

No. _____

IN THE SUPREME COURT
OF THE
UNITED STATES OF AMERICA

October Term, 2019

BRITTANY DAWN THOMAS,
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

John D. Bryson
Counsel of Record
Wyatt Early Harris Wheeler LLP
1912 Eastchester Dr., Ste. 400
High Point, NC 27265
(336) 819-6016
jbryson@wehwlaw.com

Counsel for Petitioner

QUESTION PRESENTED

1. DOES A DISTRICT COURT'S INABILITY TO DEPART BELOW A MANDATORY MINIMUM UNDER 18 U.S.C. § 3553(e), FOR ANY FACTOR OTHER THAN DEFENDANT'S SUBSTANTIAL ASSISTANCE, VIOLATE THE SEPARATION OF POWERS DOCTRINE?

LIST OF PARTIES

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

TABLE OF CONTENTS

QUESTION PRESENTED	ii
LIST OF PARTIES	iii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES.....	v
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISION INVOLVED	2
STATEMENT OF THE CASE	2
STATEMENT OF THE FACTS	3
REASONS FOR GRANTING THE WRIT.....	4
CONCLUSION	9

INDEX TO APPENDIX

APPENDIX A: Fourth Circuit Court of Appeals unpublished opinion filed on February 19, 2020, affirming Petitioner's sentence.

TABLE OF AUTHORITIES

CASES

<i>Brotherhood of R. Trainmen v. Baltimore and O.R. Co.</i> , 331 U.S. 519, 91 L. Ed. 1647, 67 S. Ct. 1387 (1947)	6
<i>Buckley v. Valeo</i> , 424 U.S. 122, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976)	8
<i>Commodity Futures Trading Com. v. Schor</i> , 478 U.S. 833, 106 S. Ct. 3245, 92 L. Ed. 2d 675 (1986)	8
<i>Mistretta v. United States</i> , 488 U.S. S. Ct. 361, 109 S. Ct. 647, 102 L. Ed. 2d. 714 (1989)	8
<i>United States v. Ahlers</i> , 305 F.3d 54 (1st Cir. 2002)	5
<i>United States v. Calle</i> , 796 F. Supp. 853 (June 23, 1992 U.S. Dist. Md.)	5, 6, 7
<i>United States v. Campbell</i> , 995 F.2d 173 (10th Cir. 1993)	5
<i>United States v. Hood</i> , 556 F.3d 226 (4th Cir. 2009)	4, 5, 7
<i>United States v. Rabins</i> , 63 F.3d 721 (8th Cir. 1995)	5
<i>United States v. Snelling</i> , 961 F.2d 93 (6th Cir. 1991).	5
<i>United States v. Spinks</i> , 770 F.3d 285 (4th Cir. 2014)	4, 5, 7
<i>United States v. Thomas</i> , 11 F.3d 732 (7th Cir. 1993)	5
<i>United States v. Valente</i> , 961 F.2d 133 (9th Cir. 1992)	5

STATUTES

18 U.S.C. § 3553(e)	2, 4, 5, 6, 7, 8, 9
21 U.S.C. § 846 and § 841(a)(1).....	2
28 U.S.C. § 994	7
28 U.S.C. § 1254	1

U.S.S.G. § 5K2.23	3
-------------------------	---

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2019

BRITTANY DAWN THOMAS, *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

The Petitioner, Brittany Dawn Thomas, respectfully requests that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Fourth Circuit issued on February 19, 2020, affirming Petitioner's sentence.

OPINION BELOW

A panel of the Fourth Circuit Court of Appeals issued an unpublished opinion filed on February 19, 2020, a copy of which appears at Appendix A.

JURISDICTION

This petition is filed within 90 days of the decision of the Court of Appeals and is therefore timely. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISION INVOLVED

Article III, Sec. 1. of the U.S. Constitution states as follows:

The judicial powers of the United States shall be vested in one supreme court, and in such inferior courts as the congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office.

STATEMENT OF THE CASE

On August 28, 2018, a grand jury sitting in the Middle District of North Carolina returned a superseding indictment charging 28 defendants, including Brittany Dawn Thomas, with conspiracy to distribute methamphetamine, conspiracy to manufacture methamphetamine, conspiracy to possess pseudoephedrine, and conspiracy to possess equipment used in the manufacture of methamphetamine. On November 2, 2018, Petitioner pled guilty to Count 1, Object 1 of the indictment, conspiracy to distribute methamphetamine in violation of 21 U.S.C. § 846 and 841(a)(1). Petitioner's plea of guilty was pursuant to a written plea agreement filed with the court on October 9, 2018. The presentence investigative report, revised on February 6, 2019, determined her total offense level at 27 with a criminal history category of IV. While Petitioner's guideline range would have been 100 to 125 months, by operation of the statutory mandatory minimum, the guideline range was set at 120-125 months. On February 11, 2019, the government filed a motion pursuant to 18 U.S.C. § 3553(e) and § 5K1.1 of the sentencing

guidelines. The government requested Petitioner's sentence be reduced by ten percent from what the court would otherwise have imposed.

Petitioner appeared for sentencing on February 13, 2019. During the sentencing hearing, counsel for Petitioner attempted to argue that the court should either depart or vary downwards based on Petitioner's lesser role as compared to that of her codefendants, and also based on codefendant disparity. Counsel also argued, as identified in Petitioner's presentence report, that there were grounds for a downward departure under U.S.S.G. § 5K2.23 for a prior discharged term of imprisonment. The presentence report noted that Petitioner had served 660 days imprisonment for conduct related to the instant offense. During this argument, the court interrupted counsel for Petitioner and advised him that it was the court's belief that he did not have the authority to sentence Petitioner below the statutory mandatory minimum for any reason other than substantial assistance. The court specifically noted that he would have considered a lesser sentence for Petitioner particularly in light of Petitioner's argument regarding a downward departure under U.S.S.G. § 5K2.23, however the court concluded that its "hands are tied." The court then sentenced Petitioner to a term of 108 months to be followed by five years of supervised release. The remaining objects of Count 1 of the indictment were dismissed.

STATEMENT OF THE FACTS

Agents of the Rowan County Sheriff's Office and the North Carolina State Bureau of Investigation initiated an investigation into a large-scale

methamphetamine distribution network in 2014. As part of that investigation, 32 individuals were initially indicted in the Middle District of North Carolina during the year 2017. Petitioner's case fell into the second phase, in which 28 individuals were indicted in 2018. In July of 2013, Petitioner was interviewed by investigators and admitted that she had brokered one-ounce methamphetamine transactions between various other members of the conspiracy. She also acknowledged assisting codefendant Rodney Hardin in the transportation of methamphetamine from Atlanta, Georgia, to Rowan County, North Carolina, on multiple occasions. She was further implicated in making a trip to Florida with another codefendant for the purpose of purchasing methamphetamine.

REASONS FOR GRANTING THE WRIT

In *United States v. Hood*, 556 F.3d 226 (4th Cir. 2009), the Fourth Circuit Court of Appeals ruled that a district court could not consider non-assistance factors in determining the extent of a departure below a mandatory minimum sentence under 18 U.S.C. § 3553(e).

In *United States v. Hood*, 556 F.3d 226 (4th Cir. 2009), we squarely addressed whether a district court can consider non-assistance factors in determining the extent of a departure from a mandatory minimum sentence under § 3553(e). Like Spinks, the defendant in *Hood* argued that a sentence imposed pursuant to a departure should be measured by non-assistance factors. *Id.* at 234 n.2. We concluded that the extent of a § 3553(e) departure below a mandatory minimum could be based “solely on the defendant’s substantial assistance and other factors related to that assistance.” *Id.* We reasoned that “[o]nly Congress could authorize a departure from the statutorily mandated minimum sentence, and it did so in § 3553(e) for the limited purpose stated there – ‘to reflect a defendant’s substantial assistance in the investigation or prosecution of another person who has committed an offense.’” *Id.* at 233 (quoting 18 U.S.C. § 3553(e)) (emphasis in original).

Hood controls here. After the Government renewed its request for a thirty percent downward departure for Spinks' substantial assistance, he requested that the court consider his rehabilitation and depart further below the mandatory minimum. Following *Hood*, the district court correctly concluded that, once it had departed below a mandatory minimum sentence on the basis of a defendant's substantial assistance, it could not further depart based on any non-assistance factor.

United States v. Spinks, 770 F.3d 285, 287 (4th Cir. 2014). Appellant concedes that other jurisdictions are consistent with the Fourth Circuit on this question. See e.g. *United States v. Ahlers*, 305 F.3d 54 (1st Cir. 2002); *United States v. Rabins*, 63 F.3d 721, 727 (8th Cir. 1995); *United States v. Thomas*, 11 F.3d 732, 736-37 (7th Cir. 1993); *United States v. Campbell*, 995 F.2d 173, 175 (10th Cir. 1993); *United States v. Valente*, 961 F.2d 133, 134-35 (9th Cir. 1992); *United States v. Snelling*, 961 F.2d 93, 97 (6th Cir. 1991).

The one exception to this interpretation is a district court opinion in *United States v. Calle*, 796 F. Supp. 853 (June 23, 1992 U.S. Dist. Md.). In *Calle*, Judge Ramsey rejected the analysis later adopted in *Hood*. The court began its review with a statutory analysis of 18 U.S.C. § 3553(e). 18 U.S.C. § 3553(e) is promulgated as follows:

(e) **Limited authority to impose a sentence below a statutory minimum** – Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

18 U.S.C. § 3553(e) (emphasis in original). The *Calle* opinion specifically notes the rule of statutory construction that the title of a statute and the heading of a section cannot limit the plain meaning of the text for interpretive purposes. *Brotherhood of R. Trainmen v. Baltimore and O.R. Co.*, 331 U.S. 519, 91 L. Ed. 1647, 67 S. Ct. 1387 (1947). *Calle* notes that 18 U.S.C. § 3553(e) does not indicate whether the term “limited” means that the court is limited by the government’s discretionary decision to move for a downward departure, or whether it is limited to the consideration of the cooperation itself. Accordingly, the court concluded that the title of a statute was an insufficient basis on which to conclude that the court had no authority to consider anything beyond cooperation itself as relevant to a departure.

Calle embraces the argument that the portion of 18 U.S.C. § 3553(e), which requires a sentence to “be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to Section 994 of Title 28 United States Code,” meant that the sentence shall be imposed in accordance with *all* the guidelines. A different interpretation would create a “new hybrid sentencing structure in which the sentence is controlled entirely by (1) the statutory minimum sentence and (2) those guidelines promulgated for the express purpose of rewarding a defendant for substantial assistance.” *Calle* at 860. The *Calle* opinion also notes that “if Congress had intended to so limit the court’s authority, it could have provided that “the sentence be imposed in accordance with the guidelines issued pursuant to Section 3553(e) itself.” *Id.* Because it did not so specify, the statute must be read as expressly providing for a sentence computed under the

guidelines issued pursuant to the general statutory mandate of 28 U.S.C. § 994, “on which all guidelines are based.” *Id.*

Finally, *Calle* points out that 18 U.S.C. § 3553(e) makes reference to a sentence to be imposed in accordance with both guidelines and policy statements. However, there are no guidelines specifically implementing Section 3553(e), and that U.S.S.G. § 5K1.1 and its application notes are merely policy statements. Thus, the expansive wording chosen by Congress suggests an intent to include in the sentencing decisions the guidelines and policy statements existing at the time the statute was enacted. To hold otherwise would render the term “guidelines” as used in the statute superfluous. *Calle* ultimately concludes:

In short, the Court agrees with the government that its power to descend below the mandatory minimum is “limited,” but only by the government’s willingness to move under § 5K1.1. Once the government so moves, the most sensible interpretation of the statute is that the Court is restored to its function as a full guideline sentencing Court.

Id. at 660-1 (footnote omitted).

While Petitioner finds the analysis employed in *Calle* more persuasive than that adopted in *Hood*, the issue presented in this petition is whether the analysis adopted by the Fourth Circuit in *Hood supra* and *Spinks supra* results in a violation of the separation of powers doctrine. Petitioner argues that the analysis adopted by the Fourth Circuit results in an impermissible threat to the institutional integrity of the judicial branch and therefore does violate the separation of powers doctrine.

“This Court consistently has given voice to, and has reaffirmed, the central judgment of the Framers of the Constitution that, within our political scheme, the

separation of governmental powers into three coordinate Branches is essential to the preservation of liberty.” *Mistretta v. United States*, 488 U.S. S. Ct. 361, 379, 109 S. Ct. 647, 102 L. Ed. 2d. 714 (1989) . . . [T]he Framers “built into the tripartite Federal Government . . . a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.” *Id.* at 382 (citing *Buckley v. Valeo*, 424 U.S. 122, 99 S. Ct. 612, 46 L. Ed. 2d. 659 (1976)). Here, the Fourth Circuit’s interpretation of 18 U.S.C. § 3553(e) creates an encroachment upon the power of the judiciary by the executive branch. The executive branch is given not only the power to allow the court to sentence a defendant below the mandatory minimum, but further, to control what factors the court may consider in departing or varying below the mandatory minimum sentence.

The risk that Congress may improperly have encroached on the federal judiciary is obviously magnified when Congress “[withdraws] from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty” and which therefore has traditionally been tried in Article III courts, and allocates the decision of those matters to a non-Article III forum of its own creation.

Commodity Futures Trading Com. v. Schor, 478 U.S. 833, 852, 106 S. Ct. 3245, 92 L. Ed. 2d 675 (1986) (emphasis supplied) (citing *Murray’s Lessee v. Hoboken Land & improvement Co.*, 18 How. 272, 284 (1856)). Here, the Fourth Circuit has adopted an interpretation of 18 U.S.C. § 3553(e) which draws from the court’s consideration a matter that has traditionally been left to Article III courts. The court’s traditional ability to sentence by considering all relevant mitigating factors to depart or vary below a mandatory minimum sentence once a motion is made under 18 U.S.C. §

3553(e) has been delegated to the executive branch by the interpretation of U.S.C. § 3553(e) adopted by the Fourth Circuit. Accordingly, this interpretation of 18 U.S.C. § 3553(e) results in a violation of the separation of powers doctrine. This Court should grant a writ of certiorari and address this important federal constitutional question.

CONCLUSION

For reasons set forth above, Petitioner requests this Court grant a writ of certiorari to review the United States Court of Appeals for the Fourth Circuit judgment below to answer this important question of federal law.

Respectfully submitted this the 7th day of May 2020.

/s/ John D. Bryson
John D. Bryson
Counsel for Petitioner
WYATT EARLY HARRIS WHEELER LLP
1912 Eastchester Dr., Ste. 400
High Point, NC 27265
Telephone: (336) 819-6016
Email: jbryson@wehwlaw.com

APPENDIX A

Fourth Circuit Court of Appeals unpublished opinion filed on February 19, 2020, affirming Petitioner's sentence

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-4170

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

BRITTANY DAWN THOMAS,

Defendant - Appellant.

No. 19-4264

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

RODNEY NEIL HARDIN,

Defendant - Appellant.

Appeals from the United States District Court for the Middle District of North Carolina, at Greensboro. Thomas D. Schroeder, Chief District Judge. (1:18-cr-00303-TDS-22; 1:18-cr-00303-TDS-7)

Submitted: January 30, 2020

Decided: February 19, 2020

Before WILKINSON, FLOYD, and RUSHING, Circuit Judges.

Affirmed by unpublished per curiam opinion.

John D. Bryson, WYATT EARLY HARRIS WHEELER, LLP, High Point, North Carolina; Renorda E. Pryor, HERRING LAW CENTER, PLLC, Durham, North Carolina, for Appellants. Matthew G.T. Martin, United States Attorney, Terry M. Meinecke, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Greensboro, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

In these consolidated appeals, Brittany Dawn Thomas and Rodney Neil Hardin appeal the sentences imposed following their guilty pleas to conspiracy to distribute methamphetamine, in violation of 21 U.S.C. §§ 841(b)(1)(A)-(C), 841(c)(2), 843(d)(2), 846 (2018). The district court sentenced Thomas to 108 months' imprisonment and Hardin to 210 months' imprisonment. Finding no error, 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); see *United States v. King*, 673 F.3d 274, 283 (4th Cir. 2012). This review requires consideration of both the procedural and substantive reasonableness of the sentence. *Gall*, 552 U.S. 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.” *Id.* at 51. We presume that a sentence within or below a properly calculated Guidelines range is substantively reasonable. *United States v. Vinson*, 852 F.3d 333, 357 (4th Cir. 2017). “Such a presumption can only be rebutted by showing that the

sentence is unreasonable when measured against the 18 U.S.C. § 3553(a) factors.” *United States v. Louthian*, 756 F.3d 295, 306 (4th Cir. 2014).

We turn to Thomas’ appeal first. Thomas’ advisory Sentencing Guidelines range was 120 to 125 months’ imprisonment, with a mandatory minimum sentence of 120 months. *See* 21 U.S.C. §§ 841(b)(1)(A), 846. Pursuant to U.S. Sentencing Guidelines Manual § 5K1.1 (2018) and 18 U.S.C. § 3553(e) (2018), the Government moved for a 10% downward departure in light of Thomas’ substantial assistance. The district court granted the Government’s motion and reduced Thomas’ 120-month mandatory minimum by 10%, for a total sentence of 108 months’ imprisonment. The court rejected Thomas’ request for an additional reduction based on factors unrelated to the substantial assistance.

Thomas now argues that the district court erred in finding that it did not have the authority to consider additional factors when departing from the mandatory minimum. We disagree. We have expressly held that “the extent of a § 3553(e) departure from a mandatory minimum can be determined . . . only by considering factors that reflect a defendant’s substantial assistance.” *United States v. Spinks*, 770 F.3d 285, 289 (4th Cir. 2014) (internal quotation marks omitted); *see also United States v. Concha*, 861 F.3d 116, 120 (4th Cir. 2017) (“As to § 5K1.1 departures . . . our case law requires a district court determining the extent of such a departure to consider assistance-related factors *only*.”). Accordingly, the district court did not err in refusing to consider additional factors in favor of a departure below the mandatory minimum.

Hardin’s claims that his below-Guidelines-range sentence is unreasonable are similarly unconvincing. The district court properly calculated Hardin’s Sentencing

Guidelines' range, responded to defense counsel's arguments for a reduced sentence, and explained the selected sentence based on Hardin's individual characteristics and the § 3553(a) sentencing factors. We conclude therefore that Hardin's sentence is procedurally reasonable. Moreover, Hardin's sentence is presumptively substantively reasonable, and Hardin has not rebutted that presumption.

Accordingly, we affirm the district court's judgments. 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