelines offense level for possessing a gun with an obliterated serial number.

PARTIES TO THE PROCEEDING

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

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I. OPINIONS BELOW

On September 9, 2014, the Grand Jury for the Southern District of Mississippi returned an Indictment charging Mr. Walker with felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). The district court case number is 3:14cr119-WHB-LRA. Mr. Walker exercised his right to a jury trial that both began and ended on August 28, 2018. Mr. Walker represented himself at trial, but the undersigned was available to him during the entire trial for consultation purposes. The jury returned a guilty verdict.

The district court conducted a sentencing hearing on November 29, 2018. It sentenced Mr. Walker to serve 97 months in prison, followed by three years of supervised release. The court entered a Final Judgment on December 12, 2018. The district court's Final Judgment is attached hereto as Appendix 1.

Mr. Walker filed a timely Notice of Appeal to the United States Court of Appeals for the Fifth Circuit on December 13, 2018. The Fifth Circuit case number is 18-60856. The Fifth Circuit affirmed the district court's rulings via an Opinion filed on December 3, 2019. The court filed a Judgment on the same day. The Opinion and Judgment are attached hereto as composite Appendix 2. The Fifth Circuit's Opinion is not designated as a published and binding Opinion, but it appears in the Federal Appendix at 786 Fed. App'x 470. A copy of the Opinion as it appears in the Federal Appendix is attached hereto as Appendix 3.

II. JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Fifth Circuit filed both its Order and its Judgment in this case on December 3, 2019. This Petition for Writ of Certiorari is filed within 90 days after entry of the Fifth Circuit's Judgment, as required by Rule 13.1 of the Supreme Court Rules. This Court has jurisdiction over the case under the provisions of 28 U.S.C. § 1254(1).

III. UNITED STATES SENTENCING GUIDELINES PROVISIONS INVOLVED

The United States Sentencing Guidelines (hereinafter “Guidelines” or “Sentencing Guidelines”) provision at issue in this case is U.S.S.G. § 2K2.1(b)(4). This provision increases a defendant’s Guidelines offense level by four levels if “any firearm [involved in the offense] … had an altered or obliterated serial number[.]” *Id.*

IV. STATEMENT OF THE CASE

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

This case arises out of a criminal conviction entered against Mr. Walker for felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). The court of first instance, which was the United States District Court for the Southern District of Mississippi, had jurisdiction over the case under 18 U.S.C. § 3231 because the criminal charge levied against Mr. Walker arose from the laws of the United States of America.

B. Statement of material facts.

Facts relevant to the issue on appeal pertain exclusively to the issue of whether the district court erred by adding four levels to Mr. Walker's offense level under the Sentencing Guidelines. As this Court is aware, the increase in a defendant's offense level results in a corresponding increase in the defendant's Guidelines sentence range.

The district court added the four levels because Mr. Walker purportedly possessed a firearm with a partially obliterated serial number. The only witness that testified at trial about this issue was Edwin Robinson, an agent with the Bureau of Alcohol, Tobacco and Firearms. Agent Robinson testified that the gun "was initially described as being an oblit." By "oblit" he meant that the gun was initially described as having a serial number that was altered or removed.

However, he unequivocally testified that the gun's serial number was "DR-4012-0." He provided no testimony regarding how he was able to determine the serial number was in fact obliterated at one time.

We now move to the sentencing phase. The Presentence Investigation Report (hereinafter "PSR"), which was drafted by the probation officer, states that the gun's serial number was obliterated. It goes on to state that the "Mississippi Crime Laboratory conducted an analysis to try to restore the serial number. The analysis yielded the serial number is DR-4012-0*, the digit represented by the asterisk being 8 or 9."

Based on the above findings by the probation officer, four levels were added to Mr. Walker's offense level. While not specifically stated in the PSR or at the sentencing hearing, this adjustment was under U.S.S.G. § 2K2.1(b)(4), which states: "If any firearm ... had an altered or obliterated serial number, increase by 4 levels."

At the sentencing hearing, the defense objected the four-level increase for having a gun with an obliterated serial number. The prosecutor stated that the Mississippi Crime Lab restored the serial number, but she provided no witnesses from the Crime Lab on the issue. Also, she did not call the probation officer that drafted the PSR as a witness. The court overruled Mr. Walker's objection on the obliterated serial number issue.

With the adjustment for the obliterated serial number, Mr. Walker's Guidelines sentence range was 78 to 97 months in prison. The court ordered a sentence at the very top of that range – 97 months in prison. The Fifth Circuit affirmed the district court's rulings, and this Petition for Writ of Certiorari followed.

V. ARGUMENT

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

Rule 10 of the Supreme Court Rules states, “[r]eview on writ of certiorari is not a matter of right, but of judicial discretion. Rule 10(a) states that one reason to grant certiorari is to exercise supervisor power over the lower courts. For the following reasons, this Court should exercise its supervisory power in Mr. Walker’s case, and grant this Petition for Writ of Certiorari.

B. The district court erred at sentencing by increasing Mr. Walker’s Sentencing Guidelines offense level for possessing a gun with an obstructed serial number.

As described above, at sentencing the district court added four levels to Mr. Walker’s offense level under U.S.S.G. § 2K2.1(b)(4). With this adjustment, his Guidelines sentence range was 78 to 97 months in prison. Without the adjustment, the Guidelines range would have been 51 to 63 months in prison.¹ The court ordered a 97-month prison sentence, which is significantly above the Guidelines sentence range without the obliterated serial number adjustment.

¹ With the obliterated serial number adjustment, Mr. Walker’s total offense level was 26. Deducting the 4 points added under § 2K2.1(b)(4) results in a total offense level of 22. Mr. Walker’s criminal history category was III. Combining an offense level of 22 with a criminal history category of III yields a sentencing range of 51 to 63 months in prison. *See Guidelines Sentencing Table.*

The only sworn testimony that the gun purportedly had an obliterated serial number at some time was from ATF Agent Robinson. It is interesting to note, however, that Agent Robinson testified that the gun was “initially” described as having an obliterated serial number. A reasonable inference from his testimony is that the obliterated serial number determination changed after a law enforcement officer later determined that it was never obliterated at any time.

Agent Robinson also testified that the gun’s serial number was “DR-4012-0.” He provided no testimony regarding how he was able to determine the serial number, if it was in fact obliterated at any time in the past. This provides further credence to the above inference that the serial number was never obliterated at any time.

After trial and before the sentencing hearing, the probation officer prepared Mr. Walker’s PSR. It states that the gun’s serial number was obliterated and that the “Mississippi Crime Laboratory conducted an analysis to try to restore the serial number.” The probation officer did not testify at sentencing to explain the source of this information or to provide any information about its veracity.

Based on these facts, we know that the district court had only two sources of information to base the obliterated serial number adjustment on. First, the court had Agent Robinson’s unclear testimony, which provides no conclusive answer on

whether the serial number was ever obliterated. Second, the court had the content of the PSR, which was not supported by any testimony at the sentencing hearing.

This begs the question of whether a sentencing court can rely on the content of the PSR, without anything more, when it enhances a defendant's sentence based on a fact stated in the PSR. This issue is covered by both the Federal Rules of Criminal Procedure and Fifth Circuit case law.

We begin with Rule 32, which state that a court:

- (A) may accept any undisputed portion of the presentence report as a finding of fact;
- (B) must for any disputed portion of the presentence report or other controverted matter rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing[.]

Fed. R. Crim. P. 32(i)(1)(A) and (b). Mr. Walker disputed the obliterated serial number adjustment in the PSR, so the district court was required to make a finding on the issue.

Next, we look to the Fifth Circuit's decision in *United States v. Valdez*, 453 F.3d 252 (5th Cir. 2006). The *Valdez* Court held, “[a] factual finding is not clearly erroneous if it is plausible in light of the record read as a whole.” *Id.* at 262 (citation omitted). “A district court ‘may adopt the facts contained in a [presentence report (‘PSR’)] without further inquiry if those facts have an adequate evidentiary basis with sufficient indicia of reliability and the defendant does not present rebuttal evidence or otherwise demonstrate that the information in the PSR

is unreliable.”” *Id.* (citation omitted). “The defendant bears the burden of showing that the information in the PSR relied on by the district court is materially untrue.” *Id.* (citation omitted).

In Mr. Walker’s case, he has made a showing that Agent Robinson’s testimony was equivocal on the issue of whether the gun’s serial number was ever obliterated. This leaves us with the content of the PSR as the only other source of information on the issue. The content of the PSR, without any supporting testimony of any kind, does not bear an adequate “evidentiary basis with a sufficient indicia of reliability” to support the sentence enhancement. *See, Valdez*, 453 F.3d at 262. Therefore, this Court should grant certiorari and ultimately vacate Mr. Walker’s sentence because the district court erred by applying the obliterated serial number adjustment.

VI. CONCLUSION

Based on the arguments presented above, Mr. Walker asks the Court to grant his Petition for Writ of Certiorari in this case.

Submitted February 28, 2020 by:

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